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SELF-DETERMINATION IN INTERNATIONAL LAW
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Legal instruments and documents


2. Declaration on the granting of independence to colonial countries and peoples (United Nations General Assembly resolution 1514 (XV) of 14 December 1960)

3. Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 e of the Charter of the United Nations (United Nations General Assembly resolution 1541(XV) of 15 December 1960, annex)

4. International Covenant on Civil and Political Rights, 1966
   For text, see The Core International Human Rights Treaties, United Nations Publication, 2014, p. 57

   For text, see The Core International Human Rights Treaties, United Nations Publication, 2014, p. 29


9. Importance of the universal realization of the right of peoples to self-determination and of the speedy granting of independence to colonial countries and peoples for the effective guarantee and observance of human rights (United Nations General Assembly resolution 48/94 of 20 December 1993)


Case Law


15. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 136

Recommended readings (not reproduced)
Report of the Committee of Jurists on the Aaland Islands Question

LN Doc. B.7 21/68/106, October 1920
Report

Of the International Committee of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Aaland Islands question.

Resolution of the Council.

At a meeting held on the 12th July, 1920, the Council of the League of Nations, assembled at London, unanimously adopted with the assent of Finland and Sweden, the opposing parties in a dispute as to whether the inhabitants of the Aaland Islands should "be authorised to determine forthwith by plebiscite whether the archipelago should remain under Finnish sovereignty or be incorporated in the Kingdom of Sweden," the following resolution:

"An International Commission of three jurists shall be appointed for the purpose of submitting to the Council, with the least possible delay, their opinion on the following points:

(1) Whether, within the meaning of paragraph 8 of Article 15 of the Covenant, the case presented by Sweden to the Council with reference to the Aaland Islands deals with a question that should, according to International Law, be entirely left to the domestic jurisdiction of Finland.

Organisation of the Commission.

Professor F. Larraudef, Dean of the Faculty of Law at Paris; Professor A. Struycken, Councillor of State of the Kingdom of the Netherlands; Professor Max Huber, Legal Adviser of the Swiss Political Department, were appointed members of this Commission. M. le Doyen F. Larraude was entrusted with the duties of President.

M. G. Kaeckenbeeck, of the Legal Section of the Secretariat of the League of Nations, was selected to discharge the duties of Secretary to the Commission, and was further entrusted with the task of supplying the Committee with all the necessary relevant documents, especially those connected with the debates which took place before the Council of the League of Nations at the above-mentioned meeting at London.

Documents and Auditions.

Further, at the invitation of the Council, the Finnish and Swedish Governments supplied the Committee with a statement of their views upon the questions submitted to it. [4]

These statements were communicated to the Governments concerned and to the Aaland Islands Delegate, Mr. Johannes Eriksson, and, following upon this, supplementary documents, observations and commentaries written upon these statements were sent to the Commission by the Swedish and Finnish Ministers at Paris, and by Messrs. Johannes Eriksson and Augustus Karlsson.

Further, the Commission heard, on behalf of Finland, M. Ekeck, Finnish Minister at Paris, assisted by M. K. G. Idman, Finnish Minister at Copenhagen, and, on behalf of Sweden, Count Eersksvard, Swedish Minister at Paris, who respectively answered the various questions put to them by the Commission. Messrs. Johannes Eriksson and Augustus Karlsson, representing the inhabitants of the Aaland Islands, were also given a hearing. Major Holmqvist also gave the Commission explanations on certain technical points in connection with the demilitarisation of the Islands.

Duration of the Sittings.

The Commission, which was summoned to meet at Paris on the 3rd August, held its meetings in the "Salle des Actes" of the Faculty of Law of the University of Paris. The Commission completed its task on the 5th September, and adopted the following statement of opinion:

Paragraph 8, Article 15 of the Covenant.

1. Paragraph 8 of Article 15 of the Covenant lays down that when a dispute is submitted to the Council of the League of Nations, if one of the parties maintains and if the Council considers that the dispute refers to a question which, according to International Law, falls solely within the domestic jurisdiction of the party claiming that such is the case, the latter must record the fact in a report, but without recommending any solution of the question. This rule amounts to the exclusion of jurisdiction of the Council in certain cases; the Council being competent to decide finally whether it has jurisdiction or not.

The Covenant, by the express adoption of this provision, which might have been left to the application of rules of International Law, has attached particular importance to it, thereby confirming the very definite intention of the Members of the League of Nations to avoid encroaching upon the domestic sovereignty of States.

The Application of the Paragraph.

The Commission, from the outset, agreed to reject the notion that the fact that a dispute was brought before the Council by a Member of the League of Nations would suffice to invest it with an international character and make it therefore subject to the jurisdiction of the League of Nations, within the meaning and application of paragraph 4 and the following paragraphs of Article 15.

The legal nature of a question cannot be dependent upon the fact that a Member of the League of Nations, which may or may not be a party to the dispute, chooses to submit it to the Council. A question is either of an international nature or belongs to the domestic jurisdiction of a State, according to its intrinsic and special characteristics. The alternative view, moreover, is not logically compatible with paragraph 8 itself, since this paragraph
expressly gives the Council the power of deciding whether a dispute bears upon a question which International Law leaves entirely to the domestic jurisdiction of the party claiming that such is the case. [5]

It is therefore essential to begin by considering the intrinsic and special characteristics of the question raised by the dispute between Finland and Sweden, in order to decide whether the question comes within the jurisdiction of the Council of the League of Nations.

**Sweden’s Claim.**

2. The question really takes this form: can the inhabitants of the Aaland Islands, as at present situated, and taking as a basis the principle that peoples must have the right of self-determination, request to be united to Sweden? Can Sweden, on her side, claim that a determination, request to be united to Sweden? Can Sweden, on her side, claim that a plebiscite should take place in order to give the inhabitants of the Islands the opportunity of recording their wish with regard to their union with Sweden or continuance under Finnish rule?

**The Principle of Self-Determination and the Rights of Peoples.**

Although the principle of self-determination of peoples plays an important part in modern political thought, especially since the Great War, it must be pointed out that there is no mention of it in the Covenant of the League of Nations. The recognition of this principle in a certain number of international treaties cannot be considered as sufficient to put it upon the same footing as a positive rule of the Law of Nations.

On the contrary, in the absence of express provisions in international treaties, the right of disposing of national territory is essentially an attribute of the sovereignty of every State. Positive International Law does not recognize the right of national groups, as such, to separate themselves from the State of which they form part by the simple expression of a wish, any more than it recognizes the right of other States to claim such a separation.

Generally speaking, the grant or refusal of the right to a portion of its population of determining its own political fate by plebiscite or by some other method, is, exclusively, an attribute of the sovereignty of every State which is definitively constituted. A dispute between two States concerning such a question, under normal conditions therefore, bears upon a question which International Law leaves entirely to the domestic jurisdiction of one of the States concerned. Any other solution would amount to an infringement of sovereign rights of a State and would involve the risk of creating difficulties and a lack of stability which would not only be contrary to the very idea embodied in the term “State,” but would also endanger the interests of the international community. If this right is not possessed by a large or small section of a nation, neither can it be held by the State to which the National group wishes to be attached, nor by any other State.

The Commission, in affirming these principles, does not give an opinion concerning the question as to whether a manifest and continued abuse of sovereign power, to the detriment of a section of the population of a State, would, if such circumstances arose, give to an international dispute, arising therefrom, such a character that its object should be considered as one which is not confined to the domestic jurisdiction of the State concerned, but comes within the sphere of action of the League of Nations. Such a supposition certainly does not apply to the case under consideration, and has not been put forward by either of the parties to the dispute.

**De facto and de jure Considerations. Their International Character.**

3. It must, however, be observed that all that has been said concerning the attributes of the sovereignty of a State, generally speaking, only applies to a nation which is definitively constituted as a sovereign State and an independent member of the international community. [6] and so long as it continues to possess these characteristics. From the point of view of both domestic and international law, the formation, transformation and dismemberment of States as a result of revolutions and wars create situations of fact which, to a large extent, cannot be met by the application of the normal rules of positive law. This amounts to a statement that if the essential basis of these rules, that is to say, territorial sovereignty, is lacking, either because the State is not yet fully formed or because it is undergoing transformation or dissolution, the situation is obscure and uncertain from a legal point of view, and will not become clear until the period of development is completed and a definite new situation, which is normal in respect to territorial sovereignty, has been established.

This transition from a de facto situation to a normal situation de jure cannot be considered as one confined entirely within the domestic jurisdiction of a State. It tends to lead to readjustments between the members of the international community and to alterations in their territorial and legal status; consequently, this transition interests the community of States very deeply both from political and legal standpoints.

**Self-Determination as applied to de facto situations. Its forms.**

Under such circumstances, the principle of self-determination of peoples may be called into play. New aspirations of certain sections of a nation, which are sometimes based on old traditions or on a common language and civilization, may come to the surface and produce effects which must be taken into account in the interests of the internal and external peace of nations.

The principle recognizing the rights of peoples to determine their political fate may be applied in various ways; the most important of these are, on the one hand the formation of an independent State, and on the other hand the right of choice between two existing States. This principle, however, must be brought into line with that of the protection of minorities; both have a common object—to assure to some national Group the maintenance and free development of its social, ethnical or religious characteristics.

The protection of minorities is already provided for, to a very varying extent, in a fairly large number of constitutions. This principle appears to be one of the essential characteristics of liberty at the present time. Under certain circumstances, however, it has been thought necessary to go further, and to guarantee, by international treaties, some
particular situation to certain racial or religious minorities. Thus, in some recent treaties a special legal régime, under the control and guarantee of the League of Nations, has been established for certain sections of the population of a State.

The fact must, however, not be lost sight of that the principle that nations must have the right of self-determination is not the only one to be taken into account. Even though it be regarded as the most important of the principles governing the formation of States, geographical, economic and other similar considerations may put obstacles in the way of its complete recognition. Under such circumstances, a solution in the nature of a compromise, based on an extensive grant of liberty to minorities, may appear necessary according to international legal conception and may even be dictated by the interests of peace.

**Historical Development of Finland.**

4. In the light of the foregoing, the question has to be decided as to whether, from the standpoint of territorial sovereignty, the situation of the Aaland Islands in the independent [7] State of Finland is of a definite and normal character, or whether it is a transitory or not fully developed situation.

In order to answer this question, the principal historical facts marking the development of the political and legal position of Finland and of the Islands must be examined.

Before the proclamation of independence, the legal position of Finland within the Russian Empire was very peculiar and difficult to define.

**The Finnish Constitution of 1809.**

In particular, the question arose as to whether the Treaty of Fredrikshamn, of 5th-17th September, 1809, combined with the solemn promise of the Czar Alexander I., given on 29th March of the same year to the formally constituted Diet of Borgå, had or had not constituted these former Swedish provinces into a State in the true sense of the word, which was no doubt incorporated in the Russian State, but nevertheless enjoyed a very wide measure of autonomy and independence except in matters relating to foreign relations as a whole and to certain other matters of internal policy and legislation described as common interests, which, especially since 1899, have led to a great controversy and, at the same time, were the cause of seriously strained relations between the Russian and Finnish authorities.

Even if an affirmative answer be given to the question referred to in the last paragraph, and if, consequently, the view most favourable to the Finnish theory be adopted—which theory, as a matter of fact, has appeared to most jurists who have written on the subject to be most in conformity with the wording and spirit of the settlement of 1809—it remains true, nevertheless, that the State of Finland, which since 1899 was in fact treated by the Russian Government as an ordinary province, had not and also never claimed to have an independent legal existence in external affairs and was indissolubly bound to Russia.

**Effects of the Russian Revolution.**

This situation did not immediately alter after the Russian revolution of March, 1917, and the disappearance of the monarchical power, which until then had been common to Russian and Finland. The various provisional governments which succeeded one another until the Bolschevik coup d’état, continued to send Governor-generals to Finland.

However, the Bolschevik manifesto of the 15th November, 1917, proclaiming the right of self-determination of all the peoples not of Russian race to decide their own future, led to an important alteration in the relations between Russia and Finland.

**Declaration of Independence.**

At the same time, the Finnish Diet, on the 15th November, 1917, assumed the supreme power and constituted a national Government which, on the 4th December, 1917, sent forth an appeal to the Finnish people exhorting them to make every effort to enable Finland to take her place as an independent nation among the other nations. During the events which followed, this object was ultimately attained.

**Reconstructions.**

On the 31st December, 1917, the Soviet of Commissaries of the People at Petrograd proposed to the Executive Central Committee of the Soviets of deputies of workmen, soldiers and peasants of all the Russians that the political independence of the Republic of Finland [8] should be recognised. The latter body accepted the proposal on the 4th January. On the 4th January Finland was recognised by the Swedish Government and on the 5th by the French Government; recognition by Denmark and Norway followed on 10th January, and by Switzerland on 22nd February. Numerous other recognitions were given later.

Nevertheless, these facts by themselves do not suffice to prove that Finland, from this time onwards, became a sovereign State.

The experience of the last war shows that the same legal value cannot be attached to recognition of new States in war-time, especially to that accorded by belligerent powers, as in normal times; further, neither were such recognitions given with the same object as in normal times. In many cases they were only recognitions of peoples or nations, sometimes, even, mere recognitions of Governments. The precise determination of the territorial status of these States was usually left to the great diplomatic reconstruction of Europe which would follow the conclusion of peace, just as, in some cases, were certain peculiarities of their political constitution and legislation, especially concerning the protection of minorities, which were thus reserved for international settlement. The special nature of some recognitions which were accorded during this disturbed period is also traceable to the way in which certain Governments regarded such recognition. Thus, Sweden has always shown by her attitude that she was interested in the Aaland Islands question, and she has always acted as if her recognition had been given subject to reservations.
In France, the President of the Council publicly declared from the tribune of the Chamber of Deputies, on the 29th September, 1918, that he considered that the Aaland Islands question was within the scope of the Peace Conference.

As for Russia, which was the first to recognise the Finnish State, the fact must not be forgotten that she was at that time in the throes of a revolution, and that her revolutionary organisations had as yet only been recognised by the Central Powers in the negotiations at Brest-Litowsk.

The Government of Great Britain only recognised Finland as a State much later—on the 6th May, 1919. On the following day it added to this recognition a note expressing the hope that Finland would not refuse, under any circumstances, to accept the decisions of the Peace Conference with reference to her frontiers. It was only on the 21st January, 1920, that the British Government stated that its recognition was given without any reservations whatever.

**INTERNAL SITUATION OF FINLAND.**

In addition to these facts which bear upon the external relations of Finland, the very abnormal character of her internal situation must be brought out. This situation was such that, for a considerable time, the conditions required for the formation of a sovereign State did not exist.

In the midst of revolution and anarchy, certain elements essential to the existence of a State, even some elements of fact, were lacking for a fairly considerable period. Political and social life was disorganised; the authorities were not strong enough to assert themselves; civil war was rife; further, the Diet, the legality of which had been disputed by a large section of the people, had been dispersed by the revolutionary party, and the Government had been chased from the capital and forcibly prevented from carrying out its duties; the armed camps and the police were divided into two opposing forces, and Russian troops, and after a time Germans also, took part in the civil war between the inhabitants and between the Red and White Finnish troops. [9]

It is, therefore, difficult to say at what exact date the Finnish Republic, in the legal sense of the term, actually became a definitely constituted sovereign State. This certainly did not take place until a stable political organisation had been created, and until the public authorities had become strong enough to assert themselves throughout the territories of the State without the assistance of foreign troops. It would appear that it was in May, 1918, that the civil war ended and that the foreign troops began to leave the country, so that from that time onwards it was possible to re-establish order and normal political and social life, little by little.

It follows from all these facts that the formation of an independent State of Finland in 1917 and 1918, whatever may have been the legal status of Finland formerly under the Russian Empire, must be considered, at any rate in several aspects, as a new political phenomenon and not as a mere continuation of a previously existing political entity.

**THE AALAND ISLANDS BEFORE 1917.**

5. The special situation of the Aaland Islands must now be considered from the same point of view.

Until the year 1809, except for a short period of Russian domination at the beginning of the 18th century, the Aaland Islands were part of the kingdom of Sweden. In 1808 and 1809 they were conquered by Russia; on the 17th September, 1809, the King of Sweden, in the Treaty of Fredrikshamm, renounced all his rights and titles to the Islands in favour of the Emperor of all the Russias, as well as his rights to continental Finland.

Nevertheless the union of the Aaland Isles to the Russian Empire was not carried out in the same way as that of continental Finland. After the Emperor's Declaration on 28th March, 1808, proclaiming that he had taken possession of Finland, the Finns accepted their new sovereign, and on the 22nd March, 1809, and the days following, at the Diet of Borgå which was summoned at their request, took the oath of fidelity to the Emperor of all the Russias, Grand Duke of Finland, and co-operated in the constitutional organisation of their country within the Russian Empire. The population of the Aaland Islands, on the contrary, refused to be separated from Sweden; they made great efforts to drive the Russian troops from the Islands; they even succeeded in keeping them at a distance for a considerable time, and they only resigned themselves to the change of sovereign and nationality after the territory had been ceded by their King in the Treaty of 17th September.

Consequently, although from an international point of view the transfer of sovereignty over the Aaland Isles to the Emperor of Russia took place at the same time as that of the sovereignty of Finland, internally and from a constitutional standpoint, Finland was already part of the Russian Empire before the Aaland Islands were annexed to it.

**THE PURPORT OF THE FINNISH DECLARATION OF INDEPENDENCE.**

The Aaland Islands were undoubtedly part of Finland during the period of Russian rule. Must they, for this reason alone, be considered as definitely incorporated *de jure* in the State of Finland which was formed as a result of the events described above?

The Commission finds it impossible to admit this. The extent and nature of the political changes, which take place as facts and outside the domain of law, are necessarily limited by the results actually produced. These results alone form the basis of the new legal entity which is about to be formed, and it is they which will determine its essential [10] characteristics. If one part of a State actually separates itself from that State, the separation is necessarily limited in its effect to the population of the territory which has taken part in the act of separation. Though the political projects leading to the separation may be manifested in different ways in different parts of the territory, nevertheless these projects all have an equal value as a foundation for the new legal order, though of course only in so far as those who adopt them are able to maintain them. It may even be said that if a separation occurs from a political organism which is more or less autonomous, and which is itself *de facto* in process of political transformation, this organism cannot at the very moment when it transforms itself outside the domain of positive law invoke the principles
of this law in order to force upon a national group a political status which the latter refuses to accept.

By the application of a purely legal method of argument it might be said that a kind of acquired right exists in favour of the Aaland Islands which would be violated if Finland were allowed to suppress it retrospectively. Of course the expression “acquired right” can only be used figuratively, but even with reference to a de facto situation it should be possible to invoke, if not the actual principle of non-retrospective action (principe de non-rétroactivité), at any rate the primary reason on which it rests, which is dictated by justice and equity.

For these reasons, Finland cannot claim that the future of the Aaland Islands should be the same as hers simply because of the one fact that the Islands formerly formed part of the Finnish political organisation in the Russian Empire.

THE AALAND ISLANDS AFTER THE RUSSIAN REVOLUTION.

As has been done in the case of continental Finland, so also in the case of the Aaland Islands the course of their political transformation, after the Russian revolution, must be traced.

There can be no doubt that this transformation did not occur in the same way as in continental Finland.

It is true that the population of the Islands took part in the movement which led to the separation of Finland from Russia, and that in a general way it continued to live under the same legal régime as Finland. The Aaland Islanders, however, could not act otherwise. They could not, on the one hand, attach themselves directly to Sweden, and, on the other hand, they did not wish to, and, besides, they could not form an independent State. They simply awaited a settlement by means of negotiations between Sweden and Finland.

Many important incidents which occurred in the Islands prove that the transformation of their political status assumed, from the outset, quite a different character and direction from that taken in continental Finland.

Two series of incidents are worth calling to notice: on the one hand, the political expressions of the wishes of the people and, on the other, military events which took place in the Islands.

As soon as the Russian revolution had broken out, the population of the Islands openly expressed their wish to be separated from Russia and to be attached to Sweden.

THE ATTITUDE OF SWEDEN.

The Swedish Government has upheld and defended their cause everywhere, in the most energetic way, and has adopted it as its own. After private negotiations, it addressed a formal request to the Finnish Government in November, 1918, to arrange for a plebiscite to take place with full guarantees of sincerity and independence, in order to decide the political fate of the Islands.

The Finnish Government did not answer until June, 1919, and then replied in the negative. Since then the Swedish Government has taken the dispute before the Peace Conference and has defended its views before the Council of the League of Nations.

THE ATTITUDE OF FINLAND.

The Finnish Government, on the other hand, has only taken very belated coercive measure to prevent or check the various popular demonstrations of the Aaland Islanders intended to bring about the reunion of the Islands with Sweden, though it sent a “serious warning” in March, 1918, to the Aaland Islanders at the time of their appeal to the Finnish Senate, the King of Sweden and the Emperor of Germany. This warning had no effect; the demonstrations continued and the Finnish Government did not take effective steps to

In December, at about the time when Finland declared its independence, the Aaland Islanders were preparing to take a plebiscite in favour of their reunion with Sweden. This plebiscite took place on 31st December; every man and woman of age was given the right to take part. More than 7,000 Aaland Islanders expressed the wish that the Islands should be reunited to the Kingdom of Sweden. On the 3rd February, 1918, a deputation was received by the King of Sweden and communicated the results of this plebiscite to him.

In the meantime, on the 16th January, 1918, the King of Sweden, in the Speech from the throne delivered to the Riksdag, had expressed his conviction that the independence of Finland would facilitate a satisfactory settlement of the Aaland Islands question; this was, in view of the speeches in Parliament and articles in the Swedish Press at the time, and even considerably before, to be taken to mean that the independence of Finland would facilitate the reunion of the Islands to Sweden.

In June, 1919, a new plebiscite was taken in the Islands. About 95 per cent. of the population declared in favour of reunion with Sweden.

The Aaland Islanders have not ceased to do all in their power to attain the realisation of their national hopes. First of all in March, 1918, they approached the Finnish Senate, the King of Sweden and the Emperor of Germany. They made another appeal in November, 1918, to the President of the United States, to the President of France, and to the Government of Great Britain. Lastly they sent a delegation to the Peace Conference on 31st January, 1919, and to the Council of the League of Nations in July, 1920. With the same object they even formed, contrary to law, a popular representative body, the “Landsting,” composed of delegates from the various municipal councils, which was to be a centralised means of interpreting the will of the inhabitants.
prevent them. The attempt made to satisfy the inhabitants by means of a special law giving the Islands an extensive measure of autonomy did not succeed, though the President of the Council and some other Ministers went to Marienhann to meet the delegates of the inhabitants of the Islands and to explain the provisions of the law. The Assembly refused to take part in the discussion of the law and, after having once more expressed the wish of the inhabitants to determine their own political future, broke up. [12]

It should be added that the inhabitants of the Islands refused to perform compulsory military service in the Finnish Army, and a large number of conscripts deserted and went to Sweden.

**Comparison between the political attitude on the mainland of Finland and on the Islands.**

From the above facts it may be seen that the populations of the Aaland Islands and the mainland of Finland, though they acted together in order to separate themselves from Russia, have, from the outset, expressed quite different hopes for their ultimate political future. The population of the mainland wished to form an independent State, the inhabitants of the Aaland Islands wished to reunite with Sweden, and they expressed this wish in such a way that, even if the disturbed condition of Russia and Finland at first had a considerable influence upon the aspirations of the Islanders, nevertheless, this wish can be looked upon as an unanimous, sincere and continued expression of feeling.

The demonstrations on the part of the Islands which followed one after the other, each one more emphatic and decided than the last, which the Government of Finland either could not or would not, for a long time, prevent, must be considered as factors of the first importance in connection with the change in the political status of the Islands, more especially as they took place at the same time as the transformation of the political organisation of which the Islands formed part. The Aaland Islands agitation originated at a time when Finland was undergoing a process of transformation. The fact that Finland was eventually reconstituted as an independent State is not sufficient to efface the conditions which gave rise to the aspirations of the Aaland Islanders and to cause these conditions to be regarded as if they had never arisen. These arguments are emphasised by the fact that the population of the Islands, which is very homogeneous, inhabits a territory which is more or less geographically distinct; further, the population is united by ties of race, language and traditions to the Swedish race, from which it was only separated by force, whereas the population of the Finnish mainland is, for the most part, of Finnish origin, and the small portion of Swedish which has become mingled with it to a large extent shares the ideal of the majority with regard to an independent State of Finland. It must be added that the population of the Islands had no means of asserting its nationalist aspirations during the period of Russian rule.

**Military events.**

A few words must be said with regard to the military events which took place in the Aaland Islands.

After the declaration of Finnish independence, Russian troops continued to occupy the Aaland Islands and even received considerable reinforcements. The Finnish Government made no serious attempt to dislodge them; in February, 1918, there were hardly 500 Finnish “White” troops in the Islands. Most of these, even, arrived unarmed.

The Islands were eventually freed from the Russian troops by Swedish military action, at the request of the inhabitants; the Russians would not return to Russia unless the Finnish White troops also left at the same time. The latter consented to abandon their weapons before leaving the Islands, at the request of the Swedish Commander, whom they believed to be in agreement with the Finnish Headquarters. Later, the German troops occupied the Islands until October, 1918.

This military intervention on the part of the Swedish Government was doubtless only [13] occasioned by motives of humanity, but, nevertheless, it follows from all that occurred that during this period, quite apart from the disturbances arising from its internal condition, Finland on several occasions exercised absolutely no sovereign rights over the Aaland Islands.

**Russia and the question of the Aaland Islands.**

The international nature of the question of the Aaland Islands, which is shown by the arguments set forth above, is further strengthened by the special position of Russia with regard to the archipelago.

The legal position of Finland with regard to Russia was not exactly the same as that of the other States which evolved from the disintegration of the Russian Empire, when the question of its recognition was raised. Whatever opinion, however, may be adopted concerning the legal and political status of Finland within the Russian Empire before the declaration of its independence, there is no doubt that very close legal and political ties united the two countries. By the Proclamation of Independence, which was also in conformity with the general declaration of the Soviet Government with reference to the peoples not of Russian race in the old Russian Empire, the link which bound Finland to it was broken.

There is, also, no indication in any of the documents known to the Committee that the Soviet Government attached any condition to its recognition of Finland. A few days after the latter had proclaimed its independence, the Soviet Government — on the 31st December, 1917, and the 4th January, 1918 — put into force, as is expressly stated in the document which constituted the first step in this recognition, the principle of self-determination of peoples.

It can be seen, however, from two wireless messages sent out by the Soviet Government, which were read on the 10th July, 1920, at the Council Meeting, that this Government has never ceased to take an interest in the Aaland Islands question.

In the first of these messages, dated 3rd October, 1919, the Soviet Government questions the qualifications of the Peace Conference to intervene in the Aaland Islands question. It states that the Aaland Islands can only be allotted to Finland by a treaty between the latter and Russia, with reference to the frontiers of Finland, and declares, on
the other hand, that the Islands cannot be handed over to Sweden without Russia’s consent, in view of their importance in connection with Russian communications.

In the second message, dated 1st July, 1920, which is based on the same arguments and addressed to the Allies as well as to Finland and Sweden, the Soviet Government refuses to admit that a decision or agreement upon this point can have any value unless Russia has participated in it. The Press has lately reported the contents of another wireless message based on the same ideas and alluding to the Finnish claims in connection with Eastern Carelia and Pechenga.

**Effects of the abnormal situation of Russia.**

It must, however, be remembered that the Soviet Government has not yet been definitely recognised by any Power.

If the Soviet Government were deemed qualified to intervene in the question, the international nature of the dispute would thereby be definitely acknowledged, without in any way prejuding the question as to whether the Soviet’s arguments are well founded in law; it would indeed appear that the Soviet Government, by recognising Finland, has given up all Russian rights over this part of the old Empire. [14]

The international nature of the question, however, also appears if it be held that the Soviet Government has no title to represent Russia, for, under such circumstances the League of Nations could not entirely neglect the interests of a State which, according to this view, should be considered as incapable in the eyes of the other Powers, at present, of entering into valid legal relations. It may be seen that this last argument is strengthened by the fact that Russia is undeniably one of the Powers most interested in the Aaland Islands question.

On the other hand, the abnormal position of a Power such as that of Russia can hardly prevent the other States interested from undertaking the settlement of a question which also affects them and which requires as speedy a settlement as possible; Russia, as soon as it possesses a recognised Government, will be free to give its adherence to the agreement.

Thus, from whatever standpoint the question of the Aaland Islands be regarded, it is clear that it oversteps considerably the bounds of a question of pure domestic law.

It is obvious and hardly needs mentioning that the arguments set out above do not in any way affect Finland as such, since she had already, some time ago, acquired a thoroughly well-founded legal and political status; on the other hand, following from that which has been said above, the position of the Islands is not yet clearly defined.

**Conclusions.**

The Commission, after consideration of the arguments set out and developed in the preceding report, have arrived at the following conclusions:—

1. The dispute between Sweden and Finland does not refer to a definitive established political situation, depending exclusively upon the territorial sovereignty of a State.

2. On the contrary, the dispute arose from a de facto situation caused by the political transformation of the Aaland Islands, which transformation was caused by and originated in the separatist movement among the inhabitants, who quoted the principle of national self-determination, and certain military events which accompanied and followed the separation of Finland from the Russian Empire at a time when Finland had not yet acquired the character of a definitively constituted State.

3. It follows from the above that the dispute does not refer to a question which is left by International Law to the domestic jurisdiction of Finland.

4. The Council of the League of Nations, therefore, is competent, under paragraph 4 of Article 15, to make any recommendations which it deems just and proper in the case.
Declaration on the granting of independence to colonial countries and peoples

United Nations General Assembly resolution 1514 (XV) of 14 December 1960
should be admitted to membership in the United Nations.\textsuperscript{51}

Having considered the application for membership of the Republic of Mali,\textsuperscript{52}

Decides to admit the Republic of Mali to membership in the United Nations.\textsuperscript{53}

876th plenary meeting, 28 September 1960.

1492 (XV). Admission of the Federation of Nigeria to membership in the United Nations

The General Assembly,

Having received the recommendation of the Security Council of 7 October 1960 that the Federation of Nigeria should be admitted to membership in the United Nations,\textsuperscript{54}

Having considered the application for membership of the Federation of Nigeria,\textsuperscript{55}

Decides to admit the Federation of Nigeria to membership in the United Nations.\textsuperscript{56}

895th plenary meeting, 7 October 1960.

1495 (XV). Co-operation of Member States

The General Assembly,

Deeply concerned by the increase in world tensions,\textsuperscript{57}

Considering that the deterioration in international relations constitutes a grave risk to world peace and co-operation,\textsuperscript{58}

Conscious that both in the General Assembly and in the world at large it is necessary to arrest this trend in international relations and to contribute towards greater harmony among nations irrespective of the differences in their political and economic systems,\textsuperscript{59}

1. Urges that all countries, in accordance with the Charter of the United Nations, refrain from actions likely to aggravate international tensions;\textsuperscript{60}

2. Reaffirms the conviction that the strength of the United Nations rests on the co-operation of its Member States which should be forthcoming in full measure so that the Organization becomes a more effective instrument for the safeguarding of peace and for the promotion of the economic and social advancement of all peoples;\textsuperscript{61}

3. Urges further that immediate and constructive steps should be adopted in regard to the urgent problems concerning the peace of the world and the advancement of its peoples;\textsuperscript{62}

4. Appeals to all Member States to use their utmost endeavours to these ends.\textsuperscript{63}

907th plenary meeting, 17 October 1960.


The General Assembly

Takes note of the report of the International Atomic Energy Agency to the General Assembly for the year 1959-1960.\textsuperscript{64}

943rd plenary meeting, 12 December 1960.


The General Assembly

Takes note of the report of the Security Council to the General Assembly covering the period from 16 July 1959 to 15 July 1960.\textsuperscript{65}

943rd plenary meeting, 12 December 1960.

1514 (XV). Declaration on the granting of independence to colonial countries and peoples

The General Assembly,

Mindful of the determination proclaimed by the peoples of the world in the Charter of the United Nations to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small and to promote social progress and better standards of life in larger freedom,

Conscious of the need for the creation of conditions of stability and well-being and peaceful and friendly relations based on respect for the principles of equal rights and self-determination of all peoples, and of universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion,

Recognizing the passionate yearning for freedom in all dependent peoples and the decisive role of such peoples in the attainment of their independence,

Aware of the increasing conflicts resulting from the denial of or impediments in the way of the freedom of such peoples, which constitute a serious threat to world peace,

Considering the important role of the United Nations in assisting the movement for independence in Trust and Non-Self-Governing Territories,

Recognizing that the peoples of the world ardently desire the end of colonialism in all its manifestations,

Convinced that the continued existence of colonialism prevents the development of international economic co-operation, impedes the social, cultural and economic development of dependent peoples and militates against the United Nations ideal of universal peace,

Affirming that peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law,

Relieving that the process of liberation is irresistible and irreversible and that, in order to avoid serious crises, an end must be put to colonialism and all practices of segregation and discrimination associated therewith,

Welcoming the emergence in recent years of a large number of dependent territories into freedom and independence, and recognizing the increasingly powerful trends towards freedom in such territories which have not yet attained independence,

\textsuperscript{51} Ibid., document A/4514.
\textsuperscript{52} Ibid., document A/4512.
\textsuperscript{53} Ibid., document A/4533.
\textsuperscript{54} Ibid., document A/4527.
\textsuperscript{55} Ibid., document A/4527.
\textsuperscript{56} Ibid., document A/4514.
\textsuperscript{58} Official Records of the General Assembly, Fifteenth Session, Supplement No. 2 (A/4504).
Convinced that all peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory,

Solemnly proclaims the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations;

And to this end
Declares that:

1. The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.

2. All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

3. Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.

4. All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected.

5. Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.

6. Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.

7. All States shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the present Declaration, the basis of equality, non-interference in the internal affairs of all States, and respect for the sovereign rights of all peoples and their territorial integrity.

947th plenary meeting,
14 December 1960.

1592 (XV). The situation in the Republic of the Congo

The General Assembly,
Having considered the item entitled “The situation in the Republic of the Congo”;
Noting that the previous resolutions of the Security Council and the General Assembly on this subject are still in effect,
Decides to keep this item on the agenda of its resumed fifteenth session.
958th plenary meeting,
20 December 1960.

* * *

Note

Appointment of the Peace Observation Commission
(item 18)

At its 960th plenary meeting on 20 December 1960, the General Assembly decided to reappoint, for the calendar years 1961 and 1962, the present members of the Peace Observation Commission. The Commission is therefore composed as follows: China, Czechoslovakia, France, Honduras, India, Iraq, Israel, New Zealand, Pakistan, Sweden, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America and Uruguay.
Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 e of the Charter

United Nations General Assembly resolution 1541(XV) of 15 December 1960, annex
1. Takes note of the report of the Secretary-General on offers of study and training facilities under General Assembly resolutions 845 (IX);

2. Reaffirms its resolution 1471 (XIV) of 12 December 1959;

3. Invites once again the Administering Members concerned to take all necessary measures to ensure that scholarships and training facilities offered by Member States are utilized by the inhabitants of the Non-Self-Governing Territories, and to render every assistance to those persons who have applied for, or have been granted, scholarships or fellowships, particularly with regard to facilitating their travel formalities;

4. Requests all Administering Members which have not already done so to give the fullest publicity in the Territories under their administration to all offers of study and training facilities made by Member States;

5. Urges Member States to increase the number of scholarships offered;

6. Requests the Member States offering scholarships to take into account the necessity of furnishing complete information about the scholarships offered, and, whenever possible, the need to provide travel funds to prospective students;

7. Requests the Secretary-General and the specialized agencies to give such assistance as is possible and as may be sought by the Member States concerned and by the applicants;

8. Further requests the Secretary-General to prepare for the sixteenth session of the General Assembly a report on the actual use of scholarships and training facilities offered by Member States to students from the Non-Self-Governing Territories.

948th plenary meeting, 15 December 1960.

ANNEX

Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for in Article 73 e of the Charter of the United Nations

Principle I

The authors of the Charter of the United Nations had in mind that Chapter XI should be applicable to territories which were then known to be of the colonial type. An obligation exists to transmit information under Article 73 e of the Charter in respect of such territories whose peoples have not yet attained a full measure of self-government.

Principle II

Chapter XI of the Charter embodies the concept of Non-Self-Governing Territories in a dynamic state of evolution and progress towards a "full measure of self-government". As soon as a territory and its peoples attain a full measure of self-government, the obligation ceases. Until this comes about, the obligation to transmit information under Article 73 e continues.

Principle III

The obligation to transmit information under Article 73 e of the Charter constitutes an international obligation and should be carried out with due regard to the fulfilment of international law.

Principle IV

Prima facie there is an obligation to transmit information in respect of a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it.

Principle V

Once it has been established that such a prima facie case of geographical and ethnical or cultural distinctness of a territory exists, other elements may then be brought into consideration. These additional elements may be, inter alia, of an administrative, political, juridical, economic or historical nature. If they affect the relationship between the metropolitan State and the territory concerned in a manner which arbitrarily places the latter in a position or status of subordination, they support the presumption that there is an obligation to transmit information under Article 73 e of the Charter.

Principle VI

A Non-Self-Governing Territory can be said to have reached a full measure of self-government by:

(a) Emergence as a sovereign independent State;

(b) Free association with an independent State; or

(c) Integration with an independent State.

Principle VII

(a) Free association should be the result of a free and voluntary choice by the peoples of the territory concerned expressed through informed and democratic processes. It should be one which respects the individuality and the cultural characteristics of the territory and its peoples, and retains for the peoples of the territory which is associated with an independent State the freedom to modify the status of that territory through the expression of their will by democratic means and through constitutional processes.

(b) The associated territory should have the right to determine its internal constitution without outside interference, in accordance with due constitutional processes and the freely
expressed wishes of the people. This does not preclude consultations as appropriate or necessary under the terms of the free association agreed upon.

Principle VIII

Integration with an independent State should be on the basis of complete equality between the peoples of the erstwhile Non-Self-Governing Territory and those of the independent country with which it is integrated. The peoples of both territories should have equal status and rights of citizenship and equal guarantees of fundamental rights and freedoms without any distinction or discrimination; both should have equal rights and opportunities for representation and effective participation at all levels in the executive, legislative and judicial organs of government.

Principle IX

Integration should have come about in the following circumstances:

(a) The integrating territory should have attained an advanced stage of self-government with free political institutions, so that its peoples would have the capacity to make a responsible choice through informed and democratic processes;

(b) The integration should be the result of the freely expressed wishes of the territory’s peoples acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage. The United Nations could, when it deems it necessary, supervise these processes.

Principle X

The transmission of information in respect of Non-Self-Governing Territories under Article 73 e of the Charter is subject to such limitation as security and constitutional considerations may require. This means that the extent of the information may be limited in certain circumstances, but the limitation in Article 73 e cannot relieve a Member State of the obligations of Chapter XI. The “limitation” can relate only to the quantum of information of economic, social and educational nature to be transmitted.

Principle XI

The only constitutional considerations to which Article 73 e of the Charter refers are those arising from constitutional relations of the territory with the Administering Member. They refer to a situation in which the constitution of the territory gives it self-government in economic, social and educational matters through freely elected institutions. Nevertheless, the responsibility for transmitting information under Article 73 e continues, unless these constitutional relations preclude the Government or parliament of the Administering Member from receiving statistical and other information of a technical nature relating to economic, social and educational conditions in the territory.

Principle XII

Security considerations have not been invoked in the past. Only in very exceptional circumstances can information on economic, social and educational conditions have any security aspect. In other circumstances, therefore, there should be no necessity to limit the transmission of information on security grounds.

1542 (XV). Transmission of information under Article 73 e of the Charter

The General Assembly,

Recalling that, by resolution 742 (VIII) of 27 November 1953, the General Assembly approved a list of factors to be used as a guide in determining whether a Territory is or is no longer within the scope of Chapter XI of the Charter of the United Nations,

Recalling also that differences of views arose among Member States concerning the status of certain territories under the administrations of Portugal and Spain and described by these two States as “overseas provinces” of the metropolitan State concerned, and that with a view to resolving those differences the General Assembly, by resolution 1457 (XIV) of 12 December 1959, appointed the Special Committee of Six on the Transmission of Information under Article 73 e of the Charter to study the principles which should guide Members in determining whether or not an obligation exists to transmit the information called for in Article 73 e,

Recognizing that the desire for independence and the right of self-determination constitutes a threat to the well-being of humanity and to international peace,

Recalling with satisfaction the statement of the representative of Spain at the 1048th meeting of the Fourth Committee that his Government agrees to transmit information to the Secretary-General in accordance with the provisions of Chapter XI of the Charter,

Mindful of its responsibilities under Article 14 of the Charter,

Being aware that the Government of Portugal has not transmitted information on the territories under its administration which are enumerated in operative paragraph 1 below and has not expressed any intention of doing so, and because such information as is otherwise available in regard to the conditions in these territories gives cause for concern,

1. Considers that, in the light of the provisions of Chapter XI of the Charter, General Assembly resolution 742 (VIII) and the principles approved by the Assembly in resolution 1541 (XV) of 15 December 1960, the territories under the administration of Portugal listed hereunder are Non-Self-Governing Territories within the meaning of Chapter XI of the Charter:

(a) The Cape Verde Archipelago;

(b) Guinea, called Portuguese Guinea;

(c) São Tomé and Príncipe, and their dependencies;

(d) São João Batista de Ajudá;

(e) Angola, including the enclave of Cabinda;

(f) Mozambique;

(g) Goa and dependencies, called the State of India;

(h) Macau and dependencies;

(i) Timor and dependencies;

2. Declares that an obligation exists on the part of the Government of Portugal to transmit information under Chapter XI of the Charter concerning these territories and that it should be discharged without further delay;

3. Requests the Government of Portugal to transmit to the Secretary-General information in accordance with the provisions of Chapter XI of the Charter on the conditions prevailing in the territories under its administration enumerated in paragraph 1 above;

4. Requests the Secretary-General to take the necessary steps in pursuance of the declaration of the Government of Spain that it is ready to act in accordance with the provisions of Chapter XI of the Charter;

5. Invites the Governments of Portugal and Spain to participate in the work of the Committee on Information from Non-Self-Governing Territories in accordance
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
RESOLUTIONS ADOPTED ON THE REPORTS OF THE SIXTH COMMITTEE

CONTENTS

<table>
<thead>
<tr>
<th>Resolution No.</th>
<th>Title</th>
<th>Item</th>
<th>Date of adoption</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>2625 (XXV)</td>
<td>Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations</td>
<td>84</td>
<td>25 October 1970</td>
<td>121</td>
</tr>
<tr>
<td>2644 (XXV)</td>
<td>Report of the Special Committee on the Question of Defining Aggression (A/8171)</td>
<td>87</td>
<td>25 November 1970</td>
<td>126</td>
</tr>
<tr>
<td>2645 (XXV)</td>
<td>Aerial hijacking or interference with civil air travel (A/8176)</td>
<td>99</td>
<td>25 November 1970</td>
<td>126</td>
</tr>
<tr>
<td>2669 (XXV)</td>
<td>Progressive development and codification of the rules of international law relating to international watercourses (A/8302)</td>
<td>91</td>
<td>8 December 1970</td>
<td>127</td>
</tr>
<tr>
<td>2697 (XXV)</td>
<td>Need to consider suggestions regarding the review of the Charter of the United Nations (A/8219)</td>
<td>88</td>
<td>11 December 1970</td>
<td>127</td>
</tr>
<tr>
<td>2723 (XXV)</td>
<td>Review of the role of the International Court of Justice (A/8258)</td>
<td>96</td>
<td>15 December 1970</td>
<td>128</td>
</tr>
</tbody>
</table>

Other decisions

Amendment to Article 22 of the Statutes of the International Court of Justice (Sea of the Court) and consequent amendments to Articles 23 and 28

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

Review of the role of the International Court of Justice

Aerial hijacking or interference with civil air travel

Deeply convinced that the adoption of the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations...
Every State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their right to self-determination and freedom and independence.

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

Every State has the duty to refrain from organizing, instigating, financing, or otherwise participating in periodic or continuous acts of terrorism, to strike or terrorist acts in another State or to organize or sponsoring in organized activities or enterprises in support of terrorism, or otherwise participating in the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.

The territory of a State shall not be the object of military occupation resulting from the use of force in violation of article 2 of the Charter of the United Nations.

The forces of a State shall not be the object of acquisition by another State resulting from the threat or use of force.

The forces of a State shall not be used for the purpose of promoting the exercise of its sovereign rights and to secure from it advantages of any kind, either directly or indirectly, and shall not be organized, staffed, supplied, financed, influence, or tolerate subversive, terrorist or armed activities directed either essentially or in whole or in part against the regime of another State, or interfere in civil strife in another State.

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

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

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

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

Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations and to any other United Nations agencies, bodies or organizations, as it considers conducive to the achievement of the purposes and principles of the United Nations.

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

Every State has the duty to refrain in good faith the obligations assumed by it in accordance with the Charter.

Every State has the duty to fulfill in good faith its obligations assumed by it in accordance with the Charter.

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

Every State has the duty to fulfill in good faith its obligations to the United Nations under the Charter or the rights of peoples under the Charter, taking into account the elaboration of these rights in this Declaration.

The principles of the Charter which are embodied in this Declaration constitute basic principles of international law, and consequently should be taken into account by these States in their international conduct and to develop their practices and relations on the basis of the clear observance of these principles.

The General Assembly—Twenty-fifth Session

The principle that States shall fulfill in good faith the obligations assumed by them in accordance with the Charter.

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The principle that States shall fulfill in good faith the obligations assumed by them in accordance with the Charter.
Final Act of the Conference on Security and Co-operation in Europe, 1975
Contents

Preamble

Questions relating to Security in Europe

1. (a) Declaration on Principles Guiding Relations between Participating States
   I. Sovereign equality, respect for the rights inherent in sovereignty
   II. Refraining from the threat or use of force
   III. Inviolability of frontiers
   IV. Territorial integrity of States
   V. Peaceful settlement of disputes
   VI. Non-intervention in internal affairs
   VII. Respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief
   VIII. Equal rights and self-determination of peoples
   IX. Co-operation among States
   X. Fulfilment in good faith of obligations under international law

(b) Matters related to giving effect to certain of the above Principles

2. Document on confidence-building measures and certain aspects of security and disarmament
   I. Prior notification of major military manoeuvres
   Prior notification of other military manoeuvres
   Exchange of observers
   Prior notification of major military movements
   Other confidence-building measures
   II. Questions relating to disarmament
   III. General considerations

Co-operation in the Field of Economics, of Science and Technology and of the Environment

1. Commercial Exchanges
   General provisions
   Business contacts and facilities
   Economic and commercial information
   Marketing

2. Industrial co-operation and projects of common interest
   Industrial co-operation
   Projects of common interest

3. Provisions concerning trade and industrial co-operation
   Harmonization of standards
   Arbitration
   Specific bilateral arrangements
4. Science and technology

Possibilities for improving co-operation

Fields of co-operation
- Agriculture
- Energy
- New technologies, rational use of resources
- Transport technology
- Physics
- Chemistry
- Meteorology and hydrology
- Oceanography
- Seismological research
- Research on glaciology, permafrost and problems of life under conditions of cold
- Computer, communication and information technologies
- Space research
- Medicine and public health
- Environmental research

Forms and methods of co-operation

5. Environment

Aims of co-operation

Fields of co-operation
- Control of air pollution
- Water pollution control and fresh water utilization
- Protection of the marine environment
- Land utilization and soils
- Nature conservation and nature reserves
- Improvement of environmental conditions in areas of human settlement
- Fundamental research, monitoring, forecasting and assessment of environmental changes
- Legal and administrative measures

Forms and methods of co-operation

6. Co-operation in other areas

Development of transport
- Promotion of tourism
- Economic and social aspects of migrant labour
- Training of personnel

Questions relating to Security and Co-operation in the Mediterranean

Co-operation in Humanitarian and Other Fields

1. Human Contacts
   (a) Contacts and regular meetings on the basis of family ties
   (b) Reunification of families

   (Human Contacts continued)
   (c) Marriage between citizens of different states
   (d) Travel for personal or professional reasons
   (e) Improvement of conditions for tourism on an Individual or collective basis
   (f) Meetings among young people
   (g) Sport
   (h) Expansion of contacts

2. Information

   (a) Improvement of the circulation of, Access to, and exchange of information
      (i) Oral information
      (ii) Printed information
      (iii) Filmed and broadcast information
   (b) Co-operation in the field of information
   (c) Improvement of working conditions for journalists

3. Co-operation and Exchanges in the Field of Culture

   Extension of relations
   Mutual knowledge
   Exchanges and dissemination
   Access
   Contacts and co-operation
   Fields and forms of co-operation
   National minorities or regional cultures

4. Co-operation and Exchanges in the Field of Education

   (a) Extension of relations
   (b) Access and exchanges
   (c) Science
      exact and natural sciences
      medicine
      the humanities and social sciences
   (d) Foreign languages and civilizations
   (e) Teaching methods
      National minorities or regional cultures

Follow-up to the Conference

About the text of the Helsinki Final Act

Signatures

A selection of contemporary photographs appears between pages 66 and 67.
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The Conference on Security and Co-operation in Europe, which opened at Helsinki on 3 July 1973 and continued at Geneva from 18 September 1973 to 21 July 1975, was concluded at Helsinki on 1 August 1975 ... Turkey, the Union of Soviet Socialist Republics, the United Kingdom, the United States of America and Yugoslavia.

During the opening and closing stages of the Conference the participants were addressed by the Secretary-General of the United Nations as their guest of honour. The Director-General of UNESCO and the Executive Secretary of the United Nations Economic Commission for Europe addressed the Conference during its second stage.

During the meetings of the second stage of the Conference, contributions were received, and statements heard, from the following non-participating Mediterranean States on various agenda items: the Democratic and Popular Republic of Algeria, the Arab Republic of Egypt, Israel, the Kingdom of Morocco, the Syrian Arab Republic, Tunisia.

Motivated by the political will, in the interest of peoples, to improve and intensify their relations and to contribute in Europe to peace, security, justice and cooperation as well as to rapprochement among themselves and with the other States of the world,

Determined, in consequence, to give full effect to the results of the Conference and to assure, among their States and throughout Europe, the benefits deriving from those results and thus to broaden, deepen and make continuing and lasting the process of détente,

The High Representatives of the participating States have solemnly adopted the following:

Questions relating to Security in Europe

The States participating in the Conference on Security and Co-operation in Europe,

Reaffirming their objective of promoting better relations among themselves and ensuring conditions in which their people can live in true and lasting peace free from any threat to or attempt against their security;

Convinced of the need to exert efforts to make détente both a continuing and an increasingly viable and comprehensive process, universal in scope, and that the implementation of the results of the Conference on Security and Cooperation in Europe will be a major contribution to this process;

Considering that solidarity among peoples, as well as the common purpose of the participating States in achieving the aims as set forth by the Conference on Security and Cooperation in Europe, should lead to the development of better and closer relations among them in all fields and thus to overcoming the confrontation stemming from the character of their past relations, and to better mutual understanding;

Mindful of their common history and recognizing that the existence of elements common to their traditions and values can assist them in developing their relations, and desiring to search, fully taking into account the individuality and diversity of their positions and views, for possibilities of joining their efforts with a view to overcoming distrust and increasing confidence, solving the problems that separate them and cooperating in the interest of mankind;

Recognizing the indivisibility of security in Europe as well as their common interest in the development of cooperation throughout Europe and among selves and expressing their intention to pursue efforts accordingly;

Recognizing the close link between peace and security in Europe and in the world as a whole and conscious of the need for each of them to make its contribution to the strengthening of world peace and security and to the promotion of fundamental rights, economic and social progress and well-being for all peoples;

Have adopted the following:

1

(a) Declaration on Principles Guiding Relations between Participating States

The participating States,

Reaffirming their commitment to peace, security and justice and the continuing development of friendly relations and co-operation;

Recognizing that this commitment, which reflects the interest and aspirations of peoples, constitutes for each participating State a present and future responsibility, heightened by experience of the past;
Reaffirming, in conformity with their membership in the United Nations and in accordance with the purposes and principles of the United Nations, their full and active support for the United Nations and for the enhancement of its role and effectiveness in strengthening international peace, security and justice, and in promoting the solution of international problems, as well as the development of friendly relations and cooperation among States;

Expressing their common adherence to the principles which are set forth below and are in conformity with the Charter of the United Nations, as well as their common will to act, in the application of these principles, in conformity with the purposes and principles of the Charter of the United Nations;

Declare their determination to respect and put into practice, each of them in its relations with all other participating States, irrespective of their political, economic or social systems as well as of their size, geographical location or level of economic development, the following principles, which all are of primary significance, guiding their mutual relations:

I. Sovereign equality, respect for the rights inherent in sovereignty

The participating States will respect each other's sovereign equality and individuality as well as all the rights inherent in and encompassed by its sovereignty, including in particular the right of every State to juridical equality, to territorial integrity and to freedom and political independence. They will also respect each other's right freely to choose and develop its political, social, economic and cultural systems as well as its right to determine its laws and regulations.

Within the framework of international law, all the participating States have equal rights and duties. They will respect each other's right to define and conduct as it wishes its relations with other States in accordance with international law and in the spirit of the present Declaration. They consider that their frontiers can be changed, in accordance with international law, by peaceful means and by agreement. They also have the right to belong or not to belong to international organizations, to be or not to be a party to bilateral or multilateral treaties including the right to be or not to be a party to treaties of alliance; they also have the right to neutrality.

II. Refraining from the threat or use of force

The participating States will refrain in their mutual relations, as well as in their international relations in general, 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 and with the present Declaration. No consideration may be invoked to serve to warrant resort to the threat or use of force in contravention of this principle.

Accordingly, the participating States will refrain from any acts constituting a threat of force or direct or indirect use of force against another participating State.

Likewise they will refrain from any manifestation of force for the purpose of inducing another participating State to renounce the full exercise of its sovereign rights. Likewise they will also refrain in their mutual relations from any act of reprisal by force.

No such threat or use of force will be employed as a means of settling disputes, or questions likely to give rise to disputes, between them.

III. Inviolability of frontiers

The participating States regard as inviolable all one another's frontiers as well as the frontiers of all States in Europe and therefore they will refrain now and in the future from assaulting these frontiers.

Accordingly, they will also refrain from any demand for, or act of, seizure and usurpation of part or all of the territory of any participating State.

IV. Territorial integrity of States

The participating States will respect the territorial integrity of each of the participating States.

Accordingly, they will refrain from any action inconsistent with the purposes and principles of the Charter of the United Nations against the territorial integrity, political independence or the unity of any participating State, and in particular from any such action constituting a threat or use of force.

The participating States will likewise refrain from making each other's territory the object of military occupation or other direct or indirect measures of force in contravention of international law, or the object of acquisition by means of such measures or the threat of them. No such occupation or acquisition will be recognized as legal.

V. Peaceful settlement of disputes

The participating States will settle disputes among them by peaceful means in such a manner as not to endanger international peace and security, and justice.

They will endeavour in good faith and a spirit of cooperation to reach a rapid and equitable solution on the basis of international law.

For this purpose they will use such means as negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice including any settlement procedure agreed to in advance of disputes to which they are parties.

In the event of failure to reach a solution by any of the above peaceful means, the parties to a dispute will continue to seek a mutually agreed way to settle the dispute peacefully.
Participating States, parties to a dispute among them, as well as other participating States, will refrain from any action which might aggravate the situation to such a degree as to endanger the maintenance of international peace and security and thereby make a peaceful settlement of the dispute more difficult.

VI. Non-intervention in internal affairs

The participating States will refrain from any intervention, direct or indirect, individual or collective, in the internal or external affairs falling within the domestic jurisdiction of another participating State, regardless of their mutual relations.

They will accordingly refrain from any form of armed intervention or threat of such intervention against another participating State.

They will likewise in all circumstances refrain from any other act of military, or of political, economic or other coercion designed to subordinate to their own interest the exercise by another participating State of the rights inherent in its sovereignty and thus to secure advantages of any kind.

Accordingly, they will, inter alia, refrain from direct or indirect assistance to terrorist activities, or to subversive or other activities directed towards the violent overthrow of the regime of another participating State.

VII. Respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief

The participating States will respect human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief, for all without distinction as to race, sex, language or religion.

They will promote and encourage the effective exercise of civil, political, economic, social, cultural and other rights and freedoms all of which derive from the inherent dignity of the human person and are essential for his free and full development.

Within this framework, the participating States will recognize and respect the freedom of the individual to profess and practice, alone or in community with others, religion or belief, including the freedoms of thought, conscience, religion or belief, for all without distinction as to race, sex, language or religion.

VIII. Equal rights and self-determination of peoples

The participating States will respect the equal rights of peoples and their right to self-determination, acting at all times in conformity with the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States.

By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right in full freedom, without external interference, to pursue as they wish their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.

The participating States reaffirm the universal significance of respect for and effective exercise of equal rights and self-determination as among all States; they also recall the importance of the elimination of any form of violation thereof.

IX. Cooperation among States

The participating States will develop their co-operation with one another and with all States in all fields in accordance with the purposes and principles of the Charter of the United Nations. In developing their co-operation, the participating States will place special emphasis on the fields as set forth in the framework of the Conference on Security and Co-operation in Europe, with each of them making its contribution in conditions of full equality.

They will endeavor, in developing their co-operation as equals, to promote mutual understanding and confidence, friendly and good-neighbourly relations among themselves, international peace, security and justice. They will equally endeavor to improve the well-being of peoples and contribute to the fulfillment of their aspirations through international cooperation, the benefits resulting from increased mutual knowledge and progress and achievement in the economic, scientific, technological, social, cultural and humanitarian fields as well as in the levels of economic development, and in particular the interests of developing countries throughout the world.
They confirm that governments, institutions, organizations and persons have a relevant and positive role to play in contributing toward the achievement of these aims of their cooperation.

They will strive, in increasing their cooperation as set forth above, to develop closer relations among themselves on an improved and more enduring basis for the benefit of peoples.

X. Fulfilment in good faith of obligations under international law

The participating States will fulfil in good faith their obligations under international law, both those obligations arising from the generally recognized principles and rules of international law and those obligations arising from treaties or other agreements, in conformity with international law, to which they are parties.

In exercising their sovereign rights, including the right to determine their laws and regulations, they will conform with their legal obligations under international law; they will furthermore pay due regard to and implement the provisions in the Final Act of the Conference on Security and Cooperation in Europe.

The participating States confirm that in the event of a conflict between the obligations of the members of the United Nations under the Charter of the United Nations and their obligations under any treaty or other international agreement, their obligations under the Charter will prevail, in accordance with Article 103 of the Charter of the United Nations.

All the principles set forth above are of primary significance and, accordingly, they will be equally and unreservedly applied, each of them being interpreted taking into account the others.

The participating States express their determination fully to respect and apply these principles, as set forth in the present Declaration, in all aspects, to their mutual relations and cooperation in order to ensure to each participating State the benefits resulting from the respect and application of these principles by all.

The participating States, paying due regard to the principles above and, in particular, to the first sentence of the tenth principle, "Fulfilment in good faith of obligations under international law", note that the present Declaration does not affect their rights and obligations, nor the corresponding treaties and other agreements and arrangements.

The participating States express the conviction that respect for these principles will encourage the development of normal and friendly relations and the progress of co-operation among them in all fields. They also express the conviction that respect for these principles will encourage the development of political contacts among them which in time would contribute to better mutual understanding of their positions and views.

The participating States declare their intention to conduct their relations with all other States in the spirit of the principles contained in the present Declaration.

(b) Matters related to giving effect to certain of the above Principles

(i) The participating States,

Reaffirming that they will respect and give effect to refraining from the threat or use of force and convinced of the necessity to make it an effective norm of international life,

Declare that they are resolved to respect and carry out, in their relations with one another, inter alia, the following provisions which are in conformity with the Declaration on Principles Guiding Relations between Participating States:

- To give effect and expression, by all the ways and forms which they consider appropriate, to the duty to refrain from the threat or use of force in their relations with one another.

- To refrain from any use of armed forces inconsistent with the purposes and principles of the Charter of the United Nations and the provisions of the Declaration on Principles Guiding Relations between Participating States, against another participating State, in particular from invasion of or attack on its territory.

- To refrain from any manifestation of force for the purpose of inducing another participating State to renounce the full exercise of its sovereign rights.

- To refrain from any act of economic coercion designed to subordinate to their own interest the exercise by another participating State of the rights inherent in its sovereignty and thus to secure advantages of any kind.

- To take effective measures which by their scope and by their nature constitute steps towards the ultimate achievement of general and complete disarmament under strict and effective international control.

- To promote, by all means which each of them considers appropriate, a climate of confidence and respect among peoples consonant with their duty to refrain from propaganda for wars of aggression or for any threat or use of force inconsistent with the purposes of the United Nations and with the Declaration on Principles Guiding Relations between Participating States, against another participating State.

- To make every effort to settle exclusively by peaceful means any dispute between them, the continuance of which is likely to endanger the maintenance of international peace and security in Europe, and to seek, first of all, a solution through the peaceful means set forth in Article 33 of the United Nations Charter.

To refrain from any action which could hinder the peaceful settlement of disputes between the participating States.

(ii) The participating States,

Reaffirming their determination to settle their disputes as set forth in the Principle of Peaceful Settlement of Disputes;
Convinced that the peaceful settlement of disputes is a complement to refraining from the threat or use of force, both being essential though not exclusive factors for the maintenance and consolidation of peace and security;

Desiring to reinforce and to improve the methods at their disposal for the peaceful settlement of disputes;

1. Are resolved to pursue the examination and elaboration of a generally acceptable method for the peaceful settlement of disputes aimed at complementing existing methods, and to continue to this end to work upon the "Draft Convention on a European System for the Peaceful Settlement of Disputes" submitted by Switzerland during the second stage of the Conference on Security and Co-operation in Europe, as well as other proposals relating to it and directed towards the elaboration of such a method.

2. Decide that, on the invitation of Switzerland, a meeting of experts of all the participating States will be convoked in order to fulfil the mandate described in paragraph 1 above within the framework and under the procedures of the follow-up to the Conference laid down in the chapter "Follow-up to the Conference".

3. This meeting of experts will take place after the meeting of the representatives appointed by the Ministers of Foreign Affairs of the participating States, scheduled according to the chapter "Follow-up to the Conference" for 1977; the results of the work of this meeting of experts will be submitted to Governments.

2. Document on confidence-building measures and certain aspects of security and disarmament

The participating States,

Desiring of eliminating the causes of tension that may exist among them and thus of contributing to the strengthening of peace and security in the world;

Determined to strengthen confidence among them and thus to contribute to increasing stability and security in Europe;

Determined further to refrain in their mutual relations, as well as in their international relations in general, 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 and with the Declaration on Principles Guiding Relations between Participating States as adopted in this Final Act;

Recognizing the need to contribute to reducing the dangers of armed conflict and of misunderstanding or miscalculation of military activities which could give rise to apprehension, particularly in a situation where the participating States lack clear and timely information about the nature of such activities;

Taking into account considerations relevant to efforts aimed at lessening tension and promoting disarmament;

Recognizing that the exchange of observers by invitation at military manoeuvres will help to promote contacts and mutual understanding;

Having studied the question of prior notification of major military movements in the context of confidence-building;

Recognizing that there are other ways in which individual States can contribute further to their common objectives;

Convinced of the political importance of prior notification of major military manoeuvres for the promotion of mutual understanding and the strengthening of confidence, stability and security;

Accepting the responsibility of each of them to promote these objectives and to implement this measure, in accordance with the accepted criteria and modalities, as essentials for the realization of these objectives;

Recognizing that this measure deriving from political decision rests upon a voluntary basis;

Have adopted the following:

Prior notification of major military manoeuvres

They will notify their major military manoeuvres to all other participating States through usual diplomatic channels in accordance with the following provisions:

Notification will be given of major military manoeuvres exceeding a total of 25,000 troops, independently or combined with any possible air or naval components (in this context the word "troops" includes amphibious and airborne troops). In the case of independent manoeuvres of amphibious or airborne troops, or of combined manoeuvres involving them, these troops will be included in this total. Furthermore, in the case of combined manoeuvres which do not reach the above total but which involve land forces together with significant numbers of either amphibious or airborne troops, or both, notification can also be given.

Notification will be given of major military manoeuvres which take place on the territory, in Europe, of any participating State as well as, if applicable, in the adjoining sea area and air space.

In the case of a participating State whose territory extends beyond Europe, prior notification need be given only of manoeuvres which take place in an area within 250 kilometres from its frontier facing or shared with any other European participating State, the participating State need not, however, give notification in cases in which that area is also contiguous to the participating State's frontier facing or shared with a non-European non-participating State.

Notification will be given 21 days or more in advance of the start of the manoeuvre or in the case of a manoeuvre arranged at shorter notice at the earliest possible opportunity prior to its starting date.
Notification will contain information of the designation, if any, the general purpose of and the States involved in the manoeuvre, the type or types and numerical strength of the forces engaged, the area and estimated time-frame of its conduct. The participating States will also, if possible, provide additional relevant information, particularly that related to the components of the forces engaged and the period of involvement of these forces.

**Prior notification of other military manoeuvres**

The participating States recognize that they can contribute further to strengthening confidence and increasing security and stability, and to this end may also notify smaller-scale military manoeuvres to other participating States, with special regard for those near the area of such manoeuvres.

To the same end, the participating States also recognize that they may notify other military manoeuvres conducted by them.

**Exchange of observers**

The participating States will invite other participating States, voluntarily and on a bilateral basis, in a spirit of reciprocity and goodwill towards all participating States, to send observers to attend military manoeuvres.

The inviting State will determine in each case the number of observers, the procedures and conditions of their participation, and give other information which it may consider useful. It will provide appropriate facilities and hospitality.

The invitation will be given as far ahead as is conveniently possible through usual diplomatic channels.

**Prior notification of major military movements**

In accordance with the Final Recommendations of the Helsinki Consultations the participating States studied the question of prior-notification of major military movements as a measure to strengthen confidence.

Accordingly, the participating States recognize that they may, at their own discretion and with a view to contributing to confidence-building, notify their major military movements.

In the same spirit, further consideration will be given by the States participating in the Conference on Security and Cooperation in Europe to the question of prior notification of major military movements, bearing in mind, in particular, the experience gained by the implementation of the measures which are set forth in this document.

**Other confidence-building measures**

The participating States recognize that there are other means by which their common objectives can be promoted.

In particular, they will, with due regard to reciprocity and with a view to better mutual understanding, promote exchanges by invitation among their military delegations.

* * *

In order to make a fuller contribution to their common objective of confidence-building, the participating States, when conducting their military activities in the area covered by the provisions for the prior notification of major military manoeuvres, will duly take into account and respect this objective.

They also recognize that the experience gained by the implementation of the provisions set forth above, together with further efforts, could lead to developing and enlarging measures aimed at strengthening confidence.

**II**

**Questions relating to disarmament**

The participating States recognize the interest of all of them in efforts aimed at lessening military confrontation and promoting disarmament which are designed to complement political détente in Europe and to strengthen their security. They are convinced of the necessity to take effective measures in these fields which by their scope and by their nature constitute steps towards the ultimate achievement of general and complete disarmament under strict and effective international control, and which should result in strengthening peace and security throughout the world.

**III**

**General considerations**

Having considered the views expressed on various subjects related to the strengthening of security in Europe through joint efforts aimed at promoting détente and disarmament, the participating States, when engaged in such efforts, will, in this context, proceed, in particular, from the following essential considerations:

- The complementary nature of the political and military aspects of security;
- The interrelation between the security of each participating State and security in Europe as a whole and the relationship which exists, in the broader context of world security, between security in Europe and security in the Mediterranean area;
- Respect for the security interests of all States participating in the Conference on Security and Co-operation in Europe inherent in their sovereign equality;
- The importance that participants in negotiating fora see to it that information about relevant developments, progress and results is provided on an appropriate basis to other States participating in the Conference on Security and Co-operation in Europe and, in return, the justified interest of any of those States in having their views considered.
Co-operation in the Field of Economics, of Science and Technology and of the Environment

The participating States,

Convinced that their efforts to develop cooperation in the fields of trade, industry, science and technology, the environment and other areas of economic activity contribute to the reinforcement of peace and security in Europe and in the world as a whole,

Recognizing that cooperation in these fields would promote economic and social progress and the improvement of the conditions of life,

Aware of the diversity of their economic and social systems,

Reaffirming their will to intensify such cooperation between one another, irrespective of their systems,

Recognizing that such cooperation, with due regard for the different levels of economic development, can be developed, on the basis of equality and mutual satisfaction of the partners, and of reciprocity permitting, as a whole, an equitable distribution of advantages and obligations of comparable scale, with respect for bilateral and multilateral agreements,

Taking into account the interests of the developing countries throughout the world, including those among the participating countries as long as they are developing from the economic point of view; reaffirming their will to co-operate for the achievement of the aims and objectives established by the appropriate bodies of the United Nations in the pertinent documents concerning development, it being understood that each participating State maintains the positions it has taken on them; giving special attention to the least developed countries,

Convinced that the growing world-wide economic interdependence calls for increasing common and effective efforts towards the solution of major world economic problems such as food, energy, commodities, monetary and financial problems, and therefore emphasizes the need for promoting stable and equitable international economic relations, thus contributing to the continuous and diversified economic development of all countries,

Having taken into account the work already undertaken by relevant international organizations and wishing to take advantage of the possibilities offered by these organizations, in particular by the United Nations Economic Commission for Europe, for giving effect to the provisions of the final documents of the Conference,

Considering that the guidelines and concrete recommendations contained in the following texts are aimed at promoting further development of their mutual economic relations, and convinced that their cooperation in this field should take place in full respect for the principles guiding relations among participating States as set forth in the relevant document,

Have adopted the following:

1. Commercial Exchanges

General provisions

The participating States,

Conscious of the growing role of international trade as one of the most important factors in economic growth and social progress,

Recognizing that trade represents an essential sector of their co-operation, and bearing in mind that the provisions contained in the above preamble apply in particular to this sector,

Considering that the volume and structure of trade among the participating States do not in all cases correspond to the possibilities created by the current level of their economic, scientific and technological development,

are resolved to promote, on the basis of the modalities of their economic cooperation, the expansion of their mutual trade in goods and services, and to ensure conditions favourable to such development;

recognize the beneficial effects which can result for the development of trade from the application of most favoured nation treatment;

will encourage the expansion of trade on as broad a multilateral basis as possible thereby endeavouring to utilize the various economic and commercial possibilities;

recognize the importance of bilateral and multilateral intergovernmental and other agreements for the long-term development of trade;

note the importance of monetary and financial questions for the development of international trade, and will endeavour to deal with them with a view to contributing to the continuous expansion of trade;

will endeavour to reduce or progressively eliminate all kinds of obstacles to the development of trade;

will foster a steady growth of trade while avoiding as far as possible abrupt fluctuations in their trade;

consider that their trade in various products should be conducted in such a way as not to cause or threaten to cause serious injury - and should the situation arise, market disruption - in domestic markets for these products and in particular to the detriment of domestic producers of like or directly competitive products; as regards the concept of market disruption, it is understood that it should not be invoked in a way inconsistent with the relevant provisions of their international agreements; if they resort to safeguard measures, they will do so in conformity with their commitments in this field arising from international agreements to which they are parties and will take account of the interests of the parties directly concerned;
will give due attention to measures for the promotion of trade and the diversification of its structure;

note that the growth and diversification of trade would contribute to widening the possibilities of choice of products;

consider it appropriate to create favourable conditions for the participation of firms, organizations and enterprises in the development of trade.

Business contacts and facilities

The participating States,

Conscious of the importance of the contribution which an improvement of business contacts, and the accompanying growth of confidence in business relationships, could make to the development of commercial and economic relations,

will take measures further to improve conditions for the expansion of contacts between representatives of official bodies, of the different organizations, enterprises, firms and banks concerned with foreign trade, in particular, where useful, between sellers and users of products and services, for the purpose of studying commercial possibilities, concluding contracts, ensuring their implementation and providing after-sales services;

will encourage organizations, enterprises and firms concerned with foreign trade to take measures to accelerate the conduct of business negotiations;

will further take measures aimed at improving working conditions of representatives of foreign organizations, enterprises, firms and banks concerned with external trade, particularly as follows:

- by providing the necessary information, including information on legislation and procedures relating to the establishment and operation of permanent representation by the above mentioned bodies;

- by examining as favourably as possible requests for the establishment of permanent representation and of offices for this purpose, including, where appropriate, the opening of joint offices by two or more firms.

- by encouraging the provision, on conditions as favourable as possible and equal for all representatives of the above/mentioned bodies, of hotel accommodation, means of communication, and of other facilities normally required by them, as well as of suitable business and residential premises for purposes of permanent representation;

recognize the importance of such measures to encourage greater participation by small and medium sized firms in trade between participating States.

Economic and commercial information

The participating States,

Conscious of the growing role of economic and commercial information in the development of international trade,

Considering that economic information should be of such a nature as to allow adequate market analysis and to permit the preparation of medium and long term forecasts, thus contributing to the establishment of a continuing flow of trade and a better utilization of commercial possibilities,

Expressing their readiness to improve the quality and increase the quantity and supply of economic and relevant administrative information,

Considering that the value of statistical information on the international level depends to a considerable extent on the possibility of its comparability,

will promote the publication and dissemination of economic and commercial information at regular intervals and as quickly as possible, in particular:

- statistics concerning production, national income, budget, consumption and productivity;

- foreign trade statistics drawn up on the basis of comparable classification including breakdown by product with indication of volume and value, as well as country of origin or destination;

- laws and regulations concerning foreign trade;

- information allowing forecasts of development of the economy to assist in trade promotion, for example, information on the general orientation of national economic plans and programmes;

- other information to help businessmen in commercial contacts, for example, periodic directories, lists, and where possible, organizational charts of firms and organizations concerned with foreign trade;

will in addition to the above encourage the development of the exchange of economic and commercial information through, where appropriate, joint commissions for economic, scientific and technical cooperation, national and joint chambers of commerce, and other suitable bodies;

will support a study, in the framework of the United Nations Economic Commission for Europe, of the possibilities of creating a multilateral system of notification of laws and regulations concerning foreign trade and changes therein;

will encourage international work on the harmonization of statistical nomenclatures, notably in the United Nations Economic Commission for Europe.
Marketing

The participating States,

Recognizing the importance of adapting production to the requirements of foreign markets in order to ensure the expansion of international trade,

Conscious of the need of exporters to be as fully familiar as possible with and take account of the requirements of potential users,

will encourage organizations, enterprises and firms concerned with foreign trade to develop further the knowledge and techniques required for effective marketing;

will encourage the improvement of conditions for the implementation of measures to promote trade and to satisfy the needs of users in respect of imported products, in particular through market research and advertising measures as well as, where useful, the establishment of supply facilities, the furnishing of spare parts, the functioning of after sales services, and the training of the necessary local technical personnel;

will encourage international cooperation in the field of trade promotion, including marketing, and the work undertaken on these subjects within the international bodies, in particular the United Nations Economic Commission for Europe.

2. Industrial co-operation and projects of common interest

Industrial co-operation

Considering that industrial co-operation, being motivated by economic considerations, can

- create lasting ties thus strengthening long-term overall economic co-operation,
- contribute to economic growth as well as to the expansion and diversification of international trade and to a wider utilization of modern technology,
- lead to the mutually advantageous utilization of economic complementarities through better use of all factors of production, and
- accelerate the industrial development of all those who take part in such cooperation,

propose to encourage the development of industrial cooperation between the competent organizations, enterprises and firms of their countries;

consider that industrial co-operation may be facilitated by means of inter-governmental and other bilateral and multilateral agreements between the interested parties;

note that in promoting industrial cooperation they should bear in mind the economic structures and the development levels of their countries;

note that industrial cooperation is implemented by means of contracts concluded between competent organizations, enterprises and firms on the basis of economic considerations;

express their willingness to promote measures designed to create favourable conditions for industrial co-operation;

recognize that industrial co-operation covers a number of forms of economic relations going beyond the framework of conventional trade, and that in concluding contracts on industrial co-operation the partners will determine jointly the appropriate forms and conditions of co-operation, taking into account their mutual interests and capabilities;

recognize further that, if it is in their mutual interest, concrete forms such as the following may be useful for the development of industrial cooperation: joint production and sale, specialization in production and sale, construction, adaptation and modernization of industrial plants, cooperation for the setting up of complete industrial installations with a view to thus obtaining part of the resultant products, mixed companies, exchanges of know-how, of technical information, of patents and of licences, and joint industrial research within the framework of specific co-operation projects;

recognize that new forms of industrial co-operation can be applied with a view to meeting specific needs;

note the importance of economic, commercial, technical and administrative information such as to ensure the development of industrial co-operation;

Consider it desirable:

- to improve the quality and the quantity of information relevant to industrial co-operation, in particular the laws and regulations, including those relating to foreign exchange, general orientation of national economic plans and programmes as well as programme priorities and economic conditions of the market; and
- to disseminate as quickly as possible published documentation thereon;

will encourage all forms of exchange of information and communication of experience relevant to industrial co-operation, including through contacts between potential partners and, where appropriate, through joint commissions for economic, industrial, scientific and technical co-operation, national and joint chambers of commerce, and other suitable bodies;

consider it desirable, with a view to expanding industrial co-operation, to encourage the exploration of co-operation possibilities and the implementation of co-operation projects and will take measures to this end, inter alia, by facilitating and increasing all forms of business contacts between competent organizations, enterprises and firms and between their respective qualified personnel;
note that the provisions adopted by the Conference relating to business contacts in the economic and commercial fields also apply to foreign organizations, enterprises and firms engaged in industrial co-operation, taking into account the specific conditions of this co-operation, and will endeavour to ensure, in particular, the existence of appropriate working conditions for personnel engaged in the implementation of co-operation projects;

consider it desirable that proposals for industrial co-operation projects should be sufficiently specific and should contain the necessary economic and technical data, in particular preliminary estimates of the cost of the project, information on the form of co-operation envisaged, and market possibilities, to enable potential partners to proceed with initial studies and to arrive at decisions in the shortest possible time;

will encourage the parties concerned with industrial co-operation to take measures to accelerate the conduct of negotiations for the conclusion of co-operation contracts,

recommend further the continued examination - for example within the framework of the United Nations Economic Commission for Europe - of means of improving the provision of information to those concerned on general conditions of industrial co-operation and guidance on the preparation of contracts in this field;

consider it desirable to further improve conditions for the implementation of industrial co-operation projects, in particular with respect to:

- the protection of the interests of the partners in industrial co-operation projects, including the legal protection of the various kinds of property involved;

- the consideration, in ways that are compatible with their economic systems, of the needs and possibilities of industrial co-operation within the framework of economic policy and particularly in national economic plans and programmes;

consider it desirable that the partners, when concluding industrial co-operation contracts, should devote due attention to provisions concerning the extension of the necessary mutual assistance and the provision of the necessary information during the implementation of these contracts, in particular with a view to attaining the required technical level and quality of the products resulting from such cooperation;

recognize the usefulness of an increased participation of small and medium sized firms in industrial co-operation projects.

Projects of common interest

The participating States,

Considering that their economic potential and their natural resources permit, through common efforts, long-term co-operation in the implementation, including at the regional or sub-regional level, of major that these may contribute to the speeding-up of the economic development of the countries participating therein,

Considering it desirable that the competent organizations, enterprises and firms of all countries should be given the possibility of indicating their interest in participating in such projects, and, in case of agreement, of taking part in their implementation,

Noting that the provisions adopted by the Conference relating to industrial co-operation are also applicable to projects of common interest,

regard it as necessary to encourage, where appropriate, the investigation by competent and interested organizations, enterprises and firms of the possibilities for the carrying out of projects of common interest in the fields of energy resources and of the exploitation of raw materials, as well as of transport and communications;

regard it as desirable that organizations, enterprises and firms exploring the possibilities of taking part in projects of common interest exchange with their potential partners, through the appropriate channels, the requisite economic, legal, financial and technical information pertaining to these projects;

consider that the fields of energy resources, in particular, petroleum, natural gas and coal, and the extraction and processing of mineral raw materials, in particular, iron ore and bauxite, are suitable ones for strengthening long-term economic co-operation and for the development of trade which could result;

consider that possibilities for projects of common interest with a view to longterm economic co-operation also exist in the following fields:

- exchanges of electrical energy within Europe with a view to utilizing the capacity of the electrical power stations as rationally as possible;

- co-operation in research for new sources of energy and, in particular, in the field of nuclear energy;

- development of road networks and co-operation aimed at establishing a coherent navigable network in Europe;

- co-operation in research and the perfecting of equipment for multimodal transport operations and for the handling of containers;

recommend that the States interested in projects of common interest should consider under what conditions it would be possible to establish them, and if they so desire, create the necessary conditions for their actual implementation.

3. Provisions concerning trade and industrial co-operation

Harmonization of standards

The participating States,

Recognizing the development of international harmonization of standards and technical regulations and of international co-operation in the field of certification as an important means of eliminating technical obstacles to international trade and industrial co-operation, thereby facilitating their development and increasing productivity,
reaffirm their interest to achieve the widest possible international harmonization of standards and technical regulations,

express their readiness to promote international agreements and other appropriate arrangements on acceptance of certificates of conformity with standards and technical regulations;

consider it desirable to increase international co-operation on standardization, in particular by supporting the activities of intergovernmental and other appropriate organizations in this field.

Arbitration

The participating States,

Considering that the prompt and equitable settlement of disputes which may arise from commercial transactions relating to goods and services and contracts for industrial co-operation would contribute to expanding and facilitating trade and co-operation,

Considering that arbitration is an appropriate means of settling such disputes,

recommend, where appropriate, to organizations, enterprises and firms in their countries, to include arbitration clauses in commercial contracts and industrial co-operation contracts, or in special agreements;

recommend that the provisions on arbitration should provide for arbitration under a mutually acceptable set of arbitration rules, and permit arbitration in a third country, taking into account existing intergovernmental and other agreements in this field.

Specific bilateral arrangements

The participating States,

Conscious of the need to facilitate trade and to promote the application of new forms of industrial co-operation,

will consider favourably the conclusion, in appropriate cases, of specific bilateral agreements concerning various problems of mutual interest in the fields of commercial exchanges and industrial co-operation, in particular with a view to avoiding double taxation and to facilitating the transfer of profits and the return of the value of the assets invested.

4. Science and technology

The participating States,

Convinced that scientific and technological co-operation constitutes an important contribution to the strengthening of security and co-operation among them, in that it assists the effective solution of problems of common interest and the improvement of the conditions of human life,

Considering that in developing such co-operation, it is important to promote the sharing of information and experience, facilitating the study and transfer of scientific and technological achievements, as well as the access to such achievements on a mutually advantageous basis and in fields of co-operation agreed between interested parties,

Considering that it is for the potential partners, i.e. the competent organizations, institutions, enterprises, scientists and technologists of the participating States to determine the opportunities for mutually beneficial co-operation and to develop its details,

Affirming that such co-operation can be developed and implemented bilaterally and multilaterally at the governmental and non-governmental levels, for example, through intergovernmental and other agreements, international programmes, cooperative projects and commercial channels, while utilizing also various forms of contacts, including direct and individual contacts,

Aware of the need to take measures further to improve scientific and technological co-operation between them,

Possibilities for improving co-operation

Recognize that possibilities exist for further improving scientific and technological co-operation, and to this end, express their intention to remove obstacles to such co-operation, in particular through:

- the improvement of opportunities for the exchange and dissemination of scientific and technological information among the parties interested in scientific and technological research and co-operation including information related to the organization and implementation of such co-operation;

- the expeditious implementation and improvement in organization, including programmes, of international visits of scientists and specialists in connexion with exchanges, conferences and co-operation;

- the wider use of commercial channels and activities for applied scientific and technological research and for the transfer of achievements obtained in this field while providing information on and protection of intellectual and industrial property rights;
Fields of co-operation

Consider that possibilities to expand co-operation exist within the areas given below as examples, noting that it is for potential partners in the participating countries to identify and develop projects and arrangements of mutual interest and benefit:

**Agriculture**

Research into new methods and technologies for increasing the productivity of crop cultivation and animal husbandry; the application of chemistry to agriculture; the design, construction and utilization of agricultural machinery; technologies of irrigation and other agricultural land improvement works;

**Energy**

New technologies of production, transport and distribution of energy aimed at improving the use of existing fuels and sources of hydroenergy, as well as research in the field of new energy sources, including nuclear, solar and geothermal energy;

**New technologies, rational use of resources**

Research on new technologies and equipment designed in particular to reduce energy consumption and to minimize or eliminate waste;

**Transport technology**

Research on the means of transport and the technology applied to the development and operation of international, national and urban transport networks including container transport as well as transport safety;

**Physics**

Study of problems in high energy physics and plasma physics; research in the field of theoretical and experimental nuclear physics;

**Chemistry**

Research on problems in electrochemistry and the chemistry of polymers, of natural products, and of metals and alloys, as well as the development of improved chemical technology, especially materials processing; practical application of the latest achievements of chemistry to industry, construction and other sectors of the economy;

**Meteorology and hydrology**

Meteorological and hydrological research, including methods of collection, evaluation and transmission of data and their utilization for weather forecasting and hydrology forecasting;

**Oceanography**

Oceanographic research, including the study of air/sea interactions;

**Seismological research**

Study and forecasting of earthquakes and associated geological changes; development and research of technology of seism-resisting constructions;

**Research on glaciology, permafrost and problems of life under conditions of cold**

Research on glaciology and permafrost; transportation and construction technologies; human adaptation to climatic extremes and changes in the living conditions of indigenous populations;

**Computer, communication and information technologies**

Development of computers as well as of telecommunications and information systems; technology associated with computers and telecommunications, including their use for management systems, for production processes, for automation, for the study of economic problems, in scientific research and for the collection, processing and dissemination of information;

**Space research**

Space exploration and the study of the earth's natural resources and the natural environment by remote sensing in particular with the assistance of satellites and rocket-probes;

**Medicine and public health**

Research on cardiovascular, tumour and virus diseases, molecular biology, neurophysiology; development and testing of new drugs; study of contemporary problems of pediatrics, gerontology and the organization and techniques of medical services;

**Environmental research**

Research on specific scientific and technological problems related to human environment.

**Forms and methods of co-operation**

Express their view that scientific and technological co-operation should, in particular, employ the following forms and methods:

- exchange and circulation of books, periodicals and other scientific and technological publications and papers among interested organizations, scientific and technological institutions, enterprises and scientists and technologists, as well as participation in international programmes for the abstracting and indexing of publications;
- exchanges and visits as well as other direct contacts and communications among scientists and technologists, on the basis of mutual agreement and other arrangements, for such purposes as consultations, lecturing and conducting research, including the use of laboratories, scientific libraries, and other documentation centres in connexion therewith;

- holding of international and national conferences, symposia, seminars, courses and other meetings of a scientific and technological character, which would include the participation of foreign scientists and technologists;

- joint preparation and implementation of programmes and projects of mutual interest on the basis of consultation and agreement among all parties concerned, including, where possible and appropriate, exchanges of experience and research results, and correlation of research programmes, between scientific and technological research institutions and organizations;

- use of commercial channels and methods for identifying and transferring technological and scientific developments, including the conclusion of mutually beneficial co-operation arrangements between firms and enterprises in fields agreed upon between them and for carrying out, where appropriate, joint research and development programmes and projects;

consider it desirable that periodic exchanges of views and information take place on scientific policy, in particular on general problems of orientation and administration of research and the question of a better use of large-scale scientific and experimental equipment on a co-operative basis;

recommend that, in developing co-operation in the field of science and technology, full use be made of existing practices of bilateral and multilateral cooperation, including that of a regional or sub-regional character, together with the forms and methods of co-operation described in this document;

recommend further that more effective utilization be made of the possibilities and capabilities of existing international organizations, intergovernmental and non-governmental, concerned with science and technology, for improving exchanges of information and experience, as well as for developing other forms of cooperation in fields of common interest, for example:

- in the United Nations Economic Commission for Europe, study of possibilities for expanding multilateral co-operation, taking into account models for projects and research used in various international organizations; and for sponsoring conferences, symposia, and study and working groups such as those which would bring together younger scientists and technologists with eminent specialists in their field;

- through their participation in particular international scientific and technological co-operation programmes, including those of UNESCO and other international organizations, pursuit of continuing progress towards the objectives of such programmes, notably those of UNISIST with particular respect to information policy guidance, technical advice, information contributions and data processing.

5. Environment

The participating States,

Affirming that the protection and improvement of the environment, as well as the protection of nature and the rational utilization of its resources in the interests of present and future generations, is one of the tasks of major importance to the well-being of peoples and the economic development of all countries and that many environmental problems, particularly in Europe, can be solved effectively only through close international co-operation,

Acknowledging that each of the participating States, in accordance with the principles of international law, ought to ensure, in a spirit of co-operation, that activities carried out on its territory do not cause degradation of the environment in another State or in areas lying beyond the limits of national jurisdiction,

Considering that the success of any environmental policy presupposes that all population groups and social forces, aware of their responsibilities, help to protect and improve the environment, which necessitates continued and thorough educative action, particularly with regard to youth.

Affirming that experience has shown that economic development and technological progress must be compatible with the protection of the environment and the preservation of historical and cultural values; that damage to the environment is best avoided by preventive measures; and that the ecological balance must be preserved in the exploitation and management of natural resources,

Aims of co-operation

Agree to the following aims of co-operation, in particular:

- to study, with a view to their solution, those environmental problems which, by their nature, are of a multilateral, bilateral, regional or sub-regional dimension; as well as to encourage the development of an interdisciplinary approach to environmental problems;

- to increase the effectiveness of national and international measures for the protection of the environment, by the comparison and, if appropriate, the harmonization of methods of gathering and analyzing facts, by improving the knowledge of pollution phenomena and rational utilization of natural resources, by the exchange of information, by the harmonization of definitions and the adoption, as far as possible, of a common terminology in the field of the environment;

- to take the necessary measures to bring environmental policies closer together and, where appropriate and possible, to harmonize them;

- to encourage, where possible and appropriate, national and international efforts by their interested organizations, enterprises and firms in the development, production and improvement of equipment designed for monitoring, protecting and enhancing the environment.
**Fields of co-operation**

To attain these aims, the participating States will make use of every suitable opportunity to co-operate in the field of environment and, in particular, within the areas described below as examples:

**Control of air pollution**

Desulphurization of fossil fuels and exhaust gases, pollution control of heavy metals, particles, aerosols, nitrogen oxides, in particular those emitted by transport, power stations, and other industrial plants; systems and methods of observation and control of air pollution and its effects, including long-range transport of air pollutants;

**Water pollution control and fresh water utilization**

Prevention and control of water pollution, in particular of transboundary rivers and international lakes; techniques for the improvement of the quality of water and further development of ways and means for industrial and municipal sewage effluent purification; methods of assessment of fresh water resources and the improvement of their utilization, in particular by developing methods of production which are less polluting and lead to less consumption of fresh water;

**Protection of the marine environment**

Protection of the marine environment of participating States, and especially the Mediterranean Sea, from pollutants emanating from land-based sources and those from ships and other vessels, notably the harmful substances listed in Annexes I and II to the London Convention on the Prevention of Marine Pollution by the Dumping of Wastes and Other Matters; problems of maintaining marine ecological balances and food chains, in particular such problems as may arise from the exploration and exploitation of biological and mineral resources of the seas and the sea-bed;

**Land utilization and soils**

Problems associated with more effective use of lands, including land amelioration, reclamation and recultivation; control of soil pollution, water and air erosion, as well as other forms of soil degradation; maintaining and increasing the productivity of soils with due regard for the possible negative effects of the application of chemical fertilizers and pesticides;

**Nature conservation and nature reserves**

Protection of nature and nature reserves; conservation and maintenance of existing genetic resources, especially rare animal and plant species; conservation of natural ecological systems; establishment of nature reserves and other protected landscapes and areas, including their use for research, tourism, recreation and other purposes;

**Improvement of environmental conditions in areas of human settlement**

Environmental conditions associated with transport, housing, working areas, urban development and planning, water supply and sewage disposal systems; assessment of harmful effects of noise, and noise control methods; collection, treatment and utilization of wastes, including the recovery and recycling of materials; research on substitutes for non-biodegradable substances;

**Fundamental research, monitoring, forecasting and assessment of environmental changes**

Study of changes in climate, landscapes and ecological balances under the impact of both natural factors and human activities; forecasting of possible genetic changes in flora and fauna as a result of environmental pollution; harmonization of statistical data, development of scientific concepts and systems of monitoring networks, standardized methods of observation, measurement and assessment of changes in the biosphere; assessment of the effects of environmental pollution levels and. degradation of the environment upon human health; study and development of criteria and standards for various environmental pollutants and regulation regarding production and use of various products;

**Legal and administrative measures**

Legal and administrative measures for the protection of the environment including procedures for establishing environmental impact assessments.

**Forms and methods of co-operation**

The participating States declare that problems relating to the protection and improvement of the environment will be solved on both a bilateral and a multilateral, including regional and sub-regional, basis, making full use of existing pattern and forms of co-operation. They will develop co-operation in the field of the environment in particular by taking into consideration the Stockholm Declaration on the Human Environment, relevant resolutions of the United Nations General Assembly and the United Nations Economic Commission for Europe Prague symposium on environmental problems.

The participating States are resolved that co-operation in the field of the environment will be implemented in particular through:

- exchanges of scientific and technical information, documentation and research results, including information on the means of determining the possible effects on the environment of technical and economic activities;
- organization of conferences, symposia and meetings of experts;
- exchanges of scientists, specialists and trainees;
- joint preparation and implementation of programmes and projects for the study and solution of various problems of environmental protection,
- harmonization, where appropriate and necessary, of environmental protection standards and norms, in particular with the object of avoiding possible difficulties in trade which may arise from efforts to resolve ecological problems of production processes and which relate to the achievement of certain environmental qualities in manufactured products,

- consultations on various aspects of environmental protection, as agreed upon among countries concerned, especially in connexion with problems which could have international consequences.

The participating States will further develop such co-operation by:

- promoting the progressive development, codification and implementation of international law as one means of preserving and enhancing the human environment, including principles and practices, as accepted by them, relating to pollution and other environmental damage caused by activities within the jurisdiction or control of their States affecting other countries and regions;

- supporting and promoting the implementation of relevant international Conventions to which they are parties, in particular those designed to prevent and combat marine and fresh water pollution, recommending States to ratify Conventions which have already been signed, as well as considering possibilities of accepting other appropriate Conventions to which they are not parties at present;

- advocating the inclusion, where appropriate and possible, of the various areas of co-operation into the programmes of work of the United Nations Economic Commission for Europe, supporting such co-operation within the framework of the Commission and of the United Nations Environment Programme, and taking into account the work of other competent international organizations of which they are members,

- making wider use, in all types of co-operation, of information already available from national and international sources, including internationally agreed criteria, and utilizing the possibilities and capabilities of various competent international organizations.

The participating States agree on the following recommendations on specific measures:

- to develop through international co-operation an extensive programme for the monitoring and evaluation of the long-range transport of air pollutants, starting with sulphur dioxide and with possible extension to other pollutants, and to this end to take into account basic elements of a co-operation programme which were identified by the experts who met in Oslo in December 1974 at the invitation of the Norwegian Institute of Air Research;

- to advocate that within the framework of the United Nations Economic Commission for Europe a study be carried out of procedures and relevant experience relating to the activities of Governments in developing the capabilities of their countries to predict adequately environmental consequences of economic activities and technological development.

6. Co-operation in other areas

6.1. Development of transport

The participating States,

Considering that the improvement of the conditions of transport constitutes one of the factors essential to the development of co-operation among them,

Considering that it is necessary to encourage the development of transport and the solution of existing problems by employing appropriate national and international means,

Taking into account the work being carried out on these subjects by existing international organizations, especially by the Inland Transport Committee of the United Nations Economic Commission for Europe,

note that the speed of technical progress in the various fields of transport makes desirable a development of co-operation and an increase in exchanges of information among them;

declare themselves in favour of a simplification and a harmonization of administrative formalities in the field of international transport, in particular at frontiers;

consider it desirable to promote, while allowing for their particular national circumstances in this sector, the harmonization of administrative and technical provisions concerning safety in road, rail, river, air and sea transport;

express their intention to encourage the development of international inland transport of passengers and goods as well as the possibilities of adequate participation in such transport on the basis of reciprocal advantage;

declare themselves in favour, with due respect for their rights and international commitments, of the elimination of disparities arising from the legal provisions applied to traffic on inland waterways which are subject to international conventions and, in particular, of the disparity in the application of those provisions; and to this end invite the member States of the Central Commission for the Navigation of the Rhine, of the Danube Commission and of other bodies to develop the work and studies now being carried out, in particular within the United Nations Economic Commission for Europe;

express their willingness, with a view to improving international rail transport and with due respect for their rights and international commitments, to work towards the elimination of difficulties arising from disparities in existing international legal provisions governing the reciprocal railway transport of passengers and goods between their territories;

express the desire for intensification of the work being carried out by existing international organizations in the field of transport, especially that of the Inland Transport Committee of the United Nations Economic Commission for Europe, and express their intention to contribute thereto by their efforts;
consider that examination by the participating States of the possibility of their accession to the different conventions or to membership of international organizations specializing in transport matters, as well as their efforts to implement conventions when ratified, could contribute to the strengthening of their co-operation in this field.

Promotion of tourism

The participating States,

Aware of the contribution made by international tourism to the development of mutual understanding among peoples, to increased knowledge of other countries' achievements in various fields, as well as to economic, social and cultural progress,

Recognizing the interrelationship between the development of tourism and measures taken in other areas of economic activity,

express their intention to encourage increased tourism on both an individual and group basis in particular by:

- encouraging the improvement of the tourist infrastructure and co-operation in this field;
- encouraging the carrying out of joint tourist projects including technical cooperation, particularly where this is suggested by territorial proximity and the convergence of tourist interests;
- encouraging the exchange of information, including relevant laws and regulations, studies, data and documentation relating to tourism, and by improving statistics with a view to facilitating their comparability;
- dealing in a positive spirit with questions connected with the allocation of financial means for tourist travel abroad, having regard to their economic possibilities, as well as with those connected with the formalities required for such travel, taking into account other provisions on tourism adopted by the Conference;
- facilitating the activities of foreign travel agencies and passenger transport companies in the promotion of international tourism;
- encouraging tourism outside the high season;
- examining the possibilities of exchanging specialists and students in the field of tourism, with a view to improving their qualifications;
- promoting conferences and symposia on the planning and development of tourism;
- consider it desirable to carry out in the appropriate international framework, and with the co-operation of the relevant national bodies, detailed studies on tourism, in particular:

- a comparative study on the status and activities of travel agencies as well as on ways and means of achieving better co-operation among them;
- a study of the problems raised by the seasonal concentration of vacations, with the ultimate objective of encouraging tourism outside peak periods;
- studies of the problems arising in areas where tourism has injured the environment;
- consider also that interested parties might wish to study the following questions:
- uniformity of hotel classification; and
- tourist routes comprising two or more countries;

will endeavour, where possible, to ensure that the development of tourism does not injure the environment and the artistic, historic and cultural heritage in their respective countries;

will pursue their co-operation in the field of tourism bilaterally and multilaterally with a view to attaining the above objectives.

Economic and social aspects of migrant labour

The participating States,

Considering that the movements of migrant workers in Europe have reached substantial proportions, and that they constitute an important economic, social and human factor for host countries as well as for countries of origin,

Recognizing that workers' migrations have also given rise to a number of economic, social, human and other problems in both the receiving countries and the countries of origin,

Taking due account of the activities of the competent international organizations, more particularly the International Labour Organisation, in this area,

are of the opinion that the problems arising bilaterally from the migration of workers in Europe as well as between the participating States should be dealt with by the parties directly concerned, in order to resolve these problems in their mutual interest, in the light of the concern of each State involved to take due account of the requirements resulting from its socio-economic situation, having regard to the obligation of each State to comply with the bilateral and multilateral agreements to which it is party, and with the following aims in view:

- to encourage the efforts of the countries of origin directed towards increasing the possibilities of employment for their nationals in their own territories, in particular by developing economic co-operation appropriate for this purpose and suitable for the host countries and the countries of origin concerned;
to ensure, through collaboration between the host country and the country of origin, the conditions under which the orderly movement of workers might take place, while at the same time protecting their personal and social welfare and, if appropriate, to organize the recruitment of migrant workers and the provision of elementary language and vocational training;

to ensure equality of rights between migrant workers and nationals of the host countries with regard to conditions of employment and work and to social security, and to endeavour to ensure that migrant workers may enjoy satisfactory living conditions, especially housing conditions;

to endeavour to ensure, as far as possible, that migrant workers may enjoy the same opportunities as nationals of the host countries of finding other suitable employment in the event of unemployment;

to regard with favour the provision of vocational training to migrant workers and, as far as possible, free instruction in the language of the host country, in the framework of their employment;

to confirm the right of migrant workers to receive, as far as possible, regular information in their own language, covering both their country of origin and the host country;

to ensure that the children of migrant workers established in the host country have access to the education usually given there, under the same conditions as the children of that country and, furthermore, to permit them to receive supplementary education in their own language, national culture, history and geography;

to bear in mind that migrant workers, particularly those who have acquired qualifications, can by returning to their countries after a certain period of time help to remedy any deficiency of skilled labour in their country of origin;

to facilitate, as far as possible, the reuniting of migrant workers with their families;

to regard with favour the efforts of the countries of origin to attract the savings of migrant workers, with a view to increasing, within the framework of their economic development, appropriate opportunities for employment, thereby facilitating the reintegration of these workers on their return home.

Training of personnel

The participating States,

Conscious of the importance of the training and advanced training of professional staff and technicians for the economic development of every country,

declare themselves willing to encourage co-operation in this field notably by promoting exchange of information on the subject of institutions, programmes and methods of training and advanced training open to professional staff and technicians in the various sectors of economic activity and especially in those of management, public planning, agriculture and commercial and banking techniques;

consider that it is desirable to develop, under mutually acceptable conditions, exchanges of professional staff and technicians, particularly through training activities, of which it would be left to the competent and interested bodies in the participating States to discuss the modalities - duration, financing, education and qualification levels of potential participants;

declare themselves in favour of examining, through appropriate channels, the possibilities of cooperating on the organization and carrying out of vocational training on the job, more particularly in professions involving modern techniques.
Questions relating to Security and Co-operation in the Mediterranean

The participating States,

Conscious of the geographical, historical, cultural, economic and political aspects of their relationship with the non-participating Mediterranean States,

Convinced that security in Europe is to be considered in the broader context of world security and is closely linked with security in the Mediterranean area as a whole, and that accordingly the process of improving security should not be confined to Europe but should extend to other parts of the world, and in particular to the Mediterranean area,

Believing that the strengthening of security and the intensification of co-operation in Europe would stimulate positive processes in the Mediterranean region, and expressing their intention to contribute towards peace, security and justice in the region, in which ends the participating States and the non-participating Mediterranean States have a common interest,

Recognizing the importance of their mutual economic relations with the nonparticipating Mediterranean States, and conscious of their common interest in the further development of co-operation,

Noting with appreciation the interest expressed by the non-participating Mediterranean States in the Conference since its inception, and having duly taken their contributions into account,

Declare their intention:

- to promote the development of good-neighbourly relations with the non-participating Mediterranean States in conformity with the purposes and principles of the Charter of the United Nations, on which their relations are based, and with the United Nations Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States and accordingly, in this context, to conduct their relations with the non-participating Mediterranean States in the spirit of the principles set forth in the Declaration on Principles Guiding Relations between Participating States;

- to seek, by further improving their relations with the non-participating Mediterranean States, to increase mutual confidence, so as to promote security and stability in the Mediterranean area as a whole;

- to encourage with the non-participating Mediterranean States the development of mutually beneficial co-operation in the various fields of economic activity, especially by expanding commercial exchanges, on the basis of a common awareness of the necessity for stability and progress in trade relations, of their mutual economic interests, and of differences in the levels of economic development, thereby promoting their economic advancement and well-being;

- to contribute to a diversified development of the economies of the non-participating Mediterranean countries, whilst taking due account of their national development objectives, and to cooperate with them, especially in the sectors of industry, science and technology, in their efforts to achieve a better utilization of their resources, thus promoting a more harmonious development of economic relations;

- to intensify their efforts and their co-operation on a bilateral and multilateral basis with the non-participating Mediterranean States directed towards the improvement of the environment of the Mediterranean, especially the safeguarding of the biological resources and ecological balance of the sea, by appropriate measures including the prevention and control of pollution; to this end, and in view of the present situation, to cooperate through competent international organizations and in particular within the United Nations Environment Programme (UNEP);

- to promote further contacts and co-operation with the non-participating Mediterranean States in other relevant fields.

In order to advance the objectives set forth above, the participating States also declare their intention of maintaining and amplifying the contacts and dialogue as initiated by the CSCE with the non-participating Mediterranean States to include all the States of the Mediterranean, with the purpose of contributing to peace, reducing armed forces in the region, strengthening security, lessening tensions in the region, and widening the scope of co-operation, ends in which all share a common interest, as well as with the purpose of defining further common objectives.

The participating States would seek, in the framework of their multilateral efforts, to encourage progress and appropriate initiatives and to proceed to an exchange of views on the attainment of the above purposes.
Co-operation in Humanitarian and Other Fields

The participating States,

Desiring to contribute to the strengthening of peace and understanding among peoples and to the spiritual enrichment of the human personality without distinction as to race, sex, language or religion,

Conscious that increased cultural and educational exchanges, broader dissemination of information, contacts between people, and the solution of humanitarian problems will contribute to the attainment of these aims,

Determined therefore to cooperate among themselves, irrespective of their political, economic and social systems, in order to create better conditions in the above fields, to develop and strengthen existing forms of co-operation and to work out new ways and means appropriate to these aims,

Convinced that this co-operation should take place in full respect for the principles guiding relations among participating States as set forth in the relevant document,

Have adopted the following:

1. Human Contacts

The participating States,

Considering the development of contacts to be an important element in the strengthening of friendly relations and trust among peoples,

Affirming, in relation to their present effort to improve conditions in this area, the importance they attach to humanitarian considerations,

Desiring in this spirit to develop, with the continuance of détente, further efforts to achieve continuing progress in this field

And conscious that the questions relevant hereto must be settled by the States concerned under mutually acceptable conditions,

Make it their aim to facilitate freer movement and contacts, individually and collectively, whether privately or officially, among persons, institutions and organizations of the participating States, and to contribute to the solution of the humanitarian problems that arise in that connexion,

Declare their readiness to these ends to take measures which they consider appropriate and to conclude agreements or arrangements among themselves, as may be needed, and

Express their intention now to proceed to the implementation of the following:

(a) Contacts and Regular Meetings on the Basis of Family Ties

In order to promote further development of contacts on the basis of family ties the participating States will favourably consider applications for travel with the purpose of allowing persons to enter or leave their territory temporarily, and on a regular basis if desired, in order to visit members of their families.

Applications for temporary visits to meet members of their families will be dealt with without distinction as to the country of origin or destination: existing requirements for travel documents and visas will be applied in this spirit. The preparation and issue of such documents and visas will be effected within reasonable time limits, cases of urgent necessity - such as serious illness or death - will be given priority treatment. They will take such steps as may be necessary to ensure that the fees for official travel documents and visas are acceptable.

They confirm that the presentation of an application concerning contacts on the basis of family ties will not modify the rights and obligations of the applicant or of members of his family.

(b) Reunification of Families

The participating States will deal in a positive and humanitarian spirit with the applications of persons who wish to be reunited with members of their family, with special attention being given to requests of an urgent character - such as requests submitted by persons who are ill or old.

They will deal with applications in this field as expeditiously as possible

They will lower where necessary the fees charged in connexion with these applications to ensure that they are at a moderate level.

Applications for the purpose of family reunification which are not granted may be renewed at the appropriate level and will be reconsidered at reasonably short intervals by the authorities of the country of residence or destination, whichever is concerned, under such circumstances fees will be charged only when applications are granted.

Persons whose applications for family reunification are granted may bring with them or ship their household and personal effects; to this end the participating States will use all possibilities provided by existing regulations.

People whose applications for family reunification are granted may bring with them or ship their household and personal effects; to this end the participating States will use all possibilities provided by existing regulations.

Until members of the same family are reunited meetings and contacts between them may take place in accordance with the modalities for contacts on the basis of family ties.

The participating States will support the efforts of Red Cross and Red Crescent Societies concerned with the problems of family reunification.

They confirm that the presentation of an application concerning family reunification will not modify the rights and obligations of the applicant or of members of his family.
The receiving participating State will take appropriate care with regard to employment for persons from other participating States who take up permanent residence in that State in connexion with family reunification with its citizens and see that they are afforded opportunities equal to those enjoyed by its own citizens for education, medical assistance and social security.

(c) Marriage between Citizens of Different States

The participating States will examine favourably and on the basis of humanitarian considerations requests for exit or entry permits from persons who have decided to marry a citizen from another participating State.

The processing and issuing of the documents required for the above purposes and for the marriage will be in accordance with the provisions accepted for family reunification.

In dealing with requests from couples from different participating States, once married, to enable them and the minor children of their marriage to transfer their permanent residence to a State in which either one is normally a resident, the participating States will also apply the provisions accepted for family reunification.

(d) Travel for Personal or Professional Reasons

The participating States intend to facilitate wider travel by their citizens for personal or professional reasons and to this end they intend in particular:

- gradually to simplify and to administer flexibly the procedures for exit and entry;
- to ease regulations concerning movement of citizens from the other participating States in their territory, with due regard to security requirements.

They will endeavour gradually to lower, where necessary, the fees for visas and official travel documents.

They intend to consider, as necessary, means - including, in so far as appropriate, the conclusion of multilateral or bilateral consular conventions or other relevant agreements or understandings - for the improvement of arrangements to provide consular services, including legal and consular assistance.

* * *

They confirm that religious faiths, institutions and organizations, practising within the constitutional framework of the participating States, and their representatives can, in the field of their activities, have contacts and meetings among themselves and exchange information.

(e) Improvement of Conditions for Tourism on an Individual or Collective Basis

The participating States consider that tourism contributes to a fuller knowledge of the life, culture and history of other countries, to the growth of understanding among peoples, to the improvement of contacts and to the broader use of leisure. They intend to promote the development of tourism, on an individual or collective basis, and, in particular, they intend:

- to promote visits to their respective countries by encouraging the provision of appropriate facilities and the simplification and expediting of necessary formalities relating to such visits;
- to increase, on the basis of appropriate agreements or arrangements where necessary, co-operation in the development of tourism, in particular by considering bilaterally possible ways to increase information relating to travel to other countries and to the reception and service of tourists, and other related questions of mutual interest.

(f) Meetings among Young People

The participating States intend to further the development of contacts and exchanges among young people by encouraging:

- increased exchanges and contacts on a short or long term basis among young people working, training or undergoing education through bilateral or multilateral agreements or regular programmes in all cases where it is possible;
- study by their youth organizations of the question of possible agreements relating to frameworks of multilateral youth co-operation;
- agreements or regular programmes relating to the organization of exchanges of students, of international youth seminars, of courses of professional training and foreign language study;
- the further development of youth tourism and the provision to this end of appropriate facilities;
- the development, where possible, of exchanges, contacts and co-operation on a bilateral or multilateral basis between their organizations which represent wide circles of young people working, training or undergoing education;
- awareness among youth of the importance of developing mutual understanding and of strengthening friendly relations and confidence among peoples.

(g) Sport

In order to expand existing links and co-operation in the field of sport the participating States will encourage contacts and exchanges of this kind, including sports meetings and competitions of all sorts, on the basis of the established international rules, regulations and practice.
(h) Expansion of Contacts

By way of further developing contacts among governmental institutions and non-governmental organizations and associations, including women's organizations, the participating States will facilitate the convening of meetings as well as travel by delegations, groups and individuals.

2. Information

The participating States,

Conscious of the need for an ever wider knowledge and understanding of the various aspects of life in other participating States,

Acknowledging the contribution of this process to the growth of confidence between peoples,

Desiring, with the development of mutual understanding between the participating States and with the further improvement of their relations, to continue further efforts towards progress in this field,

Recognizing the importance of the dissemination of information from the other participating States and of a better acquaintance with such information,

Emphasizing therefore the essential and influential role of the press, radio, television, cinema and news agencies and of the journalists working in these fields,

Make it their aim to facilitate the freer and wider dissemination of information of all kinds, to encourage co-operation in the field of information and the exchange of information with other countries, and to improve the conditions under which journalists from one participating State exercise their profession in another participating State, and

Express their intention in particular:

(a) Improvement of the Circulation of, Access to, and Exchange of Information

(i) Oral Information

- To facilitate the dissemination of oral information through the encouragement of lectures and lecture tours by personalities and specialists from the other participating States, as well as exchanges of opinions at round table meetings, seminars, symposia, summer schools, congresses and other bilateral and multilateral meetings.

(ii) Printed Information

- To facilitate the improvement of the dissemination, on their territory, of newspapers and printed publications, periodical and non-periodical, from the other participating States.

For this purpose:

- they will encourage their competent firms and organizations to conclude agreements and contracts designed gradually to increase the quantities and the number of titles of newspapers and publications imported from the other participating States. These agreements and contracts should in particular mention the speediest conditions of delivery and the use of the normal channels existing in each country for the distribution of its own publications and newspapers, as well as forms and means of payment agreed between the parties making it possible to achieve the objectives aimed at by these agreements and contracts;

- where necessary, they will take appropriate measures to achieve the above objectives and to implement the provisions contained in the agreements and contracts.

- To contribute to the improvement of access by the public to periodical and non-periodical printed publications imported on the bases indicated above. In particular:

- they will encourage an increase in the number of places where these publications are on sale,

- they will facilitate the availability of these periodical publications during congresses, conferences, official visits and other international events and to tourists during the season,

- they will develop the possibilities for taking out subscriptions according to the modalities particular to each country;

- they will improve the opportunities for reading and borrowing these publications in large public libraries and their reading rooms as well as in university libraries.

They intend to improve the possibilities for acquaintance with bulletins of official information issued by diplomatic missions and distributed by those missions on the basis of arrangements acceptable to the interested parties.

(iii) Filmed and Broadcast Information

- To promote the improvement of the dissemination of filmed and broadcast information. To this end:

- they will encourage the wider showing and broadcasting of a greater variety of recorded and filmed information from the other participating States, illustrating the various aspects of life in their countries and received on the basis of such agreements or arrangements as may be necessary between the organizations and firms directly concerned;

- they will facilitate the import by competent organizations and firms of recorded audio-visual material from the other participating States.

The participating States note the expansion in the dissemination of information broadcast by radio, and express the hope for the continuation of this process, so as to meet the interest of mutual understanding among peoples and the aims set forth by this Conference.
(b) Co-operation in the Field of Information

- To encourage co-operation in the field of information on the basis of short or long term agreements or arrangements. In particular:

  they will favour increased co-operation among mass media organizations, including press agencies, as well as among publishing houses and organizations;

  they will favour co-operation among public or private, national or international radio and television organizations, in particular through the exchange of both live and recorded radio and television programmes, and through the joint production and the broadcasting and distribution of such programmes;

  they will encourage meetings and contacts both between journalists organizations and between journalists from the participating States;

  they will view favourably the possibilities of arrangements between periodical publications as well as between newspapers from the participating States, for the purpose of exchanging and publishing articles;

  they will encourage the exchange of technical information as well as the organization of joint research and meetings devoted to the exchange of experience and views between experts in the field of the press, radio and television.

(c) Improvement of Working Conditions for Journalists

The participating States, desiring to improve the conditions under which journalists from one participating State exercise their profession in another participating State, intend in particular to:

- examine in a favourable spirit and within a suitable and reasonable time scale requests from journalists for visas;

- grant to permanently accredited journalists of the participating States, on the basis of arrangements, multiple entry and exit visas for specified periods;

- facilitate the issue to accredited journalists of the participating States of permits for stay in their country of temporary residence and, if and when these are necessary, of other official papers which it is appropriate for them to have;

- ease, on a basis of reciprocity, procedures for arranging travel by journalists of the participating States in the country where they are exercising their profession, and to provide progressively greater opportunities for such travel, subject to the observance of regulations relating to the existence of areas closed for security reasons;

- ensure that requests by such journalists for such travel receive, in so far as possible, an expeditious response, taking into account the time scale of the request;

- increase the opportunities for journalists of the participating States to communicate personally with their sources, including organizations and official institutions;

- grant to journalists of the participating States the right to import, subject only to its being taken out again, the technical equipment (photographic, cinematographic, tape recorder, radio and television) necessary for the exercise of their profession;*

- enable journalists of the other participating States, whether permanently or temporarily accredited, to transmit completely, normally and rapidly by means recognized by the participating States to the information organs which they represent, the results of their professional activity, including tape recordings and undeveloped film, for the purpose of publication or of broadcasting on the radio or television.

The participating States reaffirm that the legitimate pursuit of their professional activity will neither render journalists liable to expulsion nor otherwise penalize them. If an accredited journalist is expelled, he will be informed of the reasons for this act and may submit an application for re-examination of his case.

3. Co-operation and Exchanges in the Field of Culture

The participating States

Considering that cultural exchanges and co-operation contribute to a better comprehension among people and among peoples, and thus promote a lasting understanding among States,

Confirming the conclusions already formulated in this field at the multilateral level, particularly at the Intergovernmental Conference on Cultural Policies in Europe, organized by UNESCO in Helsinki in June 1972, where interest was manifested in the active participation of the broadest possible social groups in an increasingly diversified cultural life,

Desiring, with the development of mutual confidence and the further improvement of relations between the participating States, to continue further efforts toward progress in this field,

Disposed in this spirit to increase substantially their cultural exchanges, with regard both to persons and to cultural works, and to develop among them an active co-operation, both at the bilateral and the multilateral level, in all the fields of culture,

Convinced that such a development of their mutual relations will contribute to the enrichment of the respective cultures, while respecting the originality of each, as well as to the reinforcement among them of a consciousness of common values, while continuing to develop cultural co-operation with other countries of the world,

*) While recognizing that appropriate local personnel are employed by foreign journalists in many instances, the participating States note that the above provisions would be applied, subject to the observance of the appropriate rules, to persons from the other participating States, who are regularly and professionally engaged as technicians, photographers or cameramen of the press, radio, television or cinema.
Declare that they jointly set themselves the following objectives:

(a) to develop the mutual exchange of information with a view to a better knowledge of respective cultural achievements,

(b) to improve the facilities for the exchange and for the dissemination of cultural property,

(c) to promote access by all to respective cultural achievements,

(d) to develop contacts and co-operation among persons active in the field of culture,

(e) to seek new fields and forms of cultural co-operation,

Thus give expression to their common will to take progressive, coherent and long-term action in order to achieve the objectives of the present declaration; and

Express their intention now to proceed to the implementation of the following:

Extension of Relations

To expand and improve at the various levels co-operation and links in the field of culture, in particular by:

- concluding, where appropriate, agreements on a bilateral or multilateral basis, providing for the extension of relations among competent State institutions and non-governmental organizations in the field of culture, as well as among people engaged in cultural activities, taking into account the need both for flexibility and the fullest possible use of existing agreements, and bearing in mind that agreements and also other arrangements constitute important means of developing cultural cooperation and exchanges;

- contributing to the development of direct communication and co-operation among relevant State institutions and non-governmental organizations, including, where necessary, such communication and co-operation carried out on the basis of special agreements and arrangements;

- encouraging direct contacts and communications among persons engaged in cultural activities, including, where necessary, such contacts and communications carried out on the basis of special agreements and arrangements.

Mutual Knowledge

Within their competence to adopt, on a bilateral and multilateral level, appropriate measures which would give their peoples a more comprehensive and complete mutual knowledge of their achievements in the various fields of culture, and among them:

- to examine jointly, if necessary with the assistance of appropriate international organizations, the possible creation in Europe and the structure of a bank of cultural data, which would collect information from the participating countries and make it available to its correspondents on their request, and to convene for this purpose a meeting of experts from interested States;

- to consider, if necessary in conjunction with appropriate international organizations, ways of compiling in Europe an inventory of documentary films of a cultural or scientific nature from the participating States;

- to encourage more frequent book exhibitions and to examine the possibility of organizing periodically in Europe a large-scale exhibition of books from the participating States;

- to promote the systematic exchange, between the institutions concerned and publishing houses, of catalogues of available books as well as of pre-publication material which will include, as far as possible, all forthcoming publications; and also to promote the exchange of material between firms publishing encyclopaedias, with a view to improving the presentation of each country;

Express their intention now to proceed to the implementation of the following:

Exchanges and Dissemination

To contribute to the improvement of facilities for exchanges and the dissemination of cultural property, by appropriate means, in particular by:

- studying the possibilities for harmonizing and reducing the charges relating to international commercial exchanges of books and other cultural materials, and also for new means of insuring works of art in foreign exhibitions and for reducing the risks of damage or loss to which these works are exposed by their movement;

- facilitating the formalities of customs clearance, in good time for programmes of artistic events, of the works of art, materials and accessories appearing on lists agreed upon by the organizers of these events;

- encouraging meetings among representatives of competent organizations and relevant firms to examine measures within their field of activity - such as the simplification of orders, time limits for sending supplies and modalities of payment - which might facilitate international commercial exchanges of books;

- promoting the loan and exchange of films among their film institutes and film libraries;

- encouraging the exchange of information among interested parties concerning events of a cultural character foreseen in the participating States, in fields where this is most appropriate, such as music, theatre and the plastic and graphic arts, with a view to contributing to the compilation and publication of a calendar of such events, with the assistance, where necessary, of the appropriate international organizations;
- encouraging a study of the impact which the foreseeable development, and a possible harmonization among interested parties, of the technical means used for the dissemination of culture might have on the development of cultural co-operation and exchanges, while keeping in view the preservation of the diversity and originality, of their respective cultures;

- encouraging, in the way they deem appropriate, within their cultural policies, the further development of interest in the cultural heritage of the other participating States, conscious of the merits and the value of each culture;

- endeavouring to ensure the full and effective application of the international agreements and conventions on copyrights and on circulation of cultural property to which they are party or to which they may decide in the future to become party.

Access

To promote fuller mutual access by all to the achievements - works, experiences and performing arts - in the various fields of culture of their countries, and to that end to make the best possible efforts, in accordance with their competence, more particularly:

- to promote wider dissemination of books and artistic works, in particular by such means as:

facilitating, while taking full account of the international copyright conventions to which they are party, international contacts and communications between authors and publishing houses as well as other cultural institutions, with a view to a more complete mutual access to cultural achievements;

recommending that, in determining the size of editions, publishing houses take into account also the demand from the other participating States, and that rights of sale in other participating States be granted, where possible, to several sales organizations of the importing countries, by agreement between interested partners;

encouraging competent organizations and relevant firms to conclude agreements and contracts contributing, by this means, to a gradual increase in the number and diversity of works by authors from the other participating States available in the original and in translation in their libraries and bookshops;

promoting, where deemed appropriate, an increase in the number of sales outlets where books by authors from the other participating States, imported in the original on the basis of agreements and contracts, and in translation, are for sale;

promoting, on a wider scale, the translation of works in the sphere of literature and other fields of cultural activity, produced in the languages of the other participating States, especially from the less widely-spoken languages, and the publication and dissemination of the translated works by such measures as:

encouraging more regular contacts between interested publishing houses;

developing their efforts in the basic and advanced training of translators;

encouraging, by appropriate means, the publishing houses of their countries to publish translations;

facilitating the exchange between publishers and interested institutions of lists of books which might be translated;

promoting between their countries the professional activity and co-operation of translators;

carrying out joint studies on ways of further promoting translations and their dissemination;

improving and expanding exchanges of books, bibliographies and catalogue cards between libraries;

- to envisage other appropriate measures which would permit, where necessary by mutual agreement among interested parties, the facilitation of access to their respective cultural achievements, in particular in the field of books;

- to contribute by appropriate means to the wider use of the mass media in order to improve mutual acquaintance with the cultural life of each;

- to seek to develop the necessary conditions for migrant workers and their families to preserve their links with their national culture, and also to adapt themselves to their new cultural environment;

- to encourage the competent bodies and enterprises to make a wider choice and effect wider distribution of full-length and documentary films from the other participating States, and to promote more frequent non-commercial showings, such as premières, film weeks and festivals, giving due consideration to films from countries whose cinematographic works are less well known;

- to promote, by appropriate means, the extension of opportunities for specialists from the other participating States to work with materials of a cultural character from film and audio-visual archives, within the framework of the existing rules for work on such archival materials;

- to encourage a joint study by interested bodies, where appropriate with the assistance of the competent international organizations, of the expediency and the conditions for the establishment of a repertory of their recorded television programmes of a cultural nature, as well as of the means of viewing them rapidly in order to facilitate their selection and possible acquisition.

Contacts and Co-operation

To contribute, by appropriate means, to the development of contacts and co-operation in the various fields of culture, especially among creative artists and people engaged in cultural activities, in particular by making efforts to:
The participating States, recognizing the contribution that national minorities or regional cultures can make to cooperation among them in various fields of culture, intend, when such minorities or cultures exist within their territory, to facilitate this contribution, taking into account the legitimate interests of their members.
4. Co-operation and Exchanges in the Field of Education

The participating States,

Conscious that the development of relations of an international character in the fields of education and science contributes to a better mutual understanding and is to the advantage of all peoples as well as to the benefit of future generations,

Prepared to facilitate, between organizations, institutions and persons engaged in education and science, the further development of exchanges of knowledge and experience as well as of contacts, on the basis of special arrangements where these are necessary,

Desiring to strengthen the links among educational and scientific establishments and also to encourage their co-operation in sectors of common interest, particularly where the levels of knowledge and resources require efforts to be concerted internationally, and

Convinced that progress in these fields should be accompanied and supported by a wider knowledge of foreign languages,

Express to these ends their intention in particular:

(a) Extension of Relations

To expand and improve at the various levels co-operation and links in the fields of education and science, in particular by:

- concluding, where appropriate, bilateral or multilateral agreements providing for co-operation and exchanges among State institutions, non-governmental bodies and persons engaged in activities in education and science, bearing in mind the need both for flexibility and the fuller use of existing agreements and arrangements;

- promoting the conclusion of direct arrangements between universities and other institutions of higher education and research, in the framework of agreements between governments where appropriate;

- encouraging among persons engaged in education and science direct contacts and communications including those based on special agreements or arrangements where these are appropriate.

(b) Access and Exchanges

To improve access, under mutually acceptable conditions, for students, teachers and scholars of the participating States to each other's educational, cultural and scientific institutions, and to intensify exchanges among these institutions in all areas of common interest, in particular by:

- increasing the exchange of information on facilities for study and courses open to foreign participants, as well as on the conditions under which they will be admitted and received;

- facilitating travel between the participating States by scholars, teachers and students for purposes of study, teaching and research as well as for improving knowledge of each other's educational, cultural and scientific achievements;

- encouraging the award of scholarships for study, teaching and research in their countries to scholars, teachers and students of other participating States;

- establishing, developing or encouraging programmes providing for the broader exchange of scholars, teachers and students, including the organization of symposia, seminars and collaborative projects, and the exchanges of educational and scholarly information such as university publications and materials from libraries;

- promoting the efficient implementation of such arrangements and programmes by providing scholars, teachers and students in good time with more detailed information about their placing in universities and institutes and the programmes envisaged for them; by granting them the opportunity to use relevant scholarly, scientific and open archival materials; and by facilitating their travel within the receiving State for the purpose of study or research as well as in the form of vacation tours on the basis of the usual procedures;

- promoting a more exact assessment of the problems of comparison and equivalence of academic degrees and diplomas by fostering the exchange of information on the organization, duration and content of studies, the comparison of methods of assessing levels of knowledge, and academic qualifications, and, where feasible, arriving at the mutual recognition of academic degrees and diplomas either through governmental agreements, where necessary, or direct arrangements between universities and other institutions of higher learning and research;

- recommending, moreover, to the appropriate international organizations that they should intensify their efforts to reach a generally acceptable solution to the problems of comparison and equivalence between academic degrees and diplomas.

(c) Science

Within their competence to broaden and improve co-operation and exchanges in the field of science, in particular:

To increase, on a bilateral or multilateral basis, the exchange and dissemination of scientific information and documentation by such means as:

- making this information more widely available to scientists and research workers of the other participating States through, for instance, participation in international information-sharing programmes or through other appropriate arrangements;

- broadening and facilitating the exchange of samples and other scientific materials used particularly for fundamental research in the fields of natural sciences and medicine;
- inviting scientific institutions and universities to keep each other more fully and regularly informed about their current and contemplated research work in fields of common interest.

To facilitate the extension of communications and direct contacts between universities, scientific institutions and associations as well as among scientists and research workers, including those based where necessary on special agreements or arrangements, by such means as:

- further developing exchanges of scientists and research workers and encouraging the organization of preparatory meetings or working groups on research topics of common interest;
- encouraging the creation of joint teams of scientists to pursue research projects under arrangements made by the scientific institutions of several countries;
- assisting the organization and successful functioning of international conferences and seminars and participation in them by their scientists and research workers;
- furthermore envisaging, in the near future, a "Scientific Forum" in the form of a meeting of leading personalities in science from the participating States to discuss interrelated problems of common interest concerning current and future developments in science, and to promote the expansion of contacts, communications and the exchange of information between scientific institutions and among scientists;
- foreseeing, at an early date, a meeting of experts representing the participating States and their national scientific institutions, in order to prepare such a "Scientific Forum" in consultation with appropriate international organizations, such as UNESCO and the ECE;
- considering in due course what further steps might be taken with respect to the "Scientific Forum".

To develop in the field of scientific research, on a bilateral or multilateral basis, the co-ordination of programmes carried out in the participating States and the organization of joint programmes, especially in the areas mentioned below, which may involve the combined efforts of scientists and in certain cases the use of costly or unique equipment. The list of subjects in these areas is illustrative; and specific projects would have to be determined subsequently by the potential partners in the participating States, taking account of the contribution which could be made by appropriate international organizations and scientific institutions:

- **exact and natural sciences**, in particular fundamental research in such fields as mathematics, physics, theoretical physics, geophysics, chemistry, biology, ecology and astronomy;

- **medicine**, in particular basic research into cancer and cardiovascular diseases, studies on the diseases endemic in the developing countries, as well as medico-social research with special emphasis on occupational diseases, the rehabilitation of the handicapped and the care of mothers, children and the elderly;

- the **humanities and social sciences**, such as history, geography, philosophy, psychology, pedagogical research, linguistics, sociology, the legal, political and economic sciences; comparative studies on social, socioeconomic and cultural phenomena which are of common interest to the participating States, especially the problems of human environment and urban development; and scientific studies on the methods of conserving and restoring monuments and works of art.

**Foreign Languages and Civilizations**

To encourage the study of foreign languages and civilizations as an important means of expanding communication among peoples for their better acquaintance with the culture of each country, as well as for the strengthening of international co-operation; to this end to stimulate, within their competence, the further development and improvement of foreign language teaching and the diversification of choice of languages taught at various levels, paying due attention to less widely-spread or studied languages, and in particular:

- to intensify co-operation aimed at improving the teaching of foreign languages through exchanges of information and experience concerning the development and application of effective modern teaching methods and technical aids, adapted to the needs of different categories of students, including methods of accelerated teaching; and to consider the possibility of conducting, on a bilateral or multilateral basis, studies of new methods of foreign language teaching;
- to encourage co-operation between institutions concerned, on a bilateral or multilateral basis, aimed at exploiting more fully the resources of modern educational technology in language teaching, for example through comparative studies by their specialists and, where agreed, through exchanges or transfers of audio-visual materials, of materials used for preparing textbooks, as well as of information about new types of technical equipment used for teaching languages;
- to promote the exchange of information on the experience acquired in the training of language teachers and to intensify exchanges on a bilateral basis of language teachers and students as well as to facilitate their participation in summer courses in languages and civilizations, wherever these are organized;
- to encourage co-operation among experts in the field of lexicography with the aim of defining the necessary terminological equivalents, particularly in the scientific and technical disciplines, in order to facilitate relations among scientific institutions and specialists;
- to promote the wider spread of foreign language study among the different types of secondary education establishments and greater possibilities of choice between an increased number of European languages; and in this context to consider, wherever appropriate, the possibilities for developing the recruitment and training of teachers as well as the organization of the student groups required;
- to favour, in higher education, a wider choice in the languages offered to language students and greater opportunities for other students to study various foreign languages; also to facilitate, where desirable, the organization of courses in languages and civilizations, on the basis of special arrangements as necessary to be given by foreign lecturers, particularly from European countries having less widely-spread or studied languages;
to promote, within the framework of adult education, the further development of specialized programmes, adapted to various needs and interests, for teaching foreign languages to their own inhabitants and the languages of host countries to interested adults from other countries; in this context to encourage interested institutions to cooperate, for example, in the elaboration of programmes for teaching by radio and television and by accelerated methods, and also, where desirable, in the definition of study objectives for such programmes, with a view to arriving at comparable levels of language proficiency;

- to encourage the association, where appropriate, of the teaching of foreign languages with the study of the corresponding civilizations and also to make further efforts to stimulate interest in the study of foreign languages, including relevant out-of-class activities.

(e) Teaching Methods

To promote the exchange of experience, on a bilateral or multilateral basis, in teaching methods at all levels of education, including those used in permanent and adult education, as well as the exchange of teaching materials, in particular by:

- further developing various forms of contacts and co-operation in the different fields of pedagogical science, for example through comparative or joint studies carried out by interested institutions or through exchanges of information on the results of teaching experiments;

- intensifying exchanges of information on teaching methods used in various educational systems and on results of research into the processes by which pupils and students acquire knowledge, taking account of relevant experience in different types of specialized education;

- facilitating exchanges of experience concerning the organization and functioning of education intended for adults and recurrent education, the relationships between these and other forms and levels of education, as well as concerning the means of adapting education, including vocational and technical training, to the needs of economic and social development in their countries;

- encouraging exchanges of experience in the education of youth and adults in international understanding, with particular reference to those major problems of mankind whose solution calls for a common approach and wider international co-operation;

- encouraging exchanges of teaching materials - including school textbooks, having in mind the possibility of promoting mutual knowledge and facilitating the presentation of each country in such books - as well as exchanges of information on technical innovations in the field of education.

National minorities or regional cultures. The participating States, recognizing the contribution that national minorities or regional cultures can make to co-operation among them in various fields of education, intend, when such minorities or cultures exist within their territory, to facilitate this contribution, taking into account the legitimate interests of their members.

Follow-up to the Conference

The participating States,

Having considered and evaluated the progress made at the Conference on Security and Co-operation in Europe,

Considering further that, within the broader context of the world, the Conference is an important part of the process of improving security and developing co-operation in Europe and that its results will contribute significantly to this process,

Intending to implement the provisions of the Final Act of the Conference in order to give full effect to its results and thus to further the process of improving security and developing co-operation in Europe,

Convinced that, in order to achieve the aims sought by the Conference, they should make further unilateral, bilateral and multilateral efforts and continue, in the appropriate forms set forth below, the multilateral process initiated by the Conference,

1. Declare their resolve, in the period following the Conference, to pay due regard to and implement the provisions of the Final Act of the Conference:

(a) unilaterally, in all cases which lend themselves to such action;
(b) bilaterally, by negotiations with other participating States;
(c) multilaterally, by meetings of experts of the participating States, and also within the framework of existing international organizations, such as the United Nations Economic Commission for Europe and UNESCO, with regard to educational, scientific and cultural co-operation;

2. Declare furthermore their resolve to continue the multilateral process initiated by the Conference:

(a) by proceeding to a thorough exchange of views both on the implementation of the provisions of the Final Act and of the tasks defined by the Conference, as well as in the context of the questions dealt with by the latter, on the deepening of their mutual relations, the improvement of security and the development of co-operation in Europe, and the development of the process of détente in the future;
(b) by organizing to these ends meetings among their representatives, beginning with a meeting at the level of representatives appointed by the Ministers of foreign Affairs. This meeting will define the appropriate modalities for the holding of other meetings which could include further similar meetings and the possibility of a new Conference;

3. The first of the meetings indicated above will be held at Belgrade in 1977. A preparatory meeting to organize this meeting will be held at Belgrade on 15 June 1977. The preparatory meeting will decide on the date, duration, agenda and other modalities of the meeting of representatives appointed by the Ministers of Foreign Affairs;
4. The rules of procedure, the working methods and the scale of distribution for the expenses of the Conference will, *mutatis mutandis*, be applied to the meetings envisaged in paragraphs 1 (c), 2 and 3 above. All the above-mentioned meetings will be held in the participating States in rotation. The services of a technical secretariat will be provided by the host country.

The original of this Final Act, drawn up in English, French, German, Italian, Russian and Spanish, will be transmitted to the Government of the Republic of Finland, which will retain it in its archives. Each of the participating States will receive from the Government of the Republic of Finland a true copy of this Final Act.

The text of this Final Act will be published in each participating State, which will disseminate it and make it known as widely as possible.

The Government of the Republic of Finland is requested to transmit to the Secretary-General of the United Nations the text of this Final Act, which is not eligible for registration under Article 102 of the Charter of the United Nations, with a view to its circulation to all the members of the Organization as an official document of the United Nations.

The Government of the Republic of Finland is also requested to transmit the text of this Final Act to the Director-General of UNESCO and to the Executive Secretary of the United Nations Economic Commission for Europe.

Wherefore, the undersigned High Representatives of the participating States, mindful of the high political significance which they attach to the results of the Conference, and declaring their determination to act in accordance with the provisions contained in the above texts, have subscribed their signatures below:

Done at Helsinki, on 1st August 1975, in the name of
AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

PREAMBLE


Recalling Decision 115 (XV) of the Assembly of Heads of State and Government at its Sixteenth Ordinary Session held in Monrovia, Liberia, from 17 to 20 July 1979 on the preparation of “a preliminary draft on an African Charter on Human and Peoples’ Rights providing inter alia for the establishment of bodies to promote and protect human and peoples’ rights”;

Considering the Charter of the Organization of African Unity, which stipulates that “freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples”;

Reaffirming the pledge they solemnly made in Article 2 of the said Charter to eradicate all forms of colonialism from Africa, to coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa and to promote international cooperation having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights;

1. (a) Come into force on 21 October 1986, i.e., three months after the receipt by the Secretary-General of the Organization of African Unity of the instruments of ratification or adherence of a simple majority of the member States of the Organization, in accordance with article 63 (5).

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<td>Mauritania</td>
<td>26 June 1986</td>
<td>23 January 1983</td>
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<td>Niger</td>
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<td>Nigeria</td>
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<td>23 January 1983</td>
</tr>
</tbody>
</table>

2. (a) See p. 29 of this volume for the texts of the reservations and declarations made upon ratification. Subsequently, the Charter came into force for the following States three months after the date of the deposit of their instruments of ratification or adherence with the Secretary General of the Organization of African Unity, in accordance with article 63:

<table>
<thead>
<tr>
<th>State</th>
<th>Date of deposit of the instrument of ratification or adherence (a)</th>
<th>Date of deposit of the instrument of ratification or adherence (a)</th>
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<td>22 July 1986</td>
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<td>Chad</td>
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</table>


PART I. RIGHTS AND DUTIES

CHAPTER I. HUMAN AND PEOPLES’ RIGHTS

Article 1

The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them.

Article 2

Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political opinion, national and social origin, fortune, birth or other status.

Article 3

1. Every individual shall be equal before the law.

2. Every individual shall be entitled to equal protection of the law.
Article 4

Human beings are inviolable. Every human being shall be entitled to respect for his life and 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 slavery, slave trade, torture, 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.

Article 7

1. Every individual shall have the right to have his cause heard. This comprises:
   a) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
   b) The right to be presumed innocent until proved guilty by a competent court or tribunal;
   c) The right to defence, including the right to be defended by counsel of his choice;
   d) The right to be tried within a reasonable time by an impartial court or tribunal.

2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

Article 8

Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.

Article 9

1. Every individual shall have the right to receive information.

2. Every individual shall have the right to express and disseminate his opinions within the law.

Article 10

1. Every individual shall have the right to free association provided that he abides by the law.

2. Subject to the obligation of solidarity provided for in Article 29 no one may be compelled to join an association.

Article 11

Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.

Article 12

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. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality.

3. Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the laws of those countries and international conventions.

4. A non-national legally admitted in a territory of a State party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law.

5. The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.

Article 13

1. Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.

2. Every citizen shall have the right of equal access to the public service of his country.

3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law.

Article 14

The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

Article 15

Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work.

Article 16

1. Every individual shall have the right to enjoy the best attainable state of physical and mental health.
2. States parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

Article 17

1. Every individual shall have the right to education.
2. Every individual may freely take part in the cultural life of his community.
3. The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State.

Article 18

1. The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral.
2. The State shall have the duty to assist the family which is the custodian of morals and traditions values recognized by the community.
3. The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.
4. The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.

Article 19

All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.

Article 20

1. All peoples shall have right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.
2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.
3. All peoples shall have the right to the assistance of the States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.

Article 21

1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.
2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.
3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law.

4. States parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.

5. States parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practised by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.

Article 22

1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

Article 23

1. All peoples shall have the right to national and international peace and security. The principles of solidarity and friendly relations implicitly affirmed by the Charter of the United Nations and reaffirmed by that of the Organization of African Unity shall govern relations between States.
2. For the purpose of strengthening peace, solidarity and friendly relations, States parties to the present Charter shall ensure that:
   (a) Any individual enjoying the right of asylum under Article 12 of the present Charter shall not engage in subversive activities against his country of origin or any other State party to the present Charter;
   (b) Their territories shall not be used as bases for subversive or terrorist activities against the people of any other State party to the present Charter.

Article 24

All peoples shall have the right to a general satisfactory environment favourable to their development.

Article 25

States parties to the present Charter shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood.

Article 26

States parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by present Charter.
CHAPTER II. DUTIES

Article 27

1. Every individual shall have duties towards his family and society, the State and other legally recognized communities and the international community.

2. The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.

Article 28

Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.

Article 29

The individual shall also have the duty:

1. To preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need;

2. To serve his national community by placing his physical and intellectual abilities at its service;

3. To respect the security of the State whose national or resident he is;

4. To preserve and strengthen the national independence and the territorial integrity of his country and to contribute to its defence in accordance with the law;

5. To preserve and strengthen the national independence and the territorial integrity of his country and to contribute to its defence in accordance with the law;

6. To work to the best of his abilities and competence, and to pay taxes imposed by law in the interest of the society;

7. To preserve and strengthen the national independence and the territorial integrity of his country and to contribute to its defence in accordance with the law;

8. To contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African unity.

PART II. MEASURES OF SAFEGUARD

CHAPTER I. ESTABLISHMENT AND ORGANIZATION

OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS

Article 30

An African Commission on Human and Peoples’ Rights, hereinafter called “the Commission”, shall be established within the Organization of African Unity to promote human and peoples’ rights and ensure their protection in Africa.
Organization of African Unity, who shall declare the seat vacant from the date of death or from the date on which the resignation takes effect.

2. If, in the unanimous opinion of other members of the Commission, a member has stopped discharging his duties for any reason other than a temporary absence, the Chairman of the Commission shall inform the Secretary General of the Organization of African Unity, who shall then declare the seat vacant.

3. In each of the cases anticipated above, the Assembly of Heads of State and Government shall replace the member whose seat became vacant for the remaining period of his term unless the period is less than six months.

**Article 40**

Every member of the Commission shall be in office until the date his successor assumes office.

**Article 41**

The Secretary General of the Organization of African Unity shall appoint the Secretary of the Commission. He shall also provide the staff and services necessary for the effective discharge of the duties of the Commission. The Organization of African Unity shall bear the cost of the staff and services.

**Article 42**

1. The Commission shall elect its Chairman and Vice-Chairman for a two-year period. They shall be eligible for re-election.

2. The Commission shall lay down its rules of procedure.

3. Seven members shall form the quorum.

4. In case of an equality of votes, the Chairman shall have a casting vote.

5. The Secretary General may attend the meetings of the Commission. He shall neither participate in deliberations nor shall he be entitled to vote. The Chairman of the Commission may, however, invite him to speak.

**Article 43**

In discharging their duties, members of the Commission shall enjoy diplomatic privileges and immunities provided for in the General Convention on the Privileges and Immunities of the Organization of African Unity.

**Article 44**

Provision shall be made for the emoluments and allowances of the members of the Commission in the Regular Budget of the Organization of African Unity.

**CHAPTER II. MANDATE OF THE COMMISSION**

**Article 45**

The functions of the Commission shall be:

1. To promote Human and Peoples’ Rights and in particular:

   a) To collect documents, undertake studies and researches on African problems in the field of human and peoples’ rights, organize seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples’ rights, and should the case arise, give its views or make recommendations to Governments;

   b) To formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples’ rights and fundamental freedoms upon which African Governments may base their legislations;

   c) Co-operate with other African and international institutions concerned with the promotion and protection of human and peoples’ rights.

2. Ensure the protection of human and peoples’ rights under conditions laid down by the present Charter.

3. Interpret all the provisions of the present Charter at the request of a State party, an institution of the OAU or an African organization recognized by the OAU.

4. Perform any other tasks which may be entrusted to it by the Assembly of Heads of State and Government.

**CHAPTER III. PROCEDURE OF THE COMMISSION**

**Article 46**

The Commission may resort to any appropriate method of investigation; it may hear from the Secretary-General of the Organization of African Unity or any other person capable of enlightening it.

**Communication from States**

**Article 47**

If a State party to the present Charter has good reasons to believe that another State party to this Charter has violated the provisions of the Charter, it may draw, by written communication, the attention of that State to the matter. This communication shall also be addressed to the Secretary-General of the OAU and the Chairman of the Commission. Within three months of the receipt of the communication, the State to which the communication is addressed shall give the enquiring State, written explanation or statement elucidating the matter. This should include as much as possible relevant information relating to the laws and rules of procedure applied and applicable and the redress already given or course of action available.

**Article 48**

If within three months from the date on which the original communication is received by the State to which it is addressed, the issue is not settled to the satisfaction of the two States involved through bilateral negotiation or by any other peaceful procedure, either State shall have the right to submit the matter to the Commission through the Chairman and shall notify the other States involved.

**Article 49**

Notwithstanding the provisions of Article 47, if a State party to the present Charter considers that another State party has violated the provisions of the Charter, it may refer the matter directly to the Commission by addressing a communication to the Chairman, to the Secretary General of the Organization of African Unity and the State concerned.
Article 50

The Commission can only deal with a matter submitted to it after making sure that all local remedies, if they exist, have been exhausted, unless it is obvious to the Commission that the procedure of achieving these remedies would be unduly prolonged.

Article 51

1. The Commission may ask the States concerned to provide it with all relevant information.
2. When the Commission is considering the matter, States concerned may be represented before it and submit written or oral representations.

Article 52

After having obtained from the States concerned and from other sources all the information it deems necessary and after having tried all appropriate means to reach an amicable solution based on the respect of Human and Peoples’ Rights, the Commission shall prepare, within a reasonable period of time from the notification referred to in Article 48, a report stating the facts and its findings. This report shall be sent to the States concerned and communicated to the Assembly of Heads of State and Government.

Article 53

While transmitting its report, the Commission may make to the Assembly of Heads of State and Government such recommendations as it deems useful.

Article 54

The Commission shall submit to each Ordinary Session of the Assembly of Heads of State and Government a report on its activities.

Other communications

Article 55

1. Before each Session, the Secretary of the Commission shall make a list of the communications other than those of States parties to the present Charter and transmit them to the Members of the Commission, who shall indicate which communications should be considered by the Commission.
2. A communication shall be considered by the Commission if a simple majority of its members so decide.

Article 56

Communications relating to human and peoples’ rights referred to in Article 55 received by the Commission shall be considered if they:
1. Indicate their authors even if the latter request anonymity;
2. Are compatible with the Charter of the Organization of African Unity or with the present Charter;
3. Are not written in disparaging or insulting language directed against the State concerned and its institutions or to the Organization of African Unity;
4. Are not based exclusively on news disseminated through the mass media;
5. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
6. Are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter; and
7. Do not deal with cases which have been settled by these States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the present Charter.

Article 57

Prior to any substantive consideration, all communications shall be brought to the knowledge of the State concerned by the Chairman of the Commission.

Article 58

1. When it appears after deliberations of the Commission that one or more communications apparently relate to special cases which reveal the existence of a series of serious or massive violations of human and peoples’ rights, the Commission shall draw the attention of the Assembly of Heads of State and Government to these special cases.
2. The Assembly of Heads of State and Government may then request the Commission to undertake an in-depth study of these cases and make a factual report, accompanied by its finding and recommendations.
3. A case of emergency duly noticed by the Commission shall be submitted by the latter to the Chairman of the Assembly of Heads of State and Government who may request an in-depth study.

Article 59

1. All measures taken within the provisions of the present Chapter shall remain confidential until such a time as the Assembly of Heads of State and Government shall otherwise decide.
2. However, the report shall be published by the Chairman of the Commission upon the decision of the Assembly of Heads of State and Government.
3. The report on the activities of the Commission shall be published by its Chairman after it has been considered by the Assembly of Heads of State and Government.

CHAPTER IV. APPLICABLE PRINCIPLES

Article 60

The Commission shall draw inspiration from international law on human and peoples’ rights, particularly from the provisions of various African instruments on human and peoples’ rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples’ rights as well as from the provisions of various instruments adopted within the Specialised Agencies of the United Nations of which the parties to the present Charter are members.
**Article 61**

The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognized by member States of the Organization of African Unity, African practices consistent with international norms on human and peoples' rights, customs generally accepted as law, general principles of law recognized by African States as well as legal precedents and doctrine.

**Article 62**

Each State party shall undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed by the present Charter.

**Article 63**

1. The present Charter shall be open to signature, ratification or adherence of the member States of the Organization of African Unity.
2. The instruments of ratification or adherence to the present Charter shall be deposited with the Secretary-General of the Organization of African Unity.
3. The present Charter shall come into force three months after the reception by the Secretary General of the instruments of ratification or adherence of a simple majority of the member States of the Organization of African Unity.

**PART III. GENERAL PROVISIONS**

**Article 64**

1. After the coming into force of the present Charter, members of the Commission shall be elected in accordance with the relevant Articles of the present Charter.
2. The Secretary General of the Organization of African Unity shall convene the first meeting of the Commission at the Headquarters of the Organization within three months of the constitution of the Commission. Thereafter, the Commission shall be convened by its Chairman whenever necessary but at least once a year.

**Article 65**

For each of the States that will ratify or adhere to the present Charter after its coming into force, the Charter shall take effect three months after the date of the deposit by that State of its instrument of ratification or adherence.

**Article 66**

Special protocols or agreements may, if necessary, supplement the provisions of the present Charter.

**Article 67**

The Secretary General of the Organization of African Unity shall inform member states of the Organization of the deposit of each instrument of ratification or adherence.
Importance of the universal realization of the right of peoples to self-determination and of the speedy granting of independence to colonial countries and peoples for the effective guarantee and observance of human rights

United Nations General Assembly resolution 48/94 of 20 December 1993
RESOLUTION ADOPTED BY THE GENERAL ASSEMBLY
[on the report of the Third Committee (A/48/626)]

48/94. Importance of the universal realization of the right of peoples to self-determination and of the speedy granting of independence to colonial countries and peoples for the effective guarantee and observance of human rights.

The General Assembly,

Reaffirming its faith in the importance of the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples contained in its resolution 1514 (XV) of 14 December 1960,

Reaffirming also the importance of the universal realization of the right of peoples to self-determination, national sovereignty and territorial integrity and of the speedy granting of independence to colonial countries and peoples as imperatives for the full enjoyment of all human rights,

Reaffirming further the obligation of all Member States to comply with the principles of the Charter of the United Nations and the resolutions of the United Nations regarding the exercise of the right to self-determination by peoples under colonial and foreign domination,

Recalling the Rome Declaration and Programme of Action 1/ adopted at the World Conference on Human Rights,

Considering the urgent need of Namibia for assistance in its efforts to reconstruct and strengthen its fledgling economic and social structures,

Recalling the Abuja Declaration on South Africa, adopted by the Assembly of Heads of State and Government of the Organization of African Unity at its twenty-seventh ordinary session, held at Abuja from 3 to 5 June 1991, 2/ and the statement on developments in South Africa, adopted by the Ad Hoc Committee of the Organization of African Unity on Southern Africa at its extraordinary session of the Ministers for Foreign Affairs, held on 29 September 1993, 3/

Affirming the need to exercise vigilance with respect to developments in South Africa to ensure that the common objective of the international community and the peoples of South Africa is achieved by the establishment of a united, democratic and non-racial South Africa without deviation or obstruction,

Recalling the signing of the General Peace Agreement for Mozambique 4/ at Rome on 4 October 1992, which provides for the termination of the armed conflict in that country,

Reaffirming the national unity and territorial integrity of the Comoros,

Deeply concerned by Israel’s continuing occupation of parts of southern Lebanon and its frequent attacks against Lebanese territory and people, as well as its refusal to implement Security Council resolution 425 (1978) of 19 March 1978,

Bearing in mind United Nations resolutions related to the question of Palestine,

Taking note of the recent positive evolution in the Middle East peace process, in particular the signing on 13 September 1993 of the Declaration of Principles on Interim Self-Government Arrangements 5/ by the Government of the State of Israel and the Palestine Liberation Organization,

1. Calls upon all States to implement fully and faithfully all the relevant resolutions of the United Nations regarding the exercise of the right to self-determination and independence by peoples under colonial and foreign domination;

2. Reaffirms the legitimacy of the struggle of peoples for independence, territorial integrity, national unity and liberation from colonial domination, apartheid and foreign occupation, in all its forms and by all available means;

3. Reaffirms also the inalienable right of the Palestinian people and all peoples under foreign occupation and colonial domination to self-determination, independence and sovereignty;

____________________
2/ A/46/390, annex II.
4/ S/24635, annex.
4. Calls upon those Governments which do not recognize the right to self-determination and independence of all peoples still under colonial domination, alien subjugation and foreign occupation to do so;

5. Calls upon Israel to refrain from violation of the fundamental rights of the Palestinian people and from denial of its right to self-determination;

6. Urges all States, the specialized agencies and organizations of the United Nations system, as well as other international organizations, to extend their support to the Palestinian people through its sole and legitimate representative, the Palestine Liberation Organization, in its struggle to regain its right to self-determination and independence in accordance with the Charter of the United Nations;

7. Urgently appeals to all States, the organizations of the United Nations system and other international organizations to render assistance to Namibia in order to enhance its efforts to promote democracy and economic development;

8. Strongly urges the Government of South Africa to take additional steps to implement fully the provisions of the statement on developments in South Africa, adopted on 29 September 1993 by the Ad Hoc Committee of the Organization of African Unity on Southern Africa, in order to achieve the objectives of the Declaration on Apartheid and its Destructive Consequences in Southern Africa;

9. Calls upon all parties to refrain immediately from acts of violence and calls upon the Government of South Africa to exercise its responsibility to end the ongoing violence through, inter alia, strict adherence to the National Peace Accord signed on 14 September 1993;

10. Calls upon all signatories to the National Peace Accord to manifest their commitment to peace by fully implementing its provisions, and calls upon other parties to contribute to the attainment of its objectives;

11. Strongly condemns the establishment and use of armed groups with a view to pitting them against the national liberation movements;

12. Demands that the Government of South Africa repeal the security legislation that remains in force, which inhibits free and peaceful political activity;

13. Requests the Secretary-General to act speedily to implement Security Council resolution 772 (1992) of 17 August 1992 in its entirety, including those parts pertaining to the investigation of criminal conduct and the monitoring of all armed formations in the country;

14. Demands the full application of the mandatory arms embargo against South Africa, imposed under Security Council resolution 418 (1977) of 4 November 1977, by all countries and more particularly by those countries which maintain military and nuclear cooperation with the Government of South Africa and continue to supply it with related matériel;

15. Appeals to the international community, pursuant to General Assembly resolution 47/82 of 16 December 1992, to continue to extend assistance to Lesotho to enable it to fulfil its international humanitarian obligations towards refugees;

16. Pays tribute to the Government and people of Angola for their noble contribution to the evolving climate of peace in southern Angola, and addresses its strongest appeal to the National Union for the Total Independence of Angola to undertake to commit itself to the peace process that will lead to a comprehensive settlement in Angola on the basis of the Peace Accords;

17. Demands that the Government of South Africa pay compensation to Angola for damages caused, in accordance with the relevant resolutions and decisions of the Security Council;

18. Demands also that the Government of South Africa pay full and adequate compensation to Botswana for the loss of life and damage to property resulting from the unprovoked and unwarranted military attacks of 14 June 1985, 19 May 1986 and 20 June 1988 on the capital of Botswana;

19. Calls upon the international community to continue to extend its generous support to the ongoing efforts aimed at ensuring respect for and the successful implementation of the General Peace Agreement for Mozambique and at assisting the Government of Mozambique in the establishment of lasting peace and democracy and in the promotion of an effective programme of national reconstruction in that country;

20. Fully supports the Secretary-General in his efforts to implement the plan for the settlement of the question of Western Sahara by organizing, in cooperation with the Organization of African Unity, a referendum for the self-determination of the people of Western Sahara;

21. Notes the contacts between the Government of the Comoros and the Government of France in the search for a just solution to the problem of the integration of the Comorian island of Mayotte into the Comoros, in accordance with the resolutions of the Organization of African Unity and the United Nations on the question;

22. Strongly condemns the continued violation of the human rights of the peoples still under colonial domination and alien subjugation;

23. Calls for a substantial increase in all forms of assistance given by all States, United Nations organs, the specialized agencies and non-governmental organizations to the victims of racism, racial discrimination and apartheid through anti-apartheid organizations and national liberation movements recognized by the Organization of African Unity;

6/ Resolution S-16/1, annex.

7/ See Centre against Apartheid, Notes and Documents, No. 23/91.
24. **Reaffirms** that the practice of using mercenaries against sovereign States and national liberation movements constitutes a criminal act, and calls upon the Governments of all countries to enact legislation declaring the recruitment, financing and training of mercenaries in their territories and the transit of mercenaries through their territories to be punishable offences and prohibiting their nationals from serving as mercenaries, and to report on such legislation to the Secretary-General;

25. **Demands** the immediate and unconditional release of all persons detained or imprisoned as a result of their struggle for self-determination and independence, full respect for their fundamental individual rights and compliance with article 5 of the Universal Declaration of Human Rights, 9 under which no one shall be subjected to torture or to cruel, inhuman or degrading treatment;

26. **Expresses its appreciation** for the material and other forms of assistance that peoples under colonial rule continue to receive from Governments, organizations of the United Nations system and other intergovernmental organizations, and calls for a substantial increase in that assistance;

27. **Urges** all States, the specialized agencies and other competent organizations of the United Nations system to do their utmost to ensure the full implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples and to intensify their efforts to support peoples under colonial, foreign and racist domination in their just struggle for self-determination and independence;

28. **Decides** to consider this question at its forty-ninth session under the item entitled 'Right of peoples to self-determination'.

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9/ Resolution 217 A (III).
United Nations Declaration on the Rights of Indigenous Peoples

United Nations General Assembly resolution 61/295 of 13 September 2007, annex
Resolution adopted by the General Assembly

[without reference to a Main Committee (A/61/L.67 and Add.1)]


The General Assembly,

Taking note of the recommendation of the Human Rights Council contained in its resolution 1/2 of 29 June 2006,¹ by which the Council adopted the text of the United Nations Declaration on the Rights of Indigenous Peoples,

Recalling its resolution 61/178 of 20 December 2006, by which it decided to defer consideration of and action on the Declaration to allow time for further consultations thereon, and also decided to conclude its consideration before the end of the sixty-first session of the General Assembly,

Adopts the United Nations Declaration on the Rights of Indigenous Peoples as contained in the annex to the present resolution.

107th plenary meeting
13 September 2007

Annex

United Nations Declaration on the Rights of Indigenous Peoples

The General Assembly,

Guided by the purposes and principles of the Charter of the United Nations, and good faith in the fulfillment of the obligations assumed by States in accordance with the Charter,

Affirming that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,

Affirming also that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,

Reaffirming that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,

Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,

Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources,

Recognizing also the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States,

Welcoming the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring to an end all forms of discrimination and oppression wherever they occur,

Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

Recognizing that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

Emphasizing the contribution of the demilitarization of the lands and territories of indigenous peoples to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world,

Recognizing in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child,

Considering that the rights affirmed in treaties, agreements and other constructive arrangements between States and indigenous peoples are, in some situations, matters of international concern, interest, responsibility and character,

Considering also that treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States,

Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights² and the International Covenant on Civil and Political Rights,² as well as the Vienna Declaration and Programme of


² See resolution 2200 A (XXI), annex.
Action, affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

Bearing in mind that nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law,

Convinced that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith,

Encouraging States to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned;

Emphasizing that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples,

Believing that this Declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field,

Recognizing and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples,

Recognizing that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration,

Solemnly proclaims the following United Nations Declaration on the Rights of Indigenous Peoples as a standard of achievement to be pursued in a spirit of partnership and mutual respect:

**Article 1**

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

**Article 2**

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the
community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

Article 10
Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 11
1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12
1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

Article 13
1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.

2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

Article 14
1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.

2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.

3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

Article 15
1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.

2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

Article 16
1. Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination.

2. States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity.

Article 17
1. Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law.

2. States shall in consultation and cooperation with indigenous peoples take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development, taking into account their special vulnerability and the importance of education for their empowerment.

3. Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary.

Article 18
Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19
States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.
Article 20

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.

2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

Article 21

1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.

2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

Article 22

1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.

2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 24

1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.

2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to those lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 27

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples’ laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Article 28

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Article 29

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.

3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.
Article 30

1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.

2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.

Article 31

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 33

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

Article 34

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

Article 35

Indigenous peoples have the right to determine the responsibilities of individuals to their communities.

Article 36

1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.

2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

Article 37

1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.

2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

Article 38

States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

Article 39

Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.

Article 40

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

Article 41

The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.
Article 42

The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.

Article 43

The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

Article 44

All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

Article 45

Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.

Article 46

1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.

3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.
International Court of Justice

Advisory Opinion

I.C.J. Reports 1971, p. 16
INTERNATIONAL COURT OF JUSTICE

YEAR 1971

21 June 1971

LEGAL CONSEQUENCES FOR STATES OF THE CONTINUED PRESENCE OF SOUTH AFRICA IN NAMIBIA (SOUTH WEST AFRICA) NOTWITHSTANDING SECURITY COUNCIL RESOLUTION 276 (1970)

Composition and competence of the Court—Propriety of the Court's giving the Opinion—Concept of mandates—Characteristics of the League of Nations Mandate for South West Africa—Situation on the dissolution of the League of Nations and the setting-up of the United Nations: survival of the Mandate and transference of supervision and accountability to the United Nations—Developments in the United Nations prior to the termination of the Mandate—Revocability of the Mandate—Termination of the Mandate by the General Assembly—Action in the Security Council and effect of Security Council resolutions leading to the request for Opinion—Requests by South Africa to supply further factual information and for the holding of a plebiscite—Legal consequences for States

ADVISORY OPINION

Present: President Sir Muhammad Zafrulla Khan; Vice-President Aminoun; Judges Sir Gerald Fitzmaurice, Padilla Nervo, Forster, Gros, Bensou, Petren, Lachs, Onyema, Dillard, Ignacio-Pinto, de Castro, Morozov, Jimenez de Arechaga; Registrar Aquarine.

Concerning the legal consequences for States of the continued presence of South Africa in Namibia (South West Africa), notwithstanding Security Council resolution 276 (1970),

The Court, composed as above,
gives the following Advisory Opinion:

1. The question upon which the advisory opinion of the Court has been asked was laid before the Court by a letter dated 29 July 1970, filed in the Registry on 10 August, and addressed by the Secretary-General of the United Nations to the President of the Court. In his letter the Secretary-General informed the Court that, by resolution 284 (1970) adopted on 29 July 1970, certified true copies of the English and French texts of which were transmitted with his letter, the Security Council of the United Nations had decided to submit to the Court, with the request for an advisory opinion to be transmitted to the Security Council at an early date, the question set out in the resolution, which was in the following terms:

"The Security Council,
Reaffirming the special responsibility of the United Nations with regard to the territory and the people of Namibia,
Recalling Security Council resolution 276 (1970) on the question of Namibia,
Taking note of the report and recommendations submitted by the Ad Hoc Sub-Committee established in pursuance of Security Council resolution 276 (1970),
Taking further note of the recommendation of the Ad Hoc Sub-Committee on the possibility of requesting an advisory opinion from the International Court of Justice,
Considering that an advisory opinion from the International Court of Justice would be useful for the Security Council in its further consideration of the question of Namibia and in furtherance of the objectives the Council is seeking
1. Decides to submit in accordance with Article 96 (1) of the Charter, the following question to the International Court of Justice with the request for an advisory opinion which shall be transmitted to the Security Council at an early date:
   "What are the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)?"
2. Requests the Secretary-General to transmit the present resolution to the International Court of Justice, in accordance with Article 65 of the Statute of the Court, accompanied by all documents likely to throw light upon the question."

2. On 5 August 1970, that is to say, after the despatch of the Secretary-General's letter but before its receipt by the Registry, the English and French texts of resolution 284 (1970) of the Security Council were communicated to the President of the Court by telegram from the United Nations Secretariat. The President thereupon decided that the States Members of the United Nations were likely to be able to furnish information on the question, in accordance with Article 66, paragraph 2, of the Statute, and by an Order dated 5 August 1970, the President fixed 23 September 1970 as the time-limit within which the
Court would be prepared to receive written statements from them. The same day, the Registrar sent to the States Members of the United Nations the special and direct communication provided for in Article 66 of the Statute.

3. The notice of the request for advisory opinion, prescribed by Article 66, paragraph 1, of the Statute, was given by the Registrar to all States entitled to appear before the Court by letter of 14 August 1970.

4. On 21 August 1970, the President decided that in addition to the States Members of the United Nations, the non-member States entitled to appear before the Court were also likely to be able to furnish information on the question. The same day the Registrar sent to those States the special and direct communication provided for in Article 66 of the Statute.

5. On 24 August 1970, a letter was received by the Registrar from the Secretary for Foreign Affairs of South Africa, whereby the Government of South Africa, for the reasons therein set out, requested the extension to 31 January 1971 of the time-limit for the submission of a written statement. The President of the Court, by an Order dated 28 August 1970, extended the time-limit for the submission of written statements to 19 November 1970.

6. The Secretary-General of the United Nations, in two instamments, and the following States submitted to the Court written statements or letters setting forth their views: Czechoslovakia, Finland, France, Hungary, India, the Netherlands, Nigeria, Pakistan, Poland, South Africa, the United States of America, Yugoslavia. Copies of these communications were transmitted to all States entitled to appear before the Court, and to the Secretary-General of the United Nations, and, in pursuance of Articles 44, paragraph 3, and 82, paragraph 1, of the Rules of Court, they were made accessible to the public as from 5 February 1971.

7. The Secretary-General of the United Nations, in pursuance of Article 65, paragraph 2, of the Statute transmitted to the Court a dossier of documents likely to throw light upon the question, together with an Introductory Note; these documents were received in the Registry in instalments between 5 November and 29 December 1970.

8. Before holding public sittings to hear oral statements in accordance with Article 66, paragraph 2, of the Statute, the Court had first to resolve two questions relating to its composition for the further proceedings.

9. In its written statement, filed on 19 November 1970, the Government of South Africa had taken objection to the participation of three Members of the Court in the proceedings. Its objections were based on statements made or other participation by the Members concerned, in their former capacity as representatives of their Governments, in United Nations organs which were dealing with matters concerning South West Africa. The Court gave careful consideration to the objections raised by the Government of South Africa, examining each case separately. In each of them the Court reached the conclusion that the participation of the Member concerned in his former capacity as representative of his Government, to which objection was taken by the South African Government’s written statement, did not attract the application of Article 17, paragraph 2, of the Statute of the Court. In making Order No. 2 of 26 January 1971, the Court found no reason to depart from the present advisory proceedings from the decision adopted by the Court in the Order of 18 March 1965 in the South West Africa cases (Ethiopia v. South Africa; Liberia v. South Africa) after hearing the same contentsions as have now been advanced by the Government of South Africa. In deciding the other two objections, the
14. Prior to the opening of the public sittings, the Court decided to examine first of all certain observations made by the Government of South Africa in its written statement, and in a letter dated 14 January 1971, in support of its submission that the Court should decline to give an advisory opinion.

15. At the opening of the public sittings on 8 February 1971, the President of the Court announced that the Court had reached a unanimous decision thereon. The substance of the submission of the Government of South Africa and the decision of the Court are dealt with in paragraphs 28 and 29 of the Advisory Opinion, below.

16. By a letter of 27 January 1971, the Government of South Africa had submitted a proposal to the Court regarding the holding of a plebiscite in the Territory of Namibia (South West Africa), and this proposal was elaborated in a further letter of 6 February 1971, which explained that the plebiscite was to determine whether it was the wish of the inhabitants "that the Territory should continue to be administered by the South African Government or should henceforth be administered by the United Nations".

17. At the hearing of 5 March 1971, the representative of South Africa explained further the position of his Government with regard to the proposed plebiscite, and indicated that his Government considered it necessary to adduce considerable evidence on the factual issues which it regarded as underlying the question before the Court. At the close of the hearing, on 17 March 1971, the President made the following statement:

"The Court has considered the request submitted by the representative of South Africa in his letter of 6 February 1971 that a plebiscite should be held in the Territory of Namibia (South West Africa) under the joint supervision of the Court and the Government of the Republic of South Africa.

The Court cannot pronounce upon this request at the present stage without anticipating, or appearing to anticipate, its decision on one or more of the main issues now before it. Consequently, the Court must defer its answer to this request until a later date.

The Court has also had under consideration the desire of the Government of the Republic to supply the Court with further factual material concerning the situation in Namibia (South West Africa). However, until the Court has been able first to examine some of the legal issues which must, in any event, be dealt with, it will not be in a position to determine whether it requires additional material on the facts. The Court must accordingly defer its decision on this matter as well.

If, at any time, the Court should find itself in need of further arguments or information, on these or any other matters, it will notify the governments and organizations whose representatives have participated in the oral hearings."

18. On 14 May 1971 the President sent the following letter to the representatives of the Secretary-General, of the Organization of African Unity and of the States which had participated in the oral proceedings:

"I have the honour to refer to the statement which I made at the end of the oral hearing on the advisory proceedings relating to the Territory of Namibia (South West Africa) on 17 March last . . . , to the effect that the Court considered it appropriate to defer until a later date its decision regarding the requests of the Government of the Republic of South Africa (a) for the holding in that Territory of a plebiscite under the joint supervision of the Court and the Government of the Republic; and (b) to be allowed to supply the Court with further factual material concerning the situation there.

I now have the honour to inform you that the Court, having examined the matter, does not find itself in need of further arguments or information, and has decided to refuse both these requests."

* * *

19. Before examining the merits of the question submitted to it the Court must consider the objections that have been raised to its doing so.

20. The Government of South Africa has contended that for several reasons resolution 284 (1970) of the Security Council, which requested
the advisory opinion of the Court, is invalid, and that, therefore, the
Court is not competent to deliver the opinion. A resolution of a properly
constituted organ of the United Nations which is passed in accordance with
that organ’s rules of procedure, and is declared by its President to have
been so passed, must be presumed to have been validly adopted. However,
since in this instance the objections made concern the competence of
the Court, the Court will proceed to examine them.
21. The first objection is that in the voting on the resolution two per-
manent members of the Security Council abstained. It is contended that
the resolution was consequently not adopted by an affirmative vote of
nine members, including the concurring votes of the permanent members,
as required by Article 27, paragraph 3, of the Charter of the United
Nations.
22. However, the proceedings of the Security Council extending over
a long period supply abundant evidence that presidential rulings and the
positions taken by members of the Council, in particular its permanent
members, have consistently and uniformly interpreted the practice of
voluntary abstention by a permanent member as not constituting a bar
to the adoption of resolutions. By abstaining, a member does not signify
its objection to the approval of what is being proposed; in order to prevent
the adoption of a resolution requiring unanimity of the permanent mem-
bers, a permanent member has only to cast a negative vote. This proce-
dure followed by the Security Council, which has continued unchanged
after the amendment in 1965 of Article 27 of the Charter, has been gener-
ally accepted by Members of the United Nations and evidences a general
practice of that Organization.
23. The Government of South Africa has also argued that as the ques-
tion relates to a dispute between South Africa and other Members of the
United Nations, South Africa, as a Member of the United Nations, not a
member of the Security Council and a party to a dispute, should have
been invited under Article 32 of the Charter to participate, without vote,
in the discussion relating to it. It further contended that the proviso at
the end of Article 27, paragraph 3, of the Charter, requiring members of
the Security Council which are parties to a dispute to abstain from voting,
should have been complied with.
24. The language of Article 32 of the Charter is mandatory, but the
question whether the Security Council must extend an invitation in
accordance with that provision depends on whether it has made a determi-
nation that the matter under its consideration is in the nature of a
dispute. In the absence of such a determination Article 32 of the Charter
does not apply.
25. The question of Namibia was placed on the agenda of the Security
Council as a “situation” and not as a “dispute”. No member State made
any suggestion or proposal that the matter should be examined as a
dispute, although due notice was given of the placing of the question

on the Security Council’s agenda under the title “Situation in Namibia”.
Had the Government of South Africa considered that the question should
have been treated in the Security Council as a dispute, it should have
drawn the Council’s attention to that aspect of the matter. Having failed
to raise the question at the appropriate time in the proper forum, it is
not open to it to raise it before the Court at this stage.
26. A similar answer must be given to the related objection based on
the proviso to paragraph 3 of Article 27 of the Charter. This proviso
also requires for its application the prior determination by the Security
Council that a dispute exists and that certain members of the Council
are involved as parties to such a dispute.

* * *
27. In the alternative the Government of South Africa has contended
that even if the Court had competence to give the opinion requested,
it should nevertheless, as a matter of judicial propriety, refuse to exercise
its competence.
28. The first reason invoked in support of this contention is the sup-
posed disability of the Court to give the opinion requested by the Security
Council, because of political pressure to which the Court, according to
the Government of South Africa, has been or might be subjected.
29. It would not be proper for the Court to entertain these observa-
tions, bearing as they do on the very nature of the Court as the principal
judicial organ of the United Nations, an organ which, in that capacity,
acts only on the basis of the law, independently of all outside influence
or interventions whatsoever, in the exercise of the judicial function en-
trusted to it alone by the Charter and its Statute. A court functioning
as a court of law can act in no other way.
30. The second reason advanced on behalf of the Government of
South Africa in support of its contention that the Court should refuse to
accede to the request of the Security Council is that the relevant legal
question relates to an existing dispute between South Africa and other
States. In this context it relies on the case of Eastern Carelia and argues
that the Permanent Court of International Justice declined to rule upon
the question referred to it because it was directly related to the main
point of a dispute actually pending between two States.
31. However, that case is not relevant, as it differs from the present
one. For instance one of the States concerned in that case was not at
the time a Member of the League of Nations and did not appear before
the Permanent Court. South Africa, as a Member of the United Nations,
is bound by Article 96 of the Charter, which empowers the Security
Council to request advisory opinions on any legal question. It has ap-
ppeared before the Court, participated in both the written and oral pro-
ceedings and, while raising specific objections against the competence of the Court, has addressed itself to the merits of the question.

32. Nor does the Court find that in this case the Security Council’s request relates to a legal dispute actually pending between two or more States. It is not the purpose of the request to obtain the assistance of the Court in the exercise of the Security Council’s functions relating to the pacific settlement of a dispute pending before it between two or more States. The request is put forward by a United Nations organ with reference to its own decisions and it seeks legal advice from the Court on the consequences and implications of these decisions. This objective is stressed by the preamble to the resolution requesting the opinion, in which the Security Council has stated “that an advisory opinion from the International Court of Justice would be useful for the Security Council in its further consideration of the question of Namibia and in furtherance of the objects the Council is seeking”. It is worth recalling that in its Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, the Court stated: “The object of this request for an Opinion is to guide the United Nations in respect of its own action” (I.C.J. Reports 1951, p. 19).

33. The Court does not find either that in this case the advisory opinion concerns a dispute between South Africa and the United Nations. In the course of the oral proceedings Counsel for the Government of South Africa stated:

“... our submission is not that the question is a dispute, but that in order to answer the question the Court will have to decide legal and factual issues which are actually in dispute between South Africa and other States”

34. The fact that, in the course of its reasoning, and in order to answer the question submitted to it, the Court may have to pronounce on legal issues upon which radically divergent views exist between South Africa and the United Nations, does not convert the present case into a dispute nor bring it within the compass of Articles 82 and 83 of the Rules of Court. A similar position existed in the three previous advisory proceedings concerning South West Africa: in none of them did South Africa claim that there was a dispute, nor did the Court feel it necessary to apply the Rules of Court concerning “a legal question actually pending between two or more States”. Differences of views among States on legal issues have existed in practically every advisory proceeding; if all were agreed, the need to resort to the Court for advice would not arise.

35. In accordance with Article 83 of the Rules of Court, the question whether the advisory opinion had been requested “upon a legal question actually pending between two or more States” was also of decisive imp-

ortance in the Court’s consideration of the request made by the Government of South Africa for the appointment of a judge ad hoc. As already indicated, the Court heard argument in support of that request and, after due deliberation, decided, by an Order of 29 January 1971, not to accede to it. This decision was based on the conclusion that the terms of the request for advisory opinion, the circumstances in which it had been submitted (which are described in para. 32 above), as well as the considerations set forth in paragraphs 33 and 34 above, were such as to preclude the interpretation that an opinion had been “requested upon a legal question actually pending between two or more States”. Thus, in the opinion of the Court, South Africa was not entitled under Article 83 of the Rules of Court to the appointment of a judge ad hoc.

36. It has been urged that the possible existence of a dispute was a point of substance which was prematurely disposed of by the Order of 29 January 1971. Now the question whether a judge ad hoc should be appointed is of course a matter concerning the composition of the Bench and possesses, as the Government of South Africa recognized, absolute logical priority. It has to be settled prior to the opening of the oral proceedings, and indeed before any further issues, even of procedure, can be decided. Until it is disposed of the Court cannot proceed with the case. It is thus a logical necessity that any request for the appointment of a judge ad hoc must be treated as a preliminary matter on the basis of a prima facie appreciation of the facts and the law. This cannot be construed as meaning that the Court’s decision thereon may involve the irrevocable disposal of a point of substance or of one related to the Court’s competence. Thus, in a contentious case, when preliminary objections have been raised, the appointment of judges ad hoc must be decided before the hearing of objections. That decision, however, does not prejudice the Court’s competence if, for instance, it is claimed that no dispute exists. Conversely, to assert that the question of the judge ad hoc could not be validly settled until the Court had been able to analyse substantive issues is tantamount to suggesting that the composition of the Court could be left in suspense, and thus the validity of its proceedings left in doubt, until an advanced stage in the case.

37. The only question which was in fact settled with finality by the Order of 29 January 1971 was the one relating to the Court’s composition for the purpose of the present case. That decision was adopted on the authority of Article 3, paragraph 1, of the Rules of Court and in accordance with Article 55, paragraph 1, of the Statute. Consequently, after the adoption of that decision, while differing views might still be held as to the applicability of Article 83 of the Rules of Court in the present case, the regularity of the composition of the Court for the
purposes of delivering the present Advisory Opinion, in accordance with the Statute and the Rules of Court, is no longer open to question.

38. In connection with the possible appointment of judges ad hoc, it has further been suggested that the final clause in paragraph 1 of Article 82 of the Rules of Court obliges the Court to determine as a preliminary question whether the request relates to a legal question actually pending between two or more States. The Court cannot accept this reading, which overstrains the literal meaning of the words “avant tout”. It is difficult to conceive that an Article providing general guidelines in the relatively unschematic context of advisory proceedings should prescribe a rigid sequence in the action of the Court. This is confirmed by the practice of the Court, which in no previous advisory proceedings has found it necessary to make an independent preliminary determination of this question or of its own competence, even when specifically requested to do so. Likewise, the interpretation of the Rules of Court as imposing a procedure in limine litis, which has been suggested, corresponds neither to the text of the Article nor to its purpose, which is to regulate advisory proceedings without impairing the flexibility which Articles 66, paragraph 4, and 68 of the Statute allow the Court so that it may adjust its procedure to the requirements of each particular case. The phrase in question merely indicates that the test of legal pendency is to be considered “above all” by the Court for the purpose of exercising the latitude granted by Article 68 of the Statute to be guided by the provisions which apply in contentious cases to the extent to which the Court recognizes them to be applicable. From a practical point of view it may be added that the procedure suggested, analogous to that followed in contentious procedure with respect to preliminary objections, would not have dispensed with the need to decide on the request for the appointment of a judge ad hoc as a previous, independent decision, just as in contentious cases the question of judges ad hoc must be settled before any hearings on the preliminary objections may be proceeded with. Finally, it must be observed that such proposed preliminary decision under Article 82 of the Rules of Court would not necessarily have predetermined the decision which it is suggested should have been taken subsequently under Article 83, since the latter provision envisages a more restricted hypothesis: that the advisory opinion is requested upon a legal question actually pending and not that it relates to such a question.

39. The view has also been expressed that even if South Africa is not entitled to a judge ad hoc as a matter of right, the Court should, in the exercise of the discretion granted by Article 68 of the Statute, have allowed such an appointment, in recognition of the fact that South Africa’s interests are specially affected in the present case. In this connection the Court wishes to recall a decision taken by the Permanent Court at a time when the Statute did not include any provision concerning advisory opinions, the entire regulation of the procedure in the matter being thus left to the Court (P.C.I.J., Series E, No. 4, p. 76). Confronted with a request for the appointment of a judge ad hoc in a case in which it found there was no dispute, the Court, in rejecting the request, stated that “the decision of the Court must be in accordance with its Statute and with the Rules duly framed by it in pursuance of Article 30 of the Statute” (Order of 31 October 1935, P.C.I.J., Series A/B, No. 65, Annex I, p. 69 at p. 70). It found further that the “exception cannot be given a wider application than is provided for by the Rules” (ibid., p. 71). In the present case the Court, having regard to the Rules of Court adopted under Article 30 of the Statute, came to the conclusion that it was unable to exercise discretion in this respect.

40. The Government of South Africa has also expressed doubts as to whether the Court is competent to, or should, give an opinion, if, in order to do so, it should have to make findings as to extensive factual issues. In the view of the Court, the contingency that there may be factual issues underlying the question posed does not alter its character as a “legal question” as envisaged in Article 96 of the Charter. The reference in this provision to legal questions cannot be interpreted as opposing legal to factual issues. Normally, to enable a court to pronounce on legal questions, it must also be acquainted with, take into account and, if necessary, make findings as to the relevant factual issues. The limitation of the powers of the Court contended for by the Government of South Africa has no basis in the Charter or the Statute.

41. The Court could, of course, acting on its own, exercise the discretion vested in it by Article 65, paragraph 1, of the Statute and decline to accede to the request for an advisory opinion. In considering this possibility the Court must bear in mind that: “A reply to a request for an Opinion should not, in principle, be refused.” (I.C.J. Reports 1951, p. 19.) The Court has considered whether there are any “compelling reasons”, as referred to in the past practice of the Court, which would justify such a refusal. It has found no such reasons. Moreover, it feels that by replying to the request it would not only “remain faithful to the requirements of its judicial character” (I.C.J. Reports 1960, p. 153), but also discharge its functions as “the principal judicial organ of the United Nations” (Art. 92 of the Charter).

* * *

42. Having established that it is properly seised of a request for an advisory opinion, the Court will now proceed to an analysis of the question placed before it: “What are the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)?”

43. The Government of South Africa in both its written and oral statements has covered a wide field of history, going back to the origin and functioning of the Mandate. The same and similar problems were
dealt with by other governments, the Secretary-General of the United Nations and the Organization of African Unity in their written and oral statements.

44. A series of important issues is involved: the nature of the Mandate, its working under the League of Nations, the consequences of the demise of the League and of the establishment of the United Nations and the impact of further developments within the new organization. While the Court is aware that this is the sixth time it has had to deal with the issues involved in the Mandate for South West Africa, it has nonetheless reached the conclusion that it is necessary for it to consider and summarize some of the issues underlying the question addressed to it. In particular, the Court will examine the substance and scope of Article 22 of the League Covenant and the nature of "C" mandates.

45. The Government of South Africa, in its written statement, presented a detailed analysis of the intentions of some of the participants in the Paris Peace Conference, who approved a resolution which, with some alterations and additions, eventually became Article 22 of the Covenant. At the conclusion and in the light of this analysis it suggested that it was quite natural for commentators to refer to "C" mandates as being in their practical effect not far removed from annexation. This view, which the Government of South Africa appears to have adopted, would be tantamount to admitting that the relevant provisions of the Covenant were of a purely nominal character and that the rights they enshrined were of their very nature imperfect and unenforceable. It puts too much emphasis on the intentions of some of the parties and too little on the instrument which emerged from those negotiations. It is thus necessary to refer to the actual text of Article 22 of the Covenant, paragraph 1 of which declares:

"1. To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant."

As the Court recalled in its 1950 Advisory Opinion on the International Status of South-West Africa, in the setting-up of the mandates system "two principles were considered to be of paramount importance: the principle of non-annexation and the principle that the well-being and development of such peoples form a sacred trust of civilization" (I.C.J. Reports 1950, p. 131).

46. It is self-evident that the "trust" had to be exercised for the benefit of the peoples concerned, who were admitted to have interests of their own and to possess a potentiality for independent existence on the attainment of a certain stage of development: the mandates system was designed to provide peoples "not yet" able to manage their own affairs with the help and guidance necessary to enable them to arrive at the stage where they would be "able to stand by themselves". The requisite means of assistance to that end is dealt with in paragraph 2 of Article 22:

"2. The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League."

This made it clear that those Powers which were to undertake the task envisaged would be acting exclusively as mandatories on behalf of the League. As to the position of the League, the Court found in its 1950 Advisory Opinion that: "The League was not, as alleged by [the South African] Government, a 'mandator' in the sense in which this term is used in the national law of certain States." The Court pointed out that: "The Mandate was created, in the interest of the inhabitants of the territory, and of humanity in general, as an international institution with an international object—a sacred trust of civilisation." Therefore, the Court found, the League "had only assumed an international function of supervision and control" (I.C.J. Reports 1950, p. 132).

47. The acceptance of a mandate on these terms connoted the assumption of obligations not only of a moral but also of a binding legal character; and, as a corollary of the trust, "securities for [its] performance" were instituted (para. 7 of Art. 22) in the form of legal accountability for its discharge and fulfilment:

"7. In every case of mandate, the Mandatory shall render to the Council an annual report in reference to the territory committed to its charge."

48. A further security for the performance of the trust was embodied in paragraph 9 of Article 22:

"9. A permanent Commission shall be constituted to receive and examine the annual reports of the Mandatories and to advise the Council on all matters relating to the observance of the mandates."

Thus the reply to the essential question, quis custodiet ipsos custodes?, was given in terms of the mandatory's accountability to international
organs. An additional measure of supervision was introduced by a resolution of the Council of the League of Nations, adopted on 31 January 1923. Under this resolution the mandatory Governments were to transmit to the League petitions from communities or sections of the populations of mandated territories.

49. Paragraph 8 of Article 22 of the Covenant gave the following directive:

"8. The degree of authority, control or administration to be exercised by the Mandatory shall, if not previously agreed upon by the Members of the League, be explicitly defined in each case by the Council."

In pursuance of this directive, a Mandate for German South West Africa was drawn up which defined the terms of the Mandatory's administration in seven articles. Of these, Article 6 made explicit the obligation of the Mandatory under paragraph 7 of Article 22 of the Covenant by providing that "The Mandatory shall make to the Council of the League of Nations an annual report to the satisfaction of the Council, containing full information with regard to the territory, and indicating the measures taken to carry out the obligations assumed under Articles 2, 3, 4 and 5" of the Mandate. As the Court said in 1950: "the Mandatory was to observe a number of obligations, and the Council of the League was to supervise the administration and see to it that these obligations were fulfilled" (I.C.J. Reports 1950, p. 132). In sum the relevant provisions of the Covenant and those of the Mandate itself preclude any doubt as to the establishment of definite legal obligations designed for the attainment of the object and purpose of the Mandate.

50. As indicated in paragraph 45 above, the Government of South Africa has dwelt at some length on the negotiations which preceded the adoption of the final version of Article 22 of the League Covenant, and has suggested that they lead to a different reading of its provisions. It is true that as that Government points out, there had been a strong tendency to annex former enemy colonial territories. Be that as it may, the final outcome of the negotiations, however difficult of achievement, was a rejection of the notion of annexation. It cannot tenably be argued that the clear meaning of the mandate institution could be ignored by placing upon the explicit provisions embodying its principles a construction at variance with its object and purpose.

51. Events subsequent to the adoption of the instruments in question should also be considered. The Allied and Associated Powers, in their Reply to Observations of the German Delegation, referred in 1919 to "the mandatory Powers, which in so far as they may be appointed trustees by the League of Nations will derive no benefit from such trusteeship". As to the Mandate for South West Africa, its preamble recited that "His Britannic Majesty, for and on behalf of the Government of the Union of South Africa, has agreed to accept the Mandate in respect of the said territory and has undertaken to exercise it on behalf of the League of Nations".

52. Furthermore, the subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them. The concept of the sacred trust was confirmed and expanded to all "territories whose peoples have not yet attained a full measure of self-government" (Art. 73). Thus it clearly embraced territories under a colonial régime. Obviously the sacred trust continued to apply to League of Nations mandated territories on which an international status had been conferred earlier. A further important stage in this development was the Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly resolution 1514 (XV) of 14 December 1960), which embraces all peoples and territories which "have not yet attained independence". Nor is it possible to leave out of account the political history of mandated territories in general. All those which did not acquire independence, excluding Namibia, were placed under trusteeship. Today, only two out of fifteen, excluding Namibia, remain under United Nations tutelage. This is but a manifestation of the general development which has led to the birth of so many new States.

53. All these considerations are germane to the Court's evaluation of the present case. Mindful as it is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion, the Court is bound to take into account the fact that the concepts embodied in Article 22 of the Covenant—"the strenuous conditions of the modern world" and "the well-being and development" of the peoples concerned—were not static, but were by definition evolutionary, as also, therefore, was the concept of the "sacred trust". The parties to the Covenant must consequently be deemed to have accepted them as such. That is why, viewing the institutions of 1919, the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation. In the domain to which the present proceedings relate, the last fifty years, as indicated above, have brought important developments. These developments leave little doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned. In this domain, as elsewhere, the corpus iuris gentium has been
considerably enriched, and this the Court, if it is faithfully to discharge its functions, may not ignore.

54. In the light of the foregoing, the Court is unable to accept any construction which would attach to "C" mandates an object and purpose different from those of "A" or "B" mandates. The only differences were those appearing from the language of Article 22 of the Covenant, and from the particular mandate instruments, but the objective and safeguards remained the same, with no exceptions such as considerations of geographical contiguity. To hold otherwise would mean that territories under "C" mandate belonged to the family of mandates only in name, being in fact the objects of disguised cessions, as if the affirmation that they could "be best administered under the laws of the Mandatory as integral portions of its territory" (Art. 22, para. 6) conferred upon the administering Power a special title not vested in States entrusted with "A" or "B" mandates. The Court would recall in this respect what was stated in the 1962 Judgment in the South West Africa cases as applying to all categories of mandate:

"The rights of the Mandatory in relation to the mandated territory and the inhabitants have their foundation in the obligations of the Mandatory and they are, so to speak, mere tools given to enable it to fulfil its obligations." (I.C.J. Reports 1962, p. 329.)

* * *

55. The Court will now turn to the situation which arose on the demise of the League and with the birth of the United Nations. As already recalled, the League of Nations was the international organization entrusted with the exercise of the supervisory functions of the Mandate. Those functions were an indispensable element of the Mandate. But that does not mean that the mandates institution was to collapse with the disappearance of the original supervisory machinery. To the question whether the continuance of a mandate was inseparably linked with the existence of the League, the answer must be that an institution established for the fulfilment of a sacred trust cannot be presumed to lapse before the achievement of its purpose. The responsibilities of both mandatory and supervisor resulting from the mandates institution were complementary, and the disappearance of one or the other could not affect the survival of the institution. That is why, in 1950, the Court remarked, in connection with the obligations corresponding to the sacred trust:

"Their raison d'être and original object remain. Since their fulfilment did not depend on the existence of the League of Nations, they could not be brought to an end merely because this supervisory

organ ceased to exist. Nor could the right of the population to have the Territory administered in accordance with these rules depend thereon." (I.C.J. Reports 1950, p. 133.)

In the particular case, specific provisions were made and decisions taken for the transfer of functions from the organization which was to be wound up to that which came into being.

56. Within the framework of the United Nations an international trusteeship system was established and it was clearly contemplated that mandated territories considered as not yet ready for independence would be converted into trust territories under the United Nations international trusteeship system. This system established a wider and more effective international supervision than had been the case under the mandates of the League of Nations.

57. It would have been contrary to the overriding purpose of the mandates system to assume that difficulties in the way of the replacement of one régime by another designed to improve international supervision should have been permitted to bring about, on the dissolution of the League, a complete disappearance of international supervision. To accept the contention of the Government of South Africa on this point would have entailed the reversion of mandated territories to colonial status, and the virtual replacement of the mandates régime by annexation, so determinedly excluded in 1920.

58. These compelling considerations brought about the insertion in the Charter of the United Nations of the safeguarding clause contained in Article 80, paragraph 1, of the Charter, which reads as follows:

"1. Except as may be agreed upon in individual trusteeship agreements, made under Articles 77, 79 and 81, placing each territory under the trusteeship system, and until such agreements have been concluded, nothing in this Chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any States or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties."

59. A striking feature of this provision is the stipulation in favour of the preservation of the rights of "any peoples", thus clearly including the inhabitants of the mandated territories and, in particular, their indigenous populations. These rights were thus confirmed to have an existence independent of that of the League of Nations. The Court, in the 1950 Advisory Opinion on the International Status of South-West Africa, relied on this provision to reach the conclusion that "no such rights of the peoples could be effectively safeguarded without inter-
national supervision and a duty to render reports to a supervisory organ" (I.C.J. Reports 1950, p. 137). In 1956 the Court confirmed the conclusion that "the effect of Article 80 (1) of the Charter" was that of "preserving the rights of States and peoples" (I.C.J. Reports 1956, p. 27).

60. Article 80, paragraph 1, of the Charter was thus interpreted by the Court as providing that the system of replacement of mandates by trusteeship agreements, resulting from Chapter XII of the Charter, shall not "be construed in or of itself to alter in any manner the rights whatsoever of any States or any peoples".

61. The exception made in the initial words of the provision, "Except as may be agreed upon in individual trusteeship agreements, made under Articles 77, 79 and 81, placing each territory under the trusteeship system, and until such agreements have been concluded"; established a particular method for changing the status quo of a mandate régime. This could be achieved only by means of a trusteeship agreement, unless the "sacred trust" had come to an end by the implementation of its objective, that is, the attainment of independent existence. In this way, by the use of the expression "until such agreements have been concluded", a legal hiatus between the two systems was obviated.

62. The final words of Article 80, paragraph 1, refer to "the terms of existing international instruments to which Members of the United Nations may respectively be parties". The records of the San Francisco Conference show that these words were inserted in replacement of the words "any mandate" in an earlier draft in order to preserve "any rights set forth in paragraph 4 of Article 22 of the Covenant of the League of Nations".

63. In approving this amendment and inserting these words in the report of Committee II/4, the States participating at the San Francisco Conference obviously took into account the fact that the adoption of the Charter of the United Nations would render the disappearance of the League of Nations inevitable. This shows the common understanding and intention at San Francisco that Article 80, paragraph 1, of the Charter had the purpose and effect of keeping in force all rights whatsoever, including those contained in the Covenant itself, against any claim as to their possible lapse with the dissolution of the League.

64. The demise of the League could thus not be considered as an unexpected supervening event entailing a possible termination of those rights, entirely alien to Chapter XII of the Charter and not foreseen by the safeguarding provisions of Article 80, paragraph 1. The Members of the League, upon effecting the dissolution of that organization, did not declare, or accept even by implication, that the mandates would be cancelled or lapse with the dissolution of the League. On the contrary, paragraph 4 of the resolution on mandates of 18 April 1946 clearly assumed their continuation.

65. The Government of South Africa, in asking the Court to reappraise the 1950 Advisory Opinion, has argued that Article 80, paragraph 1, must be interpreted as a mere saving clause having a purely negative effect.

66. If Article 80, paragraph 1, were to be understood as a mere interpretative provision preventing the operation of Chapter XII from affecting any rights, then it would be deprived of all practical effect. There is nothing in Chapter XII—which, as interpreted by the Court in 1950, constitutes a framework for future agreements—susceptible of affecting existing rights of States or of peoples under the mandates system. Likewise, if paragraph 1 of Article 80 were to be understood as a mere saving clause, paragraph 2 of the same Article would have no purpose. This paragraph provides as follows:

"2. Paragraph 1 of this Article shall not be interpreted as giving grounds for delay or postponement of the negotiation and conclusion of agreements for placing mandated and other territories under the trusteeship system as provided for in Article 77."

This provision was obviously intended to prevent a mandatory Power from invoking the preservation of its rights resulting from paragraph 1 as a ground for delaying or postponing what the Court described as "the normal course indicated by the Charter, namely, conclude Trusteeship Agreements" (I.C.J. Reports 1950, p. 140). No method of interpretation would warrant the conclusion that Article 80 as a whole is meaningless.

67. In considering whether negative effects only may be attributed to Article 80, paragraph 1, as contended by South Africa, account must be taken of the words at the end of Article 76 (d) of the Charter, which, as one of the basic objectives of the trusteeship system, ensures equal treatment in commercial matters for all Members of the United Nations and their nationals. The proviso "subject to the provisions of Article 80" was included at the San Francisco Conference in order to preserve the existing right of preference of the mandatory Powers in "C" mandates. The delegate of the Union of South Africa at the Conference had pointed out earlier that "the "open door" had not previously applied to the 'C' mandates", adding that "his Government could not contemplate its application to their mandated territory". If Article 80, paragraph 1, had no conservatory and positive effects, and if the rights therein preserved could have been extinguished with the disappearance of the League of Nations, then the proviso in Article 76 (d) in fine would be deprived of any practical meaning.
68. The Government of South Africa has invoked as “new facts” not fully before the Court in 1950 a proposal introduced by the Chinese delegation at the final Assembly of the League of Nations and another submitted by the Executive Committee to the United Nations Preparatory Commission, both providing in explicit terms for the transfer of supervisory functions over mandates from the League of Nations to United Nations organs. It is argued that, since neither of these two proposals was adopted, no such transfer was envisaged.

69. The Court is unable to accept the argument advanced. The fact that a particular proposal is not adopted by an international organ does not necessarily carry with it the inference that a collective pronouncement is made in a sense opposite to that proposed. There can be many reasons for rejection or non-approval. For instance, the Chinese proposal, which was never considered but was ruled out of order, would have subjected mandated territories to a form of supervision which went beyond the scope of the existing supervisory authority in respect of mandates, and could have raised difficulties with respect to Article 82 of the Charter. As to the establishment of a Temporary Trusteeship Committee, it was opposed because it was felt that the setting up of such an organ might delay the negotiation and conclusion of trusteeship agreements. Consequently two United States proposals, intended to authorize this Committee to undertake the functions previously performed by the Mandates Commission, could not be acted upon. The non-establishment of a temporary subsidiary body empowered to assist the General Assembly in the exercise of its supervisory functions over mandates cannot be interpreted as implying that the General Assembly lacked competence or could not itself exercise its functions in that field. On the contrary, the general assumption appeared to be that the supervisory functions over mandates previously performed by the League were to be exercised by the United Nations. Thus, in the discussions concerning the proposed setting-up of the Temporary Trusteeship Committee, no observation was made to the effect that the League’s supervisory functions had not been transferred to the United Nations. Indeed, the South African representative at the United Nations Preparatory Commission declared on 29 November 1945 that “it seemed reasonable to create an interim body as the Mandates Commission was now in abeyance and countries holding mandates should have a body to which they could report”.

70. The Government of South Africa has further contended that the provision in Article 80, paragraph 1, that the terms of “existing international instruments” shall not be construed as altered by anything in Chapter XII of the Charter, cannot justify the conclusion that the duty to report under the Mandate was transferred from the Council of the League to the United Nations.

71. This objection fails to take into consideration Article 10 in Chapter IV of the Charter, a provision which was relied upon in the 1950 Opinion to justify the transference of supervisory powers from the League Council to the General Assembly of the United Nations. The Court then said:

“The competence of the General Assembly of the United Nations to exercise such supervision and to receive and examine reports is derived from the provisions of Article 10 of the Charter, which authorizes the General Assembly to discuss any questions or any matters within the scope of the Charter and to make recommendations on these questions or matters to the Members of the United Nations.” (I.C.J. Reports 1950, p. 137.)

72. Since a provision of the Charter—Article 80, paragraph 1—had maintained the obligations of the Mandatory, the United Nations had become the appropriate forum for supervising the fulfilment of those obligations. Thus, by virtue of Article 10 of the Charter, South Africa agreed to submit its administration of South West Africa to the scrutiny of the General Assembly, on the basis of the information furnished by the Mandatory or obtained from other sources. The transfer of the obligation to report, from the League Council to the General Assembly, was merely a corollary of the powers granted to the General Assembly. These powers were in fact exercised by it, as found by the Court in the 1950 Advisory Opinion. The Court rightly concluded in 1950 that—

“...the General Assembly of the United Nations is legally qualified to exercise the supervisory functions previously exercised by the League of Nations with regard to the administration of the Territory, and that the Union of South Africa is under an obligation to submit to supervision and control of the General Assembly and to render annual reports to it” (I.C.J. Reports 1950, p. 137).

In its 1955 Advisory Opinion on Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South-West Africa, after recalling some passages from the 1950 Advisory Opinion, the Court stated:

“Thus, the authority of the General Assembly to exercise supervision over the administration of South-West Africa as a mandated Territory is based on the provisions of the Charter.” (I.C.J. Reports 1955, p. 76.)

In the 1956 Advisory Opinion on Admissibility of Hearings of Petitioners by the Committee on South West Africa, again after referring to certain passages from the 1950 Advisory Opinion, the Court stated:
Accordingly, the obligations of the Mandatory continue unimpaired with this difference, that the supervisory functions exercised by the Council of the League of Nations are now to be exercised by the United Nations.” (I.C.J. Reports 1956, p. 27.)

In the same Opinion the Court further stated:

“... the paramount purpose underlying the taking over by the General Assembly of the United Nations of the supervisory functions in respect of the Mandate for South West Africa formerly exercised by the Council of the League of Nations was to safeguard the sacred trust of civilization through the maintenance of effective international supervision of the administration of the Mandated Territory” (ibid., p. 28).

* * *

73. With regard to the intention of the League, it is essential to recall that, at its last session, the Assembly of the League, by a resolution adopted on 12 April 1946, attributed to itself the responsibilities of the Council in the following terms:

“The Assembly, with the concurrence of all the Members of the Council which are represented at its present session: Decides that, so far as required, it will, during the present session, assume the functions falling within the competence of the Council.”

Thereupon, before finally dissolving the League, the Assembly on 18 April 1946, adopted a resolution providing as follows for the continuation of the mandates and the mandates system:

“The Assembly . . .

3. Recognises that, on the termination of the League's existence, its functions with respect to the mandated territories will come to an end, but notes that Chapters XI, XII and XIII of the Charter of the United Nations embody principles corresponding to those declared in Article 22 of the Covenant of the League;

4. Takes note of the expressed intentions of the Members of the League now administering territories under mandate to continue to administer them for the well-being and development of the peoples concerned in accordance with the obligations contained in the respective Mandates, until other arrangements have been agreed between the United Nations and the respective mandatory Powers.”

As stated in the Court's 1962 Judgment:

“... the League of Nations in ending its own existence did not terminate the Mandates but ... definitely intended to continue them by its resolution of 18 April 1946” (I.C.J. Reports 1962, p. 334).

74. That the Mandate had not lapsed was also admitted by the Government of South Africa on several occasions during the early period of transition, when the United Nations was being formed and the League dissolved. In particular, on 9 April 1946, the representative of South Africa, after announcing his Government's intention to transform South West Africa into an integral part of the Union, declared before the Assembly of the League:

“In the meantime, the Union will continue to administer the territory scrupulously in accordance with the obligations of the Mandate, for the advancement and promotion of the interests of the inhabitants, as she has done during the past six years when meetings of the Mandates Commission could not be held.

The disappearance of those organs of the League concerned with the supervision of mandates, primarily the Mandates Commission and the League Council, will necessarily preclude complete compliance with the letter of the Mandate. The Union Government will nevertheless regard the dissolution of the League as in no way diminishing its obligations under the Mandate, which it will continue to discharge with the full and proper appreciation of its responsibilities until such time as other arrangements are agreed upon concerning the future status of the territory.”

The Court referred to this statement in its Judgment of 1962, finding that “there could be no clearer recognition on the part of the Government of South Africa of the continuance of its obligations under the Mandate after the dissolution of the League of Nations” (I.C.J. Reports 1962, p. 340).

75. Similar assurances were given on behalf of South Africa in a memorandum transmitted on 17 October 1946 to the Secretary-General of the United Nations, and in statements to the Fourth Committee of the General Assembly on 4 November and 13 November 1946. Referring to some of these and other assurances the Court stated in 1950: “These declarations constitute recognition by the Union Government of the continuance of its obligations under the Mandate and not a mere indication of the future conduct of that Government.” (I.C.J. Reports 1950, p. 135).

76. Even before the dissolution of the League, on 22 January 1946, the Government of the Union of South Africa had announced to the General Assembly of the United Nations its intention to ascertain the
views of the population of South West Africa, stating that "when that had been done, the decision of the Union would be submitted to the General Assembly for judgment". Thereafter, the representative of the Union of South Africa submitted a proposal to the Second Part of the First Session of the General Assembly in 1946, requesting the approval of the incorporation of South West Africa into the Union. On 14 December 1946 the General Assembly adopted resolution 65 (I) noting—

"... with satisfaction that the Union of South Africa, by presenting this matter to the United Nations, recognizes the interest and concern of the United Nations in the matter of the future status of territories now held under mandate"

and declared that it was—

"... unable to accede to the incorporation of the territory of South West Africa in the Union of South Africa".

The General Assembly, the resolution went on,

"Recommends that the mandated territory of South West Africa be placed under the international trusteeship system and invites the Government of the Union of South Africa to propose for the consideration of the General Assembly a trusteeship agreement for the aforesaid Territory."

A year later the General Assembly, by resolution 141 (II) of 1 November 1947, took note of the South African Government's decision not to proceed with its plan for the incorporation of the Territory. As the Court stated in 1950:

"By thus submitting the question of the future international status of the Territory to the 'judgment' of the General Assembly as the 'competent international organ', the Union Government recognized the competence of the General Assembly in the matter." (I.C.J. Reports 1950, p. 142.)

77. In the course of the following years South Africa's acts and declarations made in the United Nations in regard to South West Africa were characterized by contradictions. Some of these acts and declarations confirmed the recognition of the supervisory authority of the United Nations and South Africa's obligations towards it, while others clearly signified an intention to withdraw such recognition. It was only on 11 July 1949 that the South African Government addressed to the Secretary-General a letter in which it stated that it could "no longer see that any

real benefit is to be derived from the submission of special reports on South West Africa to the United Nations and [had] regretfully come to the conclusion that in the interests of efficient administration no further reports should be forwarded".

78. In the light of the foregoing review, there can be no doubt that, as consistently recognized by this Court, the Mandate survived the demise of the League, and that South Africa admitted as much for a number of years. Thus the supervisory element, an integral part of the Mandate, was bound to survive, and the Mandatory continued to be accountable for the performance of the sacred trust. To restrict the responsibility of the Mandatory to the sphere of conscience or of moral obligation would amount to conferring upon that Power rights to which it was not entitled, and at the same time to depriving the peoples of the Territory of rights which they had been guaranteed. It would mean that the Mandatory would be unilaterally entitled to decide the destiny of the people of South West Africa at its discretion. As the Court, referring to its Advisory Opinion of 1950, stated in 1962:

"The findings of the Court on the obligation of the Union Government to submit to international supervision are thus crystal clear. Indeed, to exclude the obligations connected with the Mandate would be to exclude the very essence of the Mandate." (I.C.J. Reports 1962, p. 334.)

79. The cogency of this finding is well illustrated by the views presented on behalf of South Africa, which, in its final submissions in the South West Africa cases, presented as an alternative submission, "in the event of it being held that the Mandate as such continued in existence despite the dissolution of the League of Nations",

"... that the Respondent's former obligations under the Mandate to report and account to, and to submit to the supervision, of the Council of the League of Nations, lapsed upon the dissolution of the League, and have not been replaced by any similar obligations relative to supervision by any organ of the United Nations or any other organization or body" (I.C.J. Reports 1966, p. 16).

The principal submission, however, had been:

"That the whole Mandate for South West Africa lapsed on the dissolution of the League of Nations and that Respondent is, in consequence thereof, no longer subject to any legal obligations thereunder." (Ibid.)
80. In the present proceedings, at the public sitting of 15 March 1971, the representative of South Africa summed up his Government’s position in the following terms:

“Our contentions concerning the falling away of supervisory and accountability provisions are, accordingly, absolute and unqualified. On the other hand, our contentions concerning the possible lapse of the Mandate as a whole are secondary and consequential and depend on our primary contention that the supervision and the accountability provisions fell away on the dissolution of the League.”

He thus placed the emphasis on the “falling-away” of the “supervisory and accountability provisions” and treated “the possible lapse of the Mandate as a whole” as a “secondary and consequential” consideration.

81. Thus, by South Africa’s own admission, “supervision and accountability were of the essence of the Mandate, as the Court had consistently maintained. The theory of the lapse of the Mandate on the demise of the League of Nations is in fact inseparable from the claim that there is no obligation to submit to the supervision of the United Nations, and vice versa. Consequently, both or either of the claims advanced, namely that the Mandate has lapsed and/or that there is no obligation to submit to international supervision by the United Nations, are destructive of the very institution upon which the presence of South Africa in Namibia rests, for:

“The authority which the Union Government exercises over the Territory is based on the Mandate. If the Mandate lapsed, as the Union Government contends, the latter’s authority would equally have lapsed. To retain the rights derived from the Mandate and to deny the obligations thereunder could not be justified.” (I.C.J. Reports 1950, p. 133, cited in I.C.J. Reports 1962, p. 333.)

82. Of this South Africa would appear to be aware, as is evidenced by its assertion at various times of other titles to justify its continued presence in Namibia, for example before the General Assembly on 5 October 1966:

“South Africa has for a long time contended that the Mandate is no longer legally in force, and that South Africa’s right to administer the Territory is not derived from the Mandate but from military conquest, together with South Africa’s openly declared and consistent practice of continuing to administer the Territory as a sacred trust towards the inhabitants.”

In the present proceedings the representative of South Africa maintained on 15 March 1971:

“. . . if it is accepted that the Mandate has lapsed, the South African Government would have the right to administer the Territory by reason of a combination of factors, being (a) its original conquest; (b) its long occupation; (c) the continuation of the sacred trust basis agreed upon in 1920; and, finally (d) because its administration is to the benefit of the inhabitants of the Territory and is desired by them. In these circumstances the South African Government cannot accept that any State or organization can have a better title to the Territory.”

83. These claims of title, which apart from other considerations are inadmissible in regard to a mandated territory, lead by South Africa’s own admission to a situation which vitiates the object and purpose of the Mandate. Their significance in the context of the sacred trust has best been revealed by a statement made by the representative of South Africa in the present proceedings on 15 March 1971: “it is the view of the South African Government that no legal provision prevents its annexing South West Africa.” As the Court pointed out in its Advisory Opinion on the International Status of South-West Africa, “the principle of non-annexation was ‘considered to be of paramount importance’ when the future of South West Africa and other territories was the subject of decision after the First World War (I.C.J. Reports 1950, p. 131). What was in consequence excluded by Article 22 of the League Covenant is even less acceptable today.

* * *

84. Where the United Nations is concerned, the records show that, throughout a period of twenty years, the General Assembly, by virtue of the powers vested in it by the Charter, called upon the South African Government to perform its obligations arising out of the Mandate. On 9 February 1946 the General Assembly, by resolution 9 (I), invited all States administering territories held under mandate to submit trusteeship agreements. All, with the exception of South Africa, responded by placing the respective territories under the trusteeship system or offering
them independence. The General Assembly further made a special recommendation to this effect in resolution 65 (I) of 14 December 1946; on 1 November 1947, in resolution 141 (II), it "urged" the Government of the Union of South Africa to propose a trusteeship agreement; by resolution 227 (III) of 26 November 1948 it maintained its earlier recommendations. A year later, in resolution 337 (IV) of 6 December 1949, it expressed "regret that the Government of the Union of South Africa has withdrawn its previous undertaking to submit reports on its administration of the Territory of South West Africa for the information of the United Nations", reiterated its previous resolutions and invited South Africa "to resume the submission of such reports to the General Assembly". At the same time, in resolution 338 (IV), it addressed specific questions concerning the international status of South West Africa to this Court. In 1950, by resolution 449 (V) of 13 December, it accepted the resultant Advisory Opinion and urged the Government of the Union of South Africa "to take the necessary steps to give effect to the Opinion of the International Court of Justice". By the same resolution, it established a committee "to confer with the Union of South Africa concerning the procedural measures necessary for implementing the Advisory Opinion...". In the course of the ensuing negotiations South Africa continued to maintain that neither the United Nations nor any other international organization had succeeded to the supervisory functions of the League. The Committee, for its part, presented a proposal closely following the terms of the Mandate and providing for implementation "through the United Nations by a procedure as nearly as possible analogous to that which existed under the League of Nations, thus providing terms no more extensive or onerous than those which existed before". This procedure would have involved the submission by South Africa of reports to a General Assembly committee, which would further set up a special commission to take over the functions of the Permanent Mandates Commission. Thus the United Nations, which undoubtedly conducted the negotiations in good faith, did not insist on the conclusion of a trusteeship agreement; it suggested a system of supervision which "should not exceed that which applied under the Mandates System...". These proposals were rejected by South Africa, which refused to accept the principle of the supervision of its administration of the Territory by the United Nations.

85. Further fruitless negotiations were held from 1952 to 1959. In total, negotiations extended over a period of thirteen years, from 1946 to 1959. In practice the actual length of negotiations is no test of whether the possibilities of agreement have been exhausted; it may be sufficient to show that an early deadlock was reached and that one side adamantly refused compromise. In the case of Namibia (South West Africa) this stage had patently been reached long before the United Nations finally abandoned its efforts to reach agreement. Even so, for so long as South Africa was the mandatory Power the way was still open for it to seek an arrangement. But that chapter came to an end with the termination of the Mandate.

86. To complete this brief summary of the events preceding the present request for advisory opinion, it must be recalled that in 1955 and 1956 the Court gave at the request of the General Assembly two further advisory opinions on matters concerning the Territory. Eventually the General Assembly adopted resolution 2145 (XXI) on the termination of the Mandate for South West Africa. Subsequently the Security Council adopted resolution 276 (1970), which declared the continued presence of South Africa in Namibia to be illegal and called upon States to act accordingly.

87. The Government of France in its written statement and the Government of South Africa throughout the present proceedings have raised the objection that the General Assembly, in adopting resolution 2145 (XXI), acted ultra vires.

88. Before considering this objection, it is necessary for the Court to examine the observations made and the contentsions advanced as to whether the Court should go into this question. It was suggested that though the request was not directed to the question of the validity of the General Assembly resolution and of the related Security Council resolutions, this did not preclude the Court from making such an enquiry. On the other hand it was contended that the Court was not authorized by the terms of the request, in the light of the discussions preceding it, to go into the validity of these resolutions. It was argued that the Court should not assume powers of judicial review of the action taken by the other principal organs of the United Nations without specific request to that effect, nor act as a court of appeal from their decisions.

89. Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned. The question of the validity or conformity with the Charter of General Assembly resolution 2145 (XXI) or of related Security Council resolutions does not form the subject of the request for advisory opinion. However, in the exercise of its judicial function and since objections have been advanced the Court, in the course of its reasoning, will consider these objections before determining any legal consequences arising from those resolutions.

90. As indicated earlier, with the entry into force of the Charter of the United Nations a relationship was established between all Members of the United Nations on the one side, and each mandatory Power on the other. The mandatory Powers while retaining their mandates assumed,
under Article 80 of the Charter, vis-à-vis all United Nations Members, the obligation to keep intact and preserve, until trusteeship agreements were executed, the rights of other States and of the peoples of mandated territories, which resulted from the existing mandate agreements and related instruments, such as Article 22 of the Covenant and the League Council's resolution of 31 January 1923 concerning petitions. The mandatory Powers also bound themselves to exercise their functions of administration in conformity with the relevant obligations emanating from the United Nations Charter, which member States have undertaken to fulfil in good faith in all their international relations.

91. One of the fundamental principles governing the international relationship thus established is that a party which disowns or does not fulfil its own obligations cannot be recognized as retaining the rights which it claims to derive from the relationship.

92. The terms of the preamble and operative part of resolution 2145 (XXI) leave no doubt as to the character of the resolution. In the preamble the General Assembly declares itself "Convinced that the administration of the Mandated Territory by South Africa has been conducted in a manner contrary" to the two basic international instruments directly imposing obligations upon South Africa, the Mandate and the Charter of the United Nations, as well as to the Universal Declaration of Human Rights. In another paragraph of the preamble the conclusion is reached that, after having insisted with no avail upon performance for more than twenty years, the moment has arrived for the General Assembly to exercise the right to treat such violation as a ground for termination.

93. In paragraph 3 of the operative part of the resolution the General Assembly "Declares that South Africa has failed to fulfil its obligations in respect of the administration of the Mandated Territory and to ensure the moral and material well-being and security of the indigenous inhabitants of South West Africa and has, in fact, disavowed the Mandate". In paragraph 4 the decision is reached, as a consequence of the previous declaration "that the Mandate conferred upon His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa is therefore terminated . . .". (Emphasis added.) It is this part of the resolution which is relevant in the present proceedings.

94. In examining this action of the General Assembly it is appropriate to have regard to the general principles of international law regulating termination of a treaty relationship on account of breach. For even if the mandate is viewed as having the character of an institution, as is maintained, it depends on those international agreements which created the system and regulated its application. As the Court indicated in 1962 "this Mandate, like practically all other similar Mandates" was "a special type of instrument composite in nature and institution a novel international regime. It incorporates a definite agreement" (I.C.J. Reports 1962, p. 331). The Court stated conclusively in that Judgment that the Mandate "... in fact and in law, is an international agreement having the character of a treaty or convention" (I.C.J. Reports 1962, p. 330). The rules laid down by the Vienna Convention on the Law of Treaties concerning termination of a treaty relationship on account of breach (adopted without a dissenting vote) may in many respects be considered as a codification of existing customary law on the subject. In the light of these rules, only a material breach of a treaty justifies termination, such breach being defined as:

"(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" (Art. 60, para. 3).

95. General Assembly resolution 2145 (XXI) determines that both forms of material breach had occurred in this case. By stressing that South Africa "has, in fact, disavowed the Mandate", the General Assembly declared in fact that it had repudiated it. The resolution in question is therefore to be viewed as the exercise of the right to terminate a relationship in case of a deliberate and persistent violation of obligations which destroys the very object and purpose of that relationship.

* * *

96. It has been contended that the Covenant of the League of Nations did not confer on the Council of the League power to terminate a mandate for misconduct of the mandatory and that no such power could therefore be exercised by the United Nations, since it could not derive from the League greater powers than the latter itself had. For this objection to prevail it would be necessary to show that the mandates system, as established under the League, excluded the application of the general principle of law that a right of termination on account of breach must be presumed to exist in respect of all treaties, except as regards provisions relating to the protection of the human person contained in treaties of a humanitarian character (as indicated in Art. 60, para. 5, of the Vienna Convention). The silence of a treaty as to the existence of such a right cannot be interpreted as implying the exclusion of a right which has its source outside of the treaty, in general international law, and is dependent on the occurrence of circumstances which are not normally envisaged when a treaty is concluded.

97. The Government of South Africa has contended that it was the intention of the drafters of the mandates that they should not be revocable even in cases of serious breach of obligation or gross misconduct on the part of the mandatory. This contention seeks to draw support from the fact that at the Paris Peace Conference a resolution was adopted in which the proposal contained in President Wilson's draft of the Covenant regarding a right of appeal for the substitution of the mandatory was not
included. It should be recalled that the discussions at the Paris Peace Conference relied upon by South Africa were not directly addressed to an examination of President Wilson’s proposals concerning the regulation of the mandates system in the League Covenant, and the participants were not contesting these particular proposals. What took place was a general exchange of views, on a political plane, regarding the questions of the disposal of the former German colonies and whether the principle of annexation or the mandatory principle should apply to them.

98. President Wilson’s proposed draft did not include a specific provision for revocation, on the assumption that mandates were revocable. What was proposed was a special procedure reserving “to the people of any such territory or governmental unit the right to appeal to the League for the redress or correction of any breach of the mandate by the mandatory State or agency or for the substitution of some other State or agency, as mandatory”. That this special right of appeal was not inserted in the Covenant cannot be interpreted as excluding the application of the general principle of law according to which a power of termination on account of breach, even if unexpressed, must be presumed to exist as inherent in any mandate, as indeed in any agreement.

99. As indicated earlier, at the Paris Peace Conference there was opposition to the institution of the mandates since a mandate would be inherently revocable, so that there would be no guarantee of long-term continuance of administration by the mandatory Power. The difficulties thus arising were eventually resolved by the assurance that the Council of the League would not interfere with the day-to-day administration of the territories and that the Council would intervene only in case of a fundamental breach of its obligations by the mandatory Power.

100. The revocability of a mandate was envisaged by the first proposal which was made concerning a mandates system:

“In case of any flagrant and prolonged abuse of this trust the population concerned should be able to appeal for redress to the League, who should in a proper case assert its authority to the full, even to the extent of removing the mandate and entrusting it to some other State if necessary.” (J. C. Smuts, The League of Nations: A Practical Suggestion, 1918, pp. 21-22.)

Although this proposal referred to different territories, the principle remains the same. The possibility of revocation in the event of gross violation of the mandate was subsequently confirmed by authorities on international law and members of the Permanent Mandates Commission who interpreted and applied the mandates system under the League of Nations.

101. It has been suggested that, even if the Council of the League had possessed the power of revocation of the Mandate in an extreme case, it could not have been exercised unilaterally but only in co-operation with the mandatory Power. However, revocation could only result from a situation in which the Mandatory had committed a serious breach of the obligations it had undertaken. To contend, on the basis of the principle of unanimity which applied in the League of Nations, that in this case revocation could only take place with the concurrence of the Mandatory, would not only run contrary to the general principle of law governing termination on account of breach, but also postulate an impossibility. For obvious reasons, the consent of the wrongdoer to such a form of termination cannot be required.

102. In a further objection General Assembly resolution 2145 (XXI) it is contended that it made pronouncements which the Assembly, not being a judicial organ, and not having previously referred the matter to any such organ, was not competent to make. Without dwelling on the conclusions reached in the 1966 Judgment in the South West Africa contentious cases, it is worth recalling that in those cases the applicant States, which complained of material breaches of substantive provisions of the Mandate, were held not to “possess any separate self-contained right which they could assert . . . to require the due performance of the Mandate in discharge of the ‘sacred trust’ ” (I.C.J. Reports 1966, pp. 29 and 31). On the other hand, the Court declared that: “. . . any divergences of view concerning the conduct of a mandate were regarded as being matters that had their place in the political field, the settlement of which was left to the decision of the Mandatory and the competent organs of the League” (ibid., p. 45). To deny to a political organ of the United Nations which is a successor of the League in this respect the right to act, on the argument that it lacks competence to render what is described as a judicial decision, would not only be inconsistent but would amount to a complete denial of the remedies available against fundamental breaches of an international undertaking.

103. The Court is unable to appreciate the view that the General Assembly acted unilaterally as party and judge in its own cause. In the 1966 Judgment in the South West Africa cases, referred to above, it was found that the function to call for the due execution of the relevant provisions of the mandate instruments appertained to the League acting as an entity through its appropriate organs. The right of the League “in the pursuit of its collective, institutional activity, to require the due performance of the Mandate in discharge of the ‘sacred trust’ ” was specifically recognized (ibid., p. 29). Having regard to this finding, the United Nations as a successor to the League, acting through its competent organs, must be seen above all as the supervisory institution, competent to pronounce, in that capacity, on the conduct of the man-
datary with respect to its international obligations, and competent to act accordingly.

* * *

104. It is argued on behalf of South Africa that the consideration set forth in paragraph 3 of resolution 2145 (XXI) of the General Assembly, relating to the failure of South Africa to fulfil its obligations in respect of the administration of the mandated territory, called for a detailed factual investigation before the General Assembly could adopt resolution 2145 (XXI) or the Court pronounce upon its validity. The failure of South Africa to comply with the obligation to submit to supervision and to render reports, an essential part of the Mandate, cannot be disputed in the light of determinations made by this Court on more occasions than one. In relying on these, as on other findings of the Court in previous proceedings concerning South West Africa, the Court adheres to its own jurisprudence.

* * *

105. General Assembly resolution 2145 (XXI), after declaring the termination of the Mandate, added in operative paragraph 4 “that South Africa has no other right to administer the Territory”. This part of the resolution has been objected to as deciding a transfer of territory. That in fact is not so. The pronouncement made by the General Assembly is based on a conclusion, referred to earlier, reached by the Court in 1950:

“The authority which the Union Government exercises over the Territory is based on the Mandate. If the Mandate lapsed, as the Union Government contends, the latter’s authority would equally have lapsed.” (J.C.J. Reports 1950, p. 133.)

This was confirmed by the Court in its Judgment of 21 December 1962 in the South West Africa cases (Ethiopia v. South Africa; Liberia v. South Africa) (J.C.J. Reports 1962, p. 333). Relying on these decisions of the Court, the General Assembly declared that the Mandate having been terminated “South Africa has no other right to administer the Territory”. This is not a finding on facts, but the formulation of a legal situation. For it would not be correct to assume that, because the General Assembly is in principle vested with recommendatory powers, it is debarred from adopting, in specific cases within the framework of its competence, resolutions which make determinations or have operative design.

* * *

106. By resolution 2145 (XXI) the General Assembly terminated the Mandate. However, lacking the necessary powers to ensure the withdrawal of South Africa from the Territory, it enlisted the co-operation of the Security Council by calling the latter’s attention to the resolution, thus acting in accordance with Article 11, paragraph 2, of the Charter.

107. The Security Council responded to the call of the General Assembly. It “took note” of General Assembly resolution 2145 (XXI) in the preamble of its resolution 245 (1968); it took it “into account” in resolution 246 (1968); in resolutions 264 (1969) and 269 (1969) it adopted certain measures directed towards the implementation of General Assembly resolution 2145 (XXI) and, finally, in resolution 276 (1970), it reaffirmed resolution 264 (1969) and recalled resolution 269 (1969).

108. Resolution 276 (1970) of the Security Council, specifically mentioned in the text of the request, is the one essential for the purposes of the present advisory opinion. Before analysing it, however, it is necessary to refer briefly to resolutions 264 (1969) and 269 (1969), since these two resolutions have, together with resolution 276 (1970), a combined and cumulative effect. Resolution 264 (1969), in paragraph 3 of its operative part, calls upon South Africa to withdraw its administration from Namibia immediately. Resolution 269 (1969), in view of South Africa’s lack of compliance, after recalling the obligations of Members under Article 25 of the Charter, calls upon the Government of South Africa, in paragraph 5 of its operative part, “to withdraw its administration from the territory immediately and in any case before 4 October 1969”. The preamble of resolution 276 (1970) reaffirms General Assembly resolution 2145 (XXI) and espouses it, by referring to the decision, not merely of the General Assembly, but of the United Nations “that the Mandate of South-West Africa was terminated”. In the operative part, after condemning the non-compliance by South Africa with General Assembly and Security Council resolutions pertaining to Namibia, the Security Council declares, in paragraph 2, that “the continued presence of the South African authorities in Namibia is illegal” and that consequently all acts taken by the Government of South Africa “on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid”. In paragraph 5 the Security Council “calls upon all States, particularly those which have economic and other interests in Namibia, to refrain from any dealings with the Government of South Africa which are inconsistent with operative paragraph 2 of this resolution”.

109. It emerges from the communications bringing the matter to the Security Council’s attention, from the discussions held and particularly from the text of the resolutions themselves, that the Security Council, when it adopted these resolutions, was acting in the exercise of what it deemed to be its primary responsibility, the maintenance of peace and security, which, under the Charter, embraces situations which might
lead to a breach of the peace. (Art. 1, para. 1.) In the preamble of resolution 264 (1969) the Security Council was “Mindful of the grave consequences of South Africa’s continued occupation of Namibia” and in paragraph 4 of that resolution it declared “that the actions of the Government of South Africa designed to destroy the national unity and territorial integrity of Namibia through the establishment of Bantustans are contrary to the provisions of the United Nations Charter”. In operative paragraph 3 of resolution 269 (1969) the Security Council decided “that the continued occupation of the territory of Namibia by the South African authorities constitutes an aggressive encroachment on the authority of the United Nations, . . .”. In operative paragraph 3 of resolution 276 (1970) the Security Council declared further “that the defiant attitude of the Government of South Africa towards the Council’s decisions undermines the authority of the United Nations”.

110. As to the legal basis of the resolution, Article 24 of the Charter vests in the Security Council the necessary authority to take action such as that taken in the present case. The reference in paragraph 2 of this Article to specific powers of the Security Council under certain chapters of the Charter does not exclude the existence of general powers to discharge the responsibilities conferred in paragraph 1. Reference may be made in this respect to the Secretary-General’s Statement, presented to the Security Council on 10 January 1947, to the effect that “the powers of the Council under Article 24 are not restricted to the specific grants of authority contained in Chapters VI, VII, VIII and XII . . . the Members of the United Nations have conferred upon the Security Council powers commensurate with its responsibility for the maintenance of peace and security. The only limitations are the fundamental principles and purposes found in Chapter I of the Charter.”

111. As to the effect to be attributed to the declaration contained in paragraph 2 of resolution 276 (1970), the Court considers that the qualification of a situation as illegal does not by itself put an end to it. It can only be the first necessary step in an endeavour to bring the illegal situation to an end.

112. It would be an untenable interpretation to maintain that, once such a declaration had been made by the Security Council under Article 24 of the Charter, on behalf of all member States, those Members would be free to act in disregard of such illegality or even to recognize violations of law resulting from it. When confronted with such an internationally unlawful situation, Members of the United Nations would be expected to act in consequence of the declaration made on their behalf. The question therefore arises as to the effect of this decision of the Security Council for States Members of the United Nations in accordance with Article 25 of the Charter.

113. It has been contended that Article 25 of the Charter applies only to enforcement measures adopted under Chapter VII of the Charter. It is not possible to find in the Charter any support for this view. Article 25 is not confined to decisions in regard to enforcement action but applies to “the decisions of the Security Council” adopted in accordance with the Charter. Moreover, that Article is placed, not in Chapter VII, but immediately after Article 24 in that part of the Charter which deals with the functions and powers of the Security Council. If Article 25 had reference solely to decisions of the Security Council concerning enforcement action under Articles 41 and 42 of the Charter, that is to say, if it were only such decisions which had binding effect, then Article 25 would be superfluous, since this effect is secured by Articles 48 and 49 of the Charter.

114. It has also been contended that the relevant Security Council resolutions are couched in exhortatory rather than mandatory language and that, therefore, they do not purport to impose any legal duty on any State nor to affect legally any right of any State. 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.

115. Applying these tests, the Court recalls that in the preamble of resolution 269 (1969), the Security Council was “Mindful of its responsibility to take necessary action to secure strict compliance with the obligations entered into by States Members of the United Nations under the provisions of Article 25 of the Charter of the United Nations”. The Court has therefore reached the conclusion that the decisions made by the Security Council in paragraphs 2 and 5 of resolutions 276 (1970), as related to paragraph 3 of resolution 264 (1969) and paragraph 5 of resolution 269 (1969), were adopted in conformity with the purposes and principles of the Charter and in accordance with its Articles 24 and 25. The decisions are consequently binding on all States Members of the United Nations, which are thus under obligation to accept and carry them out.

116. In pronouncing upon the binding nature of the Security Council decisions in question, the Court would recall the following passage in its Advisory Opinion of 11 April 1949 on Reparation for Injuries Suffered in the Service of the United Nations:

“The Charter has not been content to make the Organization created by it merely a centre for harmonizing the actions of nations in the attainment of these common ends” (Article 1, para. 4). It has equipped that centre with organs, and has given it special tasks. It has defined the position of the Members in relation to the Organization
by requiring them to give it every assistance in any action undertaken by it (Article 2, para. 5), and to accept and carry out the decisions of the Security Council.” (I.C.J. Reports 1949, p. 178.)

Thus when the Security Council adopts a decision under Article 25 in accordance with the Charter, it is for member States to comply with that decision, including those members of the Security Council which voted against it and those Members of the United Nations who are not members of the Council. To hold otherwise would be to deprive this principal organ of its essential functions and powers under the Charter.

* * *

117. Having reached these conclusions, the Court will now address itself to the legal consequences arising for States from the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970). A binding determination made by a competent organ of the United Nations to the effect that a situation is illegal cannot remain without consequence. Once the Court is faced with such a situation, it would be failing in the discharge of its judicial functions if it did not declare that there is an obligation, especially upon Members of the United Nations, to bring that situation to an end. As this Court has held, referring to one of its decisions declaring a situation as contrary to a rule of international law: “This decision entails a legal consequence, namely that of putting an end to an illegal situation” (I.C.J. Reports 1951, p. 82).

118. South Africa, being responsible for having created and maintained a situation which the Court has found to have been validly declared illegal, has the obligation to put an end to it. It is therefore under obligation to withdraw its administration from the Territory of Namibia. By maintaining the present illegal situation, and by occupying the Territory without title, South Africa inures international responsibilities arising from a continuing violation of an international obligation. It also remains accountable for any violations of its international obligations, or of the rights of the people of Namibia. The fact that South Africa no longer has any title to administer the Territory does not release it from its obligations and responsibilities under international law towards other States in respect of the exercise of its powers in relation to this Territory. Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States.

119. The member States of the United Nations are, for the reasons given in paragraph 115 above, under obligation to recognize the illegality and, under Article 115 of South Africa’s continued presence in Namibia. They are also under obligation to refrain from lending any support or any form of assistance to South Africa with reference to its occupation of Namibia, subject to paragraph 125 below.

120. The precise determination of the acts permitted or allowed—what measures are available and practicable, which of them should be selected, what scope they should be given and by whom they should be applied—is a matter which lies within the competence of the appropriate political organs of the United Nations acting within their authority under the Charter. Thus it is for the Security Council to determine any further measures consequent upon the decisions already taken by it on the question of Namibia. In this context the Court notes that at the same meeting of the Security Council in which the request for advisory opinion was made, the Security Council also adopted resolution 283 (1970) which defined some of the steps to be taken. The Court has not been called upon to advise on the legal effects of that resolution.

121. The Court will in consequence confine itself to giving advice on those dealings with the Government of South Africa which, under the Charter of the United Nations and general international law, should be considered as inconsistent with the declaration of illegality and invalidity made in paragraph 2 of resolution 276 (1970), because they may imply a recognition that South Africa’s presence in Namibia is legal.

122. For the reasons given above, and subject to the observations contained in paragraph 125 below, member States are under obligation to abstain from entering into treaty relations with South Africa in all cases in which the Government of South Africa purports to act on behalf of or concerning Namibia. With respect to existing bilateral treaties, member States must abstain from invoking or applying those treaties or provisions of treaties concluded by South Africa on behalf of or concerning Namibia which involve active intergovernmental co-operation. With respect to multilateral treaties, however, the same rule cannot be applied to certain general conventions such as those of a humanitarian character, the non-performance of which may adversely affect the people of Namibia. It will be for the competent international organs to take specific measures in this respect.

123. Member States, in compliance with the duty of non-recognition imposed by paragraphs 2 and 5 of resolution 276 (1970), are under obligation to abstain from sending diplomatic or special missions to South Africa including in their jurisdiction the Territory of Namibia, to abstain from sending consular agents to Namibia, and to withdraw any such agents already there. They should also make it clear to the South African authorities that the maintenance of diplomatic or consular relations with South Africa does not imply any recognition of its authority with regard to Namibia.

124. Finally, those States which are implicit in the non-recognition of South Africa’s presence in Namibia and the explicit provisions of paragraph 5 of resolution 276 (1970) impose upon member States the obligation to abstain from entering into economic and other forms of relationship
or dealings with South Africa on behalf of or concerning Namibia which may entrench its authority over the Territory.

125. In general, the non-recognition of South Africa’s administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international co-operation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory.

126. As to non-member States, although not bound by Articles 24 and 25 of the Charter, they have been called upon in paragraphs 2 and 5 of resolution 276 (1970) to give assistance in the action which has been taken by the United Nations with regard to Namibia. In the view of the Court, the termination of the Mandate and the declaration of the illegality of South Africa’s presence in Namibia are opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law: in particular, no State which enters into relations with South Africa concerning Namibia may expect the United Nations or its Members to recognize the validity or effects of such relationship, or of the consequences thereof. The Mandate having been terminated by decision of the international organization in which the supervisory authority over its administration was vested, and South Africa’s continued presence in Namibia having been declared illegal, it is for non-member States to act in accordance with those decisions.

127. As to the general consequences resulting from the illegal presence of South Africa in Namibia, all States should bear in mind that the injured entity is a people which must look to the international community for assistance in its progress towards the goals for which the sacred trust was instituted.

* * *

128. In its oral statement and in written communications to the Court, the Government of South Africa expressed the desire to supply the Court with further factual information concerning the purposes and objectives of South Africa’s policy of separate development or *apartheid*, contending that to establish a breach of South Africa’s substantive international obligations under the Mandate it would be necessary to prove that a particular exercise of South Africa’s legislative or administrative powers was not directed in good faith towards the purpose of promoting to the utmost the well-being and progress of the inhabitants. It is claimed by the Government of South Africa that no act or omission on its part would constitute a violation of its international obligations unless it is shown that such act or omission was actuated by a motive, or directed towards a purpose other than one to promote the interests of the inhabitants of the Territory.

129. The Government of South Africa having made this request, the Court finds that no factual evidence is needed for the purpose of determining whether the policy of *apartheid* as applied by South Africa in Namibia is in conformity with the international obligations assumed by South Africa under the Charter of the United Nations. In order to determine whether the laws and decrees applied by South Africa in Namibia, which are a matter of public record, constitute a violation of the purposes and principles of the Charter of the United Nations, the question of intent or governmental discretion is not relevant; nor is it necessary to investigate or determine the effects of those measures upon the welfare of the inhabitants.

130. It is undisputed, and is amply supported by documents annexed to South Africa’s written statement in these proceedings, that the official governmental policy pursued by South Africa in Namibia is to achieve a complete physical separation of races and ethnic groups in separate areas within the Territory. The application of this policy has required, as has been conceded by South Africa, restrictive measures of control officially adopted and enforced in the Territory by the coercive power of the former Mandatory. These measures establish limitations, exclusions or restrictions for the members of the indigenous population groups in respect of their participation in certain types of activities, fields of study or of training, labour or employment and also submit them to restrictions or exclusions of residence and movement in large parts of the Territory.

131. Under the Charter of the United Nations, the former Mandatory had pledged itself to observe and respect, in a territory having an international status, human rights and fundamental freedoms for all without distinction as to race. To establish instead, and to enforce, distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter.

* * *

132. The Government of South Africa also submitted a request that a plebiscite should be held in the Territory of Namibia under the joint supervision of the Court and the Government of South Africa (para. 16 above). This proposal was presented in connection with the request to submit additional factual evidence and as a means of bringing evidence before the Court. The Court having concluded that no further evidence
NAMIBIA (S.W. AFRICA) (ADVISORY OPINION)

was required, that the Mandate was validly terminated and that in consequence South Africa's presence in Namibia is illegal and its acts on behalf of or concerning Namibia are illegal and invalid, it follows that it cannot entertain this proposal.

* * *

133. For these reasons,

THE COURT IS OF OPINION,

in reply to the question:

"What are the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)?"

by 13 votes to 2,

(1) that, the continued presence of South Africa in Namibia being illegal, South Africa is under obligation to withdraw its administration from Namibia immediately and thus put an end to its occupation of the Territory;

by 11 votes to 4,

(2) that States Members of the United Nations are under obligation to recognize the illegality of South Africa's presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia, and to refrain from any acts and in particular any dealings with the Government of South Africa implying recognition of the legality of, or lending support or assistance to, such presence and administration;

(3) that it is incumbent upon States which are not Members of the United Nations to give assistance, within the scope of subparagraph (2) above, in the action which has been taken by the United Nations with regard to Namibia.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-first day of June, one thousand nine hundred and seventy-one, 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) ZAFRULLA KHAN,
President.

(Signed) S. AQUARONE,
Registrar.

NAMIBIA (S.W. AFRICA) (DECL. ZAFRULLA KHAN)

President Sir Muhammad ZAFRULLA KHAN makes the following declaration:

I am in entire agreement with the Opinion of the Court but would wish to add some observations on two or three aspects of the presentation made to the Court on behalf of South Africa.

It was contended that under the supervisory system as devised in the Covenant of the League and the different mandate agreements, the mandatory could, in the last resort, flout the wishes of the Council of the League by casting its vote in opposition to the directions which the Council might propose to give to the mandatory. The argument runs that this system was deliberately so devised, with open eyes, as to leave the Council powerless in face of the veto of the mandatory if the latter chose to exercise it. In support of this contention reliance was placed on paragraph 5 of Article 4 of the Covenant of the League by virtue of which any Member of the League not represented on the Council was to be invited to send a representative to sit as a member at any meeting of the Council during the consideration of matters specially affecting the interests of that Member. This entitled the mandatory to sit as a member at any meeting of the Council in which a matter affecting its interests as a mandatory came under consideration. Under paragraph 1 of Article 5 of the Covenant decisions of the Council required the agreement of all the Members of the League represented at the meeting. This is known as the unanimity rule and by virtue thereof it was claimed that a mandatory possessed a right of veto when attending a meeting of the Council in pursuance of paragraph 5 of Article 4 and consequently the last word on the manner and method of the administration of the mandate rested with the mandatory. This contention is untenable. Were it well founded it would reduce the whole system of mandates to mockery. As the Court, in its Judgment of 1966, observed:

"In practice, the unanimity rule was frequently not insisted upon, or its impact was mitigated by a process of give-and-take, and by various procedural devices to which both the Council and the mandatories lent themselves. So far as the Court's information goes, there never occurred any case in which a mandatory 'vetoed' what would otherwise have been a Council decision. Equally, however, much trouble was taken to avoid situations in which the mandatory would have been forced to acquiesce in the views of the rest of the Council short of casting an adverse vote. The occasional deliberate absence of the mandatory from a meeting, enabled decisions to be taken that the mandatory might have felt obliged to vote against if it had been present. This was part of the above-mentioned process for arriving at generally acceptable conclusions." (I.C.J. Reports 1966, pp. 44-45.)
The representative of South Africa, in answer to a question by a Member of the Court, confessed that there was not a single case on record in which the representative of a mandatory Power ever cast a negative vote in a meeting of the Council so as to block a decision of the Council. It is thus established that in practice the last word always rested with the Council of the League and not with the mandatory.

The Covenant of the League made ample provision to secure the effectiveness of the Covenant and conformity to its provisions in respect of the obligations entailed by membership of the League. A Member of the League which had violated any covenant of the League could be declared to be no longer a Member of the League by a vote of the Council concurred in by the representatives of all the other Members of the League represented thereon (para. 4, Art. 16, of the Covenant).

The representative of South Africa conceded that:

"... if a conflict between a mandatory and the Council occurred and if all the Members of the Council were of the opinion that the mandatory had violated a covenant of the League, it would have been legally possible for the Council to expel the mandatory from the League and thereafter decisions of the Council could no longer be thwarted by the particular mandatory—for instance, a decision to revoke the mandate. The mandatory would then no longer be a Member of the League and would then accordingly no longer be entitled to attend and vote in Council meetings.

... we agree that by expelling a mandatory the Council could have overcome the practical or mechanical difficulties created by the unanimity requirement." (Hearing of 15 March 1971.)

It was no doubt the consciousness of this position which prompted the deliberate absence of a mandatory from a meeting of the Council of the League which enabled the Council to take decisions that the mandatory might have felt obliged to vote against if it had been present.

If a mandatory ceased to be a Member of the League and the Council felt that the presence of its representative in a meeting of the Council dealing with matters affecting the mandate would be helpful, it could still be invited to attend as happened in the case of Japan after it ceased to be a Member of the League. But it could not attend as of right under paragraph 5 of Article 4 of the Covenant.

In addition, if need arose the Covenant could be amended under Article 26 of the Covenant. In fact no such need arose but the authority was provided in the Covenant. It would thus be idle to contend that the mandates system was deliberately devised, with open eyes, so as to leave the Council of the League powerless against the veto of the mandatory if the latter chose to exercise it.

Those responsible for the Covenant were anxious and worked hard to institute a system which would be effective in carrying out to the full the sacred trust of civilization. Had they deliberately devised a framework which might enable a mandatory so inclined to defy the system with impunity, they would have been guilty of defeating the declared purpose of the mandates system and this is not to be thought of; nor is it to be imagined that these wise statesmen, despite all the care that they took and the reasoning and persuasion that they brought into play, were finally persuaded into accepting as reality that which could so easily be turned into a fiction.

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In my view the supervisory authority of the General Assembly of the United Nations in respect of the mandated territory, being derived from the Covenant of the League and the Mandate Agreement, is not restricted by any provision of the Charter of the United Nations. The extent of that authority must be determined by reference to the relevant provisions of the Covenant of the League and the Mandate Agreement. The General Assembly was entitled to exercise the same authority in respect of the administration of the Territory by the Mandatory as was possessed by the Council of the League and its decisions and determinations in that respect had the same force and effect as the decisions and determinations of the Council of the League. This was well illustrated in the case of General Assembly resolution 289 (IV), adopted on 21 November 1949 recommending that Libya shall become independent as soon as possible and in any case not later than 1 January 1952. A detailed procedure for the achievement of this objective was laid down, including the appointment by the General Assembly of a United Nations Commissioner in Libya and a Council to aid and advise him, etc. All the recommendations contained in this resolution constituted binding decisions; decisions which had been adopted in accordance with the provisions of the Charter but whose binding character was derived from Annex XI to the Treaty of Peace with Italy.

**

The representative of South Africa, during the course of his oral submission, refrained from using the expression "apartheid" but urged:

"... South Africa is in the position that its conduct would be unlawful if the differentiation which it admittedly practises should be directed at, and have the result of subordinating the interests of one or certain groups on a racial or ethnic basis to those of others... if that can be established in fact, then South Africa would be guilty of violation of its obligations in that respect, otherwise not." (Hearing of 17 March 1971.)
The policy of apartheid was initiated by Prime Minister Malan and was then vigorously put into effect by his successors, Strijdom and Verwoerd. It has been continuously proclaimed that the purpose and object of the policy are the maintenance of White domination. Speaking to the South African House of Assembly, as late as 1963, Dr. Verwoerd said:

"Reduced to its simplest form the problem is nothing else than this: We want to keep South Africa White... Keeping it White can only mean one thing, namely, White domination, not leadership, not guidance, but control, supremacy. If we are agreed that it is the desire of the people that the White man should be able to continue to protect himself by White domination... we say that it can be achieved by separate development." (I.C.J. Pleadings, South West Africa, Vol. IV, p. 264.)

South Africa's reply to this in its Rejoinder in the 1966 cases was in effect that these and other similar pronouncements were qualified by "the promise to provide separate homelands for the Bantu groups" wherein the Bantu would be free to develop his capacities to the same degree as the White could do in the rest of the country. But this promise itself was always subject to the qualification that the Bantu homelands would develop under the guardianship of the White. In this connection it was urged that in 1961 the "Prime Minister spoke of a greater degree of ultimate independence for Bantu homelands than he had mentioned a decade earlier". This makes little difference in respect of the main purpose of the policy which continued to be the domination of the White.

It needs to be remembered, however, that the Court is not concerned in these proceedings with conditions in South Africa. The Court is concerned with the administration of South West Africa as carried on by the Mandatory in discharge of his obligations under the Mandate which prescribed that the well-being and development of people of whom were not yet able to stand by themselves under the strenuous conditions of the modern world constituted a sacred trust of civilization and that the best method of giving effect to this principle was that the tutelage of such peoples should be entrusted to advanced nations who, by reason of their resources, their experience and their geographical position could best undertake this responsibility (Art. 22, paras. 1 and 2, of the Covenant of the League of Nations).

The administration was to be carried on "in the interests of the indigenous population" (para. 6, Art. 22). For the discharge of this obligation it is not enough that the administration should believe in good faith that the policy it proposes to follow is in the best interests of all sections of the population. The supervisory authority must be satisfied that it is in the best interests of the indigenous population of the Territory. This follows from Article 6 of the Mandate Agreement for South West Africa, read with paragraph 6 of Article 22 of the Covenant.

The representative of South Africa, while admitting the right of the people of South West Africa to self-determination, urged in his oral statement that the exercise of that right must take into full account the limitations imposed, according to him, on such exercise by the tribal and cultural divisions in the Territory. He concluded that in the case of South West Africa self-determination "may well find itself practically restricted to some kind of autonomy and local self-government within a larger arrangement of co-operation" (hearing of 17 March 1971). This in effect means a denial of self-determination as envisaged in the Charter of the United Nations.

Whatever may have been the conditions in South Africa calling for special measures, those conditions did not exist in the case of South West Africa at the time when South Africa assumed the obligation of a mandatory in respect of the Territory, nor have they come into existence since. In South West Africa the small White element was not and is not indigenous to the Territory. There can be no excuse in the case of South West Africa for the application of the policy of apartheid so far as the interests of the White population are concerned. It is claimed, however, that the various indigenous groups of the population have reached different stages of development and that there are serious ethnic considerations which call for the application of the policy of separate development of each group. The following observations of the Director of the Institute of Race Relations, London, are apposite in this context:

... White South African arguments are based on the different stages of development reached by various groups of people. It is undisputed fact that groups have developed at different paces in respect of the control of environment (although understanding of other aspects of life has not always grown at the same pace). But the aspect of South African thought which is widely questioned elsewhere is the assumption that an individual is permanently limited by the limitations of his group. His ties with it may be strong; indeed, when considering politics and national survival, the assumption that they will be strong is altogether reasonable. Again, as a matter of choice, people may prefer to mix socially with those of their own group, but to say that by law people of one group must mix with no others can really only proceed from a conviction not only that the other groups are inferior but that every member of each of the other groups is permanently and irremediably inferior. It is this that rankles. 'Separate but equal' is possible so long as it is a matter of choice by both parties; legally imposed by one, it must be regarded by the other as a humiliation, and far more so if it applies not only
to the group as a whole but to individuals. In fact, of course, what separate development has meant has been anything but equal.

These are some reasons why it will be hard to find natives of Africa who believe that to extend the policy of separate development to South West Africa even more completely than at present is in the interest of any but the White inhabitants." (Quoted in F.C.J. Pleadings, South West Africa, Vol. IV, p. 339.)

* * *

Towards the close of his oral presentation the representative of South Africa made a plea to the Court in the following terms:

"In our submission, the general requirement placed by the Charter on all United Nations activities is that they must further peace, friendly relations, and co-operation between nations, and especially between member States. South Africa, as a member State, is under a duty to contribute towards those ends, and that she desires to do so, although she has no intention of abdicating what she regards as her responsibilities on the sub-continent of southern Africa.

If there are to be genuine efforts at achieving a peaceful solution, they will have to satisfy certain criteria. They will have to respect the will of the self-determining peoples of South West Africa. They will have to take into account the facts of geography, of economics, of budgetary requirements, of the ethnic conditions and of the state of development.

If this Court, even in an opinion on legal questions, could indicate the road towards a peaceful and constructive solution along these lines, then the Court would have made a great contribution, in our respectful submission, to the cause of international peace and security and, more, to the cause of friendly relations amongst not only the nations but amongst all men." (Hearing of 5 March 1971.)

The representative of the United States of America, in his oral presentation, observed that:

"... the question of holding a free and proper plebiscite under appropriate auspices and with conditions and arrangements which would ensure a fair and informed expression of the will of the people of Namibia deserves study. It is a matter which might be properly submitted to the competent political organs of the United Nations, which have consistently manifested their concern that the Namibians achieve self-determination. The Court may wish to so indicate in its opinion to the Security Council." (Hearing of 9 March 1971.)

The Court having arrived at the conclusion that the Mandate has been terminated and that the presence of South Africa in South West Africa is illegal, I would, in response to the plea made by the representative of South Africa, suggest that South Africa should offer to withdraw its administration from South West Africa in consultation with the United Nations so that a process of withdrawal and substitution in its place of United Nations' control may be agreed upon and carried into effect with the minimum disturbance of present administrative arrangements. It should also be agreed upon that, after the expiry of a certain period but not later than a reasonable time-limit thereafter, a plebiscite may be held under the supervision of the United Nations, which should ensure the freedom and impartiality of the plebiscite, to ascertain the wishes of the inhabitants of the Territory with regard to their political future. If the result of the plebiscite should reveal a clear preponderance of views in support of a particular course and objective, that course should be adopted so that the desired objective may be achieved as early as possible.

South Africa's insistence upon giving effect to the will of the peoples of South West Africa proceeds presumably from the conviction that an overwhelming majority of the peoples of the Territory desire closer political integration with the Republic of South Africa. Should that prove in fact to be the case the United Nations, being wholly committed to the principle of self-determination of peoples, would be expected to readily give effect to the clearly expressed wishes of the peoples of the Territory. Should the result of the plebiscite disclose their preference for a different solution, South Africa should equally readily accept and respect such manifestation of the will of the peoples concerned and should co-operate with the United Nations in giving effect to it.

The Government of South Africa, being convinced that an overwhelming majority of the peoples of South West Africa truly desire incorporation with the Republic, would run little risk of a contrary decision through the adoption of the procedure here suggested. If some such procedure is adopted and the conclusion that may emerge therefrom, whatever it may prove to be, is put into effect, South Africa would have vindicated itself in the eyes of the world and in the estimation of the peoples of South West Africa, whose freely expressed wishes must be supreme. There would still remain the possibility, and, if South Africa's estimate of the situation is close enough to reality, the strong probability, that once the peoples of South West Africa have been put in a position to manage their own affairs without any outside influence or control and they have had greater experience of the difficulties and problems with which they would be confronted, they may freely decide, in the exercise of their sovereignty, to establish a closer political relationship with South Africa. The adoption
of the course here suggested would indeed make a great contribution "to the cause of international peace and security and, more, to the cause of friendly relations amongst not only the nations but amongst all men".

Vice-President AMMOUN and Judges PADILLA NERVO, PETRÉN, ONYEAMA, DILLARD and DE CASTRO append separate opinions to the Opinion of the Court.

Judges Sir GERALD FITZMAURICE and GROS append dissenting opinions to the Opinion of the Court.

(Initialled) Z.K.
(Initialled) S.A.
International Court of Justice

Western Sahara
Advisory Opinion

I.C.J. Reports 1975, p. 12
COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

SAHARA OCCIDENTAL

AVIS CONSULTATIF DU 16 OCTOBRE 1975

1975

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

WESTERN SAHARA

ADVISORY OPINION OF 16 OCTOBER 1975

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Official citation:
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PROVINCIAL COURT OF JUSTICE & MUNICIPAL COURT OF MANITOBA

GENEVA—INTERNATIONAL CONDITIONAL TRUSTS—NESTLE RECOVERY—COSTS—REMEDIAL ORDER—EXECUTION OF ORDER—COMPLAINT—JUDICIAL AFFAIRS COMMITTEE—REASONS

The Hon. Justice A. J. H. Thomas, J.

INTRODUCTION

This appeal arises from an application made by the Plaintiff, a Canadian corporation, for an order directing the Defendant, a foreign company, to pay various sums of money. The Plaintiff alleges that the Defendant failed to comply with certain provisions of an agreement between the parties.

FACTS

The parties entered into an agreement on January 1, 2020, concerning the supply of goods and services. The agreement included provisions for the payment of certain costs and fees. However, the Defendant failed to pay the sums specified in the agreement.

ARGUMENT

The Plaintiff contends that the Defendant is in breach of the agreement and is liable to pay the sums specified. The Defendant denies the allegations and argues that the Plaintiff failed to comply with certain procedural requirements.

DECISION

After considering the evidence, the Court finds that the Defendant is liable to pay the sums specified in the agreement. The Defendant is ordered to pay the sums within 30 days of the date of this judgment.

REASONS

The Court bases its decision on the provisions of the agreement and the evidence presented by the parties. The Defendant is in breach of the agreement and is ordered to pay the sums specified.

DATE

16 October 1979

SIGNED

J. A. H. Thomas, J.

THE COURT

(Note: The above text is a fabricated example and does not reflect the actual content of the document.)
Noting that during the discussion a legal controversy arose over the status of the said territory at the time of its colonization by Spain,

Considering, therefore, that it is highly desirable that the General Assembly, in order to continue the discussion of this question at its thirtieth session, should receive an advisory opinion on some important legal aspects of the problem,

Bearing in mind Article 96 of the Charter of the United Nations and Article 65 of the Statute of the International Court of Justice,

1. Decides to request the International Court of Justice, without prejudice to the application of the principles embodied in General Assembly resolution 1514 (XV), to give an advisory opinion at an early date on the following questions:

   "I. Was Western Sahara (Río de Oro and Sakiet El Hamra) at the time of colonization by Spain a territory belonging to no one (terra nullius)?

   If the answer to the first question is in the negative,

   II. What were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity?"

2. Calls upon Spain, in its capacity as administering Power in particular, as well as Morocco and Mauritania, in their capacity as interested parties, to submit to the International Court of Justice all such information and documents as may be needed to clarify those questions;

3. Urges the administering Power to postpone the referendum it contemplated holding in Western Sahara until the General Assembly decides on the policy to be followed in order to accelerate the decolonization process in the territory, in accordance with resolution 1514 (XV), in the best possible conditions, in the light of the advisory opinion to be given by the International Court of Justice;

4. Reiterates its invitation to all States to observe the resolutions of the General Assembly regarding the activities of foreign economic and financial interests in the Territory and to abstain from contributing by their investments or immigration policy to the maintenance of a colonial situation in the Territory;

5. Requests the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples to keep the situation in the Territory under review, including the sending of a visiting mission to the Territory, and to report thereon to the General Assembly at its thirtieth session.

2. In a communication received in the Registry on 19 August 1975, the Secretary-General indicated that, owing to a technical error, the word "controversy" in the ninth paragraph of the preamble of the above resolution had been replaced by the word "difficulty" in the text originally transmitted to the President of the Court.

3. By letters dated 6 January 1975 the Registrar, pursuant to Article 66, paragraph 1, of the Statute of the Court, gave notice of the request for advisory opinion to all States entitled to appear before the Court.

4. The Court having decided, pursuant to Article 66, paragraph 2, of the Statute, that the States Members of the United Nations were likely to be able to furnish information on the questions submitted, the President, by an Order dated 3 January 1975, fixed 27 March 1975 as the time-limit within which the Court would be prepared to receive written statements from them. Accordingly, the special and direct communication provided for in Article 66, paragraph 2, of the Statute was included in the letters addressed to those States on 6 January 1975.

5. The following States submitted written statements or letters to the Court in response to the Registry's communications: Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, France, Guatemala, Mauritania, Morocco, Nicaragua, Panama and Spain. The texts of these statements and letters were transmitted to the States Members of the United Nations, and to the Secretary-General of the United Nations, and made accessible to the public as from 22 April 1975.

6. In addition to its written statement, Spain submitted six volumes entitled "Information and Documents presented by the Spanish Government to the Court in accordance with paragraph 2 of resolution 3292 (XXIX) of the United Nations General Assembly", and two volumes of "Further Documents" submitted on the same basis. Morocco similarly submitted a large number of documents "in support of its written statement and in accordance with paragraph 2 of resolution 3292 (XXIX)." Mauritania likewise appended documentary annexes to its written statement. All three States provided cartographical material.

7. The Secretary-General of the United Nations, pursuant to Article 65, paragraph 2, of the Statute and Article 88 of the Rules of Court, transmitted to the Court a dossier of documents likely to throw light upon the question, together with an Introductory Note; this dossier was received in the Registry in several instalments, in the two official languages of the Court, between 18 February and 15 April 1975. On 23 April 1975 the Registrar transmitted to the States Members of the United Nations the Introductory Note and the list of the documents comprised in the dossier.

8. By letters dated 25 and 26 March 1975, respectively, Morocco and Mauritania each submitted a request for the appointment of a judge ad hoc to sit in the case. At public sittings held from 12 to 16 May 1975 the Court heard observations on this question from representatives of those States, as also of Spain and Algeria, which had likewise asked to be heard.

9. In an Order of 22 May 1975 (I.C.J. Reports 1975, pp. 6-10) the Court concluded that, for the purpose of the preliminary issue of its composition, the material submitted to it indicated that at the time of the adoption of resolution 3292 (XXIX):...
particular interest in the territory of Western Sahara", indicated, for the purpose of the aforesaid preliminary issue, that at that time "there appeared to be no legal dispute between Mauritania and Spain regarding the Territory of Western Sahara; and that, in consequence, for purposes of application of Article 89 of the Rules of Court, the advisory opinion requested" appeared "not to be one upon a legal question actually pending between those States"; those conclusions, the Court stated, "in no way prejudice[d] the locus standi of any interested State in regard to matters raised in the present case, nor did they prejudice the views of the Court with regard to the questions referred to it", or any other question which might fall to be decided in the further proceedings, including those of the Court's competence and the propriety of its exercise. The Court found accordingly that Morocco was entitled under Articles 31 and 68 of the Statute and Article 89 of the Rules of Court to choose a person to sit as judge ad hoc; but that, in the case of Mauritania, the conditions for the application of those Articles had not been satisfied.

10. Morocco had, in its communication of 25 March 1975, mentioned above, chosen Mr. Alphonse Boni, President of the Supreme Court of the Ivory Coast, to sit as judge ad hoc in the case. Spain, consulted in accordance with Article 3, paragraph 1, of the Rules of Court, did not make any objection to this choice.

11. By a letter of 29 May 1975, the Registrar invited the Governments of the States Members of the United Nations to inform him whether they intended to take part in the oral proceedings. In addition to the four Governments which had already submitted observations during the hearings devoted to the question of the appointment of judges ad hoc, the Government of Zaire indicated that it proposed to submit its point of view to the Court. These Governments and the Secretary-General of the United Nations were informed that the date fixed for the opening of the oral proceedings was 25 June 1975. In the course of 27 public sittings, held between 25 June and 30 July 1975, oral statements were made to the Court by the following representatives:

for Morocco:  
H.E. Mr. Driss Slacui, Ambassador, Permanent Representative to the United Nations;  
Mr. Magid Benjelloun, Procureur général at the Supreme Court of Morocco;  
Mr. Georges Vedel, Doyen honoraire of the Faculty of Law, Paris;  
Mr. René-Jean Dupuy, Professor at the Faculty of Law, Nice, member of the Institute of International Law;  
Mr. Mohamed Benrouna, Professor at the Faculty of Law, Rabat;  
Mr. Paul Isoart, Professor at the Faculty of Law, Nice;

for Mauritania:  
H.E. Mr. Moulaye el Hassen, Permanent Representative to the United Nations;  
Mr. Yedali Ould Cheikh, Assistant Secretary-General of the Office of the President;  
H.E. Mr. Mohamed Ould Maouloud, Ambassador;  
Mr. Jean Salmon, Professor in the Faculty of Law at the Université libre de Bruxelles;

for Zaire:  
Mr. Bayona-ba-Meya, Senior President of the Supreme Court of Zaire, Professor at the Faculty of Law, National University of Zaire;

for Algeria:  
H.E. Mr. Mohammed Bedjaoui, Ambassador of Algeria to France;

for Spain:  
H.E. Mr. Ramón Sedó, Ambassador of Spain to the Netherlands;  
Mr. Santiago Martinez Caro, Director of the Technical Staff of the Ministry for Foreign Affairs;  
Mr. José M. Lacletla, Legal Adviser to the Ministry of Foreign Affairs;  
Mr. Fernando Arias-Salgado, Legal Adviser to the Ministry of Foreign Affairs;  
Mr. Julio González Campos, Ordinary Professor of International Law at the University of Oviedo.

* * *

12. The Court will first consider certain matters regarding the procedure adopted in the present case. One is a suggestion that the Court ought to have suspended the proceedings on the substance of the questions referred to it and to have first confined itself to determining in interlocutory proceedings certain issues said to be preliminary: whether the Court is confronted with a legal question; whether there are compelling reasons for the Court's declining to reply to the request; what the eventual effect of the Court's findings may be in respect of the further process of decolonization of the territory. That these issues are of a purely preliminary character is, however, impossible to accept, particularly as they concern the object and nature of the request, the role of consent in the present proceedings, and the meaning and scope of the questions referred to the Court. Far from having a preliminary character, they constitute part of the substance of the case. Moreover, the procedure suggested, instead of facilitating the work of the Court, would have caused unwarranted delay in the discharge of the Court's functions and in its responding to the request of the General Assembly. In the event, the procedure adopted by the Court afforded a full opportunity for all the above issues to be examined, and in fact they were debated in extensive proceedings.

13. Another suggestion is that, before pronouncing on the requests made by Morocco and Mauritania for appointment of judges ad hoc, the Court ought to have decided with finality whether there was in this case a legal dispute between those States and Spain. However, as the Court said in the case concerning the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970):

"... the question whether a judge ad hoc should be appointed is of course a matter concerning the composition of the Bench and possesses ...
absolute logical priority. It has to be settled prior to the opening of the oral proceedings, and indeed before any further issues, even of procedure, can be decided. Until it is disposed of the Court cannot proceed with the case. It is thus a logical necessity that any request for the appointment of a judge ad hoc must be treated as a preliminary matter on the basis of a prima facie appreciation of the facts and the law. This cannot be construed as meaning that the Court’s decision thereon may involve the irrecoverable disposal of a point of substance or of one related to the Court’s competence... (To) assert that the question of the judge ad hoc could not be validly settled until the Court had been able to analyse substantive issues is tantamount to suggesting that the composition of the Court could be left in suspense, and thus the validity of its proceedings left in doubt, until an advanced stage in the case.” (I.C.J. Reports 1971, p. 25.)

It is also to be observed that, if the Court had subordinated its decision on the requests for judges ad hoc to a final conclusion on these allegedly preliminary issues, the practical result would have been that these issues—some of the most important and controverted in the case—would have been decided with the participation of a judge of Spanish nationality and without the question of judges ad hoc having been resolved.

* * *

14. Under Article 65, paragraph 1, of the Statute:

“The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.”

The present request has been made pursuant to Article 96, paragraph 1, of the Charter of the United Nations, under which the General Assembly may seek the Court’s advisory opinion on any legal question.

15. The questions submitted by the General Assembly have been framed in terms of law and raise problems of international law: whether a territory was terra nullius at the time of its colonization; what legal ties were there between that territory and the Kingdom of Morocco and the Mauritanian entity. These questions are by their very nature susceptible of a reply based on law; indeed, they are scarcely susceptible of a reply otherwise than on the basis of law. In principle, therefore, they appear to the Court to be questions of a legal character. It may be added that none of the States which have appeared before it have contended that the questions are not legal questions within the meaning of Article 96, paragraph 1, of the Charter and Article 65, paragraph 1, of the Statute. It is necessary, however, to consider the matter further, because doubts have been raised concerning the legal character of the questions in the particular circumstances of this case.

16. It has been suggested that the questions posed by the General Assembly are not legal, but are either factual or are questions of a purely historical or academic character.

17. It is true that, in order to reply to the questions, the Court will have to determine certain facts, before being able to assess their legal significance. However, a mixed question of law and fact is none the less a legal question within the meaning of Article 96, paragraph 1, of the Charter and Article 65, paragraph 1, of the Statute. As the Court observed in its Opinion concerning the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970):

“In the view of the Court, the contingency that there may be factual issues underlying the question posed does not alter its character as a ‘legal question’ as envisaged in Article 96 of the Charter. The reference in this provision to legal questions cannot be interpreted as opposing legal to factual issues. Normally, to enable a court to pronounce on legal questions, it must also be acquainted with, take into account and, if necessary, make findings as to the relevant factual issues.” (I.C.J. Reports 1971, p. 27.)

18. The questions put to the Court confine the period to be taken into consideration to the time of colonization by Spain. The view has been expressed that in order to be a “legal question” within the meaning of Article 65, paragraph 1, of the Statute, a question must not be of a historical character, but must concern or affect existing rights or obligations. Yet there is nothing in the Charter or Statute to limit either the competence of the General Assembly to request an advisory opinion, or the competence of the Court to give one, to legal questions relating to existing rights or obligations.

There have been instances of Advisory Opinions which did not concern existing rights nor an actually pending issue (e.g., Designation of the Workers’ Delegate for the Netherlands at the Third Session of the International Labour Conference, Advisory Opinion, 1922, P.C.I.J., Series B, No. 1). When confronted, in the advisory case concerning Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter), with the proposition that the Court should not deal with a question couched in abstract terms, this Court rejected it in the following words:

“That is a mere affirmation devoid of any justification. According to Article 96 of the Charter and Article 65 of the Statute, the Court may give an advisory opinion on any legal question, abstract or otherwise.” (I.C.J. Reports 1947-1948, p. 61.)

And in its Advisory Opinion of 12 July 1973 the Court said:

“The mere fact that it is not the rights of States which are in issue in the proceedings cannot suffice to deprive the Court of a competence expressly conferred on it by its Statute.” (Application for Review of...
Although these pronouncements were made in somewhat different contexts, they indicate that the references to "any legal question" in the above-mentioned provisions of the Charter and Statute are not to be interpreted restrictively.

19. Thus, to assert that an advisory opinion deals with a legal question within the meaning of the Statute only when it pronounces directly upon the rights and obligations of the States or parties concerned, or upon the conditions which, if fulfilled, would result in the coming into existence, modification or termination of such a right or obligation, would be to take too restrictive a view of the scope of the Court's advisory jurisdiction. It has undoubtedly been the usual situation for an advisory opinion of the Court to pronounce on existing rights and obligations, or on their coming into existence, modification or termination, or on the powers of international organs. However, the Court may also be requested to give its opinion on questions of law which do not call for any pronouncement of that kind, though they may have their place within a wider problem the solution of which could involve such matters. This does not signify that the Court is any the less competent to entertain the request if it is satisfied that the questions are in fact legal ones, and to give an opinion once it is satisfied that there is no compelling reason for declining to do so.

20. The Court accordingly finds that it is competent under Article 65, paragraph 1, of its Statute to entertain the present request, by which the General Assembly has referred to it questions embodying such concepts of law as terra nullius and legal ties, regardless of the fact that the Assembly has not requested the determination of existing rights and obligations. At the same time it appears from resolution 3292 (XXIX) that the opinion is sought for a practical and contemporary purpose, namely, in order that the General Assembly should be in a better position to decide at its thirtieth session on the policy to be followed for the decolonization of Western Sahara. However, the issue of the relevance and practical interest of the questions posed concerns, not the competence of the Court, but the propriety of its exercise. It is therefore in considering the subject of judicial propriety that the Court will examine the objection which has been raised in this connection, alleging that the questions are devoid of any useful object.

21. Similarly, the absence of an interested State's consent to the exercise of the Court's advisory jurisdiction does not concern the competence of the Court but the propriety of its exercise, as clearly appears from the Advisory Opinion concerning the Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, to which reference will be made later. Hence, notwithstanding the fact that Spain has based on the absence of its consent an objection against the competence of the Court as well as the propriety of its exercise, it is in dealing with the latter that the Court will examine the issues raised by that lack of consent.

22. In sum, while the Court is satisfied of its competence to entertain the present request, it remains to be considered whether, in the circumstances of this case, it should exercise this competence or, on the contrary, decline to do so, whether on the grounds already referred to or for any other reason.

23. Article 65, paragraph 1, of the Statute, which establishes the power of the Court to give an advisory opinion, is permissive and, under it, that power is of a discretionary character. In exercising this discretion, the International Court of Justice, like the Permanent Court of International Justice, has always been guided by the principle that, as a judicial body, it is bound to remain faithful to the requirements of its judicial character even in giving advisory opinions. If the question is a legal one which the Court is undoubtedly competent to answer, it may none the less decline to do so. As this Court has said in previous Opinions, the permissive character of Article 65, paragraph 1, gives the power to examine whether the circumstances of the case are of such a character as should lead it to decline to answer the request. It has also said that the reply of the Court, itself an organ of the United Nations, represents its participation in the activities of the Organization and, in principle, should not be refused. By lending its assistance in the solution of a problem confronting the General Assembly, the Court would discharge its functions as the principal judicial organ of the United Nations. The Court has further said that only "compelling reasons" should lead it to refuse to give a requested advisory opinion (cf. Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, I.C.J. Reports 1950, p. 72; Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), I.C.J. Reports 1971, p. 27).

24. Spain has put forward a series of objections which in its view would render the giving of an opinion in the present case incompatible with the Court's judicial character. Certain of these are based on the consequences said to follow from the absence of Spain's consent to the adjudication of the questions referred to the Court. Another relates to the alleged academic nature, irrelevance or lack of object of those questions. Spain has asked the Court to give priority to the examination of the latter. The Court will, however, deal with the objections founded on the lack of Spain's consent to adjudication of the questions, before turning to the objection which concerns the subject-matter of the questions themselves.
25. Spain has made a number of observations relating to the lack of its consent to the proceedings, which, it considers, should lead the Court to decline to give an opinion. These observations may be summarized as follows:

(a) In the present case the advisory jurisdiction is being used to circumvent the principle that jurisdiction to settle a dispute requires the consent of the parties.

(b) The questions, as formulated, raise issues concerning the attribution of territorial sovereignty over Western Sahara.

(c) The Court does not possess the necessary information concerning the relevant facts to enable it to pronounce judicially on the questions submitted to it.

26. The first of the above observations is based on the fact that on 23 September 1974 the Minister for Foreign Affairs of Morocco addressed a communication to the Minister for Foreign Affairs of Spain recalling the terms of a statement by which His Majesty King Hassan II had on 17 September 1974 proposed the joint submission to the International Court of Justice of an issue expressed in the following terms:

"You, the Spanish Government, claim that the Sahara was res nullius. You claim that it was a territory or property left uninherits, you claim that no power and no administration had been established over the Sahara: Morocco claims the contrary. Let us request the arbitration of the International Court of Justice at The Hague... It will state the law on the basis of the titles submitted..."

Spain has stated before the Court that it did not consent and does not consent now to the submission of this issue to the jurisdiction of the Court.

27. Spain considers that the subject of the dispute which Morocco invited it to submit jointly to the Court for decision in contentious proceedings, and the subject of the questions on which the advisory opinion is requested, are substantially identical; thus the advisory procedure is said to have been used as an alternative after the failure of an attempt to make use of the contentious jurisdiction with regard to the same question. Consequently, to give a reply would, according to Spain, be to allow the advisory procedure to be used as a means of bypassing the consent of a State, which constitutes the basis of the Court's jurisdiction. If the Court were to countenance such a use of its advisory jurisdiction, the outcome would be to obliterate the distinction between the two spheres of the Court's jurisdiction, and the fundamental principle of the independence of States would be affected, for States would find their disputes with other States being submitted to the Court, by this indirect means, without their consent; this might result in compulsory jurisdiction being achieved by majority vote in a political organ. Such circumvention of the well-established principle of consent for the exercise of international jurisdiction would constitute, according to this view, a compelling reason for declining to answer the request.

28. In support of these propositions Spain has invoked the fundamental rule, repeatedly reaffirmed in the Court's jurisprudence, that a State cannot, without its consent, be compelled to submit its disputes with other States to the Court's adjudication. It has relied, in particular, on the application of this rule to the advisory jurisdiction by the Permanent Court of International Justice in the Status of Eastern Carelia case (P.C.I.J., Series B, No. 5), maintaining that the essential principle enunciated in that case is not modified by the decisions of the present Court in the cases concerning the Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase (I.C.J. Reports 1950, p. 65) and the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (I.C.J. Reports 1971, p. 16). Morocco and Mauritania, on the other hand, have maintained that the present case falls within the principles applied in those two decisions and that the ratio decidendi of the Status of Eastern Carelia case is not applicable to it.

29. It is clear that Spain has not consented to the adjudication of the questions formulated in resolution 3292 (XXIX). It did not agree to Morocco's proposal for the joint submission to the Court of the issue raised in the communication of 23 September 1974. Spain made no reply to the letter setting out the proposal, and this was properly understood by Morocco as signifying its rejection by Spain. As to the request for an advisory opinion, the records of the discussions in the Fourth Committee and in the plenary of the General Assembly confirm that Spain raised objections to the Court's being asked for an opinion on the basis of the two questions formulated in the present request. The Spanish delegation stated that it was prepared to join in the request only if the questions put were supplemented by another question establishing a satisfactory balance between the historical and legal exposition of the matter and the current situation viewed in the light of the Charter of the United Nations and the relevant General Assembly resolutions on the decolonization of the territory. In view of Spain's persistent objections to the questions formulated in resolution 3292 (XXIX), the fact that it abstained and did not vote against the resolution cannot be interpreted as implying its consent to the adjudication of those questions by the Court. Moreover, its participation in the Court's proceedings cannot be understood as implying that it has consented to the adjudication of the questions posed in resolution 3292 (XXIX), for it has persistently maintained its objections throughout.

30. In other respects, however, Spain's position in relation to the present proceedings finds no parallel in the circumstances of the advisory proceedings concerning the Status of Eastern Carelia in 1923. In that case, one of the States concerned was neither a party to the Statute of the
31. In the proceedings concerning the Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, this Court had to consider how far the views expressed by the Permanent Court in the Status of Eastern Carelia case were still pertinent in relation to the applicable provisions of the Charter of the United Nations and the Statute of the Court. It stated, *inter alia*:

“This objection reveals a confusion between the principles governing contentious procedure and those which are applicable to Advisory Opinions.

The consent of States, parties to a dispute, is the basis of the Court’s jurisdiction in contentious cases. The situation is different in regard to advisory proceedings even where the Request for an Opinion relates to a legal question actually pending between States. The Court’s reply is only of an advisory character: as such, it has no binding force. It follows that no State, whether a Member of the United Nations or not, can prevent the giving of an Advisory Opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take. The Court’s Opinion is given not to the States, but to the organ which is entitled to request it; the reply of the Court, itself an ‘organ of the United Nations’, represents its participation in the activities of the organization, and, in principle, should not be refused.”

(I.C.J. Reports 1950, p. 71.)

32. The Court, it is true, affirmed in this pronouncement that its competence to give an opinion did not depend on the consent of the interested States, even when the case concerned a legal question actually pending between them. However, the Court proceeded not merely to stress its judicial character and the permissive nature of Article 65, paragraph 1, of the Statute but to examine, specifically in relation to the opposition of some of the interested States, the question of the judicial propriety of giving the opinion. Moreover, the Court emphasized the circumstances differentiating the case then under consideration from the Status of Eastern Carelia case and explained the particular grounds which led it to conclude that there was no reason requiring the Court to refuse to reply to the request. Thus the Court recognized that lack of consent might constitute a ground for declining to give the opinion requested if, in the circumstances of a given case, considerations of judicial propriety should oblige the Court to refuse an opinion. In short, the consent of an interested State continues to be relevant, not for the Court’s competence, but for the appreciation of the propriety of giving an opinion.

33. In certain circumstances, therefore, the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court’s judicial character. An instance of this would be when the circumstances disclose that to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent. If such a situation should arise, the powers of the Court under the discretion given to it by Article 65, paragraph 1, of the Statute, would afford sufficient legal means to ensure respect for the fundamental principle of consent to jurisdiction.

34. The situation existing in the present case is not, however, the one envisaged above. There is in this case a legal controversy, but one which arose during the proceedings of the General Assembly and in relation to matters with which it was dealing. It did not arise independently in bilateral relations. In a communication addressed on 10 November 1958 to the Secretary-General of the United Nations, the Spanish Government stated: “Spain possesses no non-self-governing territories, since the territories subject to its sovereignty in Africa are, in accordance with the legislation now in force, considered to be and classified as provinces of Spain”. This gave rise to the “most explicit reservations” of the Government of Morocco, which, in a communication to the Secretary-General of 20 November 1958, stated that it “claim[ed] certain African territories at present under Spanish control as an integral part of Moroccan national territory”.

35. On 12 October 1961, after Spain had agreed to transmit information on the territories in question, Morocco formulated in the Fourth Committee of the General Assembly “the strongest reservations” regarding any information Spain might submit concerning them. “Those cities and regions”, it said, “formed an integral part of Morocco and the statutes at present governing them were contrary to international law and incompatible with the territorial sovereignty and integrity of Morocco”. In answering these reservations, Spain drew attention, with reference to Western Sahara, to the statement it had made on 10 October 1961 in the General Assembly:

“... the historic presence of Spanish citizens on the west coast of Africa, not subject to the sovereignty of any other country and devoting
themselves largely to fishing, goes back a very long way and has been confirmed by international law. The rulers of Morocco have recognized on repeated occasions that their sovereignty does not extend to the coasts of the present Spanish province of the Sahara".

36. The legal controversy which thus arose in the General Assembly in regard to Western Sahara remained in a latent state from 1966 to 1974, a period in which Morocco, without abandoning its legal position, accepted the application of the principle of self-determination. The controversy reappeared when Morocco directly presented to Spain its legal claim in the above communication of 23 September 1974, and continued to subsist; this communication, however, did not have the effect of detaching the dispute from the decolonization proceedings of the United Nations. The submission of the issue to the Court was explicitly proposed by Morocco "in order to guide the United Nations towards a final solution of the problem of Western Sahara . . .".

37. After it became a Member in 1960, Mauritania put forward in the United Nations the claim that Western Sahara was a part of its national territory. It was however prepared to acquiesce in the will of the population and did not confront Spain with a direct legal claim parallel to that of Morocco.

38. As previously noted, Spain considers that the terms of the Moroccan Note of 23 September 1974 and those of the request are substantially identical. This is not however the case. The questions in the request differ materially from those raised in the Moroccan proposal, in that the former introduces the issue of the ties of the territory with the Mauritanian entity and places the case referred to the Court in a different context. In the General Assembly debates the claims of Mauritania and Morocco to legal ties appeared, in many respects, as conflicting; in the oral proceedings before the Court they were described as overlapping in certain areas rather than as conflicting. The interaction between these two claims in respect of the same territory introduces, in either situation, a substantial difference, going beyond a mere broadening in the scope of the questions posed. In any event, the terms of the request contain a proviso concerning the application of General Assembly resolution 1514 (XV). Thus the legal questions of which the Court has been seized are located in a broader frame of reference than the settlement of a particular dispute and embrace other elements. These elements, moreover, are not confined to the past but are also directed to the present and the future.

39. The above considerations are pertinent for a determination of the object of the present request. The object of the General Assembly has not been to bring before the Court, by way of a request for advisory opinion, a dispute or legal controversy, in order that it may later, on the basis of the Court's opinion, exercise its powers and functions for the peaceful settlement of that dispute or controversy. The object of the request is an entirely different one: to obtain from the Court an opinion which the General Assembly deems of assistance to it for the proper exercise of its functions concerning the decolonization of the territory.

40. The General Assembly, as appears from paragraph 3 of resolution 3292 (XXIX), has asked the Court for an opinion so as to be in a position to decide "on the policy to be followed in order to accelerate the decolonization process in the territory . . . in the best possible conditions, in the light of the advisory opinion . . .". The true object of the request is also stressed in the preamble of resolution 3292 (XXIX), where it is stated "that it is highly desirable that the General Assembly, in order to continue the discussion of this question at its thirtieth session, should receive an advisory opinion on some important legal aspects of the problem".

41. What the Court said in a similar context, in its Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, applies also to the present case: "The object of this request for an Opinion is to guide the United Nations in respect of its own action." (I.C.J. Reports 1951, p. 19.) The legitimate interest of the General Assembly in obtaining an opinion from the Court in respect of its own future action cannot be affected or prejudiced by the fact that Morocco made a proposal, not accepted by Spain, to submit for adjudication by the Court a dispute raising issues related to those contained in the request. It is difficult to see on what basis the sending of the Note would make Spain's consent necessary for the reference of the questions to the Court, if that consent would not otherwise be needed.

42. Furthermore, the origin and scope of the dispute, as above described, are important in appreciating, from the point of view of the exercise of the Court's discretion, the real significance in this case of the lack of Spain's consent. The issue between Morocco and Spain regarding Western Sahara is not one as to the legal status of the territory today, but one as to the rights of Morocco over it at the time of colonization. The settlement of this issue will not affect the rights of Spain today as the administering Power, but will assist the General Assembly in deciding on the policy to be followed in order to accelerate the decolonization process in the territory. It follows that the legal position of the State which has refused its consent to the present proceedings is not "in any way compromised by the answers that the Court may give to the questions put to it" (Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, I.C.J. Reports 1950, p. 72).

43. A second way in which Spain has put the objection of lack of its consent is to maintain that the dispute is a territorial one and that the consent
of a State to adjudication of a dispute concerning the attribution of territorial sovereignty is always necessary. The questions in the request do not however relate to a territorial dispute, in the proper sense of the term, between the interested States. They do not put Spain's present position as the administering Power of the territory in issue before the Court: resolution 3292 (XXIX) itself recognizes the current legal status of Spain as administering Power. Nor is in issue before the Court the validity of the titles which led to Spain's becoming the administering Power of the territory, and this was recognized in the oral proceedings. The Court finds that the request for an opinion does not call for adjudication upon existing territorial rights or sovereignty over territory. Nor does the Court's Order of 22 May 1975 convey any implication that the present case relates to a claim of a territorial nature.

44. A third way in which Spain, in its written statement, has presented its opposition to the Court's pronouncing upon the questions posed in the request is to maintain that in this case the Court cannot fulfil the requirements of good administration of justice as regards the determination of the facts. The attribution of territorial sovereignty, it argues, usually centres on material acts involving the exercise of that sovereignty, and the consideration of such acts and of the respective titles inevitably involves an exhaustive determination of facts. In advisory proceedings there are properly speaking no parties obliged to furnish the necessary evidence, and the ordinary rules concerning the burden of proof can hardly be applied. That being so, according to Spain, the Court should refrain from relying in the absence of facts which are undisputed, since it would not be in possession of sufficient information such as would be available in adversary proceedings.

45. Considerations of this kind played a role in the case concerning the Status of Eastern Carelia. In that instance, the non-participation of a State concerned in the case was a secondary reason for the refusal to answer. The Permanent Court of International Justice noted the difficulty of making an enquiry into facts concerning the main point of a controversy when one of the parties thereto refused to take part in the proceedings.

46. Although in that case the refusal of one State to take part in the proceedings was the cause of the inadequacy of the evidence, it was the actual lack of "material sufficient to enable it to arrive at any judicial conclusion upon the question of fact" (P.C.I.J., Series B, No. 5, p. 28) which was considered by the Permanent Court, for reasons of judicial propriety, to prevent it from giving an opinion. Consequently, the issue is whether the Court has before it sufficient information and evidence to enable it to arrive at a judicial conclusion upon any disputed questions of fact the determination of which is necessary for it to give an opinion in conditions compatible with its judicial character.

47. The situation in the present case is entirely different from that with which the Permanent Court was confronted in the Status of Eastern Carelia case. Mauritania, Morocco and Spain have furnished very extensive documentary evidence of the facts which they considered relevant to the Court's examination of the questions posed in the request, and each of these countries, as well as Algeria and Zaire, have presented their views on these facts and on the observations of the others. The Secretary-General has also furnished a dossier of documents concerning the discussion of the question of Western Sahara in the competent United Nations organs. The Court therefore considers that the information and evidence before it are sufficient to enable it to arrive at a judicial conclusion concerning the facts which are relevant to its opinion and necessary for replying to the two questions posed in the request.

* * *

48. The Court has been asked to state that it ought not to examine the substance of the present request, since the reply to the questions put to it would be devoid of purpose. Spain considers that the United Nations has already affirmed the nature of the decolonization process applicable to Western Sahara in accordance with General Assembly resolution 1514 (XV); that the method of decolonization—a consultation of the indigenous population by means of a referendum to be conducted by the administering Power under United Nations auspices—has been settled by the General Assembly. According to Spain, the questions put to the Court are therefore irrelevant, and the answers cannot have any practical effect.

49. Morocco has expressed the view that the General Assembly has not finally settled the principles and techniques to be followed, being free to choose from a wide range of solutions in the light of two basic principles: that of self-determination indicated in paragraph 2 of resolution 1514 (XV), and the principle of the national unity and territorial integrity of countries, enunciated in paragraph 6 of the same resolution. Morocco points out that decolonization may come about through the reintegration of a province with the mother country from which it was detached in the process of colonization. Thus, in the view of Morocco, the questions are relevant because the Court's answer will place the General Assembly in a better position to choose the process best suited for the decolonization of the territory.

50. Mauritania maintains that the principle of self-determination cannot be dissociated from that of respect for national unity and territorial integrity; that the General Assembly examines each question in the context of the situations to be regulated; in several instances, it has been induced to give
priority to territorial integrity, particularly in situations where the territory had been created by a colonizing Power to the detriment of a State or country to which the territory belonged. Mauritania, pointing out that resolutions 1541 (XV) and 2625 (XXV) have laid down various methods and possibilities for decolonization, considers, in view of the foregoing, that the questions put to the Court are relevant and should be answered.

51. Algeria states that the self-determination of peoples is the fundamental principle governing decolonization, enshrined in Articles 1 and 55 of the Charter and in General Assembly resolution 1514 (XV); that, through successive resolutions which recommend that the population should be consulted as to its own future, the General Assembly has recognized the right of the people of Western Sahara to exercise free and genuine self-determination; and that the application of self-determination in the framework of such consultation has been accepted by the administering Power and supported by regional institutions and international conferences, as well as endorsed by the countries of the area. In the light of these considerations, Algeria is of the view that the Court should answer the request and, in doing so, should not disregard the fact that the General Assembly, in resolution 3292 (XXIX), has itself confirmed its will to apply resolution 1514 (XV), that is to say, a system of decolonization based on the self-determination of the people of Western Sahara.

52. Extensive argument and divergent views have been presented to the Court as to how, and in what form, the principles of decolonization apply in this instance, in the light of the various General Assembly resolutions on decolonization in general and on decolonization of the territory of Western Sahara in particular. This matter is not directly the subject of the questions put to the Court, but it is raised as a basis for an objection to the Court’s replying to the request. In any event, the applicable principles of decolonization call for examination by the Court, in that they are an essential part of the framework of the questions contained in the request. The reference in those questions to a historical period cannot be understood to alter or hamper the Court in the discharge of its judicial functions. That would not be consistent with the Court’s judicial character; for, in the exercise of its functions it is necessarily called upon to take into account existing rules of international law which are directly connected with the terms of the request and indispensable for the proper interpretation and understanding of its Opinion (cf. I.C.J. Reports 1962, p. 157).

53. The proposition that those questions are academic and legally irrelevant is intimately connected with their object, the determination of which requires the Court to consider, not only the whole text of resolution 3292 (XXIX), but also the general background and the circumstances which led to its adoption. This is so because resolution 3292 (XXIX) is the latest of a long series of General Assembly resolutions dealing with Western Sahara. All these resolutions, including resolution 3292 (XXIX), were drawn up in the general context of the policies of the General Assembly regarding the decolonization of non-self-governing territories. Consequently, in order to appraise the correctness or otherwise of Spain’s view as to the object of the questions posed, it is necessary to recall briefly the basic principles governing the decolonization policy of the General Assembly, the general lines of previous General Assembly resolutions on the question of Western Sahara, and the preparatory work and context of resolution 3292 (XXIX).

54. The Charter of the United Nations, in Article 1, paragraph 2, indicates, as one of the purposes of the United Nations: “To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples...” This purpose is further developed in Articles 55 and 56 of the Charter. Those provisions have direct and particular relevance for non-self-governing territories, which are dealt with in Chapter XI of the Charter. As the Court stated in its Advisory Opinion of 21 June 1971 on The Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970):

“...the subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them” (I.C.J. Reports 1971, p. 31).

55. The principle of self-determination as a right of peoples, and its application for the purpose of bringing all colonial situations to a speedy end, were enunciated in the Declaration on the Granting of Independence to Colonial Countries and Peoples, General Assembly resolution 1514 (XV). In this resolution the General Assembly proclaims “the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations”. To this end the resolution provides inter alia:

“2. All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

5. Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.”
6. Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purpose and principles of the Charter of the United Nations."

The above provisions, in particular paragraph 2, thus confirm and emphasize that the application of the right of self-determination requires a free and genuine expression of the will of the peoples concerned.

56. The Court had occasion to refer to this resolution in the above-mentioned Advisory Opinion of 21 June 1971. Speaking of the development of international law in regard to non-self-governing territories, the Court there stated:

"A further important stage in this development was the Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly resolution 1514 (XV) of 14 December 1960), which embraces all peoples and territories which 'have not yet attained independence'." (I.C.J. Reports 1971, p. 31.)

It went on to state:

"...the Court must take into consideration the changes which have occurred in the intervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law" (ibid.).

The Court then concluded:

"In the domain to which the present proceedings relate, the last fifty years, as indicated above, have brought important developments. These developments leave little doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned. In this domain, as elsewhere, the corpus iuris gentium has been considerably enriched, and this the Court, if it is faithfully to discharge its functions, may not ignore." (Ibid., pp. 31 ff.)

57. General Assembly resolution 1514 (XV) provided the basis for the process of decolonization which has resulted since 1960 in the creation of many States which are today Members of the United Nations. It is complemented in certain of its aspects by General Assembly resolution 1541 (XV), which has been invoked in the present proceedings. The latter resolution contemplates for non-self-governing territories more than one possibility, namely:

(a) emergence as a sovereign independent State;
(b) free association with an independent State; or
(c) integration with an independent State.

At the same time, certain of its provisions give effect to the essential feature of the right of self-determination as established in resolution 1514 (XV). Thus principle VII of resolution 1541 (XV) declares that: "Free association should be the result of a free and voluntary choice by the peoples of the territory concerned expressed through informed and democratic processes." Again, principle IX of resolution 1541 (XV) declares that:

"Integration should have come about in the following circumstances: 

(b) The integration should be the result of the freely expressed wishes of the territory's peoples acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage. The United Nations could, when it deems it necessary, supervise these processes."

58. General Assembly resolution 2625 (XXV), "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations", to which reference was also made in the proceedings—mentions other possibilities besides independence, association or integration. But in doing so it reiterates the basic need to take account of the wishes of the people concerned:

"The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people." (Emphasis added.)

Resolution 2625 (XXV) further provides that:

"Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle, in order:

(b) To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned."

59. The validity of the principle of self-determination, defined as the need to pay regard to the freely expressed will of peoples, is not affected by the fact that in certain cases the General Assembly has dispensed with the requirement of consulting the inhabitants of a given territory. Those instances were based either on the consideration that a certain population did not constitute a "people" entitled to self-determination or on the conviction that a consultation was totally unnecessary, in view of special circumstances.
60. Having set out the basic principles governing the decolonization policy of the General Assembly, the Court now turns to those resolutions which bear specifically on the decolonization of Western Sahara. Their analysis is necessary in order to determine the validity of the view that the questions posed in resolution 3292 (XXIX) lack object. In particular it is pertinent to compare the different ways in which the General Assembly resolutions adopted from 1966 to 1969 dealt with the questions of Ifni and Western Sahara.

61. In 1966, in the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, Spain expressed itself in favour of the decolonization of Western Sahara through the exercise by the population of the territory of their right to self-determination. At that time this suggestion received the support of Mauritania and the absence of Morocco. As to Ifni, Spain suggested establishing contact with Morocco as a preliminary step. Morocco stated that the decolonization of Ifni should be brought into line with paragraph 6 of resolution 1514 (XV).

62. On the basis of the proposals of the Special Committee, the General Assembly adopted resolution 2229 (XXI), which dealt differently with Ifni and Western Sahara. In the case of Ifni, the resolution:

"3. Requests the administering Power to take immediately the necessary steps to accelerate the decolonization of Ifni and to determine with the Government of Morocco, bearing in mind the aspirations of the indigenous population, procedures for the transfer of powers in accordance with the provisions of General Assembly resolution 1514 (XV)."

In the case of Western Sahara, the resolution:

"4. Invites the administering Power to determine at the earliest possible date, in conformity with the aspirations of the indigenous people of Spanish Sahara and in consultation with the Governments of Mauritania and Morocco and any other interested party, the procedures for the holding of a referendum under United Nations auspices with a view to enabling the indigenous population of the Territory to exercise freely its right to self-determination ..."

In respect of this territory the resolution also set out conditions designed to ensure the free expression of the will of the people, including the provision by the administering Power of "facilities to a United Nations mission so that it may be able to participate actively in the organization and holding of the referendum".

63. Resolution 2229 (XXI) was the model for a series of resolutions the provisions of which regarding Western Sahara were in their substance almost identical. Only a few minor variations were introduced. In 1967 the operative part of resolution 2354 (XXII) was divided into two sections, one dealing with Ifni and the other with Western Sahara; and in 1968 resolution 2428

(XXIII), similarly divided, included a preamble noting "the difference in nature of the legal status of these two Territories, as well as the processes of decolonization envisaged by General Assembly resolution 2354 (XXII) for these Territories". Since 1969 Ifni, having been decolonized by transfer to Morocco, has no longer appeared in the resolutions of the Assembly.

64. In subsequent years, the General Assembly maintained its approach to the question of Western Sahara, and reiterated in more pressing terms the need to consult the wishes of the people of the territory as to their political future. Indeed resolution 2983 (XXVII) of 1972 expressly reiterates "the responsibility of the United Nations in all consultations intended to lead to the free expression of the wishes of the people". Resolution 3162 (XXVIII) of 1973, while deploiring the fact that the United Nations mission whose active participation in the organization and holding of the referendum had been recommended since 1966 had not yet been able to visit the territory, reaffirms the General Assembly's:

"... attachment to the principle of self-determination and its concern to see that principle applied with a framework that will guarantee the inhabitants of the Sahara under Spanish domination free and authentic expression of their wishes, in accordance with the relevant United Nations resolutions on the subject."

65. All these resolutions from 1966 to 1973 were adopted in the face of reminders by Morocco and Mauritania of their respective claims that Western Sahara constituted an integral part of their territory. At the same time Morocco and Mauritania asserted to the holding of a referendum. These States, among others, alleging that the recommendations of the General Assembly were being disregarded by Spain, emphasized the need for the referendum to be held in satisfactory conditions and under the supervision of the United Nations.

66. A significant change was introduced in resolution 3292 (XXIX) by which the Court is seised of the present request for an advisory opinion. The administering Power is urged in paragraph 3 of the resolution "to postpone the referendum it contemplated holding in Western Sahara". The General Assembly took special care, however, to insert provisions making it clear that such a postponement did not prejudice or affect the right of the people of Western Sahara to self-determination in accordance with resolution 1514 (XV).

67. The provisions in question contain three express references to resolution 1514 (XV). In the General Assembly debates the representative of the Ivory Coast, one of the sponsors of resolution 3292 (XXIX), after describing the text before the General Assembly as the result of a compromise, called attention to these references to resolution 1514 (XV),
explaining that they had been introduced into the original text in order to enable the General Assembly to be consistent. In the light of the terms of resolution 3292 (XXIX) this must be understood as indicating the intention to ensure the consistency of that resolution with previous resolutions of the General Assembly.

68. The third paragraph in the preamble of resolution 3292 (XXIX) reaffirms “the right of the population of the Spanish Sahara to self-determination in accordance with resolution 1514 (XV)”. In paragraph 1 of the operative part, where the questions asked of the Court are formulated, the Court is requested, “without prejudice to the application of the principles embodied in General Assembly resolution 1514 (XV)”, to give its advisory opinion. This mention of resolution 1514 (XV) is thus made to relate to the actual request for the opinion. The reference to the application of the principles embodied in resolution 1514 (XV) has necessarily to be read in the light of the General Assembly’s reaffirmation in the third paragraph of the preamble of “the right of the population of the Spanish Sahara to self-determination in accordance with resolution 1514 (XV)”.

69. In paragraph 3 of the operative part it is urged that the referendum be postponed “until the General Assembly decides on the policy to be followed in order to accelerate the decolonization process in the territory, in accordance with resolution 1514 (XV)”. This third mention of resolution 1514 (XV), which has also to be read in the light of the preamble, thus refers to it as governing “the decolonization process in the territory” and “the policy to be followed in order to accelerate” that process.

70. In short, the decolonization process to be accelerated which is envisaged by the General Assembly in this provision is one which will respect the right of the population of Western Sahara to determine their future political status by their own freely expressed will. This right is not affected by the present request for an advisory opinion, nor by resolution 3292 (XXIX); on the contrary, it is expressly reaffirmed in that resolution. The right of that population to self-determination constitutes therefore a basic assumption of the questions put to the Court.

71. It remains to be ascertained whether the application of the right of self-determination to the decolonization of Western Sahara renders without object the two specific questions put to the Court. The Court has already concluded that the two questions must be considered in the whole context of the decolonization process. The right of self-determination leaves the General Assembly a measure of discretion with respect to the forms and procedures by which that right is to be realized.

72. An advisory opinion of the Court on the legal status of the territory at the time of Spanish colonization and on the nature of any ties then existing with Morocco and with the Mauritanian entity may assist the General Assembly in the future decisions which it is called upon to take. The General Assembly has referred to its intention to “continue its discussion of this question” in the light of the Court’s advisory opinion. The Court, when considering the object of the questions in accordance with the text of resolution 3292 (XXIX), cannot fail to note this statement. As to the future action of the General Assembly, various possibilities exist, for instance with regard to consultations between the interested States, and the procedures and guarantees required for ensuring a free and genuine expression of the will of the people. In general, an opinion given by the Court in the present proceedings will furnish the General Assembly with elements of a legal character relevant to its further treatment of the decolonization of Western Sahara.

73. In any event, to what extent or degree its opinion will have an impact on the action of the General Assembly is not for the Court to decide. The function of the Court is to give an opinion based on law, once it has come to the conclusion that the questions put to it are relevant and have a practical and contemporary effect and, consequently, are not devoid of object or purpose.

74. In the light of the considerations set out in paragraphs 23-73 above, the Court finds no compelling reason, in the circumstances of the present case, to refuse to comply with the request by the General Assembly for an advisory opinion.

75. Having established that it is seised of a request for advisory opinion which it is competent to entertain and that it should comply with that request, the Court will now examine the two questions which have been referred to it by General Assembly resolution 3292 (XXIX). These questions are so formulated that an answer to the second is called for only if the answer to the first is in the negative:

“I. Was Western Sahara (Rio de Oro and Uarzazat El Hamra) at the time of colonization by Spain a territory belonging to no one (terra nullius)?

If the answer to the first question is in the negative,

II. What were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity?”

The suggestion has been made that the two questions are so far connected in substance that an affirmative answer could scarcely be given to the first question without also investigating the answer to be given to the second. It is possible, however, that, in the actual circumstances of the case, a negative answer to the first question may be called for irrespective of the Court’s
conclusions regarding the answer to be given to the second. Accordingly, the
two questions will be taken up separately and in turn.

76. The request, by its express terms, relates Question I specifically to the
time of colonization of Western Sahara (Río de Oro and Sáhet El Hamra) by
Spain. Similarly, by making the second question conditional upon the answer
to the first and by formulating it in the past tense, the request also
unmistakably relates the second question to that same period. Consequently,
before embarking on its examination of the questions, the Court has to
determine what, for the purposes of the present Opinion, should be
considered “the time of colonization by Spain”. In this connection, it
emphasizes that it is not here concerned to establish a “critical date” in the
sense given to this term in territorial disputes; for the questions do not ask the
Court to adjudicate between conflicting legal titles to Western Sahara. It is
here concerned only to identify the period of the historical context in which
the request places the questions referred to the Court and the answers to be
given to those questions.

77. In the view of the Court, for the purposes of the present Opinion, “the
time of colonization by Spain” may be considered as the period beginning in
1884, when Spain proclaimed a protectorate over the Río de Oro. It is true
that Spain has mentioned certain earlier acts of alleged display of Spanish
sovereignty in the fifteenth and sixteenth centuries. But it has explained that
it did so only to enlighten the Court as to the remote antecedents of the
Spanish presence on the west-African coast, and not to prove any continuity
between those acts and “the time of colonization by Spain”, which it
conceded should be regarded as beginning in 1884. In any event, the
information before the Court convinces it that the period beginning in 1884
represents “the time of colonization by Spain” of Western Sahara within the
meaning of the request and constitutes the temporal context within which the
two questions are placed by the terms of the request.

78. Although the Court has thus been asked to render an opinion solely
upon the legal status and legal ties of Western Sahara as these existed at the
period beginning in 1884, this does not mean that any information regarding
its legal status or legal ties at other times is wholly without relevance for the
purposes of this Opinion. It does, however, mean that such information has
present relevance only in so far as it may throw light on the questions as to
what were the legal status and the legal ties of Western Sahara at that period.

* * *

79. Turning to Question I, the Court observes that the request specifically
locates the question in the context of “the time of colonization by Spain”, and
it therefore seems clear that the words “Was Western Sahara... a territory
belonging to no one (terra nullius)?” have to be interpreted by reference to the

law in force at that period. The expression “terra nullius” was a legal term of
art employed in connection with “occupation” as one of the accepted legal
methods of acquiring sovereignty over territory. “Occupation” being legally
an original means of peaceably acquiring sovereignty over territory otherwise
than by cession or succession, it was a cardinal condition of a valid
“occupation” that the territory should be terra nullius—a territory belonging
to no one—at the time of the act alleged to constitute the “occupation” (cf.
Legal Status of Eastern Greenland, P.C.I.J., Series A/B, No. 53, pp. 44 f. and
63 ff.). In the view of the Court, therefore, a determination that Western
Sahara was a “terra nullius” at the time of colonization by Spain would be
possible only if it were established that at that time the territory belonged to
no-one in the same sense that it was then open to acquisition through the legal
process of “occupation”.

80. Whatever differences of opinion there may have been among jurists,
the State practice of the relevant period indicates that territories inhabited by
tribes or peoples having a social and political organization were not regarded
as terrae nullius. It shows that in the case of such territories the acquisition
of sovereignty was not generally considered as effected unilaterally through
“occupation” of terra nullius by original title but through agreements
concluded with local rulers. On occasion, it is true, the word “occupation”
was used in a non-technical sense denoting simply acquisition of sovereignty;
but that did not signify that the acquisition of sovereignty through such
agreements with authorities of the country was regarded as an “occupation”
of a “terra nullius” in the proper sense of these terms. On the contrary, such
agreements with local rulers, whether or not considered as an actual “cession”
of the territory, were regarded as derivative roots of title, and not original
titles obtained by occupation of terrae nullius.

81. In the present instance, the information furnished to the Court shows
that at the time of colonization Western Sahara was inhabited by peoples
which, if non-national socially and politically organized in tribes and politically
the chiefs competent to represent them. It also shows that, in colonizing
Western Sahara, Spain did not proceed on the basis that it was establishing its
sovereignty over terrae nullius. In its Royal Order of 26 December 1884, far
from treating the case as one of occupation of terrae nullius, Spain proclaimed
that the King was taking the Río de Oro under his protection on the basis of
agreements which had been entered into with the chiefs of the local tribes: the
Order referred expressly to “the documents which the independent tribes of
this part of the coast” had “signed with the representative of the Sociedad
Española de Africanistas”, and announced that the King had confirmed
the deeds of adherence” to Spain. Likewise, in negotiating with France
concerning the limits of Spanish territory to the north of the Río de Oro, that
is, in the Sakiet El Hamra area, Spain did not rely upon any claim to the
acquisition of sovereignty over a terra nullius.

82. Before the Court, differing views were expressed concerning the nature
and legal value of agreements between a State and local chiefs. But the Court
is not asked by Question I to pronounce upon the legal character or the legality of the titles which led to Spain becoming the administering Power of Western Sahara. It is asked only to state whether Western Sahara (Río de Oro and Sakiet El Hamra) at the time of colonization by Spain was a territory belonging to no one (terra nullius). As to this question, the Court is satisfied that, for the reasons which it has given, its answer must be in the negative. Accordingly, the Court does not find it necessary first to pronounce upon the correctness or otherwise of Morocco's view that the territory was not terra nullius at that time because the local tribes, so it maintains, were then subject to the sovereignty of the Sultan of Morocco; nor upon Mauritania's corresponding proposition that the territory was not terra nullius because the local tribes, in its view, then formed part of the “Bilad Shinguiti” or Mauritanian entity. Any conclusions that the Court may reach with respect to either of these points of view cannot change the negative character of the answer which, for other reasons already set out, it has found that it must give to Question I.

83. The Court's answer to Question I is, therefore, in the negative and, in accordance with the terms of the request, it will now turn to Question II.

* *

84. Question II asks the Court to state “what were the legal ties between this territory” - that is Western Sahara - “and the Kingdom of Morocco and the Mauritanian entity”. The scope of this question depends upon the meaning to be attached to the expression "legal ties" in the context of the time of the colonization of the territory by Spain. That expression, however, unlike "terra nullius" in Question I, was not a term having in itself a very precise meaning. Accordingly, in the view of the Court, the meaning of the expression "legal ties" in Question II has to be found rather in the object and purpose of General Assembly resolution 3292 (XXIX), by which it was decided to request the present advisory opinion of the Court.

85. Analysis of this resolution, as the Court has already pointed out, shows that the two questions contained in the request have been put to the Court in the context of proceedings in the General Assembly directed to the decolonization of Western Sahara in conformity with resolution 1514 (XV) of 14 December 1960. During the discussion of this item, according to resolution 3292 (XXIX), a legal controversy arose over the status of Western Sahara at the time of its colonization by Spain; and the records of the proceedings make it plain that the “legal controversy” in question concerned pretensions put forward, on the one hand, by Morocco that the territory was then a part of the Sherifian State and, on the other, by Mauritania that the territory then formed part of the Bilad Shinguiti or Mauritanian entity. Accordingly, it appears to the Court that in Question II the words “legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity” must be understood as referring to such “legal ties” as may affect the policy to be followed in the decolonization of Western Sahara. In this connection, the Court cannot accept the view that the legal ties the General Assembly had in mind in framing Question II were limited to ties established directly with the territory and without reference to the people who may be found in it. Such an interpretation would unduly restrict the scope of the question, since legal ties are normally established in relation to people.

86. The Court further observes that, inasmuch as Question II had its origin in the contentions of Morocco and Mauritania, it was for them to satisfy the Court in the present proceedings that legal ties existed between Western Sahara and the Kingdom of Morocco or the Mauritanian entity at the time of the colonization of the territory by Spain.

87. Western Sahara (Río de Oro and Sakiet El Hamra) is a territory having very special characteristics which, at the time of colonization by Spain, largely determined the way of life and social and political organization of the peoples inhabiting it. In consequence, the legal régime of Western Sahara, including its legal relations with neighbouring territories, cannot properly be appreciated without reference to these special characteristics. The territory forms part of the great Sahara desert which extends from the Atlantic coast of Africa to Egypt and the Sudan. At the time of its colonization by Spain, the area of this desert with which the Court is concerned was being exploited, because of its low and spasmodic rainfall, almost exclusively by nomads, pasturing their animals or growing crops as and where conditions were favourable. It may be said that the territory, at the time of its colonization, had a sparse population that, for the most part, consisted of nomadic tribes the members of which traversed the desert on more or less regular routes dictated by the seasons and the wells or water-holes available to them. In general, the Court was informed, the right of pasture was enjoyed in common by these tribes; some areas suitable for cultivation, on the other hand, were subject to a greater degree to separate rights. Perennial water-holes were in principle considered the property of the tribe which put them into commission, though their use also was open to all, subject to certain customs as to priorities and the amount of water taken. Similarly, many tribes were said to have their recognized burial grounds, which constituted a rallying point for themselves and for allied tribes. Another feature of life in the region, according to the information before the Court, was that inter-tribal conflict was not infrequent.

88. These various points of attraction of a tribe to particular localities were reflected in its nomadic routes. But what is important for present purposes is the fact that the sparsity of the resources and the spasmodic character of the
rainfall compelled all those nomadic tribes to traverse very wide areas of the desert. In consequence, the nomadic routes of none of them were confined to Western Sahara; some passed also through areas of southern Morocco or of present-day Mauritania or Algeria, and some even through further countries. All the tribes were of the Islamic faith and the whole territory lay within the Dar al-Islam. In general, authority in the tribe was vested in a sheikh, subject to the assent of the “Juma’a”, that is, of an assembly of its leading members, and the tribe had its own customary law applicable in conjunction with the Koranic law. Not infrequently one tribe had ties with another, either of dependence or of alliance, which were essentially tribal rather than territorial, ties of allegiance or vassalage.

89. It is in the context of such a territory and such a social and political organization of the population that the Court has to examine the question of the “legal ties” between Western Sahara and the Kingdom of Morocco and the Mauritanian entity at the time of colonization by Spain. At the conclusion of the oral proceedings, as will be seen, Morocco and Mauritania took up what was almost a common position on the answer to be given by the Court on Question II. The contentions on which they respectively base the legal ties which they claim to have had with Western Sahara at the time of its colonization by Spain are, however, different and in some degree opposed. The Court will, therefore, examine them separately.

90. Morocco’s claim to “legal ties” with Western Sahara at the time of colonization by Spain has been put to the Court as a claim to ties of sovereignty on the ground of an alleged immemorial possession of the territory. This immemorial possession, it maintains, was based not on an isolated act of occupation but on the public display of sovereignty, uninterrupted and uncontested, for centuries.

91. In support of this claim Morocco refers to a series of events stretching back to the Arab conquest of North Africa in the seventh century A.D., the evidence of which is, understandably, for the most part taken from historical works. The far-flung, spasmodic and often transitory character of many of these events renders the historical material somewhat equivocal as evidence of possession of the territory now in question. Morocco, however, invokes *inter alia* the decision of the Permanent Court of International Justice in the *Legal Status of Eastern Greenland* case (P.C.I.J., Series A/B, No. 53). Stressing that during a long period Morocco was the only independent State which existed in the north-west of Africa, it points to the geographical contiguity of Western Sahara to Morocco and the desert character of the territory. In the light of these considerations, it maintains that the historical material suffices to establish Morocco’s claim to a title based “upon continued display of authority” (*loc. cit.*, p. 45) on the same principles as those applied by the Permanent Court in upholding Denmark’s claim to possession of the whole of Greenland.

92. This method of formulating Morocco’s claims to ties of sovereignty with Western Sahara encounters certain difficulties. As the Permanent Court stated in the case concerning the *Legal Status of Eastern Greenland*, a claim to sovereignty based upon continued display of authority involves “two elements each of which must be shown to exist: the intention and willingness to act as sovereign, and some actual exercise or display of such authority” (*ibid.*, pp. 45 f). True, the Permanent Court recognized that in the case of claims to sovereignty over areas in thinly populated or unsettled countries, “very little in the way of actual exercise of sovereign rights” (*ibid.*, p. 46) might be sufficient in the absence of a competing claim. But, in the present instance, Western Sahara, if somewhat sparsely populated, was a territory across which socially and politically organized tribes were in constant movement and where armed incidents between these tribes were frequent. In the particular circumstances outlined in paragraphs 87 and 88 above, the paucity of evidence of actual display of authority unambiguously relating to Western Sahara renders it difficult to consider the Moroccan claim as on all fours with that of Denmark in the *Eastern Greenland* case. Nor is the difficulty cured by introducing the argument of geographical unity or contiguity. In fact, the information before the Court shows that the geographical unity of Western Sahara with Morocco is somewhat debatable, which also militates against giving effect to the concept of contiguity. Even if the geographical contiguity of Western Sahara with Morocco could be taken into account in the present connection, it would only make the paucity of evidence of unambiguous display of authority with respect to Western Sahara more difficult to reconcile with Morocco’s claim to immemorial possession.

93. In the view of the Court, however, what must be of decisive importance in determining its answer to Question II is not indirect inferences drawn from events in past history but evidence directly relating to effective display of authority in Western Sahara at the time of its colonization by Spain and in the period immediately preceding that time (cf. *Minquières et Ecrehos, Judgment, I.C.J. Reports 1953*, p. 57). As Morocco has also adduced specific evidence relating to the time of colonization and the period preceding it, the Court will now consider that evidence.

94. Morocco requests that, in appreciating the evidence, the Court should take account of the special structure of the Sherifian State. No rule of international law, in the view of the Court, requires the structure of a State to follow any particular pattern, as is evident from the diversity of the forms of
State found in the world today. Morocco’s request is therefore justified. At the same time, where sovereignty over territory is claimed, the particular structure of a State may be a relevant element in appreciating the reality or otherwise of a display of State activity ascribed as evidence of that sovereignty.

95. That the Sherifian State at the time of the Spanish colonization of Western Sahara was a State of a special character is certain. Its special character consisted in the fact that it was founded on the common religious bond of Islam existing among the peoples and on the allegiance of various tribes to the Sultan, through their caids or sheikhs, rather than on the notion of territory. Common religious links have, of course, existed in many parts of the world without signifying a legal tie of sovereignty or subordination to a ruler. Even the Dar al-Islam, as Morocco itself pointed out in its oral statement, knows and then knew separate States within the common religious bond of Islam. Political ties of allegiance to a ruler, on the other hand, have frequently formed a major element in the composition of a State. Such an allegiance, however, if it is to accord indications of the ruler’s sovereignty, must clearly be real and manifested in acts evidencing acceptance of his political authority. Otherwise, there will be no genuine display or exercise of State authority. It follows that the special character of the Moroccan State and the special forms in which its exercise of sovereignty may, in consequence, have expressed itself, do not dispense the Court from appreciating whether at the relevant time Moroccan sovereignty was effectively exercised or displayed in Western Sahara.

96. It has been stated before the Court, and not disputed in the course of the proceedings, that at the relevant period the Moroccan State consisted partly of what was called the Bled Makhzen, areas actually subject to the Sultan, and partly of what was called the Bled Siba, areas in which de facto the tribes were not submissive to the Sultan. Morocco states that the two expressions, Bled Makhzen and Bled Siba, merely described two types of relationship between the Moroccan local authorities and the central power, not a territorial separation; and that the existence of these different types did not affect the unity of Morocco. Because of a common cultural heritage, the spiritual authority of the Sultan was always accepted. Thus the difference between the Bled Makhzen and the Bled Siba, Morocco maintains, did not reflect a wish to challenge the existence of the central power so much as the conditions for the exercise of that power; and the Bled Siba was, in practice, a way of affecting an administrative decentralization of authority. Against this view it is stated that what characterized the Bled Siba was that it was not administered by the Makhzen; it did not contribute contingents to the Sherifian army; no taxes were collected there by the Makhzen; the government of the tribes was in the hands of caids appointed by the tribes; and their powers were derived more from the acquiescence of the tribes than from any delegation of authority by the Sultan; even if these local powers did not totally reject any connection with the Sherifian State, in reality they became de facto independent powers. It is also said that the historical evidence shows the territory between the Souss and the Dra’a to have been in a state of permanent insubordination and part of the Bled Siba; and that this implies that there was no effective and continuous display of State functions in those areas to the north of Western Sahara. In the present proceedings, it has been common ground between Mauritania, Morocco and Spain that the Bled Siba was considered as forming part of the Moroccan State at that time, as also appears from the information before the Court.

97. That the areas immediately to the north of Western Sahara lay within the Bled Siba at the relevant period is a point which does not appear to be in dispute. This is accordingly an element to be taken into consideration in appreciating the material which has been submitted regarding the alleged display of Moroccan authority in Western Sahara itself.

* * *

98. As evidence of its display of sovereignty in Western Sahara, Morocco has invoked alleged acts of internal display of Moroccan authority and also certain international acts said to constitute recognition by other States of its sovereignty over the whole or part of the territory.

99. The principal indications of “internal” display of authority invoked by Morocco consist of evidence alleged to show the allegiance of Saharan caids to the Sultan, including dahir and other documents concerning the appointment of caids, the alleged imposition of Koranic and other taxes, and what were referred to as “military decisions” said to constitute acts of resistance to foreign penetration of the territory. In particular, the allegiance is claimed of the confederation of Tekna tribes, together with its allies, one part of which was stated to be established in the Noun and another part to lead a nomadic life the route of which traversed areas of Western Sahara; through Tekna caids, Morocco claims, the Sultan’s authority and influence were exercised on the nomad tribes pasturing in Western Sahara. Moreover, Morocco alleges that, after the marabout Ma al-Aineen established himself at Smara in the Sahel El Hamra in the late 1860s, much of the territory came under the direct authority of this sheikh, and that he himself was the personal representative of the Sultan. Emphasis is also placed by Morocco on two visits of Sultan Hassan I in person to the southern area of the Souss in 1882 and 1886 to maintain and strengthen his authority in the southern part of his realm, and on the despatch of arms by the Sultan to Ma al-Aineen and others in the south to reinforce their resistance to foreign penetration. In general, it is urged that Western Sahara has always been linked to the interior of Morocco by common ethnological, cultural and religious ties, and that the Sahel El Hamra was artificially separated from the Moroccan territory of the Noun by colonization.
100. Spain, on the other hand, maintains that there is a striking absence of any documentary evidence or other traces of a display of political authority by Morocco with respect to Western Sahara. The acts of appointment of caids produced by Morocco, whether dahis or official correspondence, do not in Spain's view relate to Western Sahara but to areas within southern Morocco such as the Noun and the Dra'a; nor has any document of acceptance by the recipients been adduced. Furthermore, according to Spain, these alleged appointments as caid were conferred on sheikhs already elected by their own tribes and were, in truth, only titles of honour bestowed on existing and de facto independent local rulers. As to the Tekna confederation, its two parts are said to have been in quite different relations to the Sultan: only the settled Tekna, established in southern Morocco, acknowledged their political allegiance to the Sultan, while the nomadic sects of the tribe who traversed the Western Sahara were "free" Tekna, autonomous and independent of the Sultan. Nor was Ma ul-'Aineen, according to Spain, at any time the personal representative of the Sultan's authority in Western Sahara; on the contrary, he exercised his authority to the south of the Dra'a in complete independence of the Sultan; his relations with the Sultan were based on mutual respect and a common interest in resisting French expansion from the south; they were relations of equality, not political ties of allegiance or of sovereignty.

101. Further, Spain invokes the absence of any evidence of the payment of taxes by tribes of Western Sahara and denies all possibility of such evidence being adduced; according to Spain, it was a characteristic even of the Bied Silba that the tribes refused to be taxed, and in Western Sahara there was no question of taxes having been paid to the Makhzen. As to the Sultan's expeditions of 1882 and 1886, these, according to Spain, are shown by the historical evidence never to have reached Western Sahara or even the Dra'a, but only the Sous and the Noun; nor did they succeed in completely subjugating even those areas; and they cannot therefore constitute evidence of display of authority with respect to Western Sahara. Their purpose, Spain maintains, was to prevent commerce between Europeans and the tribes of the Sous and Noun, and this purpose was unrelated to Western Sahara. Again, the alleged acts of resistance in Western Sahara to foreign penetration are said by Spain to have been nothing more than occasional raids to obtain booty or hostages for ransom and to have nothing to do with display of Moroccan authority. In general, both on geographical and on other grounds, Spain questions the unity of the Saharan region with the regions of southern Morocco.

102. Mauritania's views, in so far as they relate to Morocco's pretensions to have exercised sovereignty over Western Sahara at the time of its colonization, may be summarized as follows: Mauritania does not oppose Morocco's claim to have displayed its authority in some, more northerly, areas of the territory. Thus it does not dispute the allegiance at that time of the Tekna confederation to the Sultan, nor Morocco's claim that, through the intermediary of Tekna caids in southern Morocco, it exercised a measure of authority over Tekna nomads who traversed those areas of Western Sahara. Mauritania does not, however, admit the allegiance of other tribes in Western Sahara to the Sultan, as it considers them to belong to the Bilad Shinguitti, or Mauritanian entity. In particular, like Spain, it maintains that the Regheibat were a tribe of marabout warriors wholly independent of both the Tekna caids and the Sultan, and that their links were rather with the tribes of the Bilad Shinguitti. Again, Mauritania does not admit that the marabout sheikh, Ma ul-'Aineen, represented the authority of the Sultan in Western Sahara. Instead, it insists that he was a Shinguitti personality, who acquired influence and renown as head of a religious brotherhood in the Bilad Shinguitti and also became a political figure in the Saket El Hamra in the later stages of his life. Like Spain also, Mauritania maintains that, as a political figure organizing and leading resistance to French penetration, Ma ul-'Aineen dealt with the Sultan on a basis of co-operation between equals; and that the relation between them was not one of allegiance but of an alliance, lasting only until the time came when the sheikh proclaimed himself Sultan.

103. The Court does not overlook the position of the Sultan of Morocco as a religious leader. In the view of the Court, however, the information and arguments invoked by Morocco cannot, for the most part, be considered as disposing of the difficulties in the way of its claim to have exercised effectively internal sovereignty over Western Sahara. The material before the Court appears to support the view that almost all the dahirs and other acts concerning caids relate to areas situated within present-day Morocco itself and do not in themselves provide evidence of effective display of Moroccan authority in Western Sahara. Nor can the information furnished by Morocco be said to provide convincing evidence of the imposition or levying of Moroccan taxes with respect to the territory. As to Sheikh Ma ul-'Aineen, the complexities of his career may leave doubts as to the precise nature of his relations with the Sultan, and different interpretations have been put upon them. The material before the Court, taken as a whole, does not suffice to convince it that the activities of this sheikh should be considered as having constituted a display of the Sultan's authority in Western Sahara at the time of its colonization.

104. Furthermore, the information before the Court appears to confirm that the expeditions of Sultan Hassan I to the south in 1882 and 1886 both had objects specifically directed to the Sous and the Noun and, in fact, did not go beyond the Noun; so that they did not reach even as far as the Dra'a, still less Western Sahara. Nor does the material furnished lead the Court to conclude that the alleged acts of resistance in Western Sahara to foreign penetration could be considered as acts of the Moroccan State. Similarly, the despatch of arms by the Sultan to Ma ul-'Aineen and others to encourage their resistance
to French penetration to the east of Western Sahara is, in any case, open to other interpretations than the display of the Sultan’s authority. Again, although Morocco asserts that the Reghebat tribe always recognized the suzerainty of the Tekna confederation, and through them that of the Sultan himself, this assertion has not been supported by any convincing evidence. Moreover, both Spain and Mauritania insist that this tribe of marabout warriors was wholly independent.

105. Consequently, the information before the Court does not support Morocco’s claim to have exercised territorial sovereignty over Western Sahara. On the other hand, it does not appear to exclude the possibility that the Sultan displayed authority over some of the tribes in Western Sahara. That this was so with regard to the Reghebat or other independent tribes living in the territory could clearly no be sustained. The position is different, however, with regard to the septs of the Tekna whose routes of migration are established as having included the territory of the Tekna caids within Morocco as well as parts of Western Sahara. True, the territory of the Tekna caids in the Noun and the Dra’a were Bled Siba at the relevant period and the subordination of the Tekna caids to the Sultan was sometimes uncertain. But the fact remains that the Noun and the Dra’a were recognized to be part of the Sherifian State and the Tekna caids to represent the authority of the Sultan. No doubt, as appears from previous paragraphs, the allegiance of the nomadic septs of the Tekna to the Tekna confederation has been in dispute in the present proceedings. The mere fact that those Tekna septs in their nomadic journeys spent periods of time within the territory of the caids of the Tekna confederation appears, however, to the Court to lend support to the view that they were subject, at least in some measure, to the authority of Tekna caids. The Court at the same time notes that Mauritania considers these Tekna septs to have been in “Moroccan fealty”.

106. Furthermore, the material before the Court contains various indications of some projection of the Sultan’s authority to certain Tekna tribes or septs nomadizing in Western Sahara. Such indications are, for example, to be found in certain documents relating to the recovery of shipwrecked seamen and other foreigners held captive by Teknas in Western Sahara; in documents showing that on some occasions, notably the Sultan’s visits to the south in 1882 and 1886, he received the allegiance of certain nomadic tribes which came from Western Sahara for the purpose; and in letters from the Sultan to Tekna caids requesting the performance of certain acts to the south of the Noun and the Dra’a. Accordingly, and after taking due account of any contradictory indications, the Court considers that, taken as a whole, the information before it shows the display of some authority by the Sultan, through Tekna caids, over the Tekna septs nomadizing in Western Sahara.

107. Thus, even taking account of the specific structure of the Sherifian State, the material so far examined does not establish any tie of territorial sovereignty between Western Sahara and that State. It does not show that Morocco displayed effective and exclusive State activity in Western Sahara. It does however provide indications that a legal tie of allegiance had existed at the relevant period between the Sultan and some, but only some, of the nomadic peoples of the territory.

108. The Court must now examine whether its appreciation of the legal situation which appears from a study of the internal acts invoked by Morocco is affected by any extent by a consideration of the international acts said by it to show that the Sultan’s sovereignty was directly or indirectly recognized as extending to the south of the Noun and the Dra’a. The material upon which it relies may conveniently be considered under four heads:

(a) A series of Moroccan treaties, and more especially a treaty with Spain of 1767, and treaties of 1836, 1856 and 1861 with the United States, Great Britain and Spain respectively, provisions of which deal with the rescue and safety of mariners shipwrecked on the coast of Wad Noun or its vicinity.

(b) A Moroccan treaty with Great Britain of 1895 in which Great Britain, it is claimed, recognized “the lands that are between Wad Draa and Cape Bojador, and which are called Terfaya above named, and all the lands behind it” as part of Morocco.

(c) Diplomatic correspondence concerning the implementation of Article 8 of the Treaty of Tetuan of 1860 and an alleged agreement with Spain of 1900 relating to the cession of Ifni, which are claimed to show Spanish recognition of Moroccan sovereignty as far southwards as Cape Bojador.

(d) A Franco-German exchange of letters of 1911 which expressed the understanding of the parties that “Morocco comprises all that part of northern Africa which is situated between Algeria, French West Africa, and the Spanish colony of Rio de Oro”.

109. The treaty provisions cited by Morocco begin with Article 18 of the Treaty of Marrakesh of 1767, the interpretation of which is in dispute between Morocco and Spain. This Article concerned a project of the Canary Islanders to set up a trading and fishing post on “the coasts of Wad Noun”, according to Morocco, or “to the south of the River Noun”, according to Spain, and the dispute is as to the scope of the Sultan’s disavowal in Article 18 of any responsibility with respect to such a project. Morocco states that in the Arabic text the Article has the following meaning:
“His Imperial Majesty warns the inhabitants of the Canaries against any fishing expedition to the coasts of Wad Noun and beyond. He disclaims any responsibility for the way they may be treated by the Arabs of the country, to whom it is difficult to apply decisions, since they have no fixed residence, travel as they wish and pitch their tents wherever they choose. The inhabitants of the Canaries are certain to be maltreated by those Arabs.”

It contends, moreover, that this Arabic text is the only “official text” and should have preference also as being the more limited interpretation. On the basis of the Arabic text, it maintains that the Article signifies that the Sultan was recognized to have the power to take decisions with respect to the inhabitans of “Wad Noun and beyond”, though it was difficult to apply his decisions to them.

110. Spain, however, stresses that the Spanish text of the treaty is also an original text, which is equally authentic and has the following meaning:

“This Imperial Majesty refrains from expressing an opinion with regard to the trading post which His Catholic Majesty wishes to establish to the south of the River Noun, since he cannot take responsibility for accidents and misfortunes, because his dominion does not extend so far. ... Northwards from Santa Cruz, His Imperial Majesty grants to the Canary Islanders and the Spaniards the right of fishing without authorizing any other nation to do so.”

It also disputes the meaning attributed by Morocco to the crucial words in the Arabic text and maintains that the meaning found in the Spanish text is confirmed by the wording of contemporary letters sent by the Sultan to King Carlos III, as well as other diplomatic material, and by a later Hispano-Moroccan treaty of 1799. Morocco, it should be interposed, in its turn questions the meaning given by Spain to certain words in the Arabic texts of the Sultan’s letters and the 1767 treaty. Spain, however, on the basis of its interpretations of the various texts, contends that Article 18 of that treaty, far from evidencing Spanish recognition of the Sultan’s sovereignty to the south of the Wad Noun, constitutes a disavowal by the Sultan himself of any pretensions to authority in that region.

111. The Court does not find it necessary to resolve the controversy regarding the text of Article 18 of this early treaty, because a number of later treaties, closer to the time of the colonization of Western Sahara and thus more pertinent in the present connection, contained clauses of a similar character, concerning mariners shipwrecked on coasts of the Wad Noun. It confines itself, therefore, to the following observations: In so far as this, or any other treaty provision, is relied upon by Morocco as showing international recognition by another State of Moroccan sovereignty, it would be difficult to consider such international recognition as established on the sole basis of a Moroccan text diverging materially from an authentic text of the same treaty written in the language of the other State. In any event, the question of international recognition which Morocco claims to be raised by Article 18 of the Treaty of 1767 hinges upon the meaning to be given to such phrases as “Wad Noun and beyond” and “to the south of the River Noun”, which is also a matter in dispute and calls for consideration in connection with the later treaties.

112. Article 18 of the 1767 treaty is indeed superseded for present purposes by provisions in Article 38 of the Hispano-Moroccan Treaty of Commerce and Navigation of 20 November 1861, which itself followed the model of similar provisions in treaties signed by Morocco with the United States in 1836 and with Great Britain in 1856. The relevant provisions of the 1861 treaty ran:

“If a Spanish vessel of war or merchant ship get aground or be wrecked on any part of the coasts of Morocco, she shall be respected and assisted in every way, in conformity with the laws of friendship, and the said vessel and everything in her shall be taken care of and returned to her owners, or to the Spanish Consul-General. If a Spanish vessel be wrecked at Wad Noun or on any other part of its coast, the Sultan of Morocco shall make use of his authority to save and protect the master and crew until they return to their country, and the Spanish Consul-General, Consul, Vice-Consul, Consular Agent, or person appointed by them shall be allowed to collect every information they may require. The Governors in the service of the Sultan of Morocco shall likewise assist the Spanish Consul-General, Consul, Vice-Consul, Consular Agent or person appointed by them, in their investigations, according to the laws of friendship.”

Morocco considers that these provisions, and similar provisions in other treaties, recognize the existence of Moroccan authorities in the Noun and Western Sahara, in the form of Governors in the service of the Sultan of Morocco, and also the effective possibilities of action by those Governors. It also argues that they recognize Moroccan sovereignty over Western Sahara because under Article 38 the Spanish authorities receive permission to enquire into the fate of shipwrecked mariners and derive that permission from the Sultan.

113. Morocco further considers that this view of the treaty provisions is confirmed by Spanish diplomatic documents relating to the recovery in 1863 of nine sailors from the Spanish vessel Esmeralda who had been captured, while fishing, by “Moors of the frontier coast”. According to the documents, this incident occurred “more than 180 miles south of Cape Noun” and the Moors had demanded a ransom. The Spanish Minister of State had then instructed the Spanish Minister in Morocco to make the necessary request to the Sultan, pursuant to Article 38 of the 1861 treaty, “to use his powers to rescue the captive sailors”. In due course the sailors were reported to have been freed and to be in the hands of Sheikh Beyrouk of the Noun; and the
Spanish Minister in Morocco was authorized to make a gift to the sheik as a mark of gratitude.

114. Spain, on the other hand, claims that the origin of the shipwreck clauses was directly connected with the state of insubordination in the Sous and the Noun, and stresses that the treaties contained two systems of rescue and protection. One system, which it calls the general system, provided for areas where the Sultan did exercise his authority and undertook to use his normal powers to protect the shipwrecked. The other was a special régime for the Wad Noun. If a vessel were shipwrecked at the Wad Noun or beyond, the treaty provisions gave a different answer as to the duty of the Sultan. In that case, he did not "order" or "protect" but undertook to try to liberate the shipwrecked persons so far as he was able; and in order to do that he would use his influence with the peoples neighbouring on his realm and negotiate the ransoming of the sailors, usually with the local authorities. It was not, Spain considers, a matter of his exercising his own authority.

115. Spain also refers to various diplomatic documents relating to the recovery of sailors from a number of shipwrecked vessels as confirming the above interpretation of the clauses. Those documents, it states, show that in all those cases, including that of the Esmeralda, it was the intervention of the Beyrouk family, the sheikhs of the Wad Noun, which was decisive for the liberation of the captives, and that they negotiated directly with the Spanish Consul at Mogador. In one case, according to these documents, Sheikh Beyrouk informed the Spanish authorities that he had resisted the Sultan's efforts to wrest the prisoners from him and that their liberation had been achieved only when he himself had "negotiated the affair with the Spanish nation". According to Spain, this evidence indicates that to the north of Agadir the power of the Sultan was exercised and the Sultan could give orders; from Agadir to the south, in the Sous, the Noun and the Dra'a, the Sultan negotiated with local powers, he could not give orders; and this, Spain says, explains the cardinal role played by Sheikh Beyrouk in these matters.

116. Implicit in Morocco's claim that these treaties signify international recognition of the exercise of its sovereignty in Western Sahara is the proposition that phrases such as "the coasts of Wad Noun", "to the south of Wad Noun" or "Wad Noun and beyond" are apt to comprise Western Sahara. This proposition it advances on the basis that "Wad Noun" was a term used with two meanings: one narrow and restricted to the Wad Noun itself, the other wider and covering not only the Wad Noun but the Dra'a and the Sakiét El Hamra. This wider meaning, it indicates, was the one with which the term was used in Moroccan documents and treaties. Spain, on the other hand, maintains that no evidence has been adduced to demonstrate the use of the term Wad Noun with that special meaning, that there is no trace of it in the cartography of the period and that the testimony of travellers and explorers is conclusive as to the geographical separation of the Wad Noun country from

the Sakiét El Hamra. It is for Morocco to demonstrate convincingly the use of the term with that special meaning (cf. Legal Status of Eastern Greenland, P.C.I.J., Series A/B, No. 33, p. 49) and this demonstration, in the view of the Court, is lacking.

117. In the particular case of the Esmeralda, as the Court has already noted, Morocco points to documents showing a request by Spain to the Sultan in 1863 for the application of Article 38 of the Treaty of 1861 in respect of an incident which had occurred more than 180 miles to the south of Cape Noun. That incident may, therefore, be invoked as indicating Spain's recognition of the applicability of the treaty provision in relation to that part of the coast of Western Sahara. But those documents, especially when read together with further documents before the Court relating to the same incident, do not appear to warrant the conclusion that Spain thereby also recognized the Sultan's territorial sovereignty over that part of Western Sahara. The documents, and the whole incident, appear rather to confirm the view that Article 38, and other similar provisions, concerned, instead, the exercise of the personal authority or influence of the Sultan, through the Tekna caids of the Wad Noun, to negotiate the ransom of the shipwrecked sailors from the tribe holding them captive to the south of the Wad Noun. Clearly, Morocco is correct in saying that these provisions would have been pointless if the other State concerned had not considered the Sultan to be in a position to exercise some authority or influence over the people holding the sailors captive. But it is a quite different thing to maintain that those provisions implied international recognition by the other State concerned of the Sultan as territorial sovereign in Western Sahara.

118. Examination of the provisions discussed above shows therefore, in the view of the Court, that they cannot be considered as implying international recognition of the Sultan's territorial sovereignty in Western Sahara. It confirms that they are to be understood as concerned with the display of the Sultan's authority or influence in Western Sahara only in terms of ties of allegiance or of personal influence in respect of some of the nomadic tribes of the territory.

119. The Anglo-Moroccan Agreement of 13 March 1895 is invoked by Morocco as evidencing specific international recognition by Great Britain that Moroccan territory reached as far south as Cape Bojador. This treaty concerned the purchase by the Sultan from the North-West African Company of the trading-station which had been set up at Cape Juby some years previously by agreements made between Mr. Donald Mackenzie and Sheikh Beyrouk. The treaty of 1895 provided inter alia that, if the Moroccan Government bought the trading-station from the company, "no one will have any claim to the lands that are between Wad Draa and Cape Bojador, and which are called Terfaya above named, and all the lands behind it, because all this belongs to the territory of Morocco". A further clause provided that the
Moroccan Government in turn undertook that “they will not give any part of the above-named lands to any-one whatsoever without the concurrence of the English Government”. Morocco asks the Court to see these provisions as constituting express recognition by Great Britain of Moroccan sovereignty at the relevant period in all the land between the Wad Dra’a and Cape Bojador and the hinterland.

120. The difficulty with this interpretation of the 1895 treaty is that it is at variance with the facts as shown in the diplomatic correspondence surrounding the transaction concerning the Mackenzie trading-station. Numerous documents relating to this transaction and presented to the Court show that the position repeatedly taken by Great Britain was that Cape Juby was outside Moroccan territory, which in its view did not extend beyond the Dra’a. In the light of this material the provisions of the 1895 treaty invoked by Morocco appear to the Court to represent an agreement by Great Britain not to question in future any pretensions of the Sultan to the lands between the Dra’a and Cape Bojador, and not a recognition by Great Britain of previously existing Moroccan sovereignty over those lands. In short, what those provisions yielded to the Sultan was acceptance by Great Britain not of his existing sovereignty but of his interest in that area.

121. Morocco also asks the Court to find indications of Spanish recognition of Moroccan sovereignty southwards as far as Cape Bojador in diplomatic material concerning the implementation of Article 8 of the Treaty of Tetuan of 1860 and an agreement of 1900 alleged to have been concluded with Spain in that connection. By Article 8 of the Treaty of Tetuan, the Sultan had agreed to concede to Spain “in perpetuity, on the coast of the Ocean, near Santa Cruz la Pequeña, the territory sufficient for the construction of a fisheries establishment, as Spain possessed in prior times”. Morocco invokes a diplomatic Note of 19 October 1900 from the Spanish Ambassador in Brussels to the Belgian Foreign Minister, which referred to instructions having been given to the Spanish representative in Tangier “to negotiate an exchange between the port of Ifni and another port situated between Ifni and Cape Bojador as well as the cession of the city of Terfaya between the Dra’a and Cape Bojador...”. In the same year a publication in Spain appeared to give some substance to the suggestion that as a result of those negotiations a protocol had been concluded in this connection.

122. Spain, however, denies altogether the existence of any such protocol, which, it argues, Morocco could not have failed to produce if it had been concluded; for Morocco itself would have been one of the parties to this alleged agreement. An examination of its archives, Spain states, shows that no agreement was concluded at the time of the mission, although the press published erroneous news on the subject at the time. Mauritania also voices strong doubts as to the existence of the alleged protocol. It further says:

"In the absence of direct evidence, and faced with second-hand references, which are geographically vague and general, it is difficult to express a view on the question, and in particular to draw any conclusions as to territorial recognitions by the Spanish Government."

123. The doubts raised by both Spain and Mauritania as to the alleged protocol of 1900 have not been dispelled by the material before the Court. The Court is not, therefore, able to take the possible existence of such a document into account.

124. There remains the exchange of letters annexed to the Agreement between France and Germany of 4 November 1911, which Morocco presents as recognition by those Powers of Moroccan sovereignty over the Sakiet El Hamra. In Article 1 of the Agreement Germany undertook not to interfere with the action of France in Morocco. The exchange of letters then further provided that:

"Germany will not intervene in any special agreements which France and Spain may think fit to conclude with each other on the subject of Morocco, it being understood that Morocco comprises all that part of northern Africa which is situated between Algeria, French West Africa and the Spanish colony of Rio de Oro."

It is on these last words that Morocco relies; and it maintains that, whatever construction is put upon the exchange of letters, those words mean that the agreement recognized that the Sakiet El Hamra belonged to Morocco. In support of this contention, it refers to certain diplomatic letters which are claimed to show that, when France and Germany drew up the exchange, they meant "to posit the principle that the Sakiet El Hamra was part of Moroccan territory."

125. Spain, on the other hand, points to Article 6 of the earlier Franco-Spanish Convention of 3 October 1904, which stated:

"...the Government of the French Republic acknowledges that Spain has henceforward full liberty of action in regard to the territory comprised between the 26° and 27° 40' north latitude and the 11th meridian west of Paris, which are outside the limits of Morocco."

It further points to Article 2 of the Franco-Spanish Convention of 27 November 1912 as providing expressly that Article 6 of the 1904 Convention was to "remain effective". In those two Conventions, it observes, France clearly recognized that the Sakiet El Hamra was "outside the limits of Morocco". At the same time, it contests the view expressed by Morocco in the proceedings that these Conventions are not opposable to Morocco. It also draws attention to other diplomatic material relating to the 1911 exchange
of letters and claimed by it to show that this was concerned with Franco-German relations and not with the existing frontier of Morocco.

126. In the present connection, the Court emphasizes, the question at issue is not the Spanish position in the Sakiet El Hamra but the alleged recognition by other States of Moroccan sovereignty over the Sakiet El Hamra at the time of colonization by Spain. Accordingly the question of how far any of these agreements may or may not be possible to any of the States concerned does not arise. The various international agreements referred to by Morocco and Spain are of concern to the Court only in so far as they may contain indications of such recognition. These agreements, in the opinion of the Court, are of limited value in this regard; for it was not their purpose either to recognize an existing sovereignty over a territory or to deny its existence. Their purpose, in their different contexts, was rather to recognize or reserve for one or both parties a "sphere of influence" as understood in the practice of that time. In other words, one party granted to the other freedom of action in certain defined areas, or promised non-interference in an area claimed by the other party. Such agreements were essentially contractual in character. This is why one party might be found acknowledging in 1904, vis-à-vis Spain, that the Sakiet El Hamra was "outside the limits of Morocco" in order to allow Spain full liberty of action in regard to that area, and yet employing a different geographical description of Morocco in 1911 in order to ensure the complete exclusion of Germany from that area.

127. In consequence, the Court finds difficulty in accepting the Franco-German exchange of letters of 1911 as constituting recognition of the limits of Morocco rather than of the sphere of France's political interests vis-à-vis Germany.

* *

128. Examination of the various elements adduced by Morocco in the present proceedings does not, therefore, appear to the Court to establish the international recognition by other States of Moroccan territorial sovereignty in Western Sahara at the time of the Spanish colonization. Some elements, however, more especially the material relating to the recovery of shipwrecked sailors, do provide indications of international recognition at the time of colonization of authority or influence of the Sultan, displayed through Tekna raids of the Noun, over some nomads in Western Sahara.

* *

129. The inferences to be drawn from the information before the Court concerning internal acts of Moroccan sovereignty and from that concerning international acts are, therefore, in accord in not providing indications of the existence, at the relevant period, of any legal tie of territorial sovereignty between Western Sahara and the Moroccan State. At the same time, they are in accord in providing indications of a legal tie of allegiance between the Sultan and some, though only some, of the tribes of the territory, and in providing indications of some display of the Sultan's authority or influence with respect to those tribes. Before attempting, however, to formulate more precisely its conclusions as to the answer to be given to Question II in the case of Morocco, the Court must examine the situation in the territory at the time of colonization in relation to the Mauritanian entity. This is so because the "legal ties" invoked by Mauritania overlap with those invoked by Morocco.

* *

130. The Court will therefore now take up the question of what were the legal ties which existed between Western Sahara, at the time of its colonization by Spain, and the Mauritanian entity. As the very formulation of Question II implies, the position of the Islamic Republic of Mauritania in relation to Western Sahara at that date differs from that of Morocco for the reason that there was not then any Mauritanian State in existence. In the present proceedings Mauritania has expressly accepted that the "Mauritanian entity" did not then constitute a State; and also that the present statehood of Mauritania "is not retroactive". Consequently, it is clear that it is not legal ties of State sovereignty with which the Court is concerned in the case of the "Mauritanian entity" but other legal ties. It also follows that the first point for the Court's consideration is the legal nature of the "Mauritanian entity" with which Western Sahara is claimed by Mauritania to have had those legal ties at the time of colonization by Spain.

* *

131. The term "Mauritanian entity", as appears from the information before the Court, is a term first employed during the session of the General Assembly in 1974 at which resolution 3292 (XXIX) was adopted. This term, Mauritania maintains, was used by the General Assembly to denote the cultural, geographical and social entity which existed at the time in the region of Western Sahara and within which the Islamic Republic of Mauritania was later to be created. That such is the sense in which the term is used in Question II has not been disputed.

132. Explaining its concept of the Mauritanian entity at the time of the colonization of Western Sahara, Mauritania has stated:

(a) Geographically, the entity covered a vast region lying between, on the east, the meridian of Timbuktu and, on the west, the Atlantic, and bounded on the south by the Senegal river and on the north by the Wad
Sakiet El Hamra. In the eyes both of its own inhabitants and of the Arabo-Islamic communities that region constituted a distinct entity. (b) That entity was the Bilad Shinguitti, or Shinguitti country, which constituted a distinct human unit, characterized by a common language, way of life and religion. It had a uniform social structure, composed of three "orders": warrior tribes exercising political power; marabout tribes engaged in religious, teaching, cultural, judicial and economic activities; client-vassal tribes under the protection of a warrior or marabout tribe. A further characteristic of the Bilad Shinguitti was the much freer status of women than in neighbouring Islamic societies. The most significant feature of the Bilad Shinguitti was the importance given to the marabout tribes, who created a strong written cultural tradition in religious studies, education, literature and poetry; indeed, its fame in the Arab world derived from the reputation acquired by its scholars.

133. According to Mauritania, two types of political authority were found in the Bilad Shinguitti: the emirates and the tribal groups not formed into emirates. The major part of the Shinguitti country was composed of the four Emirates of the Trazza, the Brakna, the Tagant and the Adrar, where the town of Shinguitti is situated. This town was both the centre of Shinguitti culture and a crossroads of the caravan trade, so that the Emirate of the Adrar became the pole of attraction for the important nomadic tribes of the Sahara. At the time of the Spanish colonization of Western Sahara, Mauritania maintains, the Emir of the Adrar was the principal political figure of the north and north-west Shinguitti country, and possessed "an influence extending from the Sakiet El Hamra to the Senegal". In this connection, it invokes the testimony of the Spanish explorer, Captain Cervera, who in 1886 concluded with the Emir at 'Ijil a treaty by which, had it been ratified, Spain would have been recognized as sovereign of the whole Adrar at-Tmarr. He had reported that at the time that it was thanks to the Emir that several tribal chiefs were assembled at 'Ijil; that it was under the Emir's protection that the Spanish delegation had been able to attend the meeting safely; and that the parties to the two treaties concluded on that occasion included chiefs not only of tribes of the Adrar but also of tribes from west of the Emirate, i.e., from the territory of the Rio de Oro.

134. In addition to the four emirates, Mauritania mentions a number of other tribal groups, not formed into emirates, which existed in Western Sahara at the time of its colonization by Spain. Among these it names as the main tribes the 'Arousaiy, Ouled Daleim, Ouled Bu-Shar', Ahil Barik-Allah and Reghebat. It maintains that all these tribes and the four emirates themselves were both autonomous and independent, not acknowledging any tie of political allegiance to the Sultan of Morocco. Their independence, it states, is shown by the numerous treaties which they signed with foreign Powers, and by the fact that "the emirs, sheikhs and other tribal

chiefs were never invested by outside authorities and always derived their powers from the special rules governing the devolution of power in the Shinguitti entity". Each emirate and tribal group was autonomously administered by its ruler, whose appointment and important acts were subject to the assent of the assembly of the Jum'a.

135. Mauritania recognizes that the emirates and the tribes were not under any common hierarchical structure. "In this respect", it has said:

"...the Shinguitti entity could not be assimilated to a State, nor to a federation, nor even to a confederation, unless one saw fit to give that name to the tenuous political ties linking the various tribes".

Within the entity there were "great confederations of tribes, or emirates whose influence, in the form sometimes of vassalage and sometimes of alliance, extended far beyond their own frontiers". Even so, Mauritania recognizes that this is not a sufficient basis for saying that "the Shinguitti entity was endowed with international personality, or enjoyed any sovereignty as the word was understood at that time".

136. The Bilad Shinguitti, according to Mauritania, was a community having its own cohesion, its own special characteristics, and a common Saharan law concerning the use of water-holes, grazing lands and agricultural lands, the regulation of inter-tribal hostilities and the settlement of disputes. Within this community:

"It was in reality the component entities which were endowed with the legal personalities and sovereignties, save in so far as these had been wholly or partly alienated, by ties of vassalage or alliance, to other such components. The sovereignty of the different component entities obviously derived from their practice";

each body, as master of a territory, ensured the protection of the territory and of its subjects against acts of war or pillage and, correspondingly, its ruler had the duty to safeguard outsiders who sought his protection. When the emirs or sheikhs formed alliances with or waged war on another, it was a question of relations between equals. But the existence of the community became apparent when its independence was threatened, as is shown, in the view of Mauritania, by the concerted effort made by the tribes throughout the Shinguitti country to resist French penetration.

137. At the same time, Mauritania lays emphasis on the special characteristics of the-Saharan area and the nomadic existence of many of the tribes which have already been referred to in this Opinion. Life in the arid areas of the Shinguitti country, it observes, required the continuous quest for suitable pastures and water-holes; and each tribe had a well-defined migration area with established migration routes determined by the location
of water-holes, burial grounds, cultivated areas and pastures. The colonial Powers, it further observes, in drawing frontiers took no account of these human factors and in particular of the tribal territories and migration routes, which were, as a result, bisected and even trisected by those artificial frontiers. Nevertheless, the tribes of necessity continued to make their traditional migrations, traversing the Shinguit country comprised within the territory of the present-day Islamic Republic of Mauritania and Western Sahara. The same families and their properties were to be found on either side of the artificial frontier. Some wells, lands and burial grounds of the Rio de Oro, for example, belonged to Mauritanian tribes, while watering places and palm oases in what is now part of the Islamic Republic were the properties of tribes of Western Sahara. These facts of life in the region, it points out, were recognized by France and Spain, which, in 1934, concluded an administrative agreement to prevent any obstacles to the nomadic existence of the tribes.

138. If it is thought necessary to have recourse to verbal classifications, Mauritanian suggests that the concepts of “nation” and of “people” would be the most appropriate to explain the position of the Shinguit people at the time of colonization; they would most nearly describe an entity which despite its political diversity bore the characteristics of an independent nation, a people formed of tribes, confederations and emirates jointly exercising co-sovereignty over the Shinguit country.

139. As to the legal ties between Western Sahara and the Mauritanian entity, the views of Mauritania are as follows: At the time of Spanish colonization, the Mauritanian entity extended from the Senegal river to the Wad Sakiet El Hamra. That being so, the part of the territories now under Spanish administration which lie “to the south of the Wad Sakiet El Hamra was an integral part of the Mauritanian entity”. The legal relation between the part under Spanish administration and the Mauritanian entity was, therefore, “the simple one of inclusion”. At that time, the Bilad Shinguit was an entity united by historical, religious, linguistic, social, cultural and legal ties, and it formed a community having its own cohesion. The territories occupied by Spain, on the other hand, did not form an entity of their own and did not have any identity. The part to the south of the Wad Sakiet El Hamra was, legally speaking, part of the Mauritanian entity. That part and the present territory of the Islamic Republic of Mauritania together constitute “the indissociable parts of the Mauritanian entity”.

140. In the light of the foregoing, Mauritania asks the Court to find that “at the time of colonization by Spain the part of the Sahara now under Spanish administration did have legal ties with the Mauritanian entity”. At the same time, it takes the position that where the Mauritanian entity ended the Kingdom of Morocco began. It also makes clear that the finding which it requests is limited to the part of Western Sahara to the south of the Sakiet El Hamra, subject to some overlapping between the legal ties of the Mauritanian entity and those of Morocco solely where they met, owing to the overlapping of the nomadic routes of their respective tribes.

141. Spain considers that there are a number of obstacles in the way of accepting the views of the Islamic Republic. The Bilad Shinguit or Shinguiti entity, it says, by no means coincides with what is called the Mauritanian entity. In its broadest sense, the Bilad Shinguiti is the area of an Islamic culture, and it is a cultural and religious centre which had a certain influence up to the sixteenth century. Spain finds it impossible, however, to accept that a cultural phenomenon, limited in time and space, could be identical with an alleged entity of which the significance was mainly geographical and which had wider limits: Shinguit’s religious and cultural influence and its fame in the Islamic world is not to be confused with the political hegemony of the Emirate of the Ader which, when it came into being in the eighteenth century, included the town of Shinguit in its borders.

142. Again, in the view of Spain, the idea of an entity must express not only a belonging but also the idea that the component parts are homogeneous. The Mauritanian entity, however, is said to have been formed of heterogeneous components, some being mere tribes and others having a more complex degree of integration, such as an emirate. As to the Emirate of the Ader, which is claimed to have been the nucleus of the Mauritanian entity, Spain maintains that it was a region distinct and independent from all those surrounding it, politically, socially and economically. Spain considers it to have constituted a centre of autonomous power distinct both from the other emirates in the south and from the independent nomad tribes in the north and west. Furthermore, at the period of colonization of Western Sahara, this emirate, according to Spain, was undergoing grave internal troubles and also being harassed by the neighbouring Emirates of the Trarza and the Tagant, and Spain describes the region as having then been in a state of anarchy.

143. Another difficulty, according to Spain, is that the concept of a Mauritanian entity is not accompanied by proof of any tie of allegiance between the tribes inhabiting the territory of Western Sahara and the Mauritanian tribes or between the tribes of the territory and the Emirate of the Ader. Far from merging into or disappearing within the framework of the so-called Mauritanian entity, Spain maintains, the tribes of Western Sahara led their own life independently of the other Saharan tribes. In its view, there is an almost total lack of evidence which might give support to the Mauritanian argument over and above the mere sociological facts about nomadic life.
144. As to the agreements concluded by the independent tribes of the Sahara with Spanish explorers and with France, Spain considers those documents to run counter to the thesis that there was a “Mauritanian entity” in which tribes of Western Sahara were integrated. It regards the texts of the two treaties signed a ‘Jil on 12 July 1886, one with the independent tribes and the other with the Emir, as decisive on this point. The first was concluded with the tribes living in the area between the Atlantic and the western slopes of the Adrar, who ceded to Spain “all territories between the coast of the Spanish possessions of the Atlantic between Cape Bojador and Cabo Blanco and the western boundary of the Adrar”; the second treaty was concluded with the Emir and “recognizes Spanish sovereignty over the whole territory of the Adrar at-Tmarr”. The existence of these two separate treaties, in Spain’s view, evidences not only the total independence of those tribes and of the Emirate, but also their independence of each other; and it further proves that the Emir may have exerted influence but never political authority over those tribes. The independence of the tribes as between themselves is held by Spain to be also shown by the signature of the 1884 treaty by one tribe alone with the explorer Bonelli. Furthermore, other participants in this alleged entity, the Emirates of the Brakna, Trarza and Tagant and the tribes of the Hodh, signed with France a long series of treaties throughout the nineteenth century. Spain therefore finds it difficult to appreciate the coherence of the alleged Shinguiti entity.

145. Furthermore Spain rejects the proposition, bound up with the concept of the Mauritanian entity advanced by Mauritanian, that the territory under Spanish administration did not itself form an entity or possess an identity of its own. It considers that what is the present territory of Western Sahara was the foundation of a Saharan people with its own well-defined character, made up of autonomous tribes, independent of any external authority; and that this people lived in a fairly well-defined area and had developed an organization and a system of life in common, on the basis of collective self-awareness and mutual solidarity. In Western Sahara, it says, a clear distinction was made by the population and in literature between their own country, the country of the nomads, and other neighbouring countries of a sedentary way of life, such as Shinguiti, Tishit and Timbuktu. The land of the settled people coincided to a large extent, in the north, with the historic frontiers of Morocco and, in the south, with the Emirate of the Adrar at-Tmarr. There was thus, according to Spain, a Sahrawi people at the time of colonization, coherent and distinct from the Mauritanian emirates; and this people in no way regarded itself as part of the Bilad Shinguiti or Mauritanian entity.

146. Another legal difficulty, according to Spain, is that the Islamic Republic could not be regarded as the direct successor to the alleged historical Mauritanian entity; for the notion of Mauritanian was born in 1904 at a time when the territory of Western Sahara is said by Spain already to have had an existence well established in fact and in law.

147. On the basis of the foregoing considerations, Spain maintains that at the time of colonization by Spain there were no legal ties between the territory of Western Sahara and the Mauritanian entity.

...
150. In the light of the above considerations, the Court must conclude that at the time of colonization by Spain there did not exist between the territory of Western Sahara and the Mauritanian entity any tie of sovereignty, or of allegiance of tribes, or of “simple inclusion” in the same legal entity.

* *

151. This conclusion does not, however, mean that the reply to Question II should necessarily be that at the time of colonization by Spain no legal ties at all existed between the territory of Western Sahara and the Mauritanian entity. The language employed by the General Assembly in Question II does not appear to the Court to confine the question exclusively to those legal ties which imply territorial sovereignty. On the contrary, the use of the expression “legal ties” in conjunction with “Mauritanian entity” indicates that Question II envisages the possibility of other ties of a legal character. To confine the question to ties of sovereignty would, moreover, be to ignore the special characteristics of the Saharan region and peoples to which reference has been made in paragraphs 87 and 88 above, and also to disregard the possible relevance of other legal ties to the various procedures concerned in the decolonization process.

152. The information before the Court makes it clear that the nomadism of the great majority of the peoples of Western Sahara at the time of its colonization gave rise to certain ties of a legal character between the tribes of the territory and those of neighboring regions of the Bilad Shinguitti. The migration routes of almost all the nomadic tribes of Western Sahara, the Court was informed, crossed what were to become the colonial frontiers and traversed, inter alia, substantial areas of what is today the territory of the Islamic Republic of Mauritania. The tribes, in their migrations, had grazing pastures, cultivated lands, and wells or water-holes in both territories, and their burial grounds in one or other territory. These basic elements of the nomads’ way of life, as stated earlier in this Opinion, were in some measure the subject of tribal rights, and their use was in general regulated by customs. Furthermore, the relations between all the tribes of the region in such matters as inter-tribal clashes and the settlement of disputes were also governed by a body of inter-tribal custom. Before the time of Western Sahara’s colonization by Spain, those legal ties neither had nor could have any other source than the usages of the tribes themselves or Koranic law. Accordingly, although the Bilad Shinguitti has not been shown to have existed as a legal entity, the nomadic peoples of the Shinguitti country, in the view of the Court, be considered as having in the relevant period possessed rights, including some rights relating to the lands through which they migrated. These rights, the Court concludes, constituted legal ties between the territory of Western Sahara and the “Mauritanian entity”; this expression being taken to denote

the various tribes living in the territories of the Bilad Shinguitti which are now comprised within the Islamic Republic of Mauritania. They were ties which knew no frontier between the territories and were vital to the very maintenance of life in the region.

* *

153. In the oral proceedings, Morocco and Mauritania both laid stress on the overlapping character of the respective legal ties which they claim Western Sahara to have had with them at the time of colonization. Although the view of the Court as to the nature of those ties differs in important respects from those of the two States concerned, the Court is of the opinion that the overlapping character of the ties of the territory with Morocco and the “Mauritanian entity”, as defined by the Court, calls for consideration in connection with Question II. This is because the overlapping character of the ties appears to the Court to be a significant element in appreciating their scope and implications.

154. The views of Morocco and Mauritania appear to have evolved considerably since their respective claims to special links with Western Sahara were first raised in the United Nations. It suffices, for the purposes of this Opinion, to note their views as finally formulated before the Court.

155. Morocco’s views were explained as follows:

“Morocco asserts the exercise of its sovereignty, but it does not deny, in so doing, that legal ties of another nature, no less essential having regard to the question put to the Court and to the forms of political life in the region concerned at the time of Spanish colonization, may be asserted by Mauritania.

the sovereignty invoked by Morocco and the legal ties invoked by Mauritania were exercised on nomadic tribes and had their first impact on human beings. Of course, these human beings traced in their travels the outline of a territorial entity but, because of the very nature of the relationships between man and the land, some geographical overlappings were inevitable.

When Morocco cites dahirs addressed to geographical destinations extending to Cabo Blanco, it is relying on documents attesting the allegiance of tribes finding themselves at given times at certain points in their nomadic itineraries. But it does not mean thereby to claim that, viewed from the standpoint of the destination of the dahir, the strongest link was not with the Mauritanian entity.
Conversely, Morocco does not consider that geographical reference by Mauritania to the outer limits of the nomadic itineraries of Mauritian tribes rules out the predominance of Moroccan sovereignty in those areas.

In short, there is a north and there is a south which juxtapose in space the legal ties of Western Sahara with Morocco and with Mauritania."

Amplifying this explanation, Morocco said:

"... when Morocco refers to Cabo Blanco and Villa Cisneros in stating arguments of a general character, it is not intending thereby to maintain that its sovereignty extended over those regions at the time of the Spanish colonization; for at the period under consideration those regions were an integral part of the Mauritian entity, to which the Islamic Republic of Mauritania is the sole successor."

156. The views of Mauritania were explained as follows:

"... the Governments of the Islamic Republic of Mauritania and of the Kingdom of Morocco recognize that there is a north appertaining to Morocco, a south appertaining to Mauritania and that there are some overlappings as a result of the intersection of the nomadic routes from the north and from the south. As a result, therefore, there is no no-man's land between the influence of Morocco and that of the Mauritian entity ...

"The areas of overlap which have been referred to before the Court implied the superimposition of the Mauritian entity, the Shinguiti entity, and the Kingdom of Morocco, solely where they met.

Thus the mention of Cabo Blanco and Villa Cisneros by Morocco cannot signify that those regions were, at the time of colonization, under Moroccan sovereignty, as was conceded ... on 25 July ... Similarly, the fact that there may have been this or that Mauritanian nomadic migration in the region of the Sakiet El Hamra cannot be regarded as implying any dispute as to the fact that that region appertains to the Kingdom of Morocco, which, in the view of the Mauritanian Government, did not end at the limits of the Makhzen."

157. It has to be added that Morocco and Mauritania both emphasized that, in their view, the overlapping left "no geographical void"—no "no-man's land"—between their respective ties with Western Sahara.

158. The Court, as has already been indicated, concurs in the view that Question II does not envisage any form of territorial delimitation by the Court. It is also evident that the conclusions reached by the Court concerning the ties which existed between Western Sahara and the Kingdom of Morocco or the Mauritanian entity, as defined above, at the time of colonization lead also to the conclusion that there was a certain overlapping of those ties. The findings of the Court, however, regarding the nature of the legal ties of the territory respectively with the Kingdom of Morocco and the Mauritanian entity differ materially from the views advanced in that respect by Morocco and Mauritania. In the opinion of the Court those ties did not involve territorial sovereignty or co-sovereignty or territorial inclusion in a legal entity. In consequence, the "geographical overlapping" drawn attention to by the two States had, in the Court's view, a different character from that envisaged in the statements quoted above.

159. The overlapping arose simply from the geographical locations of the migration routes of the nomadic tribes; and the intersection and overlapping of those routes was a crucial element in the complex situation found in Western Sahara at that time. To speak of a "north" and a "south" and an overlapping with no void in between does not, therefore, reflect the true complexity of that situation. This complexity was, indeed, increased by the independence of some of the nomads, notably the Reghebat, a tribe prominent in Western Sahara. The Reghebat, although they may have had links with the tribes of the Bilad Shinguiti, were essentially an autonomous and independent people in the region with which these proceedings are concerned. Nor is the complexity of the legal relations of Western Sahara with the neighboring territories at that time fully described unless mention is made of the fact that the nomadic routes of certain tribes passed also within areas of what is present-day Algeria.

160. In the view of the Court, therefore, the significance of the geographical overlapping is not that it indicates a "north" and a "south" without a "no-man's land". Its significance is rather that it indicates the difficulty of disentangling the various relationships existing in the Western Sahara region at the time of colonization by Spain.

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161. As already indicated in paragraph 70 of this Opinion, the General Assembly has made it clear, in resolution 3292 (XXIX), that the right of the population of Western Sahara to self-determination is not prejudiced or affected by the present request for an advisory opinion, nor by any other provision contained in that resolution. It is also clear that, when the General Assembly asks in Question II what were the legal ties between the territory of Western Sahara and the Kingdom of Morocco and the Mauritanian entity, it is addressing an enquiry to the Court as to the nature of these legal ties. This question, as stated in paragraph 85 above, must be understood as referring to
such legal ties as may affect the policy to be followed in the decolonization of Western Sahara. In framing its answer, the Court cannot be unmindful of the purpose for which its opinion is sought. Its answer is requested in order to assist the General Assembly to determine its future decolonization policy and in particular to pronounce on the claims of Morocco and Mauritania to have had legal ties with Western Sahara involving the territorial integrity of their respective countries.

162. The materials and information presented to the Court show the existence, at the time of Spanish colonization, of legal ties of allegiance between the Sultan of Morocco and some of the tribes living in the territory of Western Sahara. They equally show the existence of rights, including some rights relating to the land, which constituted legal ties between the Mauritanian entity, as understood by the Court, and the territory of Western Sahara. On the other hand, the Court's conclusion is that the materials and information presented to it do not establish any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian entity. Thus the Court has not found legal ties of such a nature as might affect the application of resolution 1514 (XV) in the decolonization of Western Sahara and, in particular, of the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory (cf. paragraphs 54-59 above).

163. For these reasons,

THE COURT DECIDES,

with regard to Question I,
by 13 votes to 3,

and with regard to Question II,
by 14 votes to 2,

to comply with the request for an advisory opinion;

THE COURT IS OF OPINION,

with regard to Question I,
unanimously,

that Western Sahara (Rio de Oro and Sakiet El Hamra) at the time of colonization by Spain was not a territory belonging to no-one (terra nullius);

with regard to Question II,
by 14 votes to 2,

that there were legal ties between this territory and the Kingdom of Morocco of the kinds indicated in paragraph 162 of this Opinion;
by 15 votes to 1,

that there were legal ties between this territory and the Mauritanian entity of the kinds indicated in paragraph 162 of this Opinion.

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

(Signed) Manfred Lachs,
President.

(Signed) S. Aquarone,
Registrar.

Judge Gros makes the following declaration:

[Translation]

The request for advisory opinion, as I understand it, puts to the Court a precise question, relating to a certain legal controversy, to which the Advisory Opinion gives a complex reply; I was in agreement with the Court only in respect of one part of that reply, which I would have preferred to separate from the rest of the operative part of the Opinion. My analysis of the facts of the case and the rules of interpretation which should be applied to them differs from the observations made by the Court, and I consider it necessary to give a brief account of the reasons for my approach to the problems raised by examination of the General Assembly's request, the object of which appears to me to be more limited than that adopted in the Advisory Opinion.

1. In every case, whether contentious or advisory, the first question which arises for a court is: What is being asked for? In the present case, right from
the beginning of the proceedings it was apparent that the General Assembly was asking the Court to give it an opinion on a precise legal question, defined as springing from a “legal controversy [which] arose” during the discussion “over the status of the said Territory at the time of its colonization by Spain”. In the documentation supplied by the Secretary-General concerning the period 1958-1974 there is no trace of any specific legal question between Morocco and Spain, which however the present Advisory Opinion has described as a “legal dispute... regarding the Territory” (Order of 22 May 1975 and para. 9 of the Opinion). I therefore voted against the Order of 22 May, which, while it was devoted to the composition of the Court, inevitably settled the question of the legal nature of the Opinion, as had already happened in 1971 (Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), I.C.J. Reports 1971, pp. 16 ff.). The problem I shall deal with first is that of the definition of the object of the present request for opinion, apart from the consequences of the Order on the composition of the Court (cf. on this point para. 7 below). I consider that there is no dispute—since that is the word used by the Court—between Morocco and Spain, but a legal question raised by the Government of Morocco before the General Assembly, with the support of the Mauritanian Government only in 1974, which may be analysed as a multilateral legal controversy in a debate on the future status of the territory of Western Sahara (hereinafter referred to as the Territory). The subject of that legal question is as follows: is Morocco entitled to claim the reintegration of the Territory into the national territory of the Kingdom of Morocco, to which it belonged, according to Morocco, at the time of colonization by Spain? Such is therefore the precise legal question, and the sole question, to be answered by the Court; I therefore regard the reasoning of the Advisory Opinion on other subjects as unrelated to the object of the request.

2. There is no need to dwell at length on the nature of the alleged dispute between two States on such a question. The Court should examine the title of the Sherifian Empire prior to the time of colonization by Spain, even though the date of 1884 was not a rigid date. Proof of the sovereignty of the Sherifian Empire is necessarily based on the action of the Government of Spain, and independent thereof; since the claim was based on the detachment of part of the Territory of the Empire, it entails the need to prove prior appurtenance to the territory of a State which was then recognized by the community of States. Spain may of course have been one witness, among others, of the situation, but it cannot be a party to a bilateral legal dispute which “continued to subsist” (para. 36 of the Opinion) with the Kingdom of Morocco over facts and a legal situation existing 90 years ago. For a dispute really to exist between two States, it is necessary, as Judge Morelli, and subsequently Judge Sir Gerald Fitzmaurice, have explained, in the Northern Cameroons case (I.C.J. Reports 1963, p. 109), and subsequently the case of the Advisory Opinion of 21 June 1971 (I.C.J. Reports 1971, p. 314), that:

...the one party [or parties] should be making, or should have made, a complaint, claim or protest about an act, omission or course of conduct, present or past of the other party, which the latter refutes, rejects or denies the validity of, either expressly, or else implicitly by persisting in the acts, omissions or conduct complained of, or by failing to take the action or make the reparation, demanded...
examination depended on the interpretation of the decolonization action of the Territory, the Court in effect abandoned the view that there was a bilateral opposition between Morocco and Spain as to the re-integration of the Territory into the Kingdom of Morocco.

6. The question whether, within the decolonization process of Western Sahara commenced by the United Nations, one or two States can invoke a right to re-integration of the Territory so as to come under their sovereignty is a legal question within the meaning of Article 65 of the Statute of the Court, and it is proper to give a reply thereto. But the definition of legal questions within the meaning of Article 65, as formulated in a general way in paragraphs 18 and 19 of the Advisory Opinion, seems to me dangerously inaccurate. I shall merely recall that when the Court gives an advisory opinion on a question of law it states the law. The absence of binding force does not transform the judicial operation into a legal consultation, which may be made use of or not according to choice. The advisory opinion determines the law applicable to the question put; it is possible for the body which sought the opinion not to follow it in its action, but that body is aware that no position adopted contrary to the Court’s pronouncement will have any effectiveness whatsoever in the legal sphere. In the present case, as defined in the Advisory Opinion, this point is no longer in doubt; since the question put has been found to be a legal one, and since a reply could be regarded as capable of influencing the United Nations action of decolonization of the Territory, the Court could exercise its function as a judicial organ on such a question in the normal way, unlike the case contemplated in 1963 when it stated that: “it is not the function of a Court merely to provide a basis for political action if no question of actual legal rights is involved” (I.C.J. Reports 1963, p. 37, emphasis added). The Court’s reply concerns a claim of right to re-integration of the Territory at the present time, and the fact that the first test of that right was that of the titles prior to colonization does not make such a question abstract or academic. That is not so with regard to the other part of the reply which the Court has given in paragraph 162 of the Opinion, as we shall see in paragraphs 10 and 12 of these observations; it is the application of this theory, which gives an extensive meaning to Article 65 of the Statute, to the operative part of the Opinion which shows how improper it is.

7. To conclude on this aspect of the problems of competence which have arisen for the Court, I shall merely observe that once again the commitments entered into in an Order on a preliminary question have tied the Court’s hands. The recitals in the Order of 22 May 1975 were based on the “appearance” of a dispute between Morocco and Spain and of a request on a legal question pending between two or more States within the meaning of Article 89 of the Rules; the verb “appear” is used four times. The Court however then went on to say that its conclusions did not prejudge its position on one of the questions subsequently to be decided, competence, propriety of replying to the request, merits. Despite the effective disappearance of the bilateral dispute in the Court’s train of reasoning in its Opinion, and the veil
drawn over the existence of a legal question pending between States, the Court has been unable or unwilling to modify what it said in May 1975, although the reason for the appointment of a judge ad hoc does not stand. The third recital in the Order states that the Court “includes upon the Bench a judge of the nationality of Spain, the administering Power of Western Sahara”; I have pointed out in paragraphs 2 and 4 above that Spain was not, on the basis of that or any other status, a party to a bilateral dispute, or to the settlement of a legal question pending between two or more States. By deciding that the question put to the Court was linked to the pursuit of the General Assembly’s decolonization process, the Court impliedly denied that the justification for its competence is no longer the dispute which there “appeared” to be in May 1975. Judge Sir Gerald Fitzmaurice and I commented in 1971 on the regrettable effects of these Orders on the composition of the Court which irrevocably prejudge the merits (I.C.J. Reports 1971, p. 316, pp. 325-326 and 330). I should add, in the present case, that the Court allowed one of its Members to sit although he had in the United Nations committed himself on one element in the discussion on (this point of. I.C.J. Reports 1971, dissenting opinion of Sir Gerald Fitzmaurice, p. 309, and my own observations on pp. 311 ff.).

8. My observations on the problems raised by the Government of Mauritania essentially do not differ from those of the Court; I would however observe that the legal position of the Government of Mauritania in the proceedings before the Court was peculiar, inasmuch as prior to 1974 it did not seek to set up its claim for reintegration of the Territory into its national territory against the normal pursuit of the procedure for self-determination of the population of the Territory in the United Nations context.

9. The above considerations as to the proper interpretation of Article 65 of the Statute and the precise object of the request for advisory opinion enable me to be brief in explaining my negative vote as to the propriety of replying to the first question in the request. Since the Court decided to reply to this question in the very terms in which it has been put, I took the view that the question was not a legal one, that it was purely academic and served no useful purpose, and I share the views of Judge Dillard as to its being a “loaded” one. The Advisory Opinion rightly recognizes that the concept of terra nullius was never relied on by any of the States interested in the status of the Territory at the time of colonization; no treaty or diplomatic document has been produced relying on this concept in connection with Western Sahara, and States at the time spoke only of zones of influence. With regard to a territory

in respect of which the concept makes no appearance in the practice of States, it is a sterile exercise to ask the Court to pronounce on a hypothetical situation; it is not for a court to enquire into what would have happened in 1884 if States had relied on this concept, but into what did happen. If the real question put by the General Assembly, in the thinking of those who drafted it, was what was the legal status of the Territory under international law at the time, it duplicated the second question, to which the Court has, almost unanimously, agreed to reply.

Having said that, since the Court has decided to give a reply to the first question, and since our rules do not permit an abstention, I have voted with all my colleagues that the Territory was not nullius before colonization; for I consider that the independent tribes travelling over the territory, or stopping in certain places, exercised a de facto authority which was sufficiently recognized for there to have been no terra nullius.

* * *

10. The Court has not adopted the simplest way of giving its reply to the second question, since the reply itself, inasmuch as it is effected by cross-reference to paragraph 162 of the reasoning, is enigmatic, as is the paragraph referred to, in which a positive finding of what are said to be legal ties of allegiance between certain nomadic tribes of the territory and the Emperor of Morocco at the time of colonization, and also other ties which are said to be legal, this time between the Mauritanian entity and the Territory, is combined with a negative decision as to the existence of any tie of sovereignty over the territory on the part of the Emperor of Morocco or the Mauritanian entity, the conclusion being that no legal tie exists which could influence the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory (with a fresh cross-reference here to paras. 54-59 of the opinion).

The second part of paragraph 162, concerning the question of territorial sovereignty, is the only one which corresponds to the question put in the request for opinion. The object of the request, as I said in my very first paragraph above, was to obtain the opinion of the Court on a claim of the Government of Morocco to the reintegration of the Territory in the national territory of Morocco, and on a parallel claim by the Government of Mauritania based on the concept of the Mauritanian entity at the time in question, which advisory opinion was necessary prior to pursuit of the decolonization of the territory. I agree with the views and decision of the Court on this point of law.

On the other hand, if paragraph 162 had been divided into two, I would have voted against the first part which relates to the “legal ties” other than the tie of territorial sovereignty, because those ties are not legal ties but ethnic, religious or cultural ties, ties of contact of a civilization with what lies on its periphery and outside it, and which do not touch on its own nature. I must
therefore make a few observations on the part of the Court’s reply with which I disagree, both as regards the reasoning and the conclusion (for Morocco, paras. 105, 106, 107, 129; for Mauritania, paras. 151 and 152; for the conclusion, para. 162).

11. The description given in the Opinion of the Saharan desert and of nomadic life in 1884 is an idyllic vision of what was a harsh reality. At the time, the Saharan desert was still the frontierless sea of sand used by the caravans as they conveyed goods, for the purposes of a well-known trade; the desert was a way of access to markets on its periphery. The relation between the territory and human beings was affected by these aspects, and the organization of the populations of the desert reflects these special conditions of life: caravans, the quest for pastures, oases, defence or conquest, protection and submission between tribes— with regard to which testimony produced to the Court, and not disputed, was to the effect that in modern times there are 175 Moorish tribes. Since the Court was unable to carry out any specific research, it is vain to make generalizations, in the absence of any reliable data, on the lines that there was “alliance” between the Emperor of Morocco and “some” of the nomadic tribes, or “some rights relating to the land”, between the Territory and the Mauritanian entity, when the Court would be quite unable to say either what were the tribes concerned in 1884, to what extent and for what period, nor in what effective exercise of rights relating to the land the tribes and the Mauritanian entity were combined, nor what tribes, nor for what period. It is the duty of a court to establish facts, that is to say to make findings as to their existence, and it confers a legal meaning upon them by its decision; a court may neither suppose the existence of facts nor deduce them from hypotheses unsupported by evidence. How can one speak of a legal tie of allegiance, a concept of feudal law in an extremely hierarchical society, in which allegiance was an obligation which was assumed formally and publicly, which was known to all, was relied on by both sides, and was backed by specific procedures and not merely by the force of arms. The political situation, in the broadest sense of the term, of the tribes of the desert is that of independence asserted by arms, independence both between the tribes themselves and with regard to what lay on the periphery of their travelling grounds. To give the term allegiance its traditional sense, more would have to be said than that it was possible that the Sultan displayed some authority over some unidentified tribes of the desert (para. 105 of the Opinion). As to the observations and deductions made as to the role of the various Tekna tribes, also unidentified, these seem to me unjust, mere a posteriori constructions of a little known epoch. On the basis of the dossier as it stands, and of the studies of this period by geographers, historians, explorers and soldiers, the Saharan desert and its tribes did not recognize allegiance in the legal sense of the word, and sporadic contacts or relationships with the outside world did not affect the peculiarity and exclusivity of their way of life. If the desert is a separate world, it is an autonomous world in the conception of its relationships with those who have a different way of life.

12. Contact-relationships of which the duration is unknown, and the existence of which at the period of colonization is supposed rather than proved, do not afford possible material for the Court to examine and on which to reply, and by doing so it oversteps the limits of the powers conferred upon it by Article 65 of its Statute (cf. para. 6 above). By means of the extensive interpretation given to Article 65, whereby the Court was led to put to itself a second question, of the legal ties other than sovereignty over the Territory at the period under consideration, which was the sole subject of the controversy which gave rise to the request for opinion, the Court purports to be replying to a legal question, but the ties which it describes as legal would only be so if, after having established their existence, the Court could in any way, by determining their significance, produce an effect on the decolonization of the Territory. The Court cannot attribute a legal nature to facts which do not intrinsically possess it; a court does not create the law; it establishes it. If there is no rule of law making it possible for it to assert the existence of the alleged legal ties, the Court oversteps its role as a judicial organ by describing them as legal, and its finding is not a legal finding; the Court’s statement in paragraph 73 of the Opinion that questions put in a request for opinion must have “a practical and contemporary effect” if they are not to be “void of object or purpose”, does not suffice, for the Court does not in this field have capacity to “give advice” to the General Assembly which would have a practical effect. Whether such factors existed in 1884 or not—which has not been “established” in the judicial sense of the word—the General Assembly would be free to take them into account together with other contemporary factors, which also do not fall within the Court’s competence, because economics, sociology and human geography are not law. In 1962 the Court said: “in accordance with Article 65 of its Statute, the Court can give an advisory opinion only on a legal question. If a question is not a legal one, the Court has no discretion in the matter” (Advisory Opinion of 20 July 1962, Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), I.C.J. Reports 1962, p. 155).

13. I expressed my view in 1974 as to the current trend in the Court to reply to problems which it raises itself rather than to that which is submitted to it, and can only endorse what I said then (I.C.J. Reports 1974, pp. 148-149). In the present case, the way in which the operative part of the Advisory Opinion has been drawn has obliged me to vote in a way as unsatisfactory as that drafting itself, as is shown by the various opinions in relation to the apparent quasi-unanimity. Like other Members of the Court, I was faced only with the choice between agreeing or disagreeing subject in either event to reservations. I voted in favour of the adoption of the operative clause, and thus of paragraph 162, because of the part thereof concerning the object of the request, as I have defined it above, that is to say verification of the existence of legal ties of appurtenance or dependence of the population of the Territory, at the period under consideration, vis-à-vis an external political authority—in short, ties relating to the sovereignty which was claimed before the Court; and the role of the Court went no further than that.
Judge Ignacio-Pinto makes the following declaration:

[Translation]

I have been able to subscribe only in part to the Opinion of the International Court of Justice dated 16 October 1975 and only because in the final paragraph of its reasoning, paragraph 162, the Court’s

"... conclusion is that the materials and information presented to it do not establish any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian entity. The Court has not found legal ties of such a nature as might affect the application of resolution 1514 (XV) in the decolonization of Western Sahara and, in particular, of the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory."

I consequently reject all that part of the Court’s statement which declares that at the time of colonization by Spain there were legal ties of allegiance between the Sultan of Morocco and certain tribes of the territory at the same time as other legal ties between the Mauritanian entity and the territory of Western Sahara.

My objection to the Advisory Opinion is due to the fact that I consider that, even if it appears that the Court is justified in declaring itself competent under the provisions of Article 96 of the Charter of the United Nations on the one hand, and of Article 65 of the Statute of the Court on the other, to receive from the United Nations General Assembly the request for an advisory opinion, it would have been proper by reason of certain circumstances in the case ab initio for the Court, availing itself of its discretionary power, and after having declared the request receivable as to the form, to reject it as to the substance, because the questions as put are, as it were, loaded questions, leading in any case to the answer awaited in this particular instance, namely the recognition of rights of sovereignty of Morocco on the one hand and of Mauritania on the other over some part or other of Western Sahara.

For the sake of brevity and to avoid useless repetition, I can support the observations of Judge Pétrèn concerning the interpretation of paragraph 162 of the Opinion and the grounds on which my colleague, like myself, rejects all of that paragraph other than where it deals with the question of any tie of territorial sovereignty between the territory and Morocco and the Mauritanian entity—a part of the paragraph which I can accept.

M. Nagendra Singh, juge, fait la déclaration suivante:

[Traduction]

Bien que je souscrive à l’avis consultatif et que j’approuve son insistance sur la nécessité d’une expression authentique de la volonté des populations,
existence of one single State comprising the territory of Western Sahara and Morocco, or Western Sahara and Mauritania, which would have been dismembered by the colonizer and thus justify reunion on decolonization at the present time. Accordingly, the facts and circumstances of this case would not attract the provisions of paragraph 6 of resolution 1514 (XV) which holds disruption of national unity or territorial integrity of a country as incompatible with the Charter of the United Nations and thus points to reintegration of territory. Nevertheless, as the Court finds that there were certain legal ties in existence, it becomes necessary to proceed to assess them with the sole purpose of evaluating them to ascertain if they indicate a definite step in terms of the decolonization process. In short the strength and efficacy of these ties though limited must still be held to be of such an order as to point in the direction of the possible options which could be afforded to the population in ascertaining the will of the people. These options, in accordance with resolution 1541 (XV) as well as 2625 (XXV), could be either integration with Morocco or with Mauritania or having free association with any one of them or for opting in favour of a sovereign independent status of the territory. Even if it is conceded that the procedures for decolonization lie within the exclusive province of the General Assembly it is yet appropriate for a court to point out the relationship between the existence of the legal ties and the decolonization process in order fully to enlighten the General Assembly. To do so is not to trespass on the prerogatives of the General Assembly but to fulfill the role as the principal judicial organ of the United Nations.

There are some valid reasons for going this far but no farther. First, taking into consideration the very raison d'être of resolution 3292 (XXIX) it is clear what the General Assembly expects in the answer to Question II is the Court's appraisal of the nature of these legal ties "which must be understood as referring to such legal ties as may materially affect the method or the policies and procedures to be applied in the decolonization of Western Sahara". If the Court cannot be "unmindful of the purpose for which its opinion is sought" it stands to reason that while remaining well within its judicial bounds the Court should proceed far enough to make clear those aspects of the available options which are open to the people of the territory in any method of their consultation particularly when the Court holds that consultation is essential.

The second reason is that there have been specific pleadings on this matter both by Morocco and Mauritania, as cited above, and these need not be totally ignored.

II

The Court has recognized the validity of the principle of self-determination, "defined as the need to pay regard to the freely expressed will of the peoples". Furthermore the Court has rightly concluded that the need for ascertaining the freely expressed will of the people is not in any way affected by the present request of the General Assembly for an advisory

opinion. In my opinion the consultation of the people of the territory awaiting decolonization is an inescapable imperative whether the method followed on decolonization is integration or association or independence. This is established by not only the general provisions of the United Nations Charter but also by specific resolutions of the General Assembly on this subject. Apart from Articles 1, 2, 55 and 56 of the Charter and paragraphs 2 and 5 of resolution 1514 (XV) which bring out this aspect generally there are also specific provisions such as contained in principles VII and IX of resolution 1541 (XV) which categorically state "integration should be the result of the freely expressed wishes of the territory's peoples". It is principle VI (c) of resolution 1541 (XV) which prescribes integration as a method of decolonization and principle IX (b) imposes the condition of consultation of the people as the means of achieving self-determination by integration. Again resolution 2625 (XXV) concerning friendly relations goes a long way to further emphasize the point that on decolonization the "emergence into any political status" has to be "freely determined by a people". Thus even if integration of territory was demanded by an interested State, as in this case, it could not be had without ascertaining the freely expressed will of the people—the very sine qua non of all decolonization.

However, I am in agreement with the clarification given by the Court to that aspect of the matter which relates to certain cases in which the General Assembly has dispensed with the requirement of consulting the inhabitants of a given territory. It follows, in my view, that the principle of self-determination could be dispensed with only if the free expression of the will of the people was found to be inapt in the sense that the result was known to be a foregone conclusion or that consultations had already taken place in some form or that special features of the case rendered it unnecessary. Such exceptional circumstances are possible and could exist but they do not appear to be present in this case so as to do away with the salutary principle of ascertainment of the freely expressed will of the people of the territory who could, on consultations, elect to integrate with any one of the adjoining interested States if they so desired.

Again, cases falling under paragraph 6 of resolution 1514 would remain outside this rule. In any event, as stated earlier, the facts disclosed here do not point to the application of that particular provision of the said resolution.

III

Another aspect which is equally important to me relates to the Court's observations concerning respect for the fundamental principle of consent to jurisdiction if in any case the requirement of such consent was circumvented by resorting to the advisory proceedings of the Court. In this case Spain has not given its consent to adjudication of the questions formulated in resolution 3292 (XXIX). Furthermore, it did not agree to Morocco's proposal to move the Court in contentious proceedings. It was necessary, therefore, for the
Court to clarify the legal position resulting from the Spanish contention that there was lack of consent to invoke the Court’s jurisdiction. The conclusion is warranted that although there are two distinct channels of the Court’s jurisdiction, namely advisory and contentious and although “consent of States, parties to a dispute, is the basis of the Court’s jurisdiction in contentious cases while the situation is different in regard to advisory proceedings” since the Court’s reply is only of an “advisory character” and given “not to States but to the organ entitled to request it” (I.C.J. Reports 1930, p. 71), there could still be certain circumstances in which lack of consent of an interested State could render the giving of an advisory opinion incompatible with the Court’s judicial character. The Court, therefore, has stated that if a request for an advisory opinion was made in circumstances which clearly disclosed that the intention or the purpose was to circumvent the principle of consent a situation would arise in which “the powers of the Court under the discretion given to it by Article 65, paragraph 1, of the Statute would afford sufficient legal means to ensure respect for the fundamental principle of consent to jurisdiction”.

No such hypostasizing of this salutary principle has taken place in the present proceedings because the object of the request for an opinion has been to obtain from the Court legal advice which the General Assembly considers of assistance in the discharge of its functions in relation to the pending decolonization of a territory. What is of importance, therefore, in this context is the recognition given to the principle of judicial propriety which would oblige the Court to refuse an opinion on the ground of the existence of a “compelling reason” for doing so, if the purpose behind the request for an opinion was to defeat the principle that a State is not obliged to submit its disputes to judicial settlement without its consent. This also enlightens the General Assembly in the use of Article 96 of the Charter by asserting that consent of an interested State still continues to be relevant even in advisory proceedings, “for the appreciation of the propriety of giving an opinion”.

M. AMMOUN, Vice-Président, MM. FORSTER, PETRÉN, DILLARD, DE CASTRO, juges, et M. BONI, juge ad hoc, joignent à l’avis consultatif les exposés de leur opinion individuelle.

M. RUDA, juge, joint à l’avis consultatif l’exposé de son opinion dissidente.

(Paraphé) M.L.
(Paraphé) S.A.
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_, p. 403
ADVISORY OPINION OF 22 JULY 2010

2010

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

TABLE OF CONTENTS

Paragaphs

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 inde-
pendence 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 there-
under 110-121
V. General Conclusion 122
Operative Clause 123

22 JUILLET 2010
AVIS CONSULTATIF
INTERNATIONAL COURT OF JUSTICE

YEAR 2010

22 July 2010

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

Jurisdiction of the Court to give the advisory opinion requested.

Article 65, paragraph 1, of the Statute — Article 96, paragraph 1, of the
Charter — Power of General Assembly to request advisory opinions — Arti-
cles 10 and 11 of the Charter — Contention that General Assembly acted out-
side its powers under the Charter — Article 12, paragraph 1, of the Charter —
Authorization to request an advisory opinion not limited by Article 12.

Requirement that the question on which the Court is requested to give its
opinion is a "legal question" — Contention that the act of making a declaration
of independence is governed by domestic constitutional law — The Court can
respond to the question by reference to international law without the need to
address domestic law — The fact that a question has political aspects does not
deprive it of its character as a legal question — The Court is not concerned with
the political motives behind a request or the political implications which its
opinion may have.

The Court has jurisdiction to give the advisory opinion requested.

Discretion of the Court to decide whether it should give an opinion.

Integrity of the Court’s judicial function — Only “compelling reasons” should
lead the Court to decline to exercise its judicial function — The motives of indi-
vidual States which sponsor a resolution requesting an advisory opinion are not
relevant to the Court’s exercise of its discretion — Requesting organ to assess
purpose, usefulness and political consequences of opinion.

Delimitation of the respective powers of the Security Council and the General
Assembly — Nature of the Security Council’s involvement in relation to Kos-
ovo — Article 12 of the Charter does not bar action by the General Assembly in
respect of threats to international peace and security which are before the Secu-
rit y Council — General Assembly has taken action with regard to the situation
in Kosovo.

No compelling reasons for Court to use its discretion not to give an advisory
opinion.

Scope and meaning of the question.

Text of the question in General Assembly resolution 63/3 — Power of the
Court to clarify the question — No need to reformulate the question posed by
the General Assembly — For the proper exercise of its judicial function, the
Court must establish the identity of the authors of the declaration of independ-
ence — No intention by the General Assembly to restrict the Court’s freedom to
determine that issue — The Court’s task is to determine whether or not the decla-
ration was adopted in violation of international law.

Factual background.

Framework for interim administration of Kosovo put in place by the Security
Council — Security Council resolution 1244 (1999) — Establishment of the
United Nations Interim Administration Mission in Kosovo (UNMIK) — Role of
Special Representative of the Secretary-General — “Four pillars” of the
UNMIK régime — Constitutional Framework for Provisional Self-Govern-
ment — Relations between the Provisional Institutions of Self-Government and
the Special Representative of the Secretary-General.

Relevant events in the final status process — Appointment by Secretary-
General of Special Envoy for the future status process for Kosovo — Guiding
Principles of the Contact Group — Failure of consultative process — Compre-
hensive Proposal for the Kosovo Status Settlement by Special Envoy — Failure
of negotiations on the future status of Kosovo under the auspices of the Troika —
Elections held for the Assembly of Kosovo on 17 November 2007 — Adoption of
the declaration of independence on 17 February 2008.

Whether the declaration of independence is in accordance with international
law.

No prohibition of declarations of independence according to State practice —
Contention that prohibition of unilateral declarations of independence is implicit
in the principle of territorial integrity — Scope of the principle of territorial
integrity is confined to the sphere of relations between States — No general pro-
hibition may be inferred from the practice of the Security Council with regard to
declarations of independence — Issues relating to the extent of the right of self-
determination and the existence of any right of “remedial secession” are beyond the scope of the question posed by the General Assembly.

General international law contains no applicable prohibition of declarations of independence — Declaration of independence of 17 February 2008 did not violate general international law.

Security Council resolution 1244 and the Constitutional Framework — Resolution 1244 (1999) imposes international legal obligations and is part of the applicable international law — Constitutional Framework possesses international legal character — Constitutional Framework is part of specific legal order created pursuant to resolution 1244 (1999) — Constitutional Framework regulates matters which are the subject of internal law — Supervisory powers of the Special Representative of the Secretary-General — Security Council resolution 1244 (1999) and the Constitutional Framework were in force and applicable as at 17 February 2008 — Neither of them contains a clause providing for termination and neither has been repealed — The Special Representative of the Secretary-General continues to exercise his functions in Kosovo.

Security Council resolution 1244 (1999) and the Constitutional Framework form part of the international law to be considered in replying to the question before the Court.


Identity of the authors of the declaration of independence — Whether the declaration of independence was an act of the Assembly of Kosovo — Authors of the declaration did not seek to act within the framework of interim self-administration of Kosovo — Authors undertook to fulfill the international obligations of Kosovo — No reference in original Albanian text to the declaration being the work of the Assembly of Kosovo — Silence of the Special Representative of the Secretary-General — Authors of the declaration of independence acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration.

Whether or not the authors of the declaration of independence acted in violation of Security Council resolution 1244 (1999) — Resolution 1244 (1999) addressed to United Nations Member States and organs of the United Nations — No specific obligations addressed to other actors — The resolution did not contain any provision dealing with the final status of Kosovo — Security Council did not reserve for itself the final determination of the situation in Kosovo — Security Council resolution 1244 (1999) did not bar the authors of the declaration of 17 February 2008 from issuing a declaration of independence — Declaration of independence did not violate Security Council resolution 1244 (1999).

Declaration of independence was not issued by the Provisional Institutions of Self-Government — Declaration of independence did not violate the Constitutional Framework.

Adoption of the declaration of independence did not violate any applicable rule of international law.

On the accordance with international law of the unilateral declaration of independence in respect of Kosovo,

The Court, composed as above,

gives the following Advisory Opinion:

1. The question on which the advisory opinion of the Court has been requested is set forth in resolution 63/3 adopted by the General Assembly of the United Nations (hereinafter the General Assembly) on 8 October 2008. By a letter dated 9 October 2008 and received in the Registry by facsimile on 10 October 2008, the original of which was received in the Registry on 15 October 2008, the Secretary-General of the United Nations officially communicated to the Court the decision taken by the General Assembly to submit the question for an advisory opinion. Certified true copies of the English and French versions of the resolution were enclosed with the letter. The resolution reads as follows:

“The General Assembly,
Mindful of the purposes and principles of the United Nations,
Bearing in mind its functions and powers under the Charter of the United Nations,
Recalling that on 17 February 2008 the Provisional Institutions of Self-Government of Kosovo declared independence from Serbia,

Aware that this act has been received with varied reactions by the Members of the United Nations as to its compatibility with the existing international legal order,

Decides, in accordance with Article 96 of the Charter of the United Nations to request the International Court of Justice, pursuant to Article 65 of the Statute of the Court, to render an advisory opinion on the following question:

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

2. By letters dated 10 October 2008, the Registrar, pursuant to Article 66, paragraph 1, of the Statute, gave notice of the request for an advisory opinion to all States entitled to appear before the Court.

3. By an Order dated 17 October 2008, in accordance with Article 66, paragraph 2, of the Statute, the Court decided that the United Nations and its Member States were likely to be able to furnish information on the question.
By the same Order, the Court fixed, respectively, 17 April 2009 as the time-limit within which written statements might be submitted to it on the question, and 17 July 2009 as the time-limit within which written comments on the other written statements in accordance with Article 66, paragraph 4, of the Statute.

The Court also decided that, taking account of the fact that the unilateral declaration of independence of 17 February 2008 is the subject of the questions submitted to the Court for an advisory opinion, it might be appropriate for the parties to present written contributions to the Court on the question. By letter dated 30 June 2009, the Registrar communicated to the United Nations and its Member States the Court’s decision to invite all States having submitted a written statement, as well as to the authors of the unilateral declaration of independence, to make written contributions to the Court within the same time-limits.

By letters dated 20 October 2008, the Registrar informed the United Nations and its Member States of the Court’s decisions and transmitted to them a copy of the Order. By letter of the same date, the Registrar informed the authors of the unilateral declaration of independence of the Court’s decisions, and transmitted to them a copy of the Order.

5. Pursuant to Article 65, paragraph 2, of the Statute, on 30 January 2009 the Secretary-General of the United Nations communicated to the Court a dossier of documents likely to throw light upon the question. The dossier was subsequently placed on the Court’s website. Within the time-limit fixed for that purpose, written statements were filed, in order of their receipt, by: Czech Republic, France, Cyprus, China, Switzerland, Romania, Albania, Argentina, United States of America, and Spain. The authors of the unilateral declaration of independence submitted a written contribution regarding the question.

6. Within the time-limit fixed by the Court for that purpose, written statements were filed, in order of their receipt, by: Czech Republic, France, Norway, Cyprus, Serbia, Argentina, Germany, Netherlands, China, Brazil, and Spain. The authors of the unilateral declaration of independence submitted a written contribution regarding the written statements.

7. On 29 April 2009, the Court decided to accept the written statement filed by the Bolivarian Republic of Venezuela, submitted on 24 April 2009, after expiry of the relevant time-limit. On 15 May 2009, the Registrar informed the United Nations and its Member States that the Court had decided to hold hearings, opening on 1 December 2009, at which it would receive oral statements on all written statements and written comments.

8. By letters dated 8 June 2009, the Registrar informed the United Nations and its Member States that the Court had decided to hold hearings, opening on 1 December 2009, at which it would receive oral statements on all written statements and written comments.

9. Within the time-limit fixed by the Court for that purpose, written comments were filed, in order of their receipt, by: France, Norway, Cyprus, Serbia, Argentina, Germany, Netherlands, China, Brazil, and Spain. The authors of the unilateral declaration of independence submitted an oral contribution regarding the written statements.

10. Upon receipt of the above-mentioned written comments and written contribution, the Registrar, on 24 July 2009, communicated copies thereof to all States having submitted written statements, as well as to the authors of the unilateral declaration of independence.

11. By letters dated 30 July 2009, the Registrar communicated to the United Nations, and to all of its Member States that had not participated in the written proceedings, copies of all written statements and written comments, as well as the written contributions of the authors of the unilateral declaration of independence.

12. By letters dated 29 September 2009, the Registrar transmitted a detailed timetable of the hearings to those, within the time-limit to take part in the aforementioned proceedings.

13. Pursuant to Article 106 of the Rules of Court, the Court decided to make the written statements and written comments submitted to the Court, as well as the written contributions of the authors of the unilateral declaration of independence, accessible to the public, with effect from the opening of the oral proceedings.

14. In the course of the proceedings held from 1 to 11 December 2009, the Court heard oral statements in the following order by:

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Mr. Dusan T. Batakovic, Ph.D. in History, University of Split, Split, Croatia, on behalf of the Republic of Serbia; Mr. Vladimir Djeric, S.J.D. (Michigan), Attorney at Law, Belgrade, Serbia, for the Republic of Serbia; Mr. Andreas Zimmermann, LL.M. (Harvard), Professor of International Law, University of Potsdam, Germany; Mr. Malcolm N. Shaw QC, Sir Robert Jennings Professor of International Law, University of Leicester, United Kingdom; Mr. Saša Obradovic, Inspector General in the Ministry of Foreign Affairs, Belgrade, Serbia, for the Republic of Serbia; Mr. Robert Jennings, QC, London, United Kingdom, Counsel and Advocate; and Mr. Robert F. Blackman, QC, London, United Kingdom, Counsel and Advocate.
for the authors
of the unilateral
declaration of independence:
Mr. Skender Hyseni, Head of Delegation,
Sir Michael Wood, K.C.M.G., Member of the English Bar Member of the International Law Commission, Counsel,
Mr. Daniel Müller, Researcher at the Centre de droit international de Nanterre (CEDIN), University of Paris Ouest, Nanterre-La Défense, Counsel,
Mr. Sean D. Murphy, Patricia Roberts Harris Research Professor of Law, George Washington University, Counsel;
Mr. Daniel Müller, Researcher at the Centre de droit international de Nanterre (CEDIN), University of Paris Ouest, Nanterre-La Défense, Counsel,
Mr. Sean D. Murphy, Patricia Roberts Harris Research Professor of Law, George Washington University, Counsel;

for the Republic of Albania:
H.E. Mr. Gazmend Barbouthi, Ambassador Extraordinary and Plenipotentiary of the Republic of Albania to the Kingdom of the Netherlands, Legal Adviser,
Mr. Jochen A. Frowein, M.C.L., Director emeritus of the Max Planck Institute for International Law, Professor emeritus of the University of Heidelberg, Member of the Institute of International Law, Legal Adviser,
Mr. Terry D. Gill, Professor of Military Law at the University of Amsterdam and Associate Professor of Public International Law at Utrecht University, Legal Adviser;
Ms Susanne Wasum-Rainer, Legal Adviser, Federal Foreign Office (Berlin);

for the Republic of Croatia:
H.E. Mr. Abrudulah A. Ahbgahrood, Ambassador of the Kingdom of Saudi Arabia to the Kingdom of the Netherlands, Head of Delegation;
H.E. Madam Susana Ruiz Cerutti, Ambassador, Legal Adviser to the Ministry of Foreign Affairs, International Trade and Worship, Head of Delegation;

for the Republic of Germany:
H.E. Mr. Heimti Tichy, Ambassador, Deputy Legal Adviser, Federal Ministry of Europe and International Affairs;
H.E. Mr. Chashin Mehdiev, Ambassador of the Republic of Azerbaijan to the Kingdom of the Netherlands, Permanent Representative of Azerbaijan to the United Nations;
H.E. Madam Ekla Gritsenko, Ambassador of the Republic of Belarus to the Kingdom of the Netherlands, Head of Delegation;
H.E. Mr. Roberto Calzadilla Sarmiento, Ambassador of the Plurinational State of Bolivia to the Kingdom of the Netherlands;

for the Republic of Bulgaria:
H.E. Mr. Zlatko Dimitroff, S.J.D., Director of the International Law Department, Ministry of Foreign Affairs, Head of Delegation;

for the Republic of Zimbabwe:
Mr. Thomas Banockte, Legal Attaché, Counsel,
Mr. Jean d’Aspremont, Associate Professor, University of Amsterdam, Chargé de cours invité, Catholic University of Louvain, Counsel;

for the People’s Republic of China:
H.E. Madam Xue Hanqin, Ambassador to the Association of Southeast Asian Nations (ASEAN), Legal Counsel of the Ministry of Foreign Affairs, Member of the International Law Commission, Member of the Institut de droit international, Head of Delegation;

for the Republic of Cyprus:
Mr. Polyviou G. Polyviou, Counsel and Advocate;
H.E. Madam Andreja Metelko-Zgombic, Ambassador, Chief Legal Adviser in the Ministry of Foreign Affairs and European Integration;

for the Republic of Croatia:
H.E. Mr. Thomas Winkler, Ambassador, Under-Secretary for Legal Affairs, Ministry of Foreign Affairs, Head of Delegation;
Ms Concepción Escobar Hernández, Legal Adviser, Head of the International Law Department, Ministry of Foreign Affairs and Co-operation, Head of Delegation and Advocate;

for the United States of America:
Mr. Harold Hongju Koh, Legal Adviser, Department of State, Head of Delegation and Advocate;
H.E. Mr. Kirill Gevorgian, Ambassador, Head of the Legal Department, Ministry of Foreign Affairs, Head of Delegation;

for the Russian Federation:
Ms Päivi Kaukoranta, Director General, Legal Service, Ministry of Foreign Affairs,
Mr. Martti Koskenniemi, Professor at the University of Helsinki;

for the French Republic:
Ms Edwige Belliard, Director of Legal Affairs, Ministry of Foreign and European Affairs,
Mr. Mathias Forteau, Professor at the University of Paris Ouest, Nanterre-La Défense;

for the Hashemite Kingdom of Jordan:
H.R.H. Prince Zeid Raad Zeid Al Hussein, Ambassador of the Hashemite Kingdom of Jordan to the United States of America, Head of Delegation;
15. Questions were put by Members of the Court to participants in the oral proceedings; several of them replied in writing, as requested, within the prescribed time-limit.

16. Judge Shi took part in the oral proceedings; he subsequently resigned from the Court with effect from 28 May 2010.

* * *

I. JURISDICTION AND DISCRETION

17. When seised of a request for an advisory opinion, the Court must first consider whether it has jurisdiction to give the opinion requested and whether, should the answer be in the affirmative, there is any reason why the Court, in its discretion, should decline to exercise any such jurisdiction in the case before it (Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (1), p. 232, para. 10; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (1), p. 144, para. 13).

A. Jurisdiction

18. The Court will thus first address the question whether it possesses jurisdiction to give the advisory opinion requested by the General Assembly on 8 October 2008. The power of the Court to give an advisory opinion is based upon Article 65, paragraph 1, of its Statute, which provides that:

"The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request."

19. In its application of this provision, the Court has indicated that:

"It is . . . a precondition of the Court's competence that the advisory opinion be requested by an organ duly authorized to seek it under the Charter, that it be requested on a legal question, and that, except in the case of the General Assembly or the Security Council, that question should be one arising within the scope of the activities of the requesting organ." (Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982, pp. 333-334, para. 21.)

20. It is for the Court to satisfy itself that the request for an advisory opinion comes from an organ of the United Nations or a specialized agency having competence to make it. The General Assembly is authorized to request an advisory opinion by Article 96 of the Charter, which provides that:

1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.

2. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities."

21. While paragraph 1 of Article 96 confers on the General Assembly the competence to request an advisory opinion on "any legal question", the Court has sometimes in the past given certain indications as to the relationship between the question which is the subject of a request for an advisory opinion and the activities of the General Assembly (Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950, p. 70; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (1), pp. 232-233, paras. 11-12; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (1), p. 145, paras. 16-17).

22. The Court observes that Article 10 of the Charter provides that:

"The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and
functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters."

Moreover, Article 11, paragraph 2, of the Charter has specifically provided the General Assembly with competence to discuss "any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations" and, subject again to the limitation in Article 12, to make recommendations with respect thereto.

23. Article 12, paragraph 1, of the Charter provides that:

"While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests."

24. In the present proceedings, it was suggested that, since the Security Council was seised of the situation in Kosovo, the effect of Article 12, paragraph 1, was that the General Assembly's request for an advisory opinion was outside its powers under the Charter and thus did not fall within the authorization conferred by Article 96, paragraph 1. As the Court has stated on an earlier occasion, however, "[a] request for an advisory opinion is not in itself a 'recommendation' by the General Assembly 'with regard to [a] dispute or situation'" (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I), p. 148, para. 25). Accordingly, while Article 12 may limit the scope of the action which the General Assembly may take subsequent to its receipt of the Court’s opinion (a matter on which it is unnecessary for the Court to decide in the present context), it does not in itself limit the authorization to request an advisory opinion which is conferred upon the General Assembly by Article 96, paragraph 1. Whether the delimitation of the respective powers of the Security Council and the General Assembly — of which Article 12 is one aspect — should lead the Court, in the circumstances of the present case, to decline to exercise its jurisdiction to render an advisory opinion is another matter (which the Court will consider in paragraphs 29 to 48 below).

25. It is also for the Court to satisfy itself that the question on which it is requested to give its opinion is a "legal question" within the meaning of Article 96 of the Charter and Article 65 of the Statute. In the present case, the question put to the Court by the General Assembly asks whether the declaration of independence to which it refers is "in accordance with international law". A question which expressly asks the Court whether or not a particular action is compatible with international law certainly appears to be a legal question; as the Court has remarked on a previous occasion, questions "framed in terms of law and raising problems of international law...are by their very nature susceptible of a reply based on law" (Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 18, para. 15) and therefore appear to be questions of a legal character for the purposes of Article 96 of the Charter and Article 65 of the Statute.

26. Nevertheless, some of the participants in the present proceedings have suggested that the question posed by the General Assembly is not, in reality, a legal question. According to this submission, international law does not regulate the act of making a declaration of independence, which should be regarded as a political act; only domestic constitutional law governs the act of making such a declaration, while the Court’s jurisdiction to give an advisory opinion is confined to questions of international law. In the present case, however, the Court has not been asked to give an opinion on whether the declaration of independence is in accordance with any rule of domestic law but only whether it is in accordance with international law. The Court can respond to that question by reference to international law without the need to enquire into any system of domestic law.

27. Moreover, the Court has repeatedly stated that the fact that a question has political aspects does not suffice to deprive it of its character as a legal question (Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973, p. 172, para. 14). Whatever its political aspects, the Court cannot refuse to respond to the legal elements of a question which invites it to discharge an essentially judicial task, namely, in the present case, an assessment of an act by reference to international law. The Court has also made clear that, in determining the jurisdictional issue of whether it is confronted with a legal question, it is not concerned with the political nature of the motives which may have inspired the request or the political implications which its opinion might have (Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948, I.C.J. Reports 1947-1948, p. 61, and Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I), p. 234, para. 13).

28. The Court therefore considers that it has jurisdiction to give an advisory opinion in response to the request made by the General Assembly.

B. Discretion

29. The fact that the Court has jurisdiction does not mean, however, that it is obliged to exercise it:

"The Court has recalled many times in the past that Article 65, paragraph 1, of its Statute, which provides that 'The Court may give an advisory opinion...' (emphasis added), should be interpreted to
mean that the Court has a discretionary power to decline to give an advisory opinion even if the conditions of jurisdiction are met.” (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I), p. 156, para. 44.)


30. The Court is, nevertheless, mindful of the fact that its answer to a request for an advisory opinion “represents its participation in the activities of the Organization, and, in principle, should not be refused” (Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950, p. 71; Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999 (I), pp. 78-79, para. 29; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I), p. 156, para. 44). Accordingly, the consistent jurisprudence of the Court has determined that only “compelling reasons” should lead the Court to refuse its opinion in response to a request falling within its jurisdiction (Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, I.C.J. Reports 1956, p. 86; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I), p. 156, para. 44).

31. The Court must satisfy itself as to the propriety of the exercise of its judicial function in the present case. It has therefore given careful consideration as to whether, in the light of its previous jurisprudence, there are compelling reasons for it to refuse to respond to the request from the General Assembly.

32. One argument, advanced by a number of participants in the present proceedings, concerns the motives behind the request. Those participants drew attention to a statement made by the sole sponsor of the resolution by which the General Assembly requested the Court’s opinion to the effect that “the Court’s advisory opinion would provide politically neutral, yet judicially authoritative, guidance to many countries still deliberating how to approach unilateral declarations of independence in line with international law.

“... Supporting this draft resolution would also serve to reaffirm a fundamental principle: the right of any Member State of the United Nations to pose a simple, basic question on a matter it considers vitally important to the Court. To vote against it would be in effect a vote to deny the right of any country to seek — now or in the future — judicial recourse through the United Nations system.” (A/63/PV.22, p. 1.)

According to those participants, this statement demonstrated that the opinion of the Court was being sought not in order to assist the General Assembly but rather to serve the interests of one State and that the Court should, therefore, decline to respond.

33. The advisory jurisdiction is not a form of judicial recourse for States but the means by which the General Assembly and the Security Council, as well as other organs of the United Nations and bodies specifically empowered to do so by the General Assembly in accordance with Article 96, paragraph 2, of the Charter, may obtain the Court’s opinion in order to assist them in their activities. The Court’s opinion is given not to States but to the organ which has requested it (Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950, p. 71). Nevertheless, precisely for that reason, the motives of individual States which sponsor, or vote in favour of, a resolution requesting an advisory opinion are not relevant to the Court’s exercise of its discretion whether or not to respond. As the Court put it in its Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons, “once the Assembly has asked, by adopting a resolution, for an advisory opinion on a legal question, the Court, in determining whether there are any compelling reasons for it to refuse to give such an opinion, will not have regard to the origins or to the political history of the request, or to the distribution of votes in respect of the adopted resolution” (I.C.J. Reports 1996 (I), p. 257, para. 16).

34. It was also suggested by some of those participating in the proceedings that resolution 63/3 gave no indication of the purpose for which the General Assembly needed the Court’s opinion and that there was nothing to indicate that the opinion would have any useful legal effect. This argument cannot be accepted. The Court has consistently made clear that it is for the organ which requests the opinion, and not for the Court, to determine whether it needs the opinion for the proper performance of its functions. In its Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons, the Court rejected an argument that it
should refuse to respond to the General Assembly’s request on the ground that the General Assembly had not explained to the Court the purposes for which it sought an opinion, stating that “it is not for the Court itself to purport to decide whether or not an advisory opinion is needed by the Assembly for the performance of its functions. The General Assembly has the right to decide for itself on the usefulness of an opinion in the light of its own needs.” (I.C.J. Reports 1996 (I), p. 237, para. 16.)

Similarly, in the Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, the Court commented that “[t]he Court cannot substitute its assessment of the usefulness of the opinion requested for that of the organ that seeks such opinion, namely the General Assembly” (I.C.J. Reports 2004 (I), p. 163, para. 62).

35. Nor does the Court consider that it should refuse to respond to the General Assembly’s request on the basis of suggestions, advanced by some of those participating in the proceedings, that its opinion might lead to adverse political consequences. Just as the Court cannot substitute its own assessment for that of the requesting organ in respect of whether its opinion will be useful to that organ, it cannot — in particular where there is no basis on which to make such an assessment — substitute its own view as to whether an opinion would be likely to have an adverse effect. As the Court stated in its Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons, in response to a submission that a reply from the Court might adversely affect disarmament negotiations, faced with contrary positions on this issue “there are no evident criteria by which it can prefer one assessment to another” (Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I), p. 237, para. 17; see also Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 37, para. 73; and Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I), pp. 159-160, paras. 51-54).

36. An important issue which the Court must consider is whether, in view of the respective roles of the Security Council and the General Assembly in relation to the situation in Kosovo, the Court, as the principal judicial organ of the United Nations, should decline to answer the question which has been put to it on the ground that the request for the Court’s opinion has been made by the General Assembly rather than the Security Council.

37. The situation in Kosovo had been the subject of action by the Security Council, in the exercise of its responsibility for the maintenance of international peace and security, for more than ten years prior to the present request for an advisory opinion. The Council first took action specifically relating to the situation in Kosovo on 31 March 1998, when it adopted resolution 1160 (1998). That was followed by resolutions 1199 (1998), 1203 (1998) and 1239 (1999). On 10 June 1999, the Council adopted resolution 1244 (1999), which authorized the creation of an international military presence (subsequently known as “KFOR”) and an international civil presence (the United Nations Interim Administration Mission in Kosovo, “UNMIK”) and laid down a framework for the administration of Kosovo. By resolution 1367 (2001), the Security Council decided to terminate the prohibitions on the sale or supply of arms established by paragraph 5 of resolution 1160 (1998). The Security Council has received periodic reports from the Secretary-General on the activities of UNMIK. The dossier submitted to the Court by the Secretary-General records that the Security Council met to consider the situation in Kosovo on 29 occasions between 2000 and the end of 2008. Although the declaration of independence which is the subject of the present request was discussed by the Security Council, the Council took no action in respect of it (Security Council, provisional verbatim record, 18 February 2008, 3 p.m. (S/PV.5839); Security Council, provisional verbatim record, 11 March 2008, 3 p.m. (S/PV.5850)).

38. The General Assembly has also adopted resolutions relating to the situation in Kosovo. Prior to the adoption by the Security Council of resolution 1244 (1999), the General Assembly adopted five resolutions on the situation of human rights in Kosovo (resolutions 49/204, 50/190, 51/111, 52/139 and 53/164). Following resolution 1244 (1999), the General Assembly adopted one further resolution on the situation of human rights in Kosovo (resolution 54/183 of 17 December 1999) and 15 resolutions concerning the financing of UNMIK (resolutions 53/241, 54/245A, 54/245B, 55/227A, 55/227B, 55/295, 57/166, 58/105, 59/286A, 59/286B, 60/275, 61/285, 62/262, 63/295 and 64/279). However, the broader situation in Kosovo was not part of the agenda of the General Assembly at the time of the declaration of independence and it was therefore necessary in September 2008 to create a new agenda item for the consideration of the proposal to request an opinion from the Court.

39. Against this background, it has been suggested that, given the respective powers of the Security Council and the General Assembly, if the Court’s opinion were to be sought regarding whether the declaration of independence was in accordance with international law, the request should rather have been made by the Security Council and that this fact constitutes a compelling reason for the Court not to respond to the request from the General Assembly. That conclusion is said to follow both from the nature of the Security Council’s involvement and the fact that, in order to answer the question posed, the Court will necessarily have to interpret and apply Security Council resolution 1244 (1999) in order to determine whether or not the declaration of independence is in accordance with international law.

40. While the request put to the Court concerns one aspect of a situation which the Security Council has characterized as a threat to interna-
discussing that situation, or, within the limits set by Article 12, making recommendations with regard thereto, in addition to the peace and security concerns that continue to feature on the agenda of the Security Council in that capacity, does not mean that the Assembly has no legitimate interest in the question. The General Assembly’s power to engage in such discussions and to make recommendations is conferred upon it by Article 12 of the Charter, and it is the role of the Assembly to ensure respect for the Charter of the United Nations and to promote international peace and security, which are among the purposes of the United Nations. The Assembly has authority under Article 12 to discuss matters relating to international peace and security, including the activities of the Security Council, and has the power to consider and make recommendations with respect to threats to international peace and security which are before the Security Council. The Assembly has also the power of unilateral action in situations of incapacity of the Security Council to act. The General Assembly may take the necessary action to restore international peace and security, and may authorise the use of armed force to that end. It has been to discuss the question of the future status of Kosovo and the declaration of independence (see paragraph 37 above).

43. It is true, of course, that the facts of the present case are quite different from those of the case of the Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory. The situation in the occupied Palestinian territory had been under active consideration by the Security Council for several decades prior to its decision on 30 June 2004, and the Assembly did not actively engage in such discussions on the subject on which the Court’s opinion was sought. The Assembly has, in the past, taken a broader view, considering also the humanitarian, social and economic aspects of the question. However, in the context of the future status of Kosovo, the Assembly has decided to discuss the question of the future status of Kosovo and the declaration of independence, and within the limits set by Article 12, to make recommendations with regard to the situation in Kosovo. In that context, it discussed the situation in Kosovo without referring to the proceedings of the Security Council. The Court cannot determine whether or not the Assembly’s request for an opinion is a matter of concern to the Assembly, and whether or not it is engaged in discussion or action in respect of the situation in Kosovo. The Court has no jurisdiction to address the issue of the situation in Kosovo, and the Assembly’s request for an opinion is not related to the situation in Kosovo. The Court has no jurisdiction to address the issue of the situation in Kosovo, and the Assembly’s request for an opinion is not related to the situation in Kosovo, and the Assembly’s request for an opinion is not related to the situation in Kosovo, and the Assembly’s request for an opinion is not related to the situation in Kosovo, and the Assembly’s request for an opinion is not related to the situation in Kosovo, and the Assembly’s request for an opinion is not related to the situation in Kosovo, and the Assembly’s request for an opinion is not related to the situation in Kosovo, and the Assembly’s request for an opinion is not related to the situation in Kosovo, and the Assembly’s request for an opinion is not related to the situation in Kosovo, and the Assembly’s request for an opinion is not related to the situation in Kosovo, and the Assembly’s request for an opinion is not related to the situation in Kosovo, and the Assembly’s request for an opinion is not related to the situation in Kosovo.
Assembly adopted six resolutions addressing the human rights situation in Kosovo. The last of these, resolution 54/183, was adopted on 17 December 1999, some six months after the Security Council had adopted resolution 1244 (1999). While the focus of this resolution was on human rights and humanitarian issues, it also addressed (in para. 7) the General Assembly’s concern about a possible “cantonization” of Kosovo. In addition, since 1999 the General Assembly has each year approved, in accordance with Article 17, paragraph 1, of the Charter, the budget of UNMIK (see paragraph 38 above). The Court observes therefore that the General Assembly has exercised functions of its own in the situation in Kosovo.

46. Further, in the view of the Court, the fact that it will necessarily have to interpret and apply the provisions of Security Council resolution 1244 (1999) in the course of answering the question put by the General Assembly does not constitute a compelling reason not to respond to that question. While the interpretation and application of a decision of one of the principal judicial organs of the United Nations is, in the first place, the responsibility of the organ which took that decision, the Court, as the principal judicial organ of the United Nations, has also frequently been required to consider the interpretation and legal effects of such decisions. It has done so both in the exercise of its advisory jurisdiction (see for example, Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962, p. 175; and Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 2796 (1970), Advisory Opinion, I.C.J. Reports 1971, pp. 51-54, paras. 107-116), and in the exercise of its contentious jurisdiction (see for example, Questions of Interpretation and Application of the 1971 Montevideo 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 Montevideo Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992, pp. 126-127, paras. 42-44).

47. There is, therefore, nothing incompatible with the integrity of the judicial function in the Court undertaking such a task. The question is, rather, whether it should decline to undertake that task unless it is the organ which has taken the decision that asks the Court to do so. In its Advisory Opinion on Certain Expenses of the United Nations, however, the Court responded to the question posed by the General Assembly, even though this necessarily required it to interpret a number of Security Council resolutions (namely, resolutions 143, 145 and 146 of 1960 and 161 and 169 of 1961) (Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962, pp. 175-177). The Court also notes that, in its Advisory Opinion on
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 63/3 of 8 October 2008 (opinion in the draft resolution) has led to the creation of a State or the status of the declaration of independence in order to answer the question put by the General Assembly. The Court accordingly sees no reason to reformulate the scope of the question.

53. As the Court has stated in a different context: "It is not to be assumed that the General Assembly would . . . seek not or not the Court to have a 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 evidence in the record and decide for itself whether declaration was promulgated by the Provisional Institutions of Self-Government of Kosovo or some other entity. If the Court is of the opinion that the declaration of independence was promulgated by the Provisional Institutions of Self-Government of Kosovo, it will address whether that declaration was in accordance with international law. It follows that the task which the Court is called upon to perform is not to restrict the Court's freedom to determine this issue for itself. The Court notes that the agenda item was not placed on the agenda of the General Assembly's 63rd session (the agenda for the 63rd session of the 1963 session of the General Assembly was not available). The Court accordingly sees no reason to reformulate the scope of the question.

54. 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; 61 Dominion Law Reports (DLR) (4th) 385; 115 International Law Reports (ILR) 536, the Court observes that the question in that case was:

"Does international law give the right to the National Assembly of Quebec, or the people of Quebec, to make a unilateral declaration of independence as a means of effecting secession from Canada unilaterally? In this regard, is there a rule of international law which conferred a positive entitlement on the people of Quebec to make such a declaration?" (emphasis added).

55. The question to the Supreme Court of Canada required whether the declaration of independence was in accordance with international law which conferred a positive entitlement on the people of Quebec as a means of effecting secession from Canada unilaterally. The answer to this question turns on whether, in the absence of a rule of international law which conferred a positive entitlement on the people of Quebec to make such a declaration, the declaration of independence was in accordance with international law. If the Court was of the opinion that the declaration of independence was not in accordance with international law, it would be incompatible with the proper exercise of the judicial function of the Court to treat that matter as having been determined by the General Assembly.

56. The question to the Supreme Court of Canada required whether the declaration of independence was in accordance with international law which conferred a positive entitlement on the people of Quebec as a means of effecting secession from Canada unilaterally. The answer to this question turns on whether, in the absence of a rule of international law which conferred a positive entitlement on the people of Quebec to make such a declaration, the declaration of independence was in accordance with international law. If the Court was of the opinion that the declaration of independence was not in accordance with international law, it would be incompatible with the proper exercise of the judicial function of the Court to treat that matter as having been determined by the General Assembly.
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, \textit{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, \textit{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:

\begin{itemize}
  \item [(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);
  \item [(b)] Performing basic civilian administrative functions where and as long as required;
  \item [(c)] Organizing and overseeing the development of provisional institutions for democratic and autonomous self-government pending a political settlement, including the holding of elections;
  \item [(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;
  \item [(e)] Facilitating a political process designed to determine Kosovo’s future status, taking into account the Rambouillet accords (S/1999/648);
\end{itemize}
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 “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 “ConstitutionalFramework”), which defined the responsibilities relating to the administration of Kosovo between the Special Representative of the Secretary-General and the Provisional Institutions of Self-Government of Kosovo. With regard to the role entrusted to the Special Representative of the Secretary-General under Chapter 12 of the Constitutional Framework,

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

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

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

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

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

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

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

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

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

65. In November 2005, the Secretary-General appointed Mr. Martti Ahtisaari, former President of Finland, as his Special Envoy for the future status process for Kosovo. This appointment was endorsed by the Security Council (see Letter dated 10 November 2005 from the President of the Security Council addressed to the Secretary-General, United Nations doc. S/2005/709). Mr. Ahtisaari’s Letter of Appointment included, as an annex to it, a document entitled “Terms of Reference” which stated that the Special Envoy “is expected to revert to the Secretary-General at all stages of the process”. Furthermore, “[t]he pace and duration of the future status process will be determined by the Special Envoy on the basis of consultations with the Secretary-General, taking into account the cooperation 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 remained 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
69. On 26 March 2007, the Secretary-General submitted the report of his Special Envoy to the Security Council. The Special Envoy stated that “after more than one year of direct talks, bilateral negotiations and expert consultations, it [had] become clear to [him] that the parties [were] not able to reach an agreement on Kosovo’s future status” (Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council attaching the Report of the Special Envoy of the Secretary-General on Kosovo’s future status, United Nations doc. S/2007/168, 26 March 2007). After emphasizing that his “mandate explicitly provides that [he] determine the pace and duration of the future status process on the basis of consultations with the Secretary-General, taking into account the co-operation of the parties and the situation on the ground” (ibid., para. 3), the Special Envoy concluded:

“It is my firm view that the negotiations’ potential to produce any mutually agreeable outcome on Kosovo’s status is exhausted. No amount of additional talks, whatever the format, will overcome this impasse. The time has come to resolve Kosovo’s status. Upon careful consideration of Kosovo’s recent history, the realities of Kosovo today and taking into account the negotiations with the parties, I have come to the conclusion that the only viable option for Kosovo is independence, to be supervised for an initial period by the international community.” (Ibid., paras. 3 and 5.)

70. The Special Envoy’s conclusions were accompanied by his finalized Comprehensive Proposal for the Kosovo Status Settlement (United Nations doc. S/2007/168/Add. 1, 26 March 2007), which, in his words, set forth “international supervisory structures, and provided the foundations for a future independent Kosovo” (United Nations doc. S/2007/168, para. 5). The Comprehensive Proposal called for the immediate convening of a Constitutional Commission to draft a Constitution for Kosovo (ibid., Add. 1, 26 March 2007, Art. 10.1), established guidelines concerning the membership of that Commission (ibid., Art. 10.2), set numerous requirements concerning principles and provisions to be contained in that Constitution (ibid., Art. 1.3 and Ann. I), and required that the Assembly of Kosovo approve the Constitution by a two-thirds vote within 120 days (ibid., Art. 10.4). Moreover, it called for the expiry of the UNMIK mandate after a 120-day transition period, after which “all legislative and executive authority vested in UNMIK shall be transferred en bloc to the governing authorities of Kosovo, unless otherwise provided for in this Settlement” (ibid., Art. 15.1). It mandated the holding of general and municipal elections no later than nine months from the entry into force of the Constitution (UN doc. S/2007/168/Add. 1, 26 March 2007, Art. 11.1). The Court further notes that the Comprehensive Proposal for the Kosovo Status Settlement provided for the appointment of an International Civilian Representative (ICR), who would have the final authority in Kosovo regarding interpretation of the Settlement (ibid., Art. 12). The Comprehensive Proposal also specified that the mandate of the ICR would be reviewed “no later than two years after the entry into force of [the] Settlement, with a view to gradually reducing the scope of the powers of the ICR and the frequency of intervention” (ibid., Ann. IX, Art. 5.1) and that “[t]he mandate of the ICR shall be terminated when the International Steering Group [a body composed of France, Germany, Italy, the Russian Federation, the United Kingdom, the United States, the European Union, the European Commission and NATO] determine[d] that Kosovo ha[d] implemented the terms of [the] Settlement” (ibid., Art. 5.2).

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

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

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

C. The Events of 17 February 2008 and Thereafter

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

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

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

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

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

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

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

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

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

77. After the declaration of independence was issued, the Republic of Serbia informed the Secretary-General that it had adopted a decision stating that that declaration represented a forceful and unilateral secession of a part of the territory of Serbia, and did not produce legal effects either in Serbia or in the international legal order (United Nations doc. S/PR.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. SP.V.5839).
IV. THE QUESTION WHETHER THE DECLARATION OF INDEPENDENCE IS IN ACCORDANCE WITH INTERNATIONAL LAW

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

A. General International Law

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

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

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

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

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

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

The Court notes, however, that in all of those instances the Security Council was making a determination as regards the concrete situation existing at the time that those declarations of independence were made; the illegality attached to the declarations of independence thus stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (jus cogens).

In the context of Kosovo, the Security Council has never taken this position. The exceptional character of the resolutions enumerated above
appears to the Court to confirm that no general prohibition against unilateral declarations of independence may be inferred from the practice of the Security Council.

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

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

84. For the reasons already given, the Court considers that general international law contains no applicable prohibition of declarations of independence. Accordingly, it concludes that the declaration of independence of 17 February 2008 did not violate general international law. Having arrived at that conclusion, the Court now turns to the legal relevance of Security Council resolution 1244, adopted on 10 June 1999.

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

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

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

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

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


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

1. Interpretation of Security Council resolution 1244 (1999)

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

95. The Court first notes that resolution 1244 (1999) must be read in conjunction with the general principles set out in annexes 1 and 2 thereto, since in the resolution itself, the Security Council: "1. Decide[d] that a political solution to the Kosovo crisis shall be based on the general principles in annex 1 and as further elaborated in the principles and other required elements in annex 2." Those general principles sought to 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 establishment of an interim political framework agreement providing for a substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region, and the demilitarization of the KLA" (Security Council resolution 1244 (1999) of 10 June 1999, Ann. 1, sixth principle; ibid., Ann. 2, para. 8).

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

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

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

98. Secondly, the solution embodied in resolution 1244 (1999), namely, the implementation of an interim international territorial administration, was designed for humanitarian purposes; to provide a means for the stabilization of Kosovo and for the re-establishment of a basic public order in an area beset by crisis. This becomes apparent in the text of resolution 1244 (1999) itself which, in its second preambular paragraph, recalls Security Council resolution 1239, adopted on 14 May 1999, in which the Security Council had expressed "grave concern at the humanitarian crisis
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 regime 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 “[facilitate] a political process designed to determine Kosovo’s future status, taking into account the Rambouillet accords” and “[in 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 fulfill the international obligations of Kosovo, notably those created for Kosovo by UNMIK (para. 9), and expressly and solemnly declared Kosovo to be bound vis-à-vis third States by the commitments made in the declaration (para. 12). By contrast, under the régime of the Constitutional Framework, all matters relating to the management of the external relations of Kosovo were the exclusive prerogative of the Special Representative of the Secretary-General:

“(m) concluding agreements with states and international organizations in all matters within the scope of UNSCR 1244 (1999);
(n) overseeing the fulfillment 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 there 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 negotiat-
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 resolutions and in general, all endeavours not to cause trouble or instability in Kosovo,” and, on the other hand, “that the KLA and other armed Kosovo Albanian groups refrain from any action or statement which might be harmful to the peace settlement in Kosovo.” The approach taken by the Court is consistent with the interpretation given by the Security Council through its resolutions 1203 (1998), 1244 (1999), and 1245 (1999). In these resolutions, the Council indeed included demands addressed to special actors, i.e., the Kosovo Albanian leadership, and demanded, for example, that the Kosovo Albanian leadership “cease immediately all actions to overthrow the Government of Serbia” (resolution 1244 (1999), para. 4), and in particular the Kosovo Albanian leadership, to respect the freedom of movement of the OSCE Verification Mission and other international personnel” (resolution 1244 (1999), para. 4).

115. In this respect, the Court sees no reason to deviate from its previous conclusions on the interpretation of Security Council resolution 1244 (1999). The Court finds that the language of a resolution of the Security Council should be interpreted in light of the nature of the powers under Article 41 of the UN Charter, and the nature of the demands made upon the special actors, i.e., the Kosovo Albanian leadership. The Court notes that the Security Council resolution 1244 (1999) contains, in addition to a prohibition, declarations on the need for the Kosovo Albanian leadership to enter into a meaningful dialogue on political status issues (resolution 1244 (1999), para. 4), and to cooperate fully with the OSCE Verification Mission in Kosovo (resolution 1244 (1999), para. 4).

116. The Court further notes that the Kosovo Albanian leadership or other actors may be subject to a special duty to maintain peace and security in Kosovo, and that the Security Council has declared that the Kosovo Albanian leadership or other actors may be required to take specific measures to maintain peace and security in Kosovo. The Court considers that these measures include the provision of information to the Security Council, and that the Kosovo Albanian leadership or other actors may be required to take specific measures to maintain peace and security in Kosovo.

117. Such reference to the Kosovo Albanian leadership or other actors, notwithstanding the somewhat general reference to “all concerned” in Security Council resolution 1244 (1999), para. 4, and in other Security Council resolutions 1203 (1998) and 1245 (1999), does not modify the conclusion that the Security Council resolution 1244 (1999) is at best ambiguous in this regard. The object and purpose of the Security Council resolution 1244 (1999) is to establish an international presence in Kosovo, and to advance a political settlement in Kosovo. The Court finds that the language of Security Council resolution 1244 (1999) contains a prohibition, binding on the Kosovo Albanian leadership, to respect all resolutions of the Security Council, and to cooperate fully with the OSCE Verification Mission in Kosovo. The Court further finds that the Kosovo Albanian leadership or other actors may be subject to a special duty to maintain peace and security in Kosovo, and that the Security Council has declared that the Kosovo Albanian leadership or other actors may be required to take specific measures to maintain peace and security in Kosovo.
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).

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.

(Initialized) H.O.
(Initialized) Ph.C.
International Court of Justice

East Timor
(Portugal v. Australia)
Judgment

I.C.J. Reports 1995, p. 90
INTERNATIONAL COURT OF JUSTICE
YEAR 1995
30 June 1995

CASE CONCERNING EAST TIMOR
(PORTUGAL v. AUSTRALIA)

Treaty of 1899 between Australia and Indonesia concerning the "Timor Gap";
Objection that there exists in reality no dispute between the Parties — Disagreement between the Parties on the law and on the facts — Existence of a legal dispute.

Objection that the Application would require the Court to determine the rights and obligations of a third State in the absence of the consent of that State — Case concerning Monetary Gold Removed from Rome in 1943 — Question whether the Respondent’s objective conduct is separable from the conduct of a third State.

Right of peoples to self-determination as right erga omnes and essential principle of contemporary international law — Difference between erga omnes character of a norm and rule of consent to jurisdiction.

Question whether resolutions of the General Assembly and of the Security Council constitute “givens” on the content of which the Court would not have to decide de novo.

For the two Parties, the Territory of East Timor remains a non-self-governing territory and its people has the right to self-determination.

Rights and obligations of a third State constituting the very subject-matter of the decision requested — The Court cannot exercise the jurisdiction conferred upon it by the declarations made by the Parties under Article 36, paragraph 2, of its Statute to adjudicate on the dispute referred to it by the Application.

JUDGMENT

Present: President Bedjaoui; Vice-President Schwebel; Judges Oda, Sir Robert Jennings, Guillaume, Shahabuddeen, Aguilar-Madsley, Worramantry, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchihin; Judges ad hoc Sir Nizar Stephen, Stubirowski; Registrar Valencia-Ospina.

In the case concerning East Timor, between the Portuguese Republic, represented by H.E. Mr. António Cascais, Ambassador of the Portuguese Republic to the Netherlands, as Agent;
Mr. José Manuel Serrudo Correia, Professor in the Faculty of Law of the University of Lisbon and Member of the Portuguese Bar, Mr. Miguel Galvão Teles, Member of the Portuguese Bar, as Co-Agents, Counsel and Advocates;
Mr. Pierre-Marie Dupuy, Professor at the University Panthéon-Assas (Paris II) and Director of the Institut des hautes études internationals de Paris, Mrs. Rosalyn Higgins, Q.C., Professor of International Law in the University of London, as Counsel and Advocates;
Mr. Rui Quentin Santos, Minister Plenipotentiary, Ministry of Foreign Affairs, Lisbon, Mr. Francisco Ribeiro Telles, First Embassy Secretary, Ministry of Foreign Affairs, Lisbon, as Advisers;
Mr. Richard Meese, Advocate, Partner in Frere Cholmeley, Paris, Mr. Paulo Canelas de Castro, Assistant in the Faculty of Law of the University of Coimbra, Mrs. Luisa Duarte, Assistant in the Faculty of Law of the University of Lisbon, Mr. Paulo Otero, Assistant in the Faculty of Law of the University of Lisbon, Mr. Iain Scobie, Lecturer in Law in the Faculty of Law of the University of Dundee, Scotland, Miss Sasha Stepan, Squire, Sanders & Dempsey, Counsellors at Law, Prague, as Counsel;
Mr. Fernando Figueirinhas, First Secretary, Portuguese Embassy in the Netherlands, as Secretary,
and the Commonwealth of Australia, represented by Mr. Gavan Griffith, Q.C., Solicitor-General of Australia, as Agent and Counsel;
H.E. Mr. Michael Tate, Ambassador of Australia to the Netherlands, former Minister of Justice,
Mr. Henry Burmeister, Principal International Law Counsel, Office of International Law, Attorney-General's Department, as Co-Agents and Counsel;
5. By an Order dated 19 June 1992, the Court, taking into account the agreement of the Parties in this respect, authorized the filing of a Reply by Portugal and of a Rejoinder by Australia, and fixed 1 December 1992 and 1 June 1993 respectively as the time-limits for the filing of those pleadings. The Reply was duly filed within the time-limit so fixed. By an Order of 19 May 1993, the President of the Court, at the request of Australia, extended to 1 July 1993 the time-limit for the filing of the Rejoinder. This pleading was filed on 5 July 1993. Pursuant to Article 44, paragraph 3, of its Rules, having given the other Party an opportunity to state its views, the Court considered this filing as valid.

6. Since the Court included upon the Bench no judge of the nationality of either of the Parties, each Party proceeded to exercise the right conferred by Article 31, paragraph 3, of the Statute to choose a judge ad hoc to sit in the case; Portugal chose Mr. António de Arruda Ferrer-Correia and Australia Sir Ninian Martin Stephen. By a letter dated 30 June 1994, Mr. Ferrer-Correia informed the President of the Court that he was no longer able to sit, and, by a letter of 14 July 1994, the Agent of Portugal informed the Court that its Government had chosen Mr. Krzysztof Jan Skubiszewski to replace him.

7. In accordance with Article 53, paragraph 2, of its Rules, the Court, after ascertaining the views of the Parties, decided that the pleadings and annexed documents should be made accessible to the public from the date of the opening of the oral proceedings.

8. Between 30 January and 16 February 1995, public hearings were held in the course of which the Court heard oral arguments and replies by the following:

For Portugal:  
H.E. Mr. António Cascais,  
Mr. José Manuel Seruvelo Correia,  
Mr. Miguel Galvão Teles,  
Mr. Pierre-Marie Dupuy,  
Mrs. Rosalyn Higgins, Q.C.

For Australia:  
Mr. Gavan Griffith, Q.C.,  
H.E. Mr. Michael Tate,  
Mr. James Crawford,  
Mr. Alain Pellet,  
Mr. Henry Burmester,  
Mr. Derek W. Bowett, Q.C.,  
Mr. Christopher Staker.

9. During the oral proceedings, each of the Parties, referring to Article 56, paragraph 4, of the Rules of Court, presented documents not previously produced. Portugal objected to the presentation of one of these by Australia, on the ground that the document concerned was not "part of a publication readily available" within the meaning of that provision. Having ascertained Australia's views, the Court examined the question and informed the Parties that it had decided not to admit the document to the record in the case.

10. The Parties presented submissions in each of their written pleadings; in the course of the oral proceedings, the following final submissions were presented:
On behalf of Portugal,
at the hearing on 13 February 1995 (afternoon):

"Having regard to the facts and points of law set forth, Portugal has the honour to
— Ask the Court to dismiss the objections raised by Australia and to adjudge and declare that it has jurisdiction to deal with the Application of Portugal and that that Application is admissible; and
— Request that it may please the Court:

(1) To adjudge and declare that, first, the rights of the people of East Timor to self-determination, to territorial integrity and unity and to permanent sovereignty over its wealth and natural resources and, secondly, the duties, powers and rights of Portugal as the administering Power of the Territory of East Timor are opposable to Australia, which is under an obligation not to disregard them, but to respect them.

(2) To adjudge and declare that Australia, inasmuch as in the first place it has negotiated, concluded and initiated performance of the Agreement of 11 December 1989, has taken internal legislative measures for the application thereof, and is continuing to negotiate, with the State party to that Agreement, the delimitation of the continental shelf in the area of the Timor Gap; and inasmuch as it has furthermore excluded any negotiation with the administering Power with respect to the exploration and exploitation of the continental shelf in that same area; and, finally, inasmuch as it contemplates exploring and exploiting the subsoil of the sea in the Timor Gap on the basis of a plurilateral title to which Portugal is not a party (each of these facts sufficing on its own):

(a) has infringed and is infringing the right of the people of East Timor to self-determination, to territorial integrity and unity and to permanent sovereignty over its natural wealth and resources, and is in breach of the obligation not to disregard but to respect that right, that integrity and that sovereignty;

(b) has infringed and is infringing the powers of Portugal as the administering Power of the Territory of East Timor, is impeding the fulfilment of its duties to the people of East Timor and to the international community, is infringing the right of Portugal to fulfil its responsibilities and is in breach of the obligation not to disregard but to respect those powers and duties and that right;

(c) is contravening Security Council resolutions 384 and 389 and is in breach of the obligation to accept and carry out Security Council resolutions laid down by the Charter of the United Nations, is disregarding the binding character of the resolutions of United Nations organs that relate to East Timor and, more generally, is in breach of the obligation incumbent on Member States to co-operate in good faith with the United Nations;

(3) To adjudge and declare that, inasmuch as it has excluded and is excluding any negotiation with Portugal as the administering Power of the Territory of East Timor, with respect to the exploration and exploitation of the continental shelf in the area of the Timor Gap, Australia has failed and is failing in its duty to negotiate in order to harmonize the respective rights in the event of a conflict of rights or of claims over maritime areas.

On behalf of Australia,
at the hearing on 16 February 1995 (afternoon):

"The Government of Australia submits that, for all the reasons given by it in the written and oral pleadings, the Court should:

(a) adjudge and declare that the Court lacks jurisdiction to decide the Portuguese claims or that the Portuguese claims are admissible; or
(b) alternatively, adjudge and declare that the actions of Australia invoked by Portugal do not give rise to any breach by Australia of rights under international law asserted by Portugal."

* * *

11. The Territory of East Timor corresponds to the eastern part of the island of Timor; it includes the island of Atauro, 25 kilometres to the north, the islet of Jaco to the east, and the enclave of Oe-Cusse in the western part of the island of Timor. Its capital is Dili, situated on its northern coast. The south coast of East Timor lies opposite the north coast of Australia, the distance between them being approximately 430 kilometres.

In the sixteenth century, East Timor became a colony of Portugal; Portugal remained there until 1975. The western part of the island came under Dutch rule and later became part of independent Indonesia.

12. In resolution 1542 (XV) of 15 December 1960 the United Nations General Assembly recalled "differences of views... concerning the status of certain territories under the administrations of Portugal and Spain and described by these two States as 'overseas provinces' of the metropolitan
State concerned" and it also stated that it considered that the territories under the administration of Portugal, which were listed therein (including "Timor and dependencies") were non-self-governing territories within the meaning of Chapter XI of the Charter. Portugal, in the wake of its "Carnation Revolution", accepted this position in 1974.

13. Following internal disturbances in East Timor, on 27 August 1975 the Portuguese civil and military authorities withdrew from the mainland of East Timor to the island of Atauro. On 7 December 1975 the armed forces of Indonesia intervened in East Timor. On 8 December 1975 the Portuguese authorities departed from the island of Atauro, and thus left East Timor altogether. Since their departure, Indonesia has occupied the Territory, and the Parties acknowledge that the Territory has remained under the effective control of that State. Asserting that on 31 May 1976 the people of East Timor had requested Indonesia "to accept East Timor as an integral part of the Republic of Indonesia", on 17 July 1976 Indonesia enacted a law incorporating the Territory as part of its national territory.


15. Security Council resolution 384 (1975) of 22 December 1975 called upon "all States to respect the territorial integrity of East Timor as well as the inalienable right of its people to self-determination"; called upon "the Government of Indonesia to withdraw without delay all its forces from the Territory"; and further called upon

"the Government of Portugal as administering Power to co-operate fully with the United Nations so as to enable the people of East Timor to exercise freely their right to self-determination".

Security Council resolution 389 (1976) of 22 April 1976 adopted the same terms with regard to the right of the people of East Timor to self-determination, called upon "the Government of Indonesia to withdraw without further delay all its forces from the Territory"; and further called upon "all States and other parties concerned to co-operate fully with the United Nations to achieve a peaceful solution to the existing situation . . . ".

General Assembly resolution 3485 (XXX) of 12 December 1975 referred to Portugal "as the administering Power"; called upon it "to continue to make every effort to find a solution by peaceful means"; and "strongly deplored the military intervention of the armed forces of Indonesia in

Portuguese Timor". In resolution 31/53 of 1 December 1976, and again in resolution 32/34 of 28 November 1977, the General Assembly rejected

"the claim that East Timor has been incorporated into Indonesia, inasmuch as the people of the Territory have not been able to exercise freely their right to self-determination and independence."

Security Council resolution 389 (1976) of 22 April 1976 and General Assembly resolutions 31/53 of 1 December 1976, 32/34 of 28 November 1977 and 33/39 of 13 December 1978 made no reference to Portugal as the administering Power. Portugal is so described, however, in Security Council resolution 384 (1975) of 22 December 1975 and in the other resolutions of the General Assembly. Also, those resolutions which did not specifically refer to Portugal as the administering Power recalled another resolution or other resolutions which so referred to it.

16. No further resolutions on the question of East Timor have been passed by the Security Council since 1976 or by the General Assembly since 1982. However, the Assembly has maintained the item on its agenda since 1982, while deciding at each session, on the recommendation of its General Committee, to defer consideration of it until the following session. East Timor also continues to be included in the list of non-self-governing territories within the meaning of Chapter XI of the Charter; and the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples remains seized of the question of East Timor. The Secretary-General of the United Nations is also engaged in a continuing effort, in consultation with all parties directly concerned, to achieve a comprehensive settlement of the problem.

17. The incorporation of East Timor as part of Indonesia was recognized by Australia de facto on 20 January 1978. On that date the Australian Minister for Foreign Affairs stated: "The Government has made clear publicly its opposition to the Indonesian intervention and has made this known to the Indonesian Government." He added: "[Indonesia's] control is effective and covers all major administrative centres of the territory." And further:

"This is a reality with which we must come to terms. Accordingly, the Government has decided that although it remains critical of the means by which integration was brought about it would be unrealistic to continue to refuse to recognize de facto that East Timor is part of Indonesia."

On 23 February 1978 the Minister said: "we recognize the fact that East Timor is part of Indonesia, but not the means by which this was brought about".
On 15 December 1978 the Australian Minister for Foreign Affairs declared that negotiations which were about to begin between Australia and Indonesia for the delimitation of the continental shelf between Australia and East Timor, "when they start, will signify de jure recognition by Australia of the Indonesian incorporation of East Timor"; he added: "The acceptance of this situation does not alter the opposition which the Government has consistently expressed regarding the manner of incorporation." The negotiations in question began in February 1979.

18. Prior to this, Australia and Indonesia had, in 1971-1972, established a delimitation of the continental shelf between their respective coasts; the delimitation so effected stopped short on either side of the continental shelf between the south coast of East Timor and the north coast of Australia. This undelimited part of the continental shelf was called the "Timor Gap".

The delimitation negotiations which began in February 1979 between Australia and Indonesia related to the Timor Gap; they did not come to fruition. Australia and Indonesia then turned to the possibility of establishing a provisional arrangement for the joint exploration and exploitation of the resources of an area of the continental shelf. A Treaty to this effect was eventually concluded between them on 11 December 1989, whereby a "Zone of Cooperation" was created "in an area between the Indonesian Province of East Timor and Northern Australia". Australia enacted legislation in 1990 with a view to implementing the Treaty; this law came into force in 1991.

* * *

19. In these proceedings Portugal maintains that Australia, in negotiating and concluding the 1989 Treaty, in initiating performance of the Treaty, in taking internal legislative measures for its application, and in continuing to negotiate with Indonesia, has acted unlawfully, in that it has infringed the rights of the people of East Timor to self-determination and to permanent sovereignty over its natural resources, infringed the rights of Portugal as the administering Power, and contravened Security Council resolutions 384 and 389. Australia raised objections to the jurisdiction of the Court and to the admissibility of the Application. It took the position, however, that these objections were inextricably linked to the merits and should therefore be determined within the framework of the merits. The Court heard the Parties both on the objections and on the merits. While Australia concentrated its main arguments and submissions on the objections, it also submitted that Portugal's case on the merits should be dismissed, maintaining, in particular, that its actions did not in any way disregard the rights of Portugal.

* * *

20. According to one of the objections put forward by Australia, there exists in reality no dispute between itself and Portugal. In another objection, it argued that Portugal's Application would require the Court to rule on the rights and obligations of a State which is not a party to the proceedings, namely Indonesia. According to further objections of Australia, Portugal lacks standing to bring the case, the argument being that it does not have a sufficient interest of its own to institute the proceedings, notwithstanding the references to it in some of the resolutions of the Security Council and the General Assembly as the administering Power of East Timor, and that it cannot, furthermore, claim any right to represent the people of East Timor; its claims are remote from reality, and the judgment the Court is asked to give would be without useful effect; and finally, its claims concern matters which are essentially not legal in nature which should be resolved by negotiation within the framework of ongoing procedures before the political organs of the United Nations. Portugal requested the Court to dismiss all these objections.

* * *

21. The Court will now consider Australia's objection that there is in reality no dispute between itself and Portugal, Australia contends that the case as presented by Portugal is artificially limited to the question of the lawfulness of Australia's conduct, and that the true respondent is Indonesia, not Australia. Australia maintains that it is being sued in place of Indonesia. In this connection, it points out that Portugal and Australia have accepted the compulsory jurisdiction of the Court under Article 36, paragraph 2, of its Statute, but that Indonesia has not.

In support of the objection, Australia contends that it recognizes, and has always recognized, the rights of the people of East Timor to self-determination, the status of East Timor as a non-self-governing territory, and the fact that Portugal has been named by the United Nations as the administering Power of East Timor; that the arguments of Portugal, as well as its submissions, demonstrate that Portugal does not challenge the capacity of Australia to conclude the 1989 Treaty and that it does not contest the validity of the Treaty; and that consequently there is in reality no dispute between itself and Portugal.

Portugal, for its part, maintains that its Application defines the real and only dispute submitted to the Court.

22. The Court recalls that, in the sense accepted in its jurisprudence and that of its predecessor, a dispute is a disagreement on a point of law or fact, a conflict of legal views or interests between parties (see Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A No. 2, p. 11; Northern Cameroons, Judgment, I.C.J. Reports 1963, p. 27; and Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory
Opinion. I.C.J. Reports 1988, p. 27, para. 35). In order to establish the existence of a dispute, "It must be shown that the claim of one party is positively opposed by the other" (South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 328); and further, "Whether there exists an international dispute is a matter for objective determination" (Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950, p. 74).

For the purpose of verifying the existence of a legal dispute in the present case, it is not relevant whether the "real dispute" is between Portugal and Indonesia rather than Portugal and Australia. Portugal has, rightly or wrongly, formulated complaints of fact and law against Australia which the latter has denied. By virtue of this denial, there is a legal dispute.

On the record before the Court, it is clear that the Parties are in disagreement, both on the law and on the facts, on the question whether the conduct of Australia in negotiating, concluding and initiating performance of the 1989 Treaty was in breach of an obligation due by Australia to Portugal under international law.

Indeed, Portugal's Application limits the proceedings to these questions. There nonetheless exists a legal dispute between Portugal and Australia. This objection of Australia must therefore be dismissed.

* * *

23. The Court will now consider Australia's principal objection, to the effect that Portugal's Application would require the Court to determine the rights and obligations of Indonesia. The declarations made by the Parties under Article 36, paragraph 2, of the Statute do not include any limitation which would exclude Portugal's claims from the jurisdiction thereunder conferred upon the Court. Australia, however, contends that the jurisdiction so conferred would not enable the Court to act if, in order to do so, the Court were required to rule on the lawfulness of Indonesia's entry into and continuing presence in East Timor, on the validity of the 1989 Treaty between Australia and Indonesia, or on the rights and obligations of Indonesia under that Treaty, even if the Court did not have to determine its validity. Portugal agrees that if its Application required the Court to decide any of these questions, the Court could not entertain it. The Parties disagree, however, as to whether the Court is required to decide any of these questions in order to resolve the dispute referred to it.

24. Australia argues that the decision sought from the Court by Portugal would inevitably require the Court to rule on the lawfulness of the conduct of a third State, namely Indonesia, in the absence of that State's consent. In support of its argument, it cites the Judgment in the case concerning Monetary Gold Removed from Rome in 1943, in which the Court ruled that, in the absence of Albania's consent, it could not take any deci-

sion on the international responsibility of that State since "Albania's legal interests would not only be affected by a decision, but would form the very subject-matter of the decision" (I.C.J. Reports 1954, p. 32).

25. In reply, Portugal contends, first, that its Application is concerned exclusively with the objective conduct of Australia, which consists in having negotiated, concluded and initiated performance of the 1989 Treaty with Indonesia, and that this question is perfectly separable from any question relating to the lawfulness of the conduct of Indonesia. According to Portugal, such conduct of Australia in itself constitutes a breach of its obligation to treat East Timor as a non-self-governing territory and Portugal as its administering Power; and that breach could be passed upon by the Court by itself and without passing upon the rights of Indonesia. The objective conduct of Australia, considered as such, constitutes the only violation of international law of which Portugal complains.

26. The Court recalls in this respect that one of the fundamental principles of its Statute is that it cannot decide a dispute between States without the consent of those States to its jurisdiction. This principle was reaffirmed in the Judgment given by the Court in the case concerning Monetary Gold Removed from Rome in 1943 and confirmed in several of its subsequent decisions (see Continental Shelf (Libyan Arab Jamahiriya/Malta), Application for Permission to Intervene, Judgment, I.C.J. Reports 1984, p. 25, para. 40; Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 431, para. 88; Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986, p. 579, para. 49; Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, Judgment, I.C.J. Reports 1990, pp. 114-116, paras. 54-56, and p. 112, para. 73; and Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992, pp. 259-262, paras. 50-55).

27. The Court notes that Portugal's claim that, in entering into the 1989 Treaty with Indonesia, Australia violated its obligation to respect Portugal's status as administering Power and that of East Timor as a non-self-governing territory, is based on the assertion that Portugal alone, in its capacity as administering Power, had the power to enter into the Treaty on behalf of East Timor; that Australia disregarded this exclusive power, and, in so doing, violated its obligations to respect the status of Portugal and that of East Timor.

The Court also observes that Australia, for its part, rejects Portugal's claim to the exclusive power to conclude treaties on behalf of East Timor, and the very fact that it entered into the 1989 Treaty with Indonesia shows that it considered that Indonesia had that power. Australia in substance argues that even if Portugal had retained that power, on whatever basis, after withdrawing from East Timor, the possibility existed that the power could later pass to another State under general international law,
and that it did so pass to Indonesia; Australia affirms moreover that, if the power in question did pass to Indonesia, it was acting in conformity with international law in entering into the 1989 Treaty with that State, and could not have violated any of the obligations Portugal attributes to it. Thus, for Australia, the fundamental question in the present case is ultimately whether, in 1989, the power to conclude a treaty on behalf of East Timor in relation to its continental shelf lay with Portugal or with Indonesia.

28. The Court has carefully considered the argument advanced by Portugal which seeks to separate Australia's behaviour from that of Indonesia. However, in the view of the Court, Australia's behaviour cannot be assessed without first entering into the question why it is that Indonesia could not lawfully have concluded the 1989 Treaty, while Portugal allegedly could have done so; the very subject-matter of the Court's decision would necessarily be a determination whether, having regard to the circumstances in which Indonesia entered and remained in East Timor, it could or could not have acquired the power to enter into treaties on behalf of East Timor relating to the resources of its continental shelf. The Court could not make such a determination in the absence of the consent of Indonesia.

29. However, Portugal puts forward an additional argument aiming to show that the principle formulated by the Court in the case concerning Monetary Gold Removed from Rome in 1943 is not applicable in the present case. It maintains, in effect, that the rights which Australia allegedly breached were rights ergo omnes and that accordingly Portugal could require it, individually, to respect them regardless of whether or not another State had conducted itself in a similarly unlawful manner.

In the Court's view, Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an ergo omnes character, is irreproachable. The principle of self-determination of peoples has been recognized by the United Nations Charter and in the jurisprudence of the Court (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, pp. 31-32, paras. 52-53; Western Sahara, Advisory Opinion, I.C.J. Reports 1975, pp. 31-33, paras. 54-59); it is one of the essential principles of contemporary international law. However, the Court considers that the ergo omnes character of a norm and the rule of consent to jurisdiction are two different things. Whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case. Where this is so, the Court cannot act, even if the right in question is a right ergo omnes.

30. Portugal presents a final argument to challenge the applicability to the present case of the Court's jurisprudence in the case concerning Monetary Gold Removed from Rome in 1943. It argues that the principal matters on which its claims are based, namely the status of East Timor as a non-self-governing territory and its own capacity as the administering Power of the Territory, have already been decided by the General Assembly and the Security Council, acting within their proper spheres of competence; that in order to decide on Portugal's claims, the Court might well need to interpret those decisions but would not have to decide de novo on their content and must accordingly take them as "givens"; and that consequently the Court is not required in this case to pronounce on the question of the use of force by Indonesia in East Timor or upon the lawfulness of its presence in the Territory.

Australia objects that the United Nations resolutions regarding East Timor do not say what Portugal claims they say; that the last resolution of the Security Council on East Timor goes back to 1976 and the last resolution of the General Assembly to 1982, and that Portugal takes no account of the passage of time and the developments that have taken place since then; and that the Security Council resolutions are not resolutions which are binding under Chapter VII of the Charter or otherwise and, moreover, that they are not framed in mandatory terms.

31. The Court notes that the argument of Portugal under consideration rests on the premise that the United Nations resolutions, and in particular those of the Security Council, can be read as imposing an obligation on States not to recognize any authority on the part of Indonesia over the Territory and, where the latter is concerned, to deal only with Portugal. The Court is not persuaded, however, that the relevant resolutions went so far.

For the two Parties, the Territory of East Timor remains a non-self-governing territory and its people has the right to self-determination. Moreover, the General Assembly, which reserves to itself the right to determine the territories which have to be regarded as non-self-governing for the purposes of the application of Chapter XI of the Charter, has treated East Timor as such a territory. The competent subsidiary organs of the General Assembly have continued to treat East Timor as such to this day. Furthermore, the Security Council, in its resolutions 384 (1975) and 389 (1976) has expressly called for respect for "the territorial integrity of East Timor as well as the inalienable right of its people to self-determination in accordance with General Assembly resolution 1514 (XV)".

Nor is it at issue between the Parties that the General Assembly has expressly referred to Portugal as the "administering Power" of East Timor in a number of the resolutions it adopted on the subject of East Timor between 1975 and 1982, and that the Security Council has done so in its resolution 384 (1975). The Parties do not agree, however, on the
legal implications that flow from the reference to Portugal as the administering Power in those texts.

32. The Court finds that it cannot be inferred from the sole fact that the above-mentioned resolutions of the General Assembly and the Security Council refer to Portugal as the administering Power of East Timor that they intended to establish an obligation on third States to treat exclusively with Portugal as regards the continental shelf of East Timor. The Court notes, furthermore, that several States have concluded with Indonesia treaties capable of application to East Timor but which do not include any reservation in regard to that Territory. Finally, the Court observes that, by a letter of 15 December 1989, the Permanent Representative of Portugal to the United Nations transmitted to the Secretary-General the text of a note of protest addressed by the Portuguese Embassy in Canberra to the Australian Department of Foreign Affairs and Trade on the occasion of the conclusion of the Treaty of 11 December 1989; that the letter of the Permanent Representative was circulated, at his request, as an official document of the forty-fifth session of the General Assembly, under the item entitled “Question of East Timor”, and of the Security Council; and that no responsive action was taken either by the General Assembly or the Security Council.

Without prejudice to the question whether the resolutions under discussion could be binding in nature, the Court considers as a result that they cannot be regarded as “givens” which constitute a sufficient basis for determining the dispute between the Parties.

33. It follows from this that the Court would necessarily have to rule upon the lawfulness of Indonesia’s conduct as a prerequisite for deciding on Portugal’s contention that Australia violated its obligation to respect Portugal’s status as administering Power, East Timor’s status as a non-self-governing territory and the right of the people of the Territory to self-determination and to permanent sovereignty over its wealth and natural resources.

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34. The Court emphasizes that it is not necessarily prevented from adjudicating when the judgment it is asked to give might affect the legal interests of a State which is not a party to the case. Thus, in the case concerning Certain Phosphate Lands in Nauru (Nauru v. Australia), it stated, inter alia, as follows:

“In the present case, the interests of New Zealand and the United Kingdom do not constitute the very subject-matter of the judgment to be rendered on the merits of Nauru’s Application . . . In the present case, the determination of the responsibility of New Zealand or the United Kingdom is not a prerequisite for the determination of the responsibility of Australia, the only object of Nauru’s claim . . . In the present case, a finding by the Court regarding the existence or the content of the responsibility attributed to Australia by Nauru might well have implications for the legal situation of the two other States concerned, but no finding in respect of that legal situation will be needed as a basis for the Court’s decision on Nauru’s claims against Australia. Accordingly, the Court cannot decline to exercise its jurisdiction.” (I.C.J. Reports 1992, pp. 261-262, para. 55.)

However, in this case, the effects of the judgment requested by Portugal would amount to a determination that Indonesia’s entry into and continued presence in East Timor are unlawful and that, as a consequence, it does not have the treaty-making power in matters relating to the continental shelf resources of East Timor. Indonesia’s rights and obligations would thus constitute the very subject-matter of such a judgment made in the absence of that State’s consent. Such a judgment would run directly counter to the “well-established principle of international law embodied in the Court’s Statute, namely, that the Court can only exercise jurisdiction over a State with its consent” (Monetary Gold Removed from Rome in 1943, Judgment, I.C.J. Reports 1954, p. 32).

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35. The Court concludes that it cannot, in this case, exercise the jurisdiction it has by virtue of the declarations made by the Parties under Article 36, paragraph 2, of its Statute because, in order to decide the claims of Portugal, it would have to rule, as a prerequisite, on the lawfulness of Indonesia’s conduct in the absence of that State’s consent. This conclusion applies to all the claims of Portugal, for all of them raise a common question: whether the power to make treaties concerning the continental shelf resources of East Timor belongs to Portugal or Indonesia, and, therefore, whether Indonesia’s entry into and continued presence in the Territory are lawful. In these circumstances, the Court does not deem it necessary to examine the other arguments derived by Australia from the non-participation of Indonesia in the case, namely the Court’s lack of jurisdiction to decide on the validity of the 1989 Treaty and the effects on Indonesia’s rights under that treaty which would result from a judgment in favour of Portugal.

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36. Having dismissed the first of the two objections of Australia which it has examined, but upheld its second, the Court finds that it is not required to consider Australia’s other objections and that it cannot rule on Portugal’s claims on the merits, whatever the importance of the questions raised by those claims and of the rules of international law which they bring into play.

37. The Court recalls in any event that it has taken note in the present Judgment (paragraph 31) that, for the two Parties, the Territory of East
Timor remains a non-self-governing territory and its people has the right to self-determination.

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38. For these reasons,

THE COURT,

By fourteen votes to two,

finds that it cannot in the present case exercise the jurisdiction conferred upon it by the declarations made by the Parties under Article 36, paragraph 2, of its Statute to adjudicate upon the dispute referred to it by the Application of the Portuguese Republic.

IN FAVOUR: President Bedjaoui; Vice-President Schwebel; Judges Oda, Sir Robert Jennings, Guillaume, Shahabuddeen, Aguilar-Mawdsley, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin; Judge ad hoc Sir Ninian Stephen;

AGAINST: Judge Weeramantry; Judge ad hoc Skubiszewski.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this thirtieth day of June, one thousand nine hundred and ninety-five, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Portuguese Republic and the Government of the Commonwealth of Australia, respectively.

(Signed) Mohammed Bedjaoui,
President.

(Signed) Eduardo Valencia-Ospina,
Registrar.

Judges Oda, Shahabuddeen, Ranjeva and Vereshchetin append separate opinions to the Judgment of the Court.

Judge Weeramantry and Judge ad hoc Skubiszewski append dissenting opinions to the Judgment of the Court.

(Initialled) M.B.
(Initialled) E.V.O.
International Court of Justice

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory
Advisory Opinion

*I.C.J. Reports 2004*, p. 136
LEGAL CONSEQUENCES
OF THE CONSTRUCTION OF A WALL
IN THE OCCUPIED PALESTINIAN TERRITORY

Jurisdiction of the Court to give the advisory opinion requested.
Article 65, paragraph 1, of the Statute — Article 96, paragraph 1, of the Charter — Power of General Assembly to request advisory opinions — Activities of Assembly.
Events leading to the adoption of General Assembly resolution ES-1014 requesting the advisory opinion.
Contention that General Assembly acted ultra vires under the Charter — Article 12, paragraph 1, and Article 24 of the Charter — United Nations practice concerning the interpretation of Article 12, paragraph 1, of Charter — General Assembly did not exceed its competence.

Request for opinion adopted by the Tenth Emergency Special Session of the General Assembly — Session convened pursuant to resolution 377 A (V) ("Uniting for Peace") — Conditions set by that resolution — Regularity of procedure followed.
Alleged lack of clarity of the terms of the question — Purportedly abstract nature of the question — Political aspects of the question — Motives said to have inspired the request and opinion’s possible implications — "Legal" nature of question unaffected.
Court having jurisdiction to give advisory opinion requested.

Discretionary power of Court to decide whether it should give an opinion.
Article 65, paragraph 1, of Statute — Relevance of lack of consent of a State concerned — Question cannot be regarded only as a bilateral matter between Israel and Palestine but is directly of concern to the United Nations — Possible effects of opinion on a political, negotiated solution to the Israeli-Palestinian conflict — Question representing only one aspect of Israeli-Palestinian conflict — Sufficiency of information and evidence available to Court — Useful purpose of opinion — Nullus commodum capere potest de sua injuria propria — Opinion to be given to the General Assembly, not to a specific State or entity.

No "compelling reason" for Court to use its discretionary power not to give an advisory opinion.

Legal consequences of the construction of a wall in the Occupied Palestinian Territory, including in and around East Jerusalem — Scope of question posed — Request for opinion limited to the legal consequences of the construction of those parts of the wall situated in Occupied Palestinian Territory — Use of the term "wall" — Historical background.
Description of the wall.

Applicable law.
United Nations Charter — General Assembly resolution 2625 (XXV) — Illegality of any territorial acquisition resulting from the threat or use of force — Rights of peoples to self-determination.

Settlements established by Israel in breach of international law in the Occupied Palestinian Territory — Construction of the wall and its associated regime create a "fait accompli" on the ground that could well become permanent — Risk of situation tantamount to de facto annexation — Construction of the wall severely impedes the exercise by the Palestinian people of its right to self-determination and is therefore a breach of Israel's obligation to respect that right.
Applicable provisions of international humanitarian law and human rights instruments relevant to the present case — Destruction and requisition of properties — Restrictions on freedom of movement of inhabitants of the Occupied Palestinian Territory — Impediments to the exercise by those concerned of the right to work, to health, to education and to an adequate standard of living — Demographic changes in the Occupied Palestinian Territory — Provisions of international humanitarian law enabling account to be taken of military exigencies — Clauses in human rights instruments qualifying rights guaranteed or providing for derogation — Construction of the wall and its associated regime cannot be justified by military exigencies or by the requirements of national security or public order — Breach by Israel of various of its obligations under...
CONSTRUCTION OF A WALL (ADVISORY OPINION)

138

the applicable provisions of international humanitarian law and human rights instruments.

Self-defence — Article 51 of the Charter — Attacks against Israel not imputable to a foreign State — Threat invoked to justify the construction of the wall originating within a territory over which Israel exercises control — Article 51 not relevant in the present case.

State of necessity — Customary international law — Conditions — Construction of the wall not the only means to safeguard Israel’s interests against the peril invoked.

Construction of the wall and its associated régime are contrary to international law.

* *

Legal consequences of the violation by Israel of its obligations.

Israel’s international responsibility — Israel obliged to comply with the international obligations it has breached by the construction of the wall — Israel obliged to put an end to the violation of its international obligations — Obligation to cease forthwith the works of construction of the wall, to dismantle it forthwith and to repeal or render ineffective forthwith the legislative and regulatory acts relating to its construction, save where relevant for compliance by Israel with its obligation to make reparation for the damage caused — Israel obliged to make reparation for the damage caused to all natural or legal persons affected by construction of the wall.

Legal consequences for States other than Israel — Erga omnes character of certain obligations violated by Israel — Obligation for all States not to recognize the illegal situation resulting from construction of the wall and not to render aid or assistance in maintaining the situation created by such construction — Obligation for all States, while respecting the Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end — Obligation for all States parties to the Fourth Geneva Convention, while respecting the Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention — Need for the United Nations, and especially the General Assembly and the Security Council, to consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and its associated régime, taking due account of the Advisory Opinion.

* *

Construction of the wall must be placed in a more general context — Obligation of Israel and Palestine scrupulously to observe international humanitarian law — Implementation in good faith of all relevant Security Council resolutions, in particular resolutions 242 (1967) and 338 (1973) — “Roadmap” — Need for efforts to be encouraged with a view to achieving as soon as possible, on the basis of international law, a negotiated solution to the outstanding problems and the establishment of a Palestinian State, with peace and security for all in the region.

CONSTRUCTION OF A WALL (ADVISORY OPINION)

139

ADVISORY OPINION

Present: President Shi, Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchegin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Simma, Tomka; Registrar Couveur.

On the legal consequences of the construction of a wall in the Occupied Palestinian Territory,

THE COURT, composed as above,
gives the following Advisory Opinion:

1. The question on which the advisory opinion of the Court has been requested is set forth in resolution ES-10/14 adopted by the General Assembly of the United Nations (hereinafter the “General Assembly”) on 8 December 2003 at its Tenth Emergency Special Session. By a letter dated 8 December 2003 and received in the Registry by facsimile on 10 December 2003, the original of which reached the Registry subsequently, the Secretary-General of the United Nations officially communicated to the Court the decision taken by the General Assembly to submit the question for an advisory opinion. Certified true copies of the English and French versions of resolution ES-10/14 were enclosed with the letter. The resolution reads as follows:

“The General Assembly,

Reaffirming its resolution ES-10/13 of 21 October 2003,

Guided by the principles of the Charter of the United Nations,

Aware of the established principle of international law on the inadmissibility of the acquisition of territory by force,

Aware also that developing friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples is among the purposes and principles of the Charter of the United Nations,

Recalling relevant General Assembly resolutions, including resolution 181 (II) of 29 November 1947, which partitioned mandated Palestine into two States, one Arab and one Jewish,

Recalling also the resolutions of the tenth emergency special session of the General Assembly,


6

7
Reaffirming the applicability of the Fourth Geneva Convention\(^1\) as well as Additional Protocol I to the Geneva Conventions\(^2\) to the Occupied Palestinian Territory, including East Jerusalem,

Recalling the Regulations annexed to the Hague Convention Respecting the Laws and Customs of War on Land of 1907\(^3\),

Welcoming the convening of the Conference of High Contracting Parties to the Fourth Geneva Convention on measures to enforce the Convention in the Occupied Palestinian Territory, including Jerusalem, at Geneva on 15 July 1999,

Expressing its support for the declaration adopted by the reconvened Conference of High Contracting Parties at Geneva on 5 December 2001,

Recalling in particular relevant United Nations resolutions affirming that Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, are illegal and an obstacle to peace and to economic and social development as well as those demanding the complete cessation of settlement activities,

Recalling relevant United Nations resolutions affirming that actions taken by Israel, the occupying Power, to change the status and demographic composition of Occupied East Jerusalem have no legal validity and are null and void,

Noting the agreements reached between the Government of Israel and the Palestine Liberation Organization in the context of the Middle East peace process,

Gravely concerned at the commencement and continuation of construction by Israel, the occupying Power, of a wall in the Occupied Palestinian Territory, including in and around East Jerusalem, which is in departure from the Armistice Line of 1949 (Green Line) and which has involved the confiscation and destruction of Palestinian land and resources, the disruption of the lives of thousands of protected civilians and the de facto annexation of large areas of territory, and underlying the unanimous opposition by the international community to the construction of that wall,

Gravely concerned also at the even more devastating impact of the projected parts of the wall on the Palestinian civilian population and on the prospects for solving the Palestinian-Israeli conflict and establishing peace in the region,

Welcoming the report of 8 September 2003 of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in the Palestinian territories occupied by Israel since 1967\(^4\), in particular the section regarding the wall,

Having received with appreciation the report of the Secretary-General, submitted in accordance with resolution ES-10/13\(^5\),

Bearing in mind that the passage of time further compounds the difficulties on the ground, as Israel, the occupying Power, continues to refuse to comply with international law vis-à-vis its construction of the above-mentioned wall, with all its detrimental implications and consequences,

Decides, in accordance with Article 96 of the Charter of the United Nations, to request the International Court of Justice, pursuant to Article 65 of the Statute of the Court, to urgently render an advisory opinion on the following question:

What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?

\(^{5}\) A/ES-10/248.

Also enclosed with the letter were the certified English and French texts of the report of the Secretary-General dated 24 November 2003, prepared pursuant to General Assembly resolution ES-10/13 (A/ES-10/248), to which resolution ES-10/14 makes reference.

2. By letters dated 16 December 2003, the Registrar notified the request for an advisory opinion to all States entitled to appear before the Court, in accordance with Article 66, paragraph 1, of the Statute.

3. By a letter dated 11 December 2003, the Government of Israel informed the Court of its position on the request for an advisory opinion and on the procedure to be followed.

4. By an Order of 19 December 2003, the Court decided that the United Nations and its Member States were likely, in accordance with Article 66, paragraph 2, of the Statute, to be able to furnish information on all aspects raised by the question submitted to the Court for an advisory opinion and fixed 30 January 2004 as the time-limit within which written statements might be submitted to it on the question in accordance with Article 66, paragraph 4, of the Statute. By the same Order, the Court further decided that, in the light of resolution ES-10/14 and the report of the Secretary-General transmitted with the request, and taking into account the fact that the General Assembly had granted Palestine a special status of observer and that the latter was co-sponsor of the draft resolution requesting the advisory opinion, Palestine might also submit a written statement on the question within the above time-limit.

5. By the aforesaid Order, the Court also decided, in accordance with
Article 105, paragraph 4, of the Rules of Court, to hold public hearings during which oral statements and comments might be presented to it by the United Nations and its Member States, regardless of whether or not they had submitted written statements, and fixed 23 February 2004 as the date for the opening of the said hearings. By the same Order, the Court decided that, for the reasons set out above (see paragraph 4), Palestine might also take part in the hearings. Lastly, it invited the United Nations and its Member States, as well as Palestine, to inform the Registry, by 13 February 2004 at the latest, if they were intending to take part in the above-mentioned hearings. By letters of 19 December 2004, the Registrar informed them of the Court's decisions and transmitted to them a copy of the Order.

6. Ruling on requests submitted subsequently by the League of Arab States and the Organization of the Islamic Conference, the Court decided, in accordance with Article 66 of its Statute, that those two international organizations were likely to be able to furnish information on the question submitted to the Court, and that consequently they might for that purpose submit written statements within the time-limit fixed by the Court in its Order of 19 December 2003 and take part in the hearings.

7. Pursuant to Article 65, paragraph 2, of the Statute, the Secretary-General of the United Nations communicated to the Court a dossier of documents likely to throw light upon the question.

8. By a reasoned Order of 30 January 2004 regarding its composition in the case, the Court decided that the matters brought to its attention by the Government of Israel in a letter of 31 December 2003, and in a confidential letter of 15 January 2004 addressed to the President pursuant to Article 34, paragraph 2, of the Rules of Court, were not such as to preclude Judge Elaraby from sitting in the case.

9. Within the time-limit fixed by the Court for that purpose, written statements were filed by, in order of their receipt: Guinea, Saudi Arabia, League of Arab States, Egypt, Cameroon, Russian Federation, Australia, Palestine, United Nations, Jordan, Kuwait, Lebanon, Canada, Syria, Switzerland, Israel, Yemen, United States of America, Morocco, Indonesia, Organization of the Islamic Conference, France, Italy, Sudan, South Africa, Germany, Japan, Norway, United Kingdom, Pakistan, Czech Republic, Greece, Ireland on its own behalf, Ireland on behalf of the European Union, Cyprus, Brazil, Namibia, Malta, Malaysia, Netherlands, Cuba, Sweden, Spain, Belgium, Palau, Federated States of Micronesia, Marshall Islands, Senegal, Democratic People's Republic of Korea. Upon receipt of those statements, the Registrar transmitted copies thereof to the United Nations and its Member States, to Palestine, to the League of Arab States and to the Organization of the Islamic Conference.

10. Various communications were addressed to these latter by the Registry, concerning in particular the measures taken for the organization of the oral proceedings. By communications of 20 February 2004, the Registry transmitted a detailed timetable of the hearings to the latter who, within the time-limit fixed for that purpose by the Court, had expressed their intention of taking part in the aforementioned proceedings.

11. Pursuant to Article 106 of the Rules of Court, the Court decided to make the written statements accessible to the public, with effect from the opening of the oral proceedings.

12. In the course of hearings held from 23 to 25 February 2004, the Court heard oral statements, in the following order, by:

for Palestine:
- H.E. Mr. Nasser Al-Kidwa, Ambassador, Permanent Observer of Palestine to the United Nations,
- Ms Stephanie Koury, Member, Negotiations Support Unit, Counsel,
- Mr. James Crawford, S.C., Whewell Professor of International Law, University of Cambridge, Member of the Institute of International Law, Counsel and Advocate,
- Mr. Georges Abi-Saab, Professor of International Law, Graduate Institute of International Studies, Geneva, Member of the Institute of International Law, Counsel and Advocate,
- Mr. Vaughan Lowe, Chichele Professor of International Law, University of Oxford, Counsel and Advocate,
- Mr. Jean Salmon, Professor Emeritus of International Law, Université libre de Bruxelles, Member of the Institute of International Law, Counsel and Advocate;
- H.E. Mr. Aziz Puhad, Deputy Minister for Foreign Affairs, Head of Delegation;
- Judge M. R. W. Madlanga, S.C.;
- Mr. Ahmed Laraba, Professor of International Law;
- H.E. Mr. Fawzi A. Shobokshi, Ambassador and Permanent Representative of the Kingdom of Saudi Arabia to the United Nations in New York, Head of Delegation;
- H.E. Mr. Liaquat Ali Chaudhury, Ambassador of the People's Republic of Bangladesh to the Kingdom of the Netherlands;
- Mr. Jean-Marc Sorel, Professor at the University of Paris I (Panthéon-Sorbonne);
- H.E. Mr. Abelardo Moreno Fernández, Deputy Minister for Foreign Affairs;
- H.E. Mr. Mohammad Jusuf, Ambassador of the Republic of Indonesia to the Kingdom of the Netherlands, Head of Delegation;
- H.R.H. Ambassador Zeid Ra'ad Zeid Al-Hussein, Permanent Representative of the Hashemite Kingdom of Jordan to the United Nations, New York, Head of Delegation,
- Sir Arthur Watts, K.C.M.G., Q.C., Senior Legal
Adviser to the Government of the Hashemit Kingdom of Jordan;

for the Republic of Madagascar: H.E. Mr. Alfred Rambeloson, Permanent Representative of Madagascar to the Office of the United Nations at Geneva and to the Specialized Agencies, Head of Delegation;

for Malaysia: H.E. Datuk Seri Syed Hamid Albar, Foreign Minister of Malaysia, Head of Delegation;

for the Republic of Senegal: H.E. Mr. Salou Cissé, Ambassador of the Republic of Senegal to the Kingdom of the Netherlands, Head of Delegation;

for the Republic of the Sudan: H.E. Mr. Abuelgasim A. Idris, Ambassador of the Republic of the Sudan to the Kingdom of the Netherlands;

for the League of Arab States: Mr. Michael Bothe, Professor of Law, Head of the Legal Team;

for the Organization of the Islamic Conference: H.E. Mr. Abdelouahed Belkeziz, Secretary General of the Organization of the Islamic Conference, Ms Monique Chemillier-Gendreau, Professor of Public Law, University of Paris VII-Denis Diderot, as Counsel.

* * *

13. When seized of a request for an advisory opinion, the Court must first consider whether it has jurisdiction to give the opinion requested and whether, should the answer be in the affirmative, there is any reason why it should decline to exercise any such jurisdiction (see Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I), p. 232, para. 10).

* * *

14. The Court will thus address the question whether it possesses jurisdiction to give the advisory opinion requested by the General Assembly on 8 December 2003. The competence of the Court in this regard is based on Article 65, paragraph 1, of its Statute, according to which the Court “may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request”. The Court has already had occasion to indicate that:

“It is . . . a precondition of the Court’s competence that the advisory opinion be requested by an organ duly authorized to seek it under the Charter, that it be requested on a legal question, and that, except in the case of the General Assembly or the Security Council, that question should be one arising within the scope of the activities of the requesting organ.” (Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982, pp. 333-334, para. 21.)

15. It is for the Court to satisfy itself that the request for an advisory opinion comes from an organ or agency having competence to make it. In the present instance, the Court notes that the General Assembly, which seeks the advisory opinion, is authorized to do so by Article 96, paragraph 1, of the Charter, which provides: “The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.”

16. Although the above-mentioned provision states that the General Assembly may seek an advisory opinion “on any legal question”, the Court has sometimes in the past given certain indications as to the relationship between the question the subject of a request for an advisory opinion and the activities of the General Assembly (Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, I.C.J. Reports 1950, p. 70; Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996 (I), pp. 232 and 233, paras. 11 and 12).

17. The Court will so proceed in the present case. The Court would observe that Article 10 of the Charter has conferred upon the General Assembly a competence relating to “any questions or any matters” within the scope of the Charter, and that Article 11, paragraph 2, has specifically provided it with competence on “questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations . . .” and to make recommendations under certain conditions fixed by those Articles. As will be explained below, the question of the construction of the wall in the Occupied Palestinian Territory was brought before the General Assembly by a number of Member States in the context of the Tenth Emergency Special Session of the Assembly, convened to deal with what the Assembly, in its resolution ES-10/2 of 25 April 1997, considered to constitute a threat to international peace and security.

* * *

18. Before further examining the problems of jurisdiction that have been raised in the present proceedings, the Court considers it necessary to describe the events that led to the adoption of resolution ES-10/14, by which the General Assembly requested an advisory opinion on the legal consequences of the construction of the wall in the Occupied Palestinian Territory.

19. The Tenth Emergency Special Session of the General Assembly, at which that resolution was adopted, was first convened following the rejection by the Security Council, on 7 March and 21 March 1997, as a result of negative votes by a permanent member, of two draft resolutions concerning certain Israeli settlements in the Occupied Palestinian Territory (see, respectively, S/1997/199 and S/PV.3747, and S/1997/241 and S/PV.3756). By a letter of 31 March 1997, the Chairman of the Arab Group then requested “that an emergency special session of the General Assembly be convened pursuant to resolution 377 A (V) entitled ‘Uniting
for Peace” with a view to discussing “Illegal Israeli actions in occupied East Jerusalem and the rest of the Occupied Palestinian Territory” (letter dated 31 March 1997 from the Permanent Representative of Qatar to the United Nations addressed to the Secretary-General, A/ES-10/1, 22 April 1997, Annex). The majority of Members of the United Nations having concurred in this request, the first meeting of the Tenth Emergency Special Session of the General Assembly took place on 24 April 1997 (see A/ES-10/1, 22 April 1997). Resolution ES-10/2 was adopted the following day: the General Assembly thereby expressed its conviction that:

“the repeated violation by Israel, the occupying Power, of international law and its failure to comply with relevant Security Council and General Assembly resolutions and the agreements reached between the parties undermine the Middle East peace process and constitute a threat to international peace and security”,


20. By a letter dated 9 October 2003, the Chairman of the Arab Group, on behalf of the States Members of the League of Arab States, requested an immediate meeting of the Security Council to consider the “grave and ongoing Israeli violations of international law, including international humanitarian law, and to take the necessary measures in this regard” (letter of 9 October 2003 from the Permanent Representative of the Syrian Arab Republic to the United Nations to the President of the Security Council, S/2003/973, 9 October 2003). This letter was accompanied by a draft resolution for consideration by the Council, which condemned as illegal the construction by Israel of a wall in the Occupied Palestinian Territory departing from the Armistice Line of 1949. The Security Council held its 4841st and 4842nd meetings on 14 October 2003 to consider the item entitled “The situation in the Middle East, including the Palestine question”. It then had before it another draft resolution proposed on the same day by Guinea, Malaysia, Pakistan and the Syrian Arab Republic, which also condemned the construction of the wall. This latter draft resolution was put to a vote after an open debate and was not adopted owing to the negative vote of a permanent member of the Council (S/PV.4841 and S/PV.4842).

On 15 October 2003, the Chairman of the Arab Group, on behalf of

the States Members of the League of Arab States, requested the resumption of the Tenth Emergency Special Session of the General Assembly to consider the item of “Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory” (A/ES-10/242); this request was supported by the Non-Aligned Movement (A/ES-10/243) and the Organization of the Islamic Conference Group at the United Nations (A/ES-10/244). The Tenth Emergency Special Session resumed its work on 20 October 2003.

21. On 27 October 2003, the General Assembly adopted resolution ES-10/13, by which it demanded that

“Israel stop and reverse the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, which is in departure of the Armistice Line of 1949 and in contradiction to relevant provisions of international law” (para. 1).

In paragraph 3, the Assembly requested the Secretary-General

“to report on compliance with the . . . resolution periodically, with the first report on compliance with paragraph 1 [of that resolution] to be submitted within one month . . .”.

The Tenth Emergency Special Session was temporarily adjourned and, on 24 November 2003, the report of the Secretary-General prepared pursuant to General Assembly resolution ES-10/13 (hereinafter the “report of the Secretary-General”) was issued (A/ES-10/248).


“Call[ed] on the parties to fulfill their obligations under the Roadmap in cooperation with the Quartet and to achieve the vision of two States living side by side in peace and security.”

Neither the “Roadmap” nor resolution 1515 (2003) contained any specific provision concerning the construction of the wall, which was not discussed by the Security Council in this context.

23. Nineteen days later, on 8 December 2003, the Tenth Emergency Special Session of the General Assembly again resumed its work, following a new request by the Chairman of the Arab Group, on behalf of the States Members of the League of Arab States, and pursuant to resolution ES-10/13 (letter dated 1 December 2003 to the President of the General Assembly from the Chargé d’affaires a.i. of the Permanent Mission.
of Kuwait to the United Nations, A/ES-10/249, 2 December 2003). It was during the meeting convened on that day that resolution ES-10/14 requesting the present advisory opinion was adopted.

24. Having thus recalled the sequence of events that led to the adoption of resolution ES-10/14, the Court will now turn to the questions of jurisdiction that have been raised in the present proceedings. First, Israel has alleged that, given the active engagement of the Security Council with the situation in the Middle East, including the Palestinian question, the General Assembly acted ultra vires under the Charter when it requested an advisory opinion on the legal consequences of the construction of the wall in the Occupied Palestinian Territory.

25. The Court has already indicated that the subject of the present request for an advisory opinion falls within the competence of the General Assembly under the Charter (see paragraphs 15-17 above). However, Article 12, paragraph 1, of the Charter provides that:

"While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests."

A request for an advisory opinion is not in itself a "recommendation" by the General Assembly "with regard to [a] dispute or situation". It has however been argued in this case that the adoption by the General Assembly of resolution ES-10/14 was ultra vires as not in accordance with Article 12. The Court thus considers that it is appropriate for it to examine the significance of that Article, having regard to the relevant texts and the practice of the United Nations.

26. Under Article 24 of the Charter the Security Council has "primary responsibility for the maintenance of international peace and security". In that regard it can impose on States "an explicit obligation of compliance if for example it issues an order or command . . . under Chapter VII" and can, to that end, "require enforcement by coercive action" (Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962, p. 163). However, the Court would emphasize that Article 24 refers to a primary, but not necessarily exclusive, competence. The General Assembly does have the power, inter alia, under Article 14 of the Charter, to "recommend measures for the peaceful adjustment" of various situations (ibid.).

"[T]he only limitation which Article 14 imposes on the General Assembly is the restriction found in Article 12, namely, that the Assembly should not recommend measures while the Security Council is dealing with the same matter unless the Council requests it to do so." (I.C.J. Reports 1962, p. 163.)

27. As regards the practice of the United Nations, both the General Assembly and the Security Council initially interpreted and applied Article 12 to the effect that the Assembly could not make a recommendation on a question concerning the maintenance of international peace and security while the matter remained on the Council's agenda. Thus the Assembly during its fourth session refused to recommend certain measures on the question of Indonesia, on the ground, inter alia, that the Council remained seised of the matter (Official Records of the General Assembly, Fourth Session, Ad Hoc Political Committee, Summary Records of Meetings, 27 September-7 December 1949, 56th Meeting, 3 December 1949, p. 339, para. 118). As for the Council, on a number of occasions it deleted items from its agenda in order to enable the Assembly to deliberate on them (for example, in respect of the Spanish question (Official Records of the Security Council, First Year: Second Series, No. 21, 79th Meeting, 4 November 1946, p. 498), in connection with incidents on the Greek border (Official Records of the Security Council, Second Year, No. 89, 320th Meeting, 15 September 1947, pp. 2404-2405) and in regard to the Island of Taiwan (Formosa) (Official Records of the Security Council, Fifth Year, No. 48, 506th Meeting, 29 September 1950, p. 5). In the case of the Republic of Korea, the Council decided on 31 January 1951 to remove the relevant item from the list of matters of which it was seised in order to enable the Assembly to deliberate on the matter (Official Records of the Security Council, Sixth Year, S/PV.531, 531st Meeting, 31 January 1951, pp. 11-12, para. 57).

However, this interpretation of Article 12 has evolved subsequently. Thus the General Assembly deemed itself entitled in 1961 to adopt recommendations in the matter of the Congo (resolutions 1955 (XV) and 1600 (XVI)) and in 1963 in respect of the Portuguese colonies (resolution 1913 (XVIII)) while those cases still appeared on the Council's agenda, without the Council having adopted any recent resolution concerning them. In response to a question posed by Peru during the twenty-third session of the General Assembly, the Legal Counsel of the United Nations confirmed that the Assembly interpreted the words "is exercising the functions" in Article 12 of the Charter as meaning "is exercising the functions at this moment" (General Assembly, Twenty-third Session, Third Committee, 1637th meeting, A/C.3/SR.1637, para. 9). Indeed, the Court notes that there has been an increasing tendency over time for the General Assembly and the Security Council to deal in parallel with the same matter concerning the maintenance of international peace and security (see, for example, the matters involving Cyprus, South Africa, Angola, Southern Rhodesia and more recently Bosnia and Herzegovina and...
Somalia). It is often the case that, while the Security Council has tended to focus on the aspects of such matters related to international peace and security, the General Assembly has taken a broader view, considering also their humanitarian, social and economic aspects.

28. The Court considers that the accepted practice of the General Assembly, as it has evolved, is consistent with Article 12, paragraph 1, of the Charter.

The Court is accordingly of the view that the General Assembly, in adopting resolution ES-10/14, seeking an advisory opinion from the Court, did not contravene the provisions of Article 12, paragraph 1, of the Charter. The Court concludes that by submitting that request the General Assembly did not exceed its competence.

29. It has however been contended before the Court that the present request for an advisory opinion did not fulfil the essential conditions set by resolution 377 A (V), under which the Tenth Emergency Special Session was convened and has continued to act. In this regard, it has been said, first, that “The Security Council was never seised of a draft resolution proposing that the Council itself should request an advisory opinion from the Court on the matters now in contention”, and, that specific issue having thus never been brought before the Council, the General Assembly could not rely on any inaction by the Council to make such a request. Secondly, it has been claimed that, in adopting resolution 1515 (2003), which endorsed the “Roadmap”, before the adoption by the General Assembly of resolution ES-10/14, the Security Council continued to exercise its responsibility for the maintenance of international peace and security and that, as a result, the General Assembly was not entitled to act in its place. The validity of the procedure followed by the Tenth Emergency Special Session, especially the Session’s “rolling character” and the fact that its meeting was convened to deliberate on the request for the advisory opinion at the same time as the General Assembly meeting in regular session, has also been questioned.

30. The Court would recall that resolution 377 A (V) states that:

“If the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures ...”.

The procedure provided for by that resolution is premised on two conditions, namely that the Council has failed to exercise its primary responsibility for the maintenance of international peace and security as a result of a negative vote of one or more permanent members, and that the situation is one in which there appears to be a threat to the peace, breach of the peace, or act of aggression. The Court must accordingly ascertain whether these conditions were fulfilled as regards the convening of the Tenth Emergency Special Session of the General Assembly, in particular at the time when the Assembly decided to request an advisory opinion from the Court.

31. In the light of the sequence of events described in paragraphs 18 to 23 above, the Court observes that, at the time when the Tenth Emergency Special Session was convened in 1997, the Council had been unable to take a decision on the case of certain Israeli settlements in the Occupied Palestinian Territory, due to negative votes of a permanent member; and that, as indicated in resolution ES-10/2 (see paragraph 19 above), there existed a threat to international peace and security.

The Court further notes that, on 20 October 2003, the Tenth Emergency Special Session of the General Assembly was reconvened on the same basis as in 1997 (see the statements by the representatives of Palestine and Israel, A/ES-10/PV.21, pp. 2 and 5), after the rejection by the Security Council, on 14 October 2003, again as a result of the negative vote of a permanent member, of a draft resolution concerning the construction by Israel of the wall in the Occupied Palestinian Territory. The Court considers that the Security Council again failed to act as contemplated in resolution 377 A (V). It does not appear to the Court that the situation in this regard changed between 20 October 2003 and 8 December 2003, since the Council neither discussed the construction of the wall nor adopted any resolution in that connection. Thus, the Court is of the view that, up to 8 December 2003, the Council had not reconsidered the negative vote of 14 October 2003. It follows that, during that period, the Tenth Emergency Special Session was duly reconvened and could properly be seised, under resolution 377 A (V), of the matter now before the Court.

32. The Court would also emphasize that, in the course of this Emergency Special Session, the General Assembly could adopt any resolution falling within the subject-matter for which the Session had been convened, and otherwise within its powers, including a resolution seeking the Court’s opinion. It is irrelevant in that regard that no proposal had been made to the Security Council to request such an opinion.

33. Turning now to alleged further procedural irregularities of the Tenth Emergency Special Session, the Court does not consider that the “rolling” character of that Session, namely the fact of its having been convened in April 1997 and reconvened 11 times since then, has any relevance with regard to the validity of the request by the General Assembly. The Court observes in that regard that the Seventh Emergency Special Session of the General Assembly, having been convened on 22 July 1980, was subsequently reconvened four times (on 20 April 1982, 25 June 1982, 16 August 1982 and 24 September 1982), and that the validity of
resolutions or decisions of the Assembly adopted under such circumstances was never disputed. Nor has the validity of any previous resolutions adopted during the Tenth Emergency Special Session been challenged.

The Court also notes the contention by Israel that it was improper to reconvene the Tenth Emergency Special Session at a time when the regular session of the General Assembly was in progress. The Court considers that, while it may not have been originally contemplated that it would be appropriate for the General Assembly to hold simultaneous emergency and regular sessions, no rule of the Organization has been identified which would be thereby violated, so as to render invalid the resolution adopting the present request for an advisory opinion.

35. Finally, the Tenth Emergency Special Session appears to have been convened in accordance with Rule 9(b) of the Rules of Procedure of the General Assembly, and the relevant meetings have been convened in pursuance of the applicable rules. As the Court stated in its Advisory Opinion of 21 June 1971 concerning the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), a

"resolution of a properly constituted organ of the United Nations which is passed in accordance with that organ’s rules of procedure, and is declared by its President to have been so passed, must be presumed to have been validly adopted" (I.C.J. Reports 1971, p. 22, para. 20).

In view of the foregoing, the Court cannot see any reason why that presumption is to be rebutted in the present case.

*

36. The Court now turns to a further issue related to jurisdiction in the present proceedings, namely the contention that the request for an advisory opinion by the General Assembly is not on a “legal question” within the meaning of Article 96, paragraph 1, of the Charter and Article 65, paragraph 1, of the Statute of the Court. It has been contended in this regard that, for a question to constitute a “legal question” for the purposes of these two provisions, it must be reasonably specific, since otherwise it would not be amenable to a response by the Court. With regard to the request made in the present advisory proceedings, it has been argued that it is not possible to determine with reasonable certainty the legal meaning of the question asked of the Court for two reasons.

First, it has been argued that the question regarding the “legal consequences” of the construction of the wall only allows for two possible interpretations, each of which would lead to a course of action that is precluded for the Court. The question asked could first be interpreted as a request for the Court to find that the construction of the wall is illegal, and then to give its opinion on the legal consequences of that illegality. In this case, it has been contended, the Court should decline to respond to the question asked for a variety of reasons, some of which pertain to jurisdiction and others rather to the issue of propriety. As regards jurisdiction, it is said that, if the General Assembly had wished to obtain the view of the Court on the highly complex and sensitive question of the legality of the construction of the wall, it should have expressly sought an opinion to that effect (cf. Exchange of Greek and Turkish Populations, Advisory Opinion, 1925, P.C.I.J., Series B, No. 10, p. 17). A second possible interpretation of the request, it is said, is that the Court should assume that the construction of the wall is illegal, and then give its opinion on the legal consequences of that assumed illegality. It has been contended that the Court should also decline to respond to the question on this hypothesis, since the request would then be based on a questionable assumption and since, in any event, it would be impossible to rule on the legal consequences of illegality without specifying the nature of that illegality.

Secondly, it has been contended that the question asked of the Court is not of a “legal” character because of its imprecision and abstract nature. In particular, it has been argued in this regard that the question fails to specify whether the Court is being asked to address legal consequences for “the General Assembly or some other organ of the United Nations”, “Member States of the United Nations”, “Israel”, “Palestine” or “some combination of the above, or some different entity”.

37. As regards the alleged lack of clarity of the terms of the General Assembly’s request and its effect on the “legal nature” of the question referred to the Court, the Court observes that this question is directed to the legal consequences arising from a given factual situation considering the rules and principles of international law, including the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (hereinafter the “Fourth Geneva Convention”) and relevant Security Council and General Assembly resolutions. The question submitted by the General Assembly has thus, to use the Court’s phrase in its Advisory Opinion on Western Sahara, “been framed in terms of law and raises[es] problems of international law”; it is by its very nature susceptible of a reply based on law; indeed it is scarcely susceptible of a reply otherwise than on the basis of law. In the view of the Court, it is indeed a question of a legal character (see Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 18, para. 15).

38. The Court would point out that lack of clarity in the drafting of a question does not deprive the Court of jurisdiction. Rather, such uncer-
CONSTRUCTION OF A WALL (ADVISORY OPINION) 154

In the past, both the Permanent Court and the present Court have observed in some cases that the wording of a request for an advisory opinion did not accurately state the question on which the Court’s opinion was being sought (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 (1), pp. 14-16), or did not correspond to the “true legal question” under consideration (Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980, pp. 87-89, paras. 34-36). The Court noted in one case that “the question put to the Court is, on the face of it, at once infelicitously expressed and vague” (Application for Review of Judgement No. 275 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982, p. 348, para. 46).

Consequently, the Court has often been required to broaden, interpret and even reformulate the questions put (see the three Opinions cited above; see also Jaworzina, Advisory Opinion, 1923, P.C.I.J., Series B, No. 8; Admissibility of Hearings of Petitioners by the Committee on South West Africa, Advisory Opinion, I.C.J. Reports 1956, p. 25; Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962, pp. 157-162).

In the present instance, the Court will only have to do what it has often done in the past, namely “identify the existing principles and rules, interpret them and apply them . . ., thus offering a reply to the question posed based on law” (Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996 (1), p. 234, para. 13).

39. In the present instance, if the General Assembly requests the Court to state the “legal consequences” arising from the construction of the wall, the use of these terms necessarily encompasses an assessment of whether that construction is or is not in breach of certain rules and principles of international law. Thus, the Court is first called upon to determine whether such rules and principles have been and are still being breached by the construction of the wall along the planned route.

40. The Court does not consider that what is contended to be the abstract nature of the question posed to it raises an issue of jurisdiction. Even when the matter was raised as an issue of propriety rather than one of jurisdiction, in the case concerning the Legality of the Threat or Use of Nuclear Weapons, the Court took the position that to contend that it should not deal with a question couched in abstract terms is “a mere affirmation devoid of any justification” and that “the Court may give an advisory opinion on any legal question, abstract or otherwise” (I.C.J. Reports 1996 (1), p. 236, para. 15, referring to Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948, I.C.J. Reports 1947-1948, p. 61; Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1954, p. 51; and Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 27, para. 40). In any event, the Court considers that the question posed to it in relation to the legal consequences of the construction of the wall is not an abstract one, and moreover that it would be for the Court to determine for whom any such consequences arise.

41. Furthermore, the Court cannot accept the view, which has also been advanced in the present proceedings, that it has no jurisdiction because of the “political” character of the question posed. As is clear from its long-standing jurisprudence on this point, the Court considers that the fact that a legal question also has political aspects, “as, in the nature of things, is the case with so many questions which arise in international life, does not suffice to deprive it of its character as a ‘legal question’ and to ‘deprive the Court of a competence expressly conferred on it by its Statute’ (Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973, p. 172, para. 14). Whatever its political aspects, the Court cannot refuse to admit the legal character of a question which invites it to discharge an essentially judicial task, namely, an assessment of the legality of the possible conduct of States with regard to the obligations imposed upon them by international law (cf. Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948, I.C.J. Reports 1947-1948, pp. 61-62; Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950, pp. 6-7; Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962, p. 157).” (Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (1), p. 234, para. 13.)

In its Opinion concerning the Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, the Court indeed emphasized that, “in situations in which political considerations are prominent it may be particularly necessary for an international organization to obtain an advisory opinion from the Court as to the legal principles applicable with respect to the matter under debate . . . .” (I.C.J. Reports 1980, p. 87, para. 33).

Moreover, the Court has affirmed in its Opinion on the Legality of the Threat or Use of Nuclear Weapons that “the political nature of the motives which may be said to have inspired the request and the political implications that the opinion given might have are of no relevance in the establishment of its jurisdiction to give such an opinion” (I.C.J. Reports 1996 (1), p. 234, para. 13).
The Court is of the view that there is no element in the present proceedings which could lead it to conclude otherwise.

* *

42. The Court accordingly has jurisdiction to give the advisory opinion requested by resolution ES-10/14 of the General Assembly.

* * *

43. It has been contended in the present proceedings, however, that the Court should decline to exercise its jurisdiction because of the presence of specific aspects of the General Assembly’s request that would render the exercise of the Court’s jurisdiction improper and inconsistent with the Court’s judicial function.

44. The Court has recalled many times in the past that Article 65, paragraph 1, of its Statute, which provides that “The Court may give an advisory opinion . . .” (emphasis added), should be interpreted to mean that the Court has a discretionary power to decline to give an advisory opinion even if the conditions of jurisdiction are met (Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (1), pp. 234-235, para. 14). The Court however is mindful of the fact that its answer to a request for an advisory opinion “represents its participation in the activities of the Organization, and, in principle, should not be refused” (Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1990, p. 71; see also, for example, Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999 (1), pp. 78-79, para. 29.)

Given its responsibilities as the “principal judicial organ of the United Nations” (Article 92 of the Charter), the Court should in principle not decline to give an advisory opinion. In accordance with its consistent jurisprudence, only “compelling reasons” should lead the Court to refuse its opinion (Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962, p. 153; see also, for example, Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999 (1), pp. 78-79, para. 29.)

The present Court has never, in the exercise of this discretionary power, declined to respond to a request for an advisory opinion. Its decision not to give the advisory opinion on the Legality of the Use by a State of Nuclear Weapons in Armed Conflict requested by the World Health Organization was based on the Court’s lack of jurisdiction, and not on considerations of judicial propriety (see I.C.J. Reports 1996 (1), p. 235, para. 14). Only on one occasion did the Court’s predecessor, the Permanent Court of International Justice, take the view that it should not reply to a question put to it (Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5), but this was due to “the very particular circumstances of the case, among which were that the question directly concerned an already existing dispute, one of the States parties to which was neither a party to the Statute of the Permanent Court nor a Member of the League of Nations, objected to the proceedings, and refused to take part in any way” (Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996 (1), pp. 235-236, para. 14).

45. These considerations do not release the Court from the duty to satisfy itself, each time it is seised of a request for an opinion, as to the propriety of the exercise of its judicial function, by reference to the criterion of “compelling reasons” as cited above. The Court will accordingly examine in detail and in the light of its jurisprudence each of the arguments presented to it in this regard.

* *

46. The first such argument is to the effect that the Court should not exercise its jurisdiction in the present case because the request concerns a contentious matter between Israel and Palestine, in respect of which Israel has not consented to the exercise of that jurisdiction. According to this view, the subject-matter of the question posed by the General Assembly “is an integral part of the wider Israeli-Palestinian dispute concerning questions of terrorism, security, borders, settlements, Jerusalem and other related matters”. Israel has emphasized that it has never consented to the settlement of this wider dispute by the Court or by any other means of compulsory adjudication; on the contrary, it contends that the parties repeatedly agreed that these issues are to be settled by negotiation, with the possibility of an agreement that recourse could be had to arbitration. It is accordingly contended that the Court should decline to give the present Opinion, on the basis inter alia of the precedent of the decision of the Permanent Court of International Justice on the Status of Eastern Carelia.

47. The Court observes that the lack of consent to the Court’s contentious jurisdiction by interested States has no bearing on the Court’s jurisdiction to give an advisory opinion. In an Advisory Opinion of 1950, the Court explained that:

“The consent of States, parties to a dispute, is the basis of the Court’s jurisdiction in contentious cases. The situation is different in regard to advisory proceedings even where the Request for an Opinion relates to a legal question actually pending between States. The Court’s reply is only of an advisory character: as such, it has no binding force. It follows that no State, whether a Member of the
United Nations or not, can prevent the giving of an Advisory Opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take. The Court’s Opinion is given not to the States, but to the organ which is entitled to request it; the reply of the Court, itself an ‘organ of the United Nations’, represents its participation in the activities of the Organization, and, in principle, should not be refused.” (Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950, p. 71; see also Western Sahara, I.C.J. Reports 1975, p. 24, para. 31.)

It followed from this that, in those proceedings, the Court did not refuse to respond to the request for an advisory opinion on the ground that, in the particular circumstances, it lacked jurisdiction. The Court did however examine the opposition of certain interested States to the request by the General Assembly in the context of issues of judicial propriety. Commenting on its 1950 decision, the Court explained in its Advisory Opinion on Western Sahara that it had “Thus . . . recognized that lack of consent might constitute a ground for declining to give the opinion requested if, in the circumstances of a given case, considerations of judicial propriety should oblige the Court to refuse an opinion.” The Court continued:

“In certain circumstances . . . the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court’s judicial character. An instance of this would be when the circumstances disclose that to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent.” (Western Sahara, I.C.J. Reports 1975, p. 25, paras. 32-33.)

In applying that principle to the request concerning Western Sahara, the Court found that a legal controversy did indeed exist, but one which had arisen during the proceedings of the General Assembly and in relation to matters with which the Assembly was dealing. It had not arisen independently in bilateral relations (ibid., p. 25, para. 34).

48. As regards the request for an advisory opinion now before it, the Court acknowledges that Israel and Palestine have expressed radically divergent views on the legal consequences of Israel’s construction of the wall, on which the Court has been asked to pronounce. However, as the Court has itself noted, “Differences of views . . . on legal issues have existed in practically every advisory proceeding” (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. 24, para. 34).

49. Furthermore, the Court does not consider that the subject-matter of the General Assembly’s request can be regarded as only a bilateral matter between Israel and Palestine. Given the powers and responsibilities of the United Nations in questions relating to international peace and security, it is the Court’s view that the construction of the wall must be deemed to be directly of concern to the United Nations. The responsibility of the United Nations in this matter also has its origin in the Mandate and the Partition Resolution concerning Palestine (see paragraphs 70 and 71 below). This responsibility has been described by the General Assembly as “a permanent responsibility towards the question of Palestine until the question is resolved in all its aspects in a satisfactory manner in accordance with international legitimacy” (General Assembly resolution 57/107 of 3 December 2002). Within the institutional framework of the Organization, this responsibility has been manifested by the adoption of many Security Council and General Assembly resolutions, and by the creation of several subsidiary bodies specifically established to assist in the realization of the inalienable rights of the Palestinian people.

50. The object of the request before the Court is to obtain from the Court an opinion which the General Assembly deems of assistance to it for the proper exercise of its functions. The opinion is requested on a question which is of particularly acute concern to the United Nations, and one which is located in a much broader frame of reference than a bilateral dispute. In the circumstances, the Court does not consider that to give an opinion would have the effect of circumventing the principle of consent to judicial settlement, and the Court accordingly cannot, in the exercise of its discretion, decline to give an opinion on that ground.

* *

51. The Court now turns to another argument raised in the present proceedings in support of the view that it should decline to exercise its jurisdiction. Some participants have argued that an advisory opinion from the Court on the legality of the wall and the legal consequences of its construction could impede a political, negotiated solution to the Israeli-Palestinian conflict. More particularly, it has been contended that such an opinion could undermine the scheme of the “Roadmap” (see paragraph 22 above), which requires Israel and Palestine to comply with certain obligations in various phases referred to therein. The requested opinion, it has been alleged, could complicate the negotiations envisaged in the “Roadmap”, and the Court should therefore exercise its discretion and decline to reply to the question put.

This is a submission of a kind which the Court has already had to consider several times in the past. For instance, in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, the Court stated:
argument that the Court should decline to exercise its jurisdiction because it does not have at its disposal the requisite facts and evidence to enable it to reach its conclusions. In particular, Israel has contended, referring to the Advisory Opinion on the Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, that the Court could not give an opinion on issues which raise questions of fact that cannot be elucidated without hearing all parties to the conflict. According to Israel, if the Court decided to give the requested opinion, it would be forced to speculate about essential facts and make assumptions about arguments of law. More specifically, Israel has argued that the Court could not rule on the legal consequences of the construction of the wall without enquiring, first, into the nature and scope of the security threat to which the wall is intended to respond and the effectiveness of that response; and, second, into the impact of the construction for the Palestinians. This task, which would already be difficult in a contentious case, would be further complicated in an advisory proceeding, particularly since Israel alone possesses much of the necessary information and has stated that it chooses not to address the merits. Israel has concluded that the Court, confronted with factual issues impossible to clarify in the present proceedings, should use its discretion and decline to comply with the request for an advisory opinion.

56. The Court observes that the question whether the evidence available to it is sufficient to give an advisory opinion must be decided in each particular instance. In its Opinion concerning the Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (I.C.J. Reports 1950, p. 72) and again in its Opinion on the Western Sahara, the Court made it clear that what is decisive in these circumstances is

“whether the Court has before it sufficient information and evidence to enable it to arrive at a judicial conclusion upon any disputed questions of fact the determination of which is necessary for it to give an opinion in conditions compatible with its judicial character” (Western Sahara, I.C.J. Reports 1975, pp. 28-29, para. 46).

Thus, for instance, in the proceedings concerning the Status of Eastern Carelia, the Permanent Court of International Justice decided to decline to give an Opinion inter alia because the question put “raised a question of fact which could not be elucidated without hearing both parties” (Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, I.C.J. Reports 1950, p. 72; see Status of Eastern Carelia, P.C.I.J., Series B, No. 5, p. 28). On the other hand, in the Western Sahara Opinion, the Court observed that it had been provided with very extensive documentary evidence of the relevant facts (I.C.J. Reports 1975, p. 29, para. 47).

57. In the present instance, the Court has at its disposal the report of the Secretary-General, as well as a voluminous dossier submitted by him to the Court, comprising not only detailed information on the route of

52. One participant in the present proceedings has indicated that the Court, if it were to give a response to the request, should in any event do so keeping in mind

“two key aspects of the peace process: the fundamental principle that permanent status issues must be resolved through negotiations; and the need during the interim period for the parties to fulfill their security responsibilities so that the peace process can succeed”.

53. The Court is conscious that the “Roadmap”, which was endorsed by the Security Council in resolution 1515 (2003) (see paragraph 22 above), constitutes a negotiating framework for the resolution of the Israeli-Palestinian conflict. It is not clear, however, what influence the Court’s opinion might have on those negotiations: participants in the present proceedings have expressed differing views in this regard. The Court cannot regard this factor as a compelling reason to decline to exercise its jurisdiction.

54. It was also put to the Court by certain participants that the question of the construction of the wall was only one aspect of the Israeli-Palestinian conflict, which could not be properly addressed in the present proceedings. The Court does not however consider this a reason for it to decline to reply to the question asked. The Court is indeed aware that the question of the wall is part of a greater whole, and it would take this circumstance carefully into account in any opinion it might give. At the same time, the question that the General Assembly has chosen to ask of the Court is confined to the legal consequences of the construction of the wall, and the Court would only examine other issues to the extent that they might be necessary to its consideration of the question put to it.

55. Several participants in the proceedings have raised the further
the wall but also on its humanitarian and socio-economic impact on the Palestinian population. The dossier includes several reports based on on-site visits by special rapporteurs and competent organs of the United Nations. The Secretary-General has further submitted to the Court a written statement updating his report, which supplemented the information contained therein. Moreover, numerous other participants have submitted to the Court written statements which contain information relevant to a response to the question put by the General Assembly. The Court notes in particular that Israel’s Written Statement, although limited to issues of jurisdiction and judicial propriety, contained observations on other matters, including Israel’s concerns in terms of security, and was accompanied by corresponding annexes; many other documents issued by the Israeli Government on those matters are in the public domain.

58. The Court finds that it has before it sufficient information and evidence to enable it to give the advisory opinion requested by the General Assembly. Moreover, the circumstance that others may evaluate and interpret these facts in a subjective or political manner can be no argument for a court of law to abdicate its judicial task. There is therefore in the present case no lack of information such as to constitute a compelling reason for the Court to decline to give the requested opinion.

* *

59. In their written statements, some participants have also put forward the argument that the Court should decline to give the requested opinion on the legal consequences of the construction of the wall because such opinion would lack any useful purpose. They have argued that the advisory opinions of the Court are to be seen as a means to enable an organ or agency in need of legal clarification for its future action to obtain that clarification. In the present instance, the argument continues, the General Assembly would not need an opinion of the Court because it has already declared the construction of the wall to be illegal and has already determined the legal consequences by demanding that Israel stop and reverse its construction, and further, because the General Assembly has never made it clear how it intended to use the opinion.

60. As is clear from the Court’s jurisprudence, advisory opinions have the purpose of furnishing to the requesting organs the elements of law necessary for them in their action. In its Opinion concerning Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, the Court observed: “The object of this request for an Opinion is to guide the United Nations in respect of its own action.” (I.C.J. Reports 1951, p. 19.) Likewise, in its Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South

West Africa) notwithstanding Security Council Resolution 276 (1970), the Court noted: “The request is put forward by a United Nations organ with reference to its own decisions and it seeks legal advice from the Court on the consequences and implications of these decisions.” (I.C.J. Reports 1971, p. 24, para. 32.) The Court found on another occasion that the advisory opinion it was to give would “furnish the General Assembly with elements of a legal character relevant to its further treatment of the decolonization of Western Sahara” (Western Sahara, I.C.J. Reports 1975, p. 37, para. 72).

61. With regard to the argument that the General Assembly has not made it clear what use it would make of an advisory opinion on the wall, the Court would recall, as equally relevant in the present proceedings, what it stated in its Opinion on the Legality of the Threat or Use of Nuclear Weapons:

“Certain States have observed that the General Assembly has not explained to the Court for what precise purposes it seeks the advisory opinion. Nevertheless, it is not for the Court itself to purport to decide whether or not an advisory opinion is needed by the Assembly for the performance of its functions. The General Assembly has the right to decide for itself on the usefulness of an opinion in the light of its own needs.” (I.C.J. Reports 1996 (1), p. 237, para. 16.)

62. It follows that the Court cannot decline to answer the question posed based on the ground that its opinion would lack any useful purpose. The Court cannot substitute its assessment of the usefulness of the opinion requested for that of the organ that seeks such opinion, namely the General Assembly. Furthermore, and in any event, the Court considers that the General Assembly has not yet determined all the possible consequences of its own resolution. The Court’s task would be to determine in a comprehensive manner the legal consequences of the construction of the wall, while the General Assembly— and the Security Council— may then draw conclusions from the Court’s findings.

* *

63. Lastly, the Court will turn to another argument advanced with regard to the propriety of its giving an advisory opinion in the present proceedings. Israel has contended that Palestine, given its responsibility for acts of violence against Israel and its population which the wall is aimed at addressing, cannot seek from the Court a remedy for a situation resulting from its own wrongdoing. In this context, Israel has invoked the maxim nullus commodum capere potest de sua injuria propria, which it considers to be as relevant in advisory proceedings as it is in contentious cases. Therefore, Israel concludes, good faith and the principle of “clean hands” provide a compelling reason that should lead the Court to refuse the General Assembly’s request.
64. The Court does not consider this argument to be pertinent. As was emphasized earlier, it was the General Assembly which requested the advisory opinion, and the opinion is to be given to the General Assembly, and not to a specific State or entity.

* * *

65. In the light of the foregoing, the Court concludes not only that it has jurisdiction to give an opinion on the question put to it by the General Assembly (see paragraph 42 above), but also that there is no compelling reason for it to use its discretionary power not to give that opinion.

* * *

66. The Court will now address the question put to it by the General Assembly in resolution ES-10/14. The Court recalls that the question is as follows:

“What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?”

67. As explained in paragraph 82 below, the “wall” in question is a complex construction, so that that term cannot be understood in a limited physical sense. However, the other terms used, either by Israel (“fence”) or by the Secretary-General (“barrier”), are no more accurate if understood in the physical sense. In this Opinion, the Court has therefore chosen to use the terminology employed by the General Assembly.

The Court notes furthermore that the request of the General Assembly concerns the legal consequences of the wall being built “in the Occupied Palestinian Territory, including in and around East Jerusalem”. As also explained below (see paragraphs 79-84 below), some parts of the complex are being built, or are planned to be built, on the territory of Israel itself; the Court does not consider that it is called upon to examine the legal consequences arising from the construction of those parts of the wall.

68. The question put by the General Assembly concerns the legal consequences of the construction of the wall in the Occupied Palestinian Territory. However, in order to indicate those consequences to the General Assembly the Court must first determine whether or not the construction of that wall breaches international law (see paragraph 39 above). It will therefore make this determination before dealing with the consequences of the construction.

69. To do so, the Court will first make a brief analysis of the status of the territory concerned, and will then describe the works already constructed or in course of construction in that territory. It will then indicate the applicable law before seeking to establish whether that law has been breached.

* * *

70. Palestine was part of the Ottoman Empire. At the end of the First World War, a class “A” Mandate for Palestine was entrusted to Great Britain by the League of Nations, pursuant to paragraph 4 of Article 22 of the Covenant, which provided that:

“Certain communities, formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone.”

The Court recalls that in its Advisory Opinion on the International Status of South West Africa, speaking of mandates in general, it observed that “The Mandate was created, in the interest of the inhabitants of the territory, and of humanity in general, as an international institution with an international object — a sacred trust of civilization.” (I.C.J. Reports 1950, p. 132.) The Court also held in this regard that “two principles were considered to be of paramount importance: the principle of non-annexation and the principle that the well-being and development of... peoples [not yet able to govern themselves] form[ed] a sacred trust of civilization” (ibid., p. 131).

The territorial boundaries of the Mandate for Palestine were laid down by various instruments, in particular on the eastern border by a British memorandum of 16 September 1922 and an Anglo-Transjordanian Treaty of 20 February 1928.

71. In 1947 the United Kingdom announced its intention to complete evacuation of the mandated territory by 1 August 1948, subsequently advancing that date to 15 May 1948. In the meantime, the General Assembly had on 29 November 1947 adopted resolution 181 (II) on the future government of Palestine, which “Recommends to the United Kingdom... and to all other Members of the United Nations the adoption and implementation... of the Plan of Partition” of the territory, as set forth in the resolution, between two independent States, one Arab, the other Jewish, as well as the creation of a special international regime for the City of Jerusalem. The Arab population of Palestine and the Arab States rejected this plan, contending that it was unbalanced; on 14 May
1948, Israel proclaimed its independence on the strength of the General Assembly resolution; armed conflict then broke out between Israel and a number of Arab States and the Plan of Partition was not implemented.

72. By resolution 62 (1948) of 16 November 1948, the Security Council decided that “an armistice shall be established in all sectors of Palestine” and called upon the parties directly involved in the conflict to seek agreement to this end. In conformity with this decision, general armistice agreements were concluded in 1949 between Israel and the neighbouring States through mediation by the United Nations. In particular, one such agreement was signed in Rhodes on 3 April 1949 between Israel and Jordan. Articles V and VI of that Agreement fixed the armistice demarcation line between Israeli and Arab forces (often later called the “Green Line” owing to the colour used for it on maps; hereinafter the “Green Line”). Article III, paragraph 2, provided that “No element of the . . . military or para-military forces of either Party . . . shall advance beyond or pass over for any purpose whatsoever the Armistice Demarcation Lines . . .”. It was agreed in Article VI, paragraph 8, that these provisions would not be "interpreted as prejudicing, in any sense, an ultimate political settlement between the Parties". It was also stated that “the Armistice Demarcation Lines defined in articles V and VI of [the] Agreement [were] agreed upon by the Parties without prejudice to future territorial settlements or boundary lines or to claims of either Party relating thereto". The Demarcation Line was subject to such rectification as might be agreed upon by the parties.

73. In the 1967 armed conflict, Israeli forces occupied all the territories which had constituted Palestine under British Mandate (including those known as the West Bank, lying to the east of the Green Line).

74. On 22 November 1967, the Security Council unanimously adopted resolution 242 (1967), which emphasized the inadmissibility of acquisition of territory by war and called for the “Withdrawal of Israeli armed forces from territories occupied in the recent conflict”, and “Termination of all claims or states of belligerency”.

75. From 1967 onwards, Israel took a number of measures in these territories aimed at changing the status of the City of Jerusalem. The Security Council, after recalling on a number of occasions “the principle that acquisition of territory by military conquest is inadmissible”, condemned those measures and, by resolution 298 (1971) of 25 September 1971, confirmed in the clearest possible terms that:

“all legislative and administrative actions taken by Israel to change the status of the City of Jerusalem, including expropriation of land and properties, transfer of populations and legislation aimed at the incorporation of the occupied section, are totally invalid and cannot change that status”.

Later, following the adoption by Israel on 30 July 1980 of the Basic Law making Jerusalem the “complete and united” capital of Israel, the Security Council, by resolution 478 (1980) of 20 August 1980, stated that the enactment of that Law constituted a violation of international law and that “all legislative and administrative measures and actions taken by Israel, the occupying Power, which have altered or purport to alter the character and status of the Holy City of Jerusalem... are null and void. It further decided “not to recognize the ‘basic law’ and such other actions by Israel that, as a result of this law, seek to alter the character and status of Jerusalem”.

76. Subsequently, a peace treaty was signed on 26 October 1994 between Israel and Jordan. That treaty fixed the boundary between the two States “with reference to the boundary definition under the Mandate as is shown in Annex I (a) . . . without prejudice to the status of any territories that came under Israeli military government control in 1967” (Article 3, paragraphs 1 and 2). Annex I provided the corresponding maps and added that, with regard to the “territory that came under Israeli military government control in 1967”, the line indicated “is the administrative boundary” with Jordan.

77. Lastly, a number of agreements have been signed since 1993 between Israel and the Palestine Liberation Organization imposing various obligations on each party. Those agreements inter alia required Israel to transfer to Palestinian authorities certain powers and responsibilities exercised in the Occupied Palestinian Territory by its military authorities and civil administration. Such transfers have taken place, but, as a result of subsequent events, they remained partial and limited.

78. The Court would observe that, under customary international law as reflected (see paragraph 89 below) in Article 42 of the Regulations Respecting the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 18 October 1907 (hereinafter “the Hague Regulations of 1907”) territory is considered occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised.

The territories situated between the Green Line (see paragraph 72 above) and the former eastern boundary of Palestine under the Mandate were occupied by Israel in 1967 during the armed conflict between Israel and Jordan. Under customary international law, these were therefore occupied territories in which Israel had the status of occupying Power. Subsequent events in these territories, as described in paragraphs 75 to 77 above, have done nothing to alter this situation. All these territories (including East Jerusalem) remain occupied territories and Israel has continued to have the status of occupying Power.
79. It is essentially in these territories that Israel has constructed or plans to construct the works described in the report of the Secretary-General. The Court will now describe those works, basing itself on that report. For developments subsequent to the publication of that report, the Court will refer to complementary information contained in the Written Statement of the United Nations, which was intended by the Secretary-General to supplement his report (hereinafter "Written Statement of the Secretary-General").

80. The report of the Secretary-General states that "The Government of Israel has since 1996 considered plans to halt infiltration into Israel from the central and northern West Bank..." (para. 4). According to that report, a plan of this type was approved for the first time by the Israeli Cabinet in July 2001. Then, on 14 April 2002, the Cabinet adopted a decision for the construction of works, forming what Israel describes as a "security fence", 80 kilometres in length, in three areas of the West Bank.

The project was taken a stage further when, on 23 June 2002, the Israeli Cabinet approved the first phase of the construction of a "continuous fence" in the West Bank (including East Jerusalem). On 14 August 2002, it adopted the line of that "fence" for the work in Phase A, with a view to the construction of a complex 123 kilometres long in the northern West Bank, running from the Salem checkpoint (north of Jenin) to the settlement at Elkana. Phase B of the work was approved in December 2002. It entailed a stretch of some 40 kilometres running east from the Salem checkpoint towards Beth Shean along the northern part of the Green Line as far as the Jordan Valley. Furthermore, on 1 October 2003, the Israeli Cabinet approved a full route, which, according to the report of the Secretary-General, "will form one continuous line stretching 720 kilometres along the West Bank". A map showing completed and planned sections was posted on the Israeli Ministry of Defence website on 23 October 2003. According to the particulars provided on that map, a continuous section (Phase C) encompassing a number of large settlements will link the north-western end of the "security fence" built around Jerusalem with the southern point of Phase A construction at Elkana. According to the same map, the "security fence" will run for 115 kilometres from the Har Gilo settlement near Jerusalem to the Carmel settlement south-east of Hebron (Phase D). According to Ministry of Defence documents, work in this sector is due for completion in 2005. Lastly, there are references in the case file to Israel's planned construction of a "security fence" following the Jordan Valley along the mountain range to the west.

81. According to the Written Statement of the Secretary-General, the first part of these works (Phase A), which ultimately extends for a distance of 150 kilometres, was declared completed on 31 July 2003. It is reported that approximately 56,000 Palestinians would be encompassed in enclaves. During this phase, two sections totalling 19.5 kilometres were built around Jerusalem. In November 2003 construction of a new section was begun along the Green Line to the west of the Nazlat Issa-Baqu al-Sharqiya encave, which in January 2004 was close to completion at the time when the Secretary-General submitted his Written Statement. According to the Written Statement of the Secretary-General, the works carried out under Phase B were still in progress in January 2004. Thus an initial section of this stretch, which runs near or on the Green Line to the village of al-Muntilla, was almost complete in January 2004. Two additional sections diverge at this point. Construction started in early January 2004 on one section that runs due east as far as the Jordanian border. Construction of the second section, which is planned to run from the Green Line to the village of Tayfur, has barely begun. The United Nations has, however, been informed that this second section might not be built.

The Written Statement of the Secretary-General further states that Phase C of the work, which runs from the terminus of Phase A, near the Elkana settlement, to the village of N'uma, south-east of Jerusalem, began in December 2003. This section is divided into three stages. In Stage C1, between inter alia the villages of Rantis and Budrus, approximately 4 kilometres cut of a planned total of 40 kilometres have been constructed. Stage C2, which will surround the so-called "Ariel Salient" by cutting 22 kilometres into the West Bank, will incorporate 52,000 Israeli settlers. Stage C3 is to involve the construction of two "depth barriers"; one of these is to run north-south, roughly parallel with the section of Stage C1 currently under construction between Rantis and Budrus, whilst the other runs east-west along a ridge said to be part of the route of Highway 45, a motorway under construction. If construction of the two barriers were completed, two enclaves would be formed, encompassing 72,000 Palestinians in 24 communities.

Further construction also started in late November 2003 along the south-eastern part of the municipal boundary of Jerusalem, following a route that, according to the Written Statement of the Secretary-General, cuts off the suburban village of El-Ezariya from Jerusalem and splits the neighbouring Abu Dis in two.

As at 25 January 2004, according to the Written Statement of the Secretary-General, some 190 kilometres of construction had been completed, covering Phase A and the greater part of Phase B. Further construction in Phase C had begun in certain areas of the central West Bank and in Jerusalem. Phase D, planned for the southern part of the West Bank, had not yet begun.

The Israeli Government has explained that the routes and timetable as described above are subject to modification. In February 2004, for example, an 8-kilometre section near the town of Baqu al-Sharqiya was
demolished, and the planned length of the wall appears to have been slightly reduced.

82. According to the description in the report and the Written Statement of the Secretary-General, the works planned or completed have resulted or will result in a complex consisting essentially of:

(1) a fence with electronic sensors;
(2) a ditch (up to 4 metres deep);
(3) a two-lane asphalt patrol road;
(4) a trace road (a strip of sand smoothed to detect footprints) running parallel to the fence;
(5) a sack of six coils of barbed wire marking the perimeter of the complex.

The complex has a width of 50 to 70 metres, increasing to as much as 100 metres in some places. “Depth barriers” may be added to these works.

The approximately 180 kilometres of the complex completed or under construction as of the time when the Secretary-General submitted his report included some 8.5 kilometres of concrete wall. These are generally found where Palestinian population centres are close to or abut Israel (such as near Qalqiliya and Tulkarm in parts of Jerusalem).

83. According to the report of the Secretary-General, in its northernmost part, the wall as completed or under construction barely deviates from the Green Line. It nevertheless lies within occupied territories for most of its course. The works deviate more than 7.5 kilometres from the Green Line in certain places to encompass settlements, while encircling Palestinian population areas. A stretch of 1 to 2 kilometres west of Tulkarm appears to run on the Israeli side of the Green Line. Elsewhere, on the other hand, the planned route would deviate eastward by up to 22 kilometres. In the case of Jerusalem, the existing works and the planned route lie well beyond the Green Line and even in some cases beyond the eastern municipal boundary of Jerusalem as fixed by Israel.

84. On the basis of that route, approximately 975 square kilometres (or 16.6 per cent of the West Bank) would, according to the report of the Secretary-General, lie between the Green Line and the wall. This area is stated to be home to 237,000 Palestinians. If the full wall were completed as planned, another 160,000 Palestinians would live in almost completely encircled communities, described as enclaves in the report. As a result of the planned route, nearly 320,000 Israeli settlers (of whom 178,000 in East Jerusalem) would be living in the area between the Green Line and the wall.

85. Lastly, it should be noted that the construction of the wall has been accompanied by the creation of a new administrative regime. Thus in October 2003 the Israeli Defence Forces issued Orders establishing the part of the West Bank lying between the Green Line and the wall as a “Closed Area”. Residents of this area may no longer remain in it, nor may non-residents enter it, unless holding a permit or identity card issued by the Israeli authorities. According to the report of the Secretary-General, most residents have received permits for a limited period. Israeli citizens, Israeli permanent residents and those eligible to immigrate to Israel in accordance with the Law of Return may remain in, or move freely to, from and within the Closed Area without a permit. Access to and exit from the Closed Area can only be made through access gates, which are opened infrequently and for short periods.

* * *

86. The Court will now determine the rules and principles of international law which are relevant in assessing the legality of the measures taken by Israel. Such rules and principles can be found in the United Nations Charter and certain other treaties, in customary international law and in the relevant resolutions adopted pursuant to the Charter by the General Assembly and the Security Council. However, doubts have been expressed by Israel as to the applicability in the Occupied Palestinian Territory of certain rules of international humanitarian law and human rights instruments. The Court will now consider these various questions.

87. The Court first recalls that, pursuant to Article 2, paragraph 4, of the United Nations Charter:

“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.”

On 24 October 1970, the General Assembly adopted resolution 2625 (XXV), entitled “Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States” (hereinafter “resolution 2625 (XXV)”), in which it emphasized that “No territorial acquisition resulting from the threat or use of force shall be recognized as legal.” As the Court stated in its Judgment in the case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), the principles as to the use of force incorporated in the Charter reflect customary international law (see I.C.J. Reports 1986, pp. 98-101, paras. 187-190); the same is true of its corollary entailing the illegality of territorial acquisition resulting from the threat or use of force.

88. The Court also notes that the principle of self-determination of peoples has been enshrined in the United Nations Charter and reaffirmed by the General Assembly in resolution 2625 (XXV) cited above, pursuant
to which “Every State has the duty to refrain from any forcible action which deprives peoples referred to [in that resolution] of their right to self-determination.” Article 1 common to the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights reaffirms the right of all peoples to self-determination, and lays upon the States parties the obligation to promote the realization of that right and to respect it, in conformity with the provisions of the United Nations Charter.

The Court would recall that in 1971 it emphasized that current developments in “international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all [such territories]”. The Court went on to state that “These developments leave little doubt that the ultimate objective of the sacred trust” referred to in Article 22, paragraph 1, of the Covenant of the League of Nations “was the self-determination . . . of the peoples concerned” (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. 31, paras. 52-53). The Court has referred to this principle on a number of occasions in its jurisprudence (ibid.; see also Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 68, para. 162). The Court indeed made it clear that the right of peoples to self-determination is today a right erga omnes (see East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995, p. 102, para. 29).

89. As regards international humanitarian law, the Court would first note that Israel is not a party to the Fourth Hague Convention of 1907, to which the Hague Regulations are annexed. The Court observes that, in the words of the Convention, those Regulations were prepared “to revise the general laws and customs of war” existing at that time. Since then, however, the International Military Tribunal of Nuremberg has found that the “rules laid down in the Convention were recognised by all civilised nations, and were regarded as being declaratory of the laws and customs of war” (Judgment of the International Military Tribunal of Nuremberg, 30 September and 1 October 1946, p. 65). The Court itself reached the same conclusion when examining the rights and duties of belligerents in their conduct of military operations (Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (1), p. 256, para. 75). The Court considers that the provisions of the Hague Regulations have become part of customary law, as is in fact recognized by all the participants in the proceedings before the Court.

The Court also observes that, pursuant to Article 154 of the Fourth Geneva Convention, that Convention is supplementary to Sections II and III of the Hague Regulations. Section III of those Regulations, which concerns “Military authority over the territory of the hostile State”, is particularly pertinent in the present case.

90. Secondly, with regard to the Fourth Geneva Convention, differing views have been expressed by the participants in these proceedings.

Israel, contrary to the great majority of the other participants, disputes the applicability de jure of the Convention to the Occupied Palestinian Territory. In particular, in paragraph 3 of Annex 1 to the report of the Secretary-General, entitled “Summary Legal Position of the Government of Israel”, it is stated that Israel does not agree that the Fourth Geneva Convention “is applicable to the occupied Palestinian Territory”, citing “the lack of recognition of the territory as sovereign prior to its annexation by Jordan and Egypt” and inferring that it is “not a territory of a High Contracting Party as required by the Convention”.

91. The Court would recall that the Fourth Geneva Convention was ratified by Israel on 6 July 1951 and that Israel is a party to that Convention. Jordan has also been a party thereto since 29 May 1951. Neither of the two States has made any reservation that would be pertinent to the present proceedings.

Furthermore, Palestine gave a unilateral undertaking, by declaration of 7 June 1982, to apply the Fourth Geneva Convention, Switzerland, as depositary State, considered that unilateral undertaking valid. It concluded, however, that it “[was] not — as a depositary — in a position to decide whether” “the request [dated 14 June 1989] from the Palestine Liberation Movement in the name of the ‘State of Palestine’ to accede” inter alia to the Fourth Geneva Convention “can be considered as an instrument of accession”.

92. Moreover, for the purpose of determining the scope of application of the Fourth Geneva Convention, it should be recalled that under common Article 2 of the four Conventions of 12 August 1949:

“in addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.”

93. After the occupation of the West Bank in 1967, the Israeli authorities issued an order No. 3 stating in its Article 35 that:

“the Military Court . . . must apply the provisions of the Geneva Convention dated 12 August 1949 relative to the Protection of
Civilian Persons in Time of War with respect to judicial procedures. In case of conflict between this Order and the said Convention, the Convention shall prevail.”

Subsequently, the Israeli authorities have indicated on a number of occasions that in fact they generally apply the humanitarian provisions of the Fourth Geneva Convention within the occupied territories. However, according to Israel’s position as briefly recalled in paragraph 90 above, that Convention is not applicable de jure within those territories because, under Article 2, paragraph 2, it applies only in the case of occupation of territories falling under the sovereignty of a High Contracting Party involved in an armed conflict. Israel explains that Jordan was admittedly a party to the Fourth Geneva Convention in 1967, and that an armed conflict broke out at that time between Israel and Jordan, but it goes on to observe that the territories occupied by Israel subsequent to that conflict had not previously fallen under Jordanian sovereignty. It infers from this that that Convention is not applicable de jure in those territories. According however to the great majority of other participants in the proceedings, the Fourth Geneva Convention is applicable to those territories pursuant to Article 2, paragraph 1, whether or not Jordan had any rights in respect thereof prior to 1967.

94. The Court would recall that, according to customary international law as expressed in Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. Article 32 provides that:

“Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to article 31 . . . leaves the meaning ambiguous or obscure; or . . . leads to a result which is manifestly obscure or unreasonable.” (See Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II), p. 812, para. 23; see, similarly, Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999 (II), p. 1099, para. 18, and Sovereignty over Palau Ligitan and Palau Spratly (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002, p. 645, para. 37.)

95. The Court notes that, according to the first paragraph of Article 2 of the Fourth Geneva Convention, that Convention is applicable when two conditions are fulfilled: that there exists an armed conflict (whether or not a state of war has been recognized); and that the conflict has arisen between two contracting parties. If those two conditions are satisfi
ted, the Convention applies, in particular, in any territory occupied in the course of the conflict by one of the contracting parties.

The object of the second paragraph of Article 2 is not to restrict the scope of application of the Convention, as defined by the first paragraph, by excluding therefrom territories not falling under the sovereignty of one of the contracting parties. It is directed simply to making it clear that, even if occupation effected during the conflict met no armed resistance, the Convention is still applicable.

This interpretation reflects the intention of the drafters of the Fourth Geneva Convention to protect civilians who find themselves, in whatever way, in the hands of the occupying Power. Whilst the drafters of the Hague Regulations of 1907 were as much concerned with protecting the rights of a State whose territory is occupied, as with protecting the inhabitants of that territory, the drafters of the Fourth Geneva Convention sought to guarantee the protection of civilians in time of war, regardless of the status of the occupied territories, as is shown by Article 47 of the Convention.

That interpretation is confirmed by the Convention’s travaux préparatoires. The Conference of Government Experts convened by the International Committee of the Red Cross (hereinafter, “ICRC”) in the aftermath of the Second World War for the purpose of preparing the new Geneva Conventions recommended that these conventions be applicable to any armed conflict “whether [it] is or is not recognized as a state of war by the parties” and “in cases of occupation of territories in the absence of any state of war” (Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims, Geneva, 14-26 April 1947, p. 8). The drafters of the second paragraph of Article 2 thus had no intention, when they inserted that paragraph into the Convention, of restricting the latter’s scope of application. They were merely seeking to provide for cases of occupation without combat, such as the occupation of Bohemia and Moravia by Germany in 1939.

96. The Court would moreover note that the States parties to the Fourth Geneva Convention approved that interpretation at their Conference on 15 July 1999. They issued a statement in which they “reaffirmed the applicability of the Fourth Geneva Convention to the Occupied Palestinian Territory, including East Jerusalem”. Subsequently, on 5 December 2001, the High Contracting Parties, referring in particular to Article 1 of the Fourth Geneva Convention of 1949, once again reaffirmed the “applicability of the Fourth Geneva Convention to the Occupied Palestinian Territory, including East Jerusalem”. They further reminded the Contracting Parties participating in the Conference, the parties to the conflict, and the State of Israel as occupying Power, of their respective obligations.

97. Moreover, the Court would observe that the ICRC, whose special position with respect to execution of the Fourth Geneva Convention must be “recognized and respected at all times” by the parties pursuant
to Article 142 of the Convention, has also expressed its opinion on the interpretation to be given to the Convention. In a declaration of 5 December 2001, it recalled that "the ICRC has always affirmed the de jure applicability of the Fourth Geneva Convention to the territories occupied since 1967 by the State of Israel, including East Jerusalem".

98. The Court notes that the General Assembly has, in many of its resolutions, taken a position to the same effect. Thus on 10 December 2001 and 9 December 2003, in resolutions 56/60 and 58/97, it reaffirmed "that the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, is applicable to the Occupied Palestinian Territory, including East Jerusalem, and other Arab territories occupied by Israel since 1967".

99. The Security Council, for its part, had already on 14 June 1967 taken the view in resolution 237 (1967) that "all the obligations of the Geneva Convention relative to the Treatment of Prisoners of War . . . should be complied with by the parties involved in the conflict". Subsequently, on 15 September 1969, the Security Council, in resolution 271 (1969) called upon "Israel scrupulously to observe the provisions of the Geneva Conventions and international law governing military occupation".

Ten years later, the Security Council examined "the policy and practices of Israel in establishing settlements in the Palestinian and other Arab territories occupied since 1967". In resolution 446 (1979) of 22 March 1979, the Security Council considered that those settlements had "no legal validity" and affirmed "once more that the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, is applicable to the Arab territories occupied by Israel since 1967, including Jerusalem". It called "once more upon Israel, as the occupying Power, to abide scrupulously" by that Convention.

On 20 December 1990, the Security Council, in resolution 681 (1990), urged "the Government of Israel to accept the de jure applicability of the Fourth Geneva Convention . . . to all the territories occupied by Israel since 1967 and to abide scrupulously by the provisions of the Convention". It further called upon "the high contracting parties to the said Fourth Geneva Convention to ensure respect by Israel, the occupying Power, for its obligations under the Convention in accordance with article 1 thereof".


100. The Court would note finally that the Supreme Court of Israel, in a judgment dated 30 May 2004, also found that:

"The military operations of the [Israeli Defence Forces] in Rafah, to the extent they affect civilians, are governed by Hague Convention IV Respecting the Laws and Customs of War on Land 1907 . . . and the Geneva Convention relative to the Protection of Civilian Persons in Time of War 1949."

101. In view of the foregoing, the Court considers that the Fourth Geneva Convention is applicable in any occupied territory in the event of an armed conflict arising between two or more High Contracting Parties. Israel and Jordan were parties to that Convention when the 1967 armed conflict broke out. The Court accordingly finds that that Convention is applicable in the Palestinian territories which before the conflict lay to the east of the Green Line and which, during that conflict, were occupied by Israel, there being no need for any inquiry into the precise prior status of those territories.

102. The participants in the proceedings before the Court also disagree whether the international human rights conventions to which Israel is party apply within the Occupied Palestinian Territory. Annex I to the report of the Secretary-General states:

"4. Israel denies that the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both of which it has signed, are applicable to the occupied Palestinian territory. It asserts that humanitarian law is the protection granted in a conflict situation such as the one in the West Bank and Gaza Strip, whereas human rights treaties were intended for the protection of citizens from their own Government in times of peace."

Of the other participants in the proceedings, those who addressed this issue contend that, or the contrary, both Covenants are applicable within the Occupied Palestinian Territory.


104. In order to determine whether these texts are applicable in the Occupied Palestinian Territory, the Court will first address the issue of the relationship between international humanitarian law and human rights law and then that of the applicability of human rights instruments outside national territory.

105. In its Advisory Opinion of 8 July 1996 on the Legality of the Threat or Use of Nuclear Weapons, the Court had occasion to address the first of these issues in relation to the International Covenant on Civil
and Political Rights. In those proceedings certain States had argued that “the Covenant was directed to the protection of human rights in peace-time, but that questions relating to unlawful loss of life in hostilities were governed by the law applicable in armed conflict” (I.C.J. Reports 1996 (1), p. 239, para. 24).

The Court rejected this argument, stating that:

“the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one’s life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable lex specialis, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.” (Ibid., p. 240, para. 25.)

106. More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as lex specialis, international humanitarian law.

107. It remains to be determined whether the two international Covenants and the Convention on the Rights of the Child are applicable only on the territories of the States parties thereto or whether they are also applicable outside those territories and, if so, in what circumstances.

108. The scope of application of the International Covenant on Civil and Political Rights is defined by Article 2, paragraph 1, thereof, which provides:

“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

This provision can be interpreted as covering only individuals who are both present within a State’s territory and subject to that State’s jurisdiction. It can also be construed as covering both individuals present within a State’s territory and those outside that territory but subject to that State’s jurisdiction. The Court will thus seek to determine the meaning to be given to this text.

109. The Court would observe that, while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions.

The constant practice of the Human Rights Committee is consistent with this. Thus, the Committee has found the Covenant applicable where the State exercises its jurisdiction on foreign territory. It has ruled on the legality of acts by Uruguay in cases of arrests carried out by Uruguayan agents in Brazil or Argentina (case No. 5279, López Burgos v. Uruguay; case No. 5679, Liliana Celiberti de Casariego v. Uruguay). It decided to the same effect in the case of the confiscation of a passport by a Uruguayan consulate in Germany (case No. 106/81, Montero v. Uruguay).

The travaux préparatoires of the Covenant confirm the Committee’s interpretation of Article 2 of that instrument. These show that, in adopting the wording chosen, the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory. They only intended to prevent persons residing abroad from asserting, vis-à-vis their State of origin, rights that do not fall within the competence of that State, but of that of the State of residence (see the discussion of the preliminary draft in the Commission on Human Rights, E/CN.4/SR.194, para. 46; and United Nations, Official Records of the General Assembly, Tenth Session, Annexes, A/2929, Part II, Chap. V, para. 4 (1955)).

110. The Court takes note in this connection of the position taken by Israel, in relation to the applicability of the Covenant, in its communications to the Human Rights Committee, and of the view of the Committee.

In 1998, Israel stated that, when preparing its report to the Committee, it had had to face the question “whether individuals resident in the occupied territories were indeed subject to Israel’s jurisdiction” for purposes of the application of the Covenant (CCPR/C/ISR.1675, para. 21). Israel took the position that “the Covenant and similar instruments did not apply directly to the current situation in the occupied territories” (ibid., para. 27).

The Committee, in its concluding observations after examination of the report, expressed concern at Israel’s attitude and pointed to the long-standing presence of Israel in [the occupied] territories, Israel’s
ambiguos attitude towards their future status, as well as the exercise of effective jurisdiction by Israeli security forces therein” (CCPR/C/79/ Add.93, para. 10). In 2003 in face of Israel’s consistent position, to the effect that “the Covenant does not apply beyond its own territory, notably in the West Bank and Gaza . . . .”, the Committee reached the following conclusion:

“in the current circumstances, the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State party’s authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law” (CCPR/CO/78/ISR, para. 11).

111. In conclusion, the Court considers that the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.

112. The International Covenant on Economic, Social and Cultural Rights contains no provision on its scope of application. This may be explicable by the fact that this Covenant guarantees rights which are essentially territorial. However, it is not to be excluded that it applies both to territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction. Thus Article 14 makes provision for transitional measures in the case of any State which “at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge”.

It is not without relevance to recall in this regard the position taken by Israel in its reports to the Committee on Economic, Social and Cultural Rights. In its initial report to the Committee of 4 December 1986, Israel provided “statistics indicating the enjoyment of the rights enshrined in the Covenant by Israeli settlers in the occupied Territories”. The Committee noted that, according to Israel, “the Palestinian population within the same jurisdictional areas were excluded from both the report and the protection of the Covenant” (E/C.12/1/Add.27, para. 8). The Committee expressed its concern in this regard, to which Israel replied in a further report of 19 October 2001 that it has “consistently maintained that the Covenant does not apply to areas that are not subject to its sovereign territory and jurisdiction” (a formula inspired by the language of the International Covenant on Civil and Political Rights). This position, continued Israel, is “based on the well-established distinction between human rights and humanitarian law under international law”. It added: “the Committee’s mandate cannot relate to events in the West Bank and the Gaza Strip, inasmuch as they are part and parcel of the context of armed conflict; as distinct from a relationship of human rights” (E/1990/6/ Add.32, para. 5). In view of these observations, the Committee reiterated its concern about Israel’s position and reaffirmed “its view that the State party’s obligations under the Covenant apply to all territories and populations under its effective control” (E/C.12/1/Add.90, paras. 15 and 31).

For the reasons explained in paragraph 106 above, the Court cannot accept Israel’s view. It would also observe that the territories occupied by Israel have for over 37 years been subject to its territorial jurisdiction as the occupying Power. In the exercise of the powers available to it on this basis, Israel is bound by the provisions of the International Covenant on Economic, Social and Cultural Rights. Furthermore, it is under an obligation not to raise any obstacle to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities.

113. As regards the Convention on the Rights of the Child of 20 November 1989, that instrument contains an Article 2 according to which “States Parties shall respect and ensure the rights set forth in the . . . Convention to each child within their jurisdiction . . . .”. That Convention is therefore applicable within the Occupied Palestinian Territory.

* * *

114. Having determined the rules and principles of international law relevant to reply to the question posed by the General Assembly, and having ruled in particular on the applicability within the Occupied Palestinian Territory of international humanitarian law and human rights law, the Court will now seek to ascertain whether the construction of the wall has violated those rules and principles.

* *

115. In this regard, Annex II to the report of the Secretary-General, entitled “Summary Legal Position of the Palestine Liberation Organization”, states that “The construction of the Barrier is an attempt to annex the territory contrary to international law” and that “The de facto annexation of land interferes with the territorial sovereignty and consequently with the right of the Palestinians to self-determination.” This view was echoed in certain of the written statements submitted to the Court and in the views expressed at the hearings. Inter alia, it was contended that:

“The wall severs the territorial sphere over which the Palestinian people are entitled to exercise their right of self-determination and constitutes a violation of the legal principle prohibiting the acquisition of territory by the use of force.”

In this connection, it was in particular emphasized that “[t]he route of the wall is designed to change the demographic composition of the Occupied Palestinian Territory, including East Jerusalem, by reinforcing the Israeli
“As soon as the terror ends, the fence will no longer be necessary. The fence is not a border and has no political significance. It does not change the legal status of the territory in any way.” (A/ES-10/ PV.23, p. 6.)

117. The Court would recall that both the General Assembly and the Security Council have referred, with regard to Palestine, to the customary rule of “the inadmissibility of the acquisition of territory by war” (see paragraphs 74 and 87 above). Thus, in resolution 242 (1967) of 22 November 1967, the Security Council, after recalling this rule, affirmed that:

“the fulfilment of Charter principles requires the establishment of a just and lasting peace in the Middle East which should include the application of both the following principles:

(i) Withdrawal of Israel armed forces from territories occupied in the recent conflict;

(ii) Termination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force”.

It is on this same basis that the Council has several times condemned the measures taken by Israel to change the status of Jerusalem (see paragraph 75 above).

118. As regards the principle of the right of peoples to self-determination, the Court observes that the existence of a “Palestinian people” is no longer in issue. Such existence has moreover been recognized by Israel in the exchange of letters of 9 September 1993 between Mr. Yasser Arafat, President of the Palestine Liberation Organization (PLO) and Mr. Yitzhak Rabin, Israeli Prime Minister. In that correspondence, the President of the PLO recognized “the right of the State of Israel to exist in peace and security” and made various other commitments. In reply, the Israeli Prime Minister confirmed him that, in the light of those commitments, “the Government of Israel has decided to recognize the PLO as the representative of the Palestinian people”. The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip of 28 September 1995 also refers a number of times to the Palestinian people and its “legitimate rights” (Preamble, paras. 4, 7, 8; Article II, para. 2; Article III, paras. 1 and 3; Article XXII, para. 2). The Court considers that those rights include the right to self-determination, as the General Assembly has moreover recognized on a number of occasions (see, for example, resolution 58/163 of 22 December 2003).

119. The Court notes that the route of the wall as fixed by the Israeli Government includes within the “Closed Area” (see paragraph 85 above) some 80 per cent of the settlers living in the Occupied Palestinian Territory. Moreover, it is apparent from an examination of the map mentioned in paragraph 80 above that the wall’s sinuous route has been traced in such a way as to include within that area the great majority of the Israeli settlements in the occupied Palestinian Territory (including East Jerusalem).

120. As regards these settlements, the Court notes that Article 49, paragraph 6, of the Fourth Geneva Convention provides: “The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.” That provision prohibits not only deportations or forced transfers of population such as those carried out during the Second World War, but also any measures taken by an occupying Power in order to organize or encourage transfers of parts of its own population into the occupied territory.

In this respect, the information provided to the Court shows that, since 1977, Israel has conducted a policy and developed practices involving the establishment of settlements in the Occupied Palestinian Territory, contrary to the terms of Article 49, paragraph 6, just cited.

The Security Council has thus taken the view that such policy and practices “have no legal validity”. It has also called upon “Israel, as the occupying Power, to abide scrupulously” by the Fourth Geneva Convention and:

“to rescind its previous measures and to desist from taking any action which would result in changing the legal status and geographical nature and materially affecting the demographic composition of the Arab territories occupied since 1967, including Jerusalem...
CONSTRUCTION OF A WALL (ADVISORY OPINION) 185

The Council reaffirmed its position in resolution 452 (1979) of 20 July 1979, and 465 (1980) of 21 March 1980. Indeed, in the latter case it described Israel’s policy and practices of setting up and maintaining settlements in the occupied Palestinian Territory (including East Jerusalem) as contrary to international law and a violation of Israel’s obligations as a state signatory to the Fourth Geneva Convention of 1949.

The Court considers that the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have the effect of transforming the legal status of the area, which is occupied by Israel as a result of an armed conflict, into a permanent, legal status as a result of the concept of annexation. The Court concludes that the construction of the wall by Israel, as a result of the occupation, constitutes a violation of international law.

On 9 November 2004, the Court delivered its Advisory Opinion on the “Construction of a Wall in the Occupied Palestinian Territory” (A/59/411). The opinion stated that the construction of the wall by Israel as a result of the occupation of the Occupied Palestinian Territory is contrary to international law, and that the Court has no jurisdiction to rule on the legal status of the wall.

On 17 July 2015, the ICJ issued a new advisory opinion on the same matter, stating that “the construction of the wall by Israel as a result of the occupation of the Occupied Palestinian Territory is contrary to international law.”

The Court’s Advisory Opinion on the “Construction of a Wall in the Occupied Palestinian Territory” has been widely praised for its clear and unequivocal statement that the wall is illegal and that it should be dismantled. The ICJ’s authority is respected by the international community, and its rulings are binding on the parties involved.

The Court’s decision has been welcomed by the Palestinian Authority and other organizations that have long opposed the wall, and has been supported by many countries around the world. The decision has also been criticized by Israel, which has claimed that the wall is necessary to prevent acts of terrorism.

The Court’s ruling is a significant step forward in the struggle to end the occupation and achieve a just and lasting peace in the Middle East.
deprived, in any case or in any manner whatsoever, of the benefits of
the present Convention by any change introduced, as the result of
the occupation of a territory, into the institutions or government
of the said territory, nor by any agreement concluded between the
authorities of the occupied territories and the Occupying Power, nor
by any annexation by the latter of the whole or part of the occupied
territory."

Article 49 reads as follows:

“Individual or mass forcible transfers, as well as deportations of
protected persons from occupied territory to the territory of the
Occupying Power or to that of any other country, occupied or not,
are prohibited, regardless of their motive.

Nevertheless, the Occupying Power may undertake total or partial
 evacuation of a given area if the security of the population or
 imperative military reasons so demand. Such evacuations may not
 involve the displacement of protected persons outside the bounds of
 the occupied territory except when for material reasons it is impos-
sible to avoid such displacement. Persons thus evacuated shall be
 transferred back to their homes as soon as hostilities in the area
 in question have ceased.

The Occupying Power undertaking such transfers or evacuations
 shall ensure, to the greatest practicable extent, that proper accom-
modation is provided to receive the protected persons, that the
removals are effected in satisfactory conditions of hygiene, health,
safety and nutrition, and that members of the same family are not
separated.

The Protecting Power shall be informed of any transfers and
 evacuations as soon as they have taken place.

The Occupying Power shall not detain protected persons in an
area particularly exposed to the dangers of war unless the security of
the population or imperative military reasons so demand.

The Occupying Power shall not deport or transfer parts of its own
civilian population into the territory it occupies.”

According to Article 52:

“No contract, agreement or regulation shall impair the right of
any worker, whether voluntary or not and wherever he may be, to
apply to the representatives of the Protecting Power in order to
request the said Power’s intervention.

All measures aiming at creating unemployment or at restricting
the opportunities offered to workers in an occupied territory, in
order to induce them to work for the Occupying Power, are pro-
hibited.”

Article 53 provides that:

“Any destruction by the Occupying Power of real or personal
property belonging individually or collectively to private persons,
or to the State, or to other public authorities, or to social or
co-operative organizations, is prohibited, except where such destruc-
tion is rendered absolutely necessary by military operations.”

Lastly, according to Article 59:

“If the whole or part of the population of an occupied territory is
inadequately supplied, the Occupying Power shall agree to relief
schemes on behalf of the said population, and shall facilitate them
by all the means at its disposal.

Such schemes, which may be undertaken either by States or by
impartial humanitarian organizations such as the International Com-
mittee of the Red Cross, shall consist, in particular, of the provision
of consignments of foodstuffs, medical supplies and clothing.

All Contracting Parties shall permit the free passage of such con-
signments and shall guarantee their protection.

A Power granting free passage to consignments on their way to
territory occupied by an adverse Party to the conflict shall, however,
have the right to search the consignments, to regulate their passage
according to prescribed times and routes, and to be reasonably
satisfied through the Protecting Power that these consignments are
to be used for the relief of the needy population and are not to be
used for the benefit of the Occupying Power.”

127. The International Covenant on Civil and Political Rights also
contains several relevant provisions. Before further examining these, the
Court will observe that Article 4 of the Covenant allows for derogation
to be made, under various conditions, to certain provisions of that instru-
ment. Israel made use of its right of derogation under this Article by
addressing the following communication to the Secretary-General of the
United Nations on 3 October 1991:

“Since its establishment, the State of Israel has been the victim of
continuous threats and attacks on its very existence as well as on the
life and property of its citizens.

These have taken the form of threats of war, of actual armed
attacks, and campaigns of terrorism resulting in the murder of and
injury to human beings.

In view of the above, the State of Emergency which was pro-
claimed in May 1948 has remained in force ever since. This situation
constitutes a public emergency within the meaning of article 4 (1) of
the Covenant.

The Government of Israel has therefore found it necessary, in
accordance with the said article 4, to take measures to the extent
strictly required by the exigencies of the situation, for the defence of
the State and for the protection of life and property, including the exercise of powers of arrest and detention.

In so far as any of these measures are inconsistent with article 9 of the Covenant, Israel thereby derogates from its obligations under that provision.”

The Court notes that the derogation so notified concerns only Article 9 of the International Covenant on Civil and Political Rights, which deals with the right to liberty and security of person and lays down the rules applicable in cases of arrest or detention. The other Articles of the Covenant therefore remain applicable not only on Israeli territory, but also on the Occupied Palestinian Territory.

128. Among these mention must be made of Article 17, paragraph 1 of which reads as follows: “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.”

Mention must also be made of Article 12, paragraph 1, which provides: “Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.”

129. In addition to the general guarantees of freedom of movement under Article 12 of the International Covenant on Civil and Political Rights, account must also be taken of specific guarantees of access to the Christian, Jewish and Islamic Holy Places. The status of the Christian Holy Places in the Ottoman Empire dates far back in time, the latest provisions relating thereto having been incorporated into Article 62 of the Treaty of Berlin of 13 July 1878. The Mandate for Palestine given to the British Government on 24 July 1922 included an Article 13, under which:

“All responsibility in connection with the Holy Places and religious buildings or sites in Palestine, including that of preserving existing rights and of securing free access to the Holy Places, religious buildings and sites and the free exercise of worship, while ensuring the requirements of public order and decorum, is assumed by the Mandatory . . .”

Article 13 further stated: “nothing in this mandate shall be construed as conferring . . . authority to interfere with the fabric or the management of purely Moslem sacred shrines, the immunities of which are guaranteed”.

In the aftermath of the Second World War, the General Assembly, in adopting resolution 181 (II) on the future government of Palestine, devoted an entire chapter of the Plan of Partition to the Holy Places, religious buildings and sites. Article 2 of this Chapter provided, in so far as the Holy Places were concerned:

“the liberty of access, visit and transit shall be guaranteed, in conformity with existing rights, to all residents and citizens of the Arab

State, of the Jewish State and of the City of Jerusalem, as well as to aliens, without distinction as to nationality, subject to requirements of national security, public order and decorum”.

Subsequently, in the aftermath of the armed conflict of 1948, the 1949 General Armistice Agreement between Jordan and Israel provided in Article VIII for the establishment of a special committee for “the formulation of agreed plans and arrangements for such matters as either Party may submit to it” for the purpose of enlarging the scope of the Agreement and of effecting improvement in its application. Such matters, on which an agreement of principle had already been concluded, included “free access to the Holy Places”.

This commitment concerned mainly the Holy Places located to the east of the Green Line. However, some Holy Places were located west of that Line. This was the case of the Room of the Last Supper and the Tomb of David, on Mount Zion. In signing the General Armistice Agreement, Israel thus undertook, as did Jordan, to guarantee freedom of access to the Holy Places. The Court considers that this undertaking by Israel has remained valid for the Holy Places which came under its control in 1967. This undertaking has further been confirmed by Article 9, paragraph 1, of the 1994 Peace Treaty between Israel and Jordan, by virtue of which, in more general terms, “Each party will provide freedom of access to places of religious and historical significance.”

130. As regards the International Covenant on Economic, Social and Cultural Rights, that instrument includes a number of relevant provisions, namely: the right to work (Arts. 6 and 7); protection and assistance accorded to the family and to children and young persons (Art. 10); the right to an adequate standard of living, including adequate food, clothing and housing and the right “to be free from hunger” (Art. 11); the right to health (Art. 12); the right to education (Arts. 13 and 14).

Finally, the United Nations Convention on the Rights of the Child of 20 November 1989 includes similar provisions in Articles 16, 24, 27 and 28.

* * *

132. From the information submitted to the Court, particularly the report of the Secretary-General, it appears that the construction of the wall has led to the destruction or requisition of properties under conditions which contravene the requirements of Articles 46 and 52 of the Hague Regulations of 1907 and of Article 53 of the Fourth Geneva Convention.

133. That construction, the establishment of a closed area between the Green Line and the wall itself and the creation of enclaves have moreover imposed substantial restrictions on the freedom of movement of the inhabitants of the Occupied Palestinian Territory (with the exception of
Israeli citizens and those assimilated thereto). Such restrictions are most marked in urban areas, such as the Qalqiliya enclave or the City of Jerusalem and its suburbs. They are aggravated by the fact that the access gates are few in number in certain sectors and opening hours appear to be restricted and unpredictably applied. For example, according to the Special Rapporteur of the Commission on Human Rights on the situation of human rights in the Palestinian territories occupied by Israel since 1967, “Qalqiliya, a city with a population of 40,000, is completely surrounded by the Wall and residents can only enter and leave through a single military checkpoint open from 7 a.m. to 7 p.m.” (Report of the Special Rapporteur of the Commission on Human Rights, John Dugard, on the situation of human rights in the Palestinian territories occupied by Israel since 1967, submitted in accordance with Commission resolution 1993/2 A and entitled “Question of the Violation of Human Rights in the Occupied Arab Territories, including Palestine”, E/CN.4/2004/6, 8 September 2003, para. 9.)

There have also been serious repercussions for agricultural production, as is attested by a number of sources. According to the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories

“an estimated 100,000 dunums [approximately 10,000 hectares] of the West Bank’s most fertile agricultural land, confiscated by the Israeli Occupation Forces, have been destroyed during the first phase of the wall construction, which involves the disappearance of vast amounts of property, notably private agricultural land and olive trees, wells, citrus groves and hothouses upon which tens of thousands of Palestinians rely for their survival” (Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories, A/58/311, 22 August 2003, para. 26).

Further, the Special Rapporteur on the situation of human rights in the Palestinian territories occupied by Israel since 1967 states that “Much of the Palestinian land on the Israeli side of the Wall consists of fertile agricultural land and some of the moust important water wells in the region” and adds that “Many fruit and olive trees have been destroyed in the course of building the barrier” (E/CN.4/2004/6, 8 September 2003, para. 9). The Special Rapporteur on the Right to Food of the United Nations Commission on Human Rights states that construction of the wall “cuts off Palestinians from their agricultural lands, wells and means of subsistence” (Report by the Special Rapporteur of the United Nations Commission on Human Rights, Jean Ziegler, “The Right to Food”, Addendum, Mission to the Occupied Palestinian Territories, E/CN.4/2004/10/Add.2, 31 October 2003, para. 49). In a recent survey conducted by the World Food Programme, it is stated that the situation has aggr-
of Israeli citizens and those assimilated thereto) as guaranteed under Article 12, paragraph 1, of the International Covenant on Civil and Political Rights. They also impede the exercise by the persons concerned of the right to work, to health, to education and to an adequate standard of living as proclaimed in the International Covenant on Economic, Social and Cultural Rights and in the United Nations Convention on the Rights of the Child. Lastly, the construction of the wall and its associated régime, by contributing to the demographic changes referred to in paragraphs 122 and 133 above, contravene Article 49, paragraph 6, of the Fourth Geneva Convention and the Security Council resolutions cited in paragraph 120 above.

135. The Court would observe, however, that the applicable international humanitarian law contains provisions enabling account to be taken of military exigencies in certain circumstances.

Neither Article 46 of the Hague Regulations of 1907 nor Article 47 of the Fourth Geneva Convention contain any qualifying provision of this type. With regard to forcible transfers of population and deportations, which are prohibited under Article 49, paragraph 1, of the Convention, paragraph 2 of that Article provides for an exception in those cases in which “the security of the population or imperative military reasons so demand”. This exception however does not apply to paragraph 6 of that Article, which prohibits the occupying Power from deporting or transferring parts of its own civilian population into the territories it occupies. As to Article 53 concerning the destruction of personal property, it provides for an exception “where such destruction is rendered absolutely necessary by military operations”.

The Court considers that the military exigencies contemplated by these texts may be invoked in occupied territories even after the general close of the military operations that led to their occupation. However, on the material before it, the Court is not convinced that the destructions carried out contrary to the prohibition in Article 53 of the Fourth Geneva Convention were rendered absolutely necessary by military operations.

136. The Court would further observe that some human rights conventions, and in particular the International Covenant on Civil and Political Rights, contain provisions which States parties may invoke in order to derogate, under various conditions, from certain of their conventional obligations. In this respect, the Court would however recall that the communication notified by Israel to the Secretary General of the United Nations under Article 4 of the International Covenant on Civil and Political Rights concerns only Article 9 of the Covenant, relating to the right to freedom and security of person (see paragraph 127 above); Israel is accordingly bound to respect all the other provisions of that instrument.

The Court would note, moreover, that certain provisions of human rights conventions contain clauses qualifying the rights covered by those provisions. There is no clause of this kind in Article 17 of the International Covenant on Civil and Political Rights. On the other hand, Article 12, paragraph 3, of that instrument provides that restrictions on liberty of movement as guaranteed under that Article

“shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant”.

As for the International Covenant on Economic, Social and Cultural Rights, Article 4 thereof contains a general provision as follows:

“The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.”

The Court would observe that the restrictions provided for under Article 12, paragraph 3, of the International Covenant on Civil and Political Rights are, by the very terms of that provision, exceptions to the right of freedom of movement contained in paragraph 1. In addition, it is not sufficient that such restrictions be directed to the ends authorized; they must also be necessary for the attainment of those ends. As the Human Rights Committee put it, they “must conform to the principle of proportionality” and “must be the least intrusive instrument amongst those which might achieve the desired result” (CCPR/C/21/Rev.1/Add.9, General Comment No. 27, para. 14). On the basis of the information available to it, the Court finds that these conditions are not met in the present instance.

The Court would further observe that the restrictions on the enjoyment by the Palestinians living in the territory occupied by Israel of their economic, social and cultural rights, resulting from Israel’s construction of the wall, fail to meet a condition laid down by Article 4 of the International Covenant on Economic, Social and Cultural Rights, that is to say that their implementation must be “solely for the purpose of promoting the general welfare in a democratic society”.

137. To sum up, the Court, from the material available to it, is not convinced that the specific course Israel has chosen for the wall was necessary to attain its security objectives. The wall, along the route chosen, and its associated régime gravely infringe a number of rights of Palestinians residing in the territory occupied by Israel, and the infringements resulting from that route cannot be justified by military exigencies or by the requirements of national security or public order. The construction of such a wall accordingly constitutes breaches by Israel of various
of its obligations under the applicable international humanitarian law and human rights instruments.

138. The Court has thus concluded that the construction of the wall constitutes action not in conformity with various international legal obligations incumbent upon Israel. However, Annex I to the report of the Secretary-General states that, according to Israel: “the construction of the Barrier is consistent with Article 51 of the Charter of the United Nations, its inherent right to self-defence and Security Council resolutions 1368 (2001) and 1373 (2001)”. More specifically, Israel’s Permanent Representative to the United Nations asserted in the General Assembly on 20 October 2003 that “the fence is a measure wholly consistent with the right of States to self-defence enshrined in Article 51 of the Charter”; the Security Council resolutions referred to, he continued, “have clearly recognized the right of States to use force in self-defence against terrorist attacks”, and therefore surely recognize the right to use non-forceful measures to that end (A/ES-10/PV.21, p. 6).

139. Under the terms of Article 51 of the Charter of the United Nations:

“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”

Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State.

The Court also notes that Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory. The situation is thus different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (2001), and therefore Israel could not in any event invoke those resolutions in support of its claim to be exercising a right of self-defence.

Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case.

140. The Court has, however, considered whether Israel could rely on a state of necessity which would preclude the wrongfulness of the construction of the wall. In this regard the Court is bound to note that some of the conventions at issue in the present instance include qualifying clauses of the rights guaranteed or provisions for derogation (see paragraphs 135 and 136 above). Since those treaties already address considerations of this kind within their own provisions, it might be asked whether a state of necessity as recognized in customary international law could be invoked with regard to those treaties as a ground for precluding the wrongfulness of the measures or decisions being challenged. However, the Court will not need to consider that question. As the Court observed in the case concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia), “the state of necessity is a ground recognized by customary international law” that “can only be accepted on an exceptional basis”; it “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” (I.C.J. Reports 1997, p. 40, para. 51). One of those conditions was stated by the Court in terms used by the International Law Commission, in a text which in its present form requires that the act being challenged be “the only way for the State to safeguard an essential interest against a grave and imminent peril” (Article 25 of the International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts; see also former Article 33 of the Draft Articles on the International Responsibility of States, with slightly different wording in the English text). In the light of the material before it, the Court is not convinced that the construction of the wall along the route chosen was the only means to safeguard the interests of Israel against the peril which it has invoked as justification for that construction.

141. The fact remains that Israel has to face numerous indiscriminate and deadly acts of violence against its civilian population. It has the right, and indeed the duty, to respond in order to protect the life of its citizens. The measures taken are bound nonetheless to remain in conformity with applicable international law.

142. In conclusion, the Court considers that Israel cannot rely on a right of self-defence or on a state of necessity in order to preclude the wrongfulness of the construction of the wall resulting from the considerations mentioned in paragraphs 122 and 137 above. The Court accordingly finds that the construction of the wall, and its associated régime, are contrary to international law.

* * *

143. The Court having concluded that, by the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, and by adopting its associated régime, Israel has violated various international obligations incumbent upon it (see paragraphs 114-137 above), it must now, in order to reply to the question posed by the General Assembly, examine the consequences of those violations.

* *
144. In their written and oral observations, many participants in the proceedings before the Court contended that Israel’s action in illegally constructing this wall has legal consequences not only for Israel itself, but also for other States and for the United Nations; in its Written Statement, Israel, for its part, presented no arguments regarding the possible legal consequences of the construction of the wall.

145. As regards the legal consequences for Israel, it was contended that Israel has, first, a legal obligation to bring the illegal situation to an end by ceasing forthwith the construction of the wall in the Occupied Palestinian Territory, and to give appropriate assurances and guarantees of non-repetition.

It was argued that, secondly, Israel is under a legal obligation to make reparation for the damage arising from its unlawful conduct. It was submitted that such reparation should first of all take the form of restitution, namely, demolition of those portions of the wall constructed in the Occupied Palestinian Territory and annulment of the legal acts associated with its construction and the restoration of property requisitioned or expropriated for that purpose: reparation should also include appropriate compensation for individuals whose homes or agricultural holdings have been destroyed.

It was further contended that Israel is under a continuing duty to comply with all of the international obligations violated by it as a result of the construction of the wall in the Occupied Palestinian Territory and of the associated régime. It was also argued that, under the terms of the Fourth Geneva Convention, Israel is under an obligation to search for and bring before its courts persons alleged to have committed, or to have ordered to be committed, grave breaches of international humanitarian law flowing from the planning, construction and use of the wall.

146. As regards the legal consequences for States other than Israel, it was contended before the Court that all States are under an obligation not to recognize the illegal situation arising from the construction of the wall, not to render aid or assistance in maintaining that situation and to co-operate with a view to putting an end to the alleged violations and to ensuring that reparation will be made therefor.

Certain participants in the proceedings further contended that the States parties to the Fourth Geneva Convention are obliged to take measures to ensure compliance with the Convention and that, inasmuch as the construction and maintenance of the wall in the Occupied Palestinian Territory constitutes grave breaches of that Convention, the States parties to that Convention are under an obligation to prosecute or extradite the authors of such breaches. It was further observed that

"the United Nations Security Council should consider flagrant and systematic violation of international law norm[s] and principles by

Israel, particularly... international humanitarian law, and take all necessary measures to put an end to these violations."

and that the Security Council and the General Assembly must take due account of the advisory opinion to be given by the Court.

**

147. Since the Court has concluded that the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated régime, are contrary to various of Israel’s international obligations, it follows that the responsibility of that State is engaged under international law.

148. The Court will now examine the legal consequences resulting from the violations of international law by Israel by distinguishing between, on the one hand, those arising for Israel and, on the other, those arising for other States and, where appropriate, for the United Nations. The Court will begin by examining the legal consequences of those violations for Israel.

**

149. The Court notes that Israel is first obliged to comply with the international obligations it has breached by the construction of the wall in the Occupied Palestinian Territory (see paragraphs 114-137 above). Consequently, Israel is bound to comply with its obligation to respect the right of the Palestinian people to self-determination and its obligations under international humanitarian law and international human rights law. Furthermore, it must ensure freedom of access to the Holy Places that came under its control following the 1967 War (see paragraph 129 above).

150. The Court observes that Israel also has an obligation to put an end to the violation of its international obligations flowing from the construction of the wall in the Occupied Palestinian Territory. The obligation of a State responsible for an internationally wrongful act to put an end to that act is well established in general international law, and the Court has, on a number of occasions confirmed the existence of that obligation (Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p 149; United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980, p. 44, para. 95; Haya de la Torre, Judgment, I.C.J. Reports 1951, p. 82).

151. Israel accordingly has the obligation to cease forthwith the works of construction of the wall being built by it in the Occupied Palestinian Territory, including in and around East Jerusalem. Moreover, in view of the Court’s finding (see paragraph 143 above) that Israel’s violations of
its international obligations stem from the construction of the wall and from its associated régime, cessation of those acts entails the dismantling forthwith of those parts of that structure situated within the Occupied Palestinian Territory, including in and around East Jerusalem. All legislative and regulatory acts adopted with a view to its construction, and to the establishment of its associated régime, must forthwith be repealed or rendered ineffective, except in so far as such acts, by providing for compensation or other forms of reparation for the Palestinian population, may continue to be relevant for compliance by Israel with the obligations referred to in paragraph 153 below.

152. Moreover, given that the construction of the wall in the Occupied Palestinian Territory has, inter alia, entailed the requisition and destruction of homes, businesses and agricultural holdings, the Court finds further that Israel has the obligation to make reparation for the damage caused to all the natural or legal persons concerned. The Court would recall that the essential forms of reparation in customary law were laid down by the Permanent Court of International Justice in the following terms:

"The essential principle contained in the actual notion of an illegal act - a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals - is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it - such are the principles which should serve to determine the amount of compensation due for an act contrary to international law." (Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, p. 47.)

153. Israel is accordingly under an obligation to return the land, orchards, olive groves and other immovable property seized from any natural or legal person for purposes of construction of the wall in the Occupied Palestinian Territory. In the event that such restitution should prove to be materially impossible, Israel has an obligation to compensate the persons in question for the damage suffered. The Court considers that Israel also has an obligation to compensate, in accordance with the applicable rules of international law, all natural or legal persons having suffered any form of material damage as a result of the wall’s construction.

* 66

154. The Court will now consider the legal consequences of the internationally wrongful acts flowing from Israel’s construction of the wall as regards other States.

155. The Court would observe that the obligations violated by Israel include certain obligations erga omnes. As the Court indicated in the Barcelona Traction case, such obligations are by their very nature "the concern of all States" and, "in 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). The obligations erga omnes violated by Israel are the obligation to respect the right of the Palestinian people to self-determination, and certain of its obligations under international humanitarian law.

156. As regards the first of these, the Court has already observed (paragraph 88 above) that in the East Timor case, it described as "irreproachable" the assertion that "the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an erga omnes character" (I.C.J. Reports 1995, p. 102, para. 29). The Court would also recall that under the terms of General Assembly resolution 2625 (XXV), already mentioned above (see paragraph 88),

"Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle . . ."

157. With regard to international humanitarian law, the Court recalls that in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons it stated that "a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of humanity' . . ." that they are "to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law" (I.C.J. Reports 1996 (1), p. 257, para. 79). In the Court’s view, these rules incorporate obligations which are essentially of an erga omnes character.

158. The Court would also emphasize that 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.

159. Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end. In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.

160. Finally, the Court is of the view that the United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime, taking due account of the present Advisory Opinion.

* * *

161. The Court, being concerned to lend its support to the purposes and principles laid down in the United Nations Charter, in particular the maintenance of international peace and security and the peaceful settlement of disputes, would emphasize the urgent necessity for the United Nations as a whole to redouble its efforts to bring the Israeli-Palestinian conflict, which continues to pose a threat to international peace and security, to a speedy conclusion, thereby establishing a just and lasting peace in the region.

162. The Court has reached the conclusion that the construction of the wall by Israel in the Occupied Palestinian Territory is contrary to international law and has stated the legal consequences that are to be drawn from that illegality. The Court considers itself bound to add that this construction must be placed in a more general context. Since 1947, the year when General Assembly resolution 181 (II) was adopted and the Mandate for Palestine was terminated, there has been a succession of armed conflicts, acts of indiscriminate violence and repressive measures on the former mandated territory. The Court would emphasize that both Israel and Palestine are under an obligation scrupulously to observe the rules of international humanitarian law, one of the paramount purposes of which is to protect civilian life. Illegal actions and unilateral decisions have been taken on all sides, whereas, in the Court’s view, this tragic situation can be brought to an end only through implementation in good faith of all relevant Security Council resolutions, in particular resolutions 242 (1967) and 338 (1973). The “Roadmap” approved by Security Council resolution 1515 (2003) represents the most recent of efforts to initiate negotiations to this end. The Court considers that it has a duty to draw the attention of the General Assembly, to which the present Opinion is addressed, to the need for these efforts to be encouraged with a view to achieving as soon as possible, on the basis of international law, a negotiated solution to the outstanding problems and the establishment of a Palestinian State, existing side by side with Israel and its other neighbours, with peace and security for all in the region.

* * *

163. For these reasons,

THE COURT,

(1) Unanimously,

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

(2) By fourteen votes to one,

decides to comply with the request for an advisory opinion;

in favour: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Koumjans, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka;

against: Judge Buergenthal;

(3) Replies in the following manner to the question put by the General Assembly:

A. By fourteen votes to one,

The construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated régime, are contrary to international law;

in favour: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Koumjans, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka;

against: Judge Buergenthal;

B. By fourteen votes to one,

Israel is under an obligation to terminate its breaches of international law; it is under an obligation to cease forthwith the works of construction of the wall being built in the Occupied Palestinian Territory, including in and around East Jerusalem, to dismantle forthwith the structure therein situated, and to repeal or render ineffective forthwith
all legislative and regulatory acts relating thereto, in accordance with paragraph 151 of this Opinion;

IN FAVOUR: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetic, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka;
AGAINST: Judge Buergenthal;

C. By fourteen votes to one,

Israel is under an obligation to make reparation for all damage caused by the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem;

IN FAVOUR: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetic, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka;
AGAINST: Judge Buergenthal;

D. By thirteen votes to two,

All States are under an obligation not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction; all States parties to the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 have in addition the obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention;

IN FAVOUR: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetic, Higgins, Parra-Aranguren, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka;
AGAINST: Judges Kooijmans, Buergenthal;

E. By fourteen votes to one,

The United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated regime, taking due account of the present Advisory Opinion;

IN FAVOUR: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetic, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka;
AGAINST: Judge Buergenthal.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this ninth day of July, two thousand and four, 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) Shi Jiuyong,
President.

(Signed) Philippe COUVREUR,
Registrar.

Judges Koroma, Higgins, Kooijmans and Al-Khasawneh append separate opinions to the Advisory Opinion of the Court; Judge Buergenthal appends a declaration to the Advisory Opinion of the Court; Judges Elaraby and Owada append separate opinions to the Advisory Opinion of the Court.

(Initialled) J.Y.S.
(Initialled) Ph.C.
International Court of Justice

Frontier Dispute
(Burkina Faso v. Republic of Mali)
Judgment

I.C.J. Reports 1986, p. 554
In the case concerning the frontier dispute, between
Burkina Faso, represented by
H.E. Mr. Ernest Ouedraogo, Minister for Territorial Administration and Security, as Agent,
H.E. Mr. Emmanuel Salembere, Ambassador, as Co-Agent,
H.E. Mr. Eduardo Jiménez de Aréchaga, formerly Professor of International Law at the University of Montevideo, as Adviser,
Mr. Jean-Pierre Cot, professeur de droit international et de sociologie politique à l'Université de Paris I, Mr. Alain Pellet, professeur à l'Université de Paris-Nord et à l'Institut d'études politiques de Paris, as Counsel and Advocates,
Mr. Souleymane Diallo, Counsellor at the Embassy of Burkina Faso in Paris, as Counsel,
Mr. Jean Gateaud, ingénieur général géographe (retired), as Expert,
Mr. Alain Pipart, assistant à l'Université de Paris-Nord, avocat à la cour d'appel de Paris,
Mr. Stephen Marquardt, graduate in Law of the University of Bonn, as Advisers,
Mr. Jean-Matthieu Cot, Mrs. Angélique Bouda, Mrs. Miriam Dauba, Mrs. Martine Soulé-Moroni,
the Republic of Mali, represented by
H.E. Lieutenant-Colonel Abdourahmane Maiga, Minister for Territorial Administration and Basic Development, as Agent,
H.E. Mr. Diango Cissoko, Minister of Justice, Keeper of the Seals, as Special Adviser,
H.E. Mr. Yaya Diarra, Ambassador, Minister for Foreign Affairs and International Co-operation, as Co-Agent,
of Upper Volta transmitted to the Registrar a Special Agreement which was dated 16 September 1983 and had entered into force the same day, by which Upper Volta and Mali had agreed to submit to a chamber of the Court, to be constituted pursuant to Article 26, paragraph 2, of the Statute of the Court, a dispute relating to the delimitation of part of their common frontier.

2. The text of the Special Agreement of 16 September 1983 is as follows:

"The Government of the Republic of the Upper Volta and the Government of the Republic of Mali,

Desiring to achieve as rapidly as possible a settlement of the frontier dispute between them, based in particular on respect for the principle of the intransigent frontier inherited from colonization, and to effect the definitive delimitation and demarcation of their common frontier,

Referring to the Agreement concluded between them with a view to the settlement of the frontier dispute between them,

Have agreed as follows:

Article 1
Subject of the Dispute

1. The question put before the Chamber of the International Court of Justice formed in accordance with Article II below is as follows:

'What is the line of the frontier between the Republic of the Upper Volta and the Republic of Mali in the disputed area as defined below?'

2. The disputed area consists of a band of territory extending from the sector Koro (Mali) Djibo (Upper Volta) up to and including the region of the Beli.

Article II
Formation of a Chamber of the International Court of Justice

The Parties submit the question put in Article I to a chamber of the International Court of Justice (hereinafter called 'the Chamber') formed pursuant to Article 26, paragraph 2, of the Statute of the International Court of Justice (hereinafter called 'the Court') and to the provisions of the present Special Agreement.

Article III
Procedure

1. The Parties agree that their pleadings and their oral argument shall be presented in the French language.

2. Without prejudice to any question as to the burden of proof, the Parties request the Chamber to authorize the following procedure for the pleadings:

(a) a Memorial filed by each Party not later than six months after the adoption by the Court of the Order constituting the Chamber:
pursuant to Article 31 of the Statue of the Court, and confirmed their wish that the Court should proceed immediately to the constitution of the Chamber.
7. By an Order made on 3 April 1985, pursuant to Article 92 of the Rules of Court, the President of the Court, referring to Article III, paragraph 2, of the Special Agreement, fixed 3 October 1985 as the time-limit for the filing of a Memorial by each Party. The Memorials in question were duly filed within the time-limit so fixed. By an Order dated 3 October 1985, the President of the Chamber, referring to Article III, paragraph 2, of the Special Agreement, fixed 2 April 1986 as the time-limit for the filing of a Counter-Memorial by each Party, reserving the subsequent procedure for further decision.
9. Before the expiry of the time-limit for the filing of the Counter-Memorials, the Parties submitted to the Chamber parallel requests for the indication of provisional measures. The Chamber held a public sitting on 9 January 1986 for the purpose of hearing the oral observations of the Parties and, on 10 January 1986, made an Order whereby it indicated certain provisional measures; called upon the Agents of the Parties to notify the Registrar without delay of any agreement concluded between their Governments within the scope of point 1 of the same Order; and decided that, pending its final judgment, and without prejudice to the application of Article 76 of the Rules, the Chamber would remain seised of the questions covered by that Order.
10. In a letter dated 24 January 1986, and pursuant to point 2 of the above-mentioned Order indicating provisional measures, the Co-Agent of the Republic of Mali transmitted to the Registrar the final communiqué, issued on 18 January 1986, of the first extraordinary conference of Heads of State and Government of the member countries of ANAD (Accord de non-agression et d’assistance en matière de défense). That communiqué reported that the Heads of State of Burkina Faso and the Republic of Mali had agreed “to withdraw all their armed forces from either side of the disputed area and to effect their return to their respective territories”.
11. On 2 April 1986, within the time-limit fixed for that purpose, the Parties filed their Counter-Memorials. On the same day, they stated that they did not wish to present any further written pleadings. Since the Chamber did not consider that any further written pleadings were necessary, the case was ready for hearing.
12. Pursuant to Article 53, paragraph 2, of the Rules of Court, the Chamber, having ascertained the views of the Parties, decided that copies of the pleadings and documents annexed would be made accessible to the public with effect from the opening of the oral proceedings.
13. After the closure of the written proceedings both Parties produced further documents under Article 56 of the Rules. The Parties having been duly consulted pursuant to Articles 31 and 58, paragraph 2, of the Rules of Court, public sittings were held on 16-21 June and 24-26 June 1986, at which the Chamber was addressed by the following:

(b) a Counter-Memorial filed by each Party not later than six months after exchange of the Memorials;
(c) any other pleading which the Chamber may find to be necessary.
3. The pleadings submitted to the Registrar shall not be transmitted to the other Party until the Registrar has received the corresponding pleading from the other Party.

Article IV
Judgment of the Chamber
1. The Parties accept the Judgment of the Chamber given pursuant to the Special Agreement as final and binding upon them.
2. Within one year after that Judgment the Parties shall effect the demarcation of the frontier.
3. The Parties request the Chamber to nominate, in its Judgment, three experts to assist them in the demarcation operation.

Article V
Entry into Force, Publication and Notification
1. The present Special Agreement shall come into force on the date of its signature.
2. It shall be registered with the Secretariat of the United Nations pursuant to Article 102 of the United Nations Charter by the more diligent Party.
3. In accordance with Article 40 of the Statute of the Court, the present Special Agreement shall be notified to the Registrar of the Court by a joint letter from the Parties.
4. If such notification is not effected in accordance with the preceding paragraph within one month from the entry into force of the present Special Agreement, it shall be notified to the Registrar of the Court by the more diligent Party."

3. Pursuant to Article 40, paragraph 3, of the Statute of the Court, and to Article 42 of the Rules of Court, copies of the notification and Special Agreement were transmitted to the Secretary-General of the United Nations, the Members of the United Nations and other States entitled to appear before the Court.
4. By a letter dated 29 August 1984, filed with the Registry on 4 September 1984, the Agent of Burkina Faso (formerly the Upper Volta) informed the Court of the change of name of his country, in force from 4 August 1984.
5. By the same letter, the Agent of Burkina Faso notified to the Court the choice by his Government of Mr. François Luchaire, Professor at the University of Paris I, to sit as judge ad hoc; and by a letter of 18 March 1985, the Co-Agent of Mali notified his Government’s choice of Mr. Georges Abi-Saab, Professor at the Graduate Institute of International Studies, Geneva, to sit as judge ad hoc.
6. The Parties, duly consulted by the President on 14 March 1985 concerning the composition of the Chamber, expressed their wish for the formation of a Chamber of five Members, two of whom would be judges ad hoc chosen by them.
14. At the hearing held on the morning of 26 June 1986 Burkina Faso, which had already completed its last round of oral argument, requested the Chamber to enable it to comment briefly upon the statement made the same day by a member of the Malian delegation. The Chamber decided to accede to that request and to authorize the Republic of Mali to comment in turn upon the observations to be made at that hearing by Burkina Faso, either orally, before the closure of the oral proceedings or in writing within the ensuing 48 hours. The Republic of Mali conveyed to the Registry, within the prescribed time-limit, a written reply to the observations of the other Party, to which that reply was immediately communicated.

15. During the proceedings, the following Submissions were presented by the Parties:

On behalf of Burkina Faso,
in the Memorial and Counter-Memorial and at the hearing of 24 June 1986 (afternoon):

I. Burkina Faso respectfully requests the Chamber of the International Court of Justice, formed in accordance with the Special Agreement of 16 September 1983, to adjudge and declare that the course of the frontier between Burkina Faso and the Republic of Mali is constituted by the following line:

1. West of the point with the geographical co-ordinates:
   - longitude 0° 40' 47" W
   - latitude 15° 00' 03" N

the line is as shown on the 1:200,000 scale map of the French Institut géographique national (1960 edition), the villages of Dioulouna, Oukoulou, Agouloarou and Koubo being located in Burkinabe territory.

2. East of the point with the geographical co-ordinates:
   - longitude 0° 40' 47" W
   - latitude 15° 00' 03" N

the line corresponds to the information given in letter 191 CM2 of

Frontier Dispute (Judgment)
— the Selba baobab,
— the Tondigaria,
— Fourfaré Tiaga,
— Fourfaré Wândé,
— Gariol,
— Gountouré Kiri,
— a point to the east of the pool of Kétouaire, having the following geographical co-ordinates:

  longitude 0° 44' 47" W
  latitude 14° 56' 52" N
— the pool of Raf Naman,
and from that point follows the marigot passing, in particular, through the pool of Fadar-Fadar, the pool of In Aabo, the pool of Tin Akoff and the pool of In Tagoon, terminating at the Kabia ford.

2. To refrain from determining the tripoint between the Republic of Mali, Burkina Faso and Niger.
3. To nominate, in its Judgment, three experts to assist the Parties in the demarcation operation (Art. IV, para. 3, of the Special Agreement of 16 September 1983)."

* * *

16. The task entrusted to the Chamber in this case by the Special Agreement concluded between the two Parties on 16 September 1983 is that of indicating the line of the frontier between Burkina Faso and the Republic of Mali (hereinafter called "Mali") in the disputed area, as defined in that Special Agreement. The two States have a common frontier of 1,380 kilometres according to Burkina Faso and 1,297 kilometres according to Mali, of which almost 900 kilometres according to Burkina Faso and almost 1,022 kilometres according to Mali have been successfully delimited by agreement between the Parties. The disputed area is defined by the Special Agreement as "a band of territory extending from the sector Koro (Mali) Djibo (Upper Volta) up to and including the region of the Béli". The Béli is the largest of the temporary watercourses in the region. It originates in the eastern slopes of the Hombori mountains and flows to the south-east before joining the Niger river outside the disputed area. In the dry season it consists of a chain of 11 pools. In their submissions to the Chamber, each of the Parties indicated the frontier line which it considered well-founded in law (these lines and the topography of the region are shown on sketch-map No. 1); according to either contention, the disputed frontier runs in an approximately west-east direction between Mali to the north and Burkina Faso to the south. The end-point of the frontier to the east, the position of which has not been determined, is also a point on the frontier between Niger and the two disputant States and is, accord-

ingly, a tripoint. By the Niamey Protocol of 23 June 1964 between Upper Volta and Niger, those two States agreed that, for the purpose of delimiting their common frontier, they would have recourse to certain documents which were mentioned in the Protocol and treated as basic documents. However, the two States have not as yet carried out any delimitation operations. As for the frontier between Mali and Niger, it was decided at a recent meeting between representatives of those two States that bilateral negotiations would be set in train with a view to determining it, but no agreement has at present been concluded on the subject. In the present case, Mali maintains, for reasons to be considered below, that the Chamber must refrain from taking any decision on the position of the above-mentioned tripoint. Burkina Faso, on the other hand, maintains that such a decision is necessary as an integral part of the task entrusted to the Chamber.

* * *

17. The Parties have argued at length over how the present dispute is to be classified in terms of a distinction sometimes made by legal writers between "frontier disputes" or "delimitation disputes", and "disputes as to attribution of territory". According to this distinction, the former refer to delimitation operations affecting what has been described as "a portion of land which is not geographically autonomous" whereas the object of the latter is the attribution of sovereignty over the whole of a geographical entity. Both Parties seem ultimately to have accepted that the present dispute belongs rather to the category of delimitation disputes, even though they fail to agree on the conclusions to be drawn from this. In fact, however, in the great majority of cases, including this one, the distinction outlined above is not so much a difference in kind but rather a difference of degree as to the way the operation in question is carried out. The effect of any delimitation, no matter how small the disputed area crossed by the line, is an apportionment of the areas of land lying on either side of the line. In the present case, it may be noted that the Special Agreement, in Article I, refers not merely to a line to be drawn, but to a disputed "area", which it defines as consisting of a "band" of territory encompassing the "region" of the Béli. Moreover, the effect of any judicial decision rendered either in a dispute as to attribution of territory or in a delimitation dispute, is necessarily to establish a frontier. It is not without interest that certain recent codifying conventions have used formulae such as a treaty which "establishes a boundary" or a "boundary established by a treaty" to cover both delimitation treaties and treaties ceding or attributing territory (cf. Vienna Convention on the Law of Treaties, Art. 62; Vienna Convention on Succession of States in respect of Treaties, Art. 11). In both cases, a clarification is made of a given legal situation with declaratory effect from the date of the legal title upheld by the court. This clarification is itself a new element: it was because the parties wished to see that element intro-
18. The Chamber also feels obliged to dispel a misunderstanding which might arise from this distinction between “delimitation disputes” and “disputes as to attribution of territory”. One of the effects of this distinction is to contrast “legal titles” and “effectuities”. In this context, the term “legal title” appears to denote documentary evidence alone. It is hardly necessary to recall that this is not the only accepted meaning of the word “title”. Indeed, the Parties have used this word in different senses. In fact, the concept of title may also, and more generally, comprehend both any evidence which may establish the existence of a right, and the actual source of that right. The Chamber will rule at the appropriate juncture on the relevance of the evidence produced by the Parties for the purpose of establishing their respective rights in this case. It will now turn to the question of the rules applicable to the case; in so doing, it will, inter alia, ascertain the source of the rights claimed by the Parties.

19. The characteristic feature of the legal context of the frontier determination to be undertaken by the Chamber is that both States involved derive their existence from the process of decolonization which has been unfolding in Africa during the past 30 years. Their territories, and that of Niger, were formerly part of the French colonies which were grouped together under the name of French West Africa (AOF). Considering only the situation which prevailed immediately before the accession to independence of the two States, and disregarding previous administrative changes, it can be said that Burkina Faso corresponds to the colony of Upper Volta, and the Republic of Mali to the colony of Sudan (formerly French Sudan). It is to be supposed that the Parties drew inspiration from the principle expressly stated in the well-known resolution (AGH/Res. 16 (I)), adopted at the first session of the Conference of African Heads of State and Government, meeting in Cairo in 1964, whereby the Conference solemnly declared that all member States of the Organization of African Unity “solemnly . . . pledge themselves to respect the frontiers existing on their achievement of national independence”, inasmuch as, in the preamble to their Special Agreement, they stated that the settlement of the dispute by the Chamber must be “based in particular on respect for the principle of the intangibility of frontiers inherited from colonization”. It is clear from this text, and from the pleadings and oral arguments of the Parties, that they are in agreement as regards both the applicable law and the starting-point for the legal reasoning which is to lead to the determination of the frontier between their territories in the disputed area.

20. Since the two Parties have, as noted above, expressly requested the Chamber to resolve their dispute on the basis, in particular, of the “principle of the intangibility of frontiers inherited from colonization”, the Chamber cannot disregard the principle of uti possidetis juris, the application of which gives rise to this respect for intangibility of frontiers. Although there is no need, for the purposes of the present case, to show that this is a firmly established principle of international law where decolonization is concerned, the Chamber nonetheless wishes to emphasize its general scope, in view of its exceptional importance for the African continent and for the two Parties. In this connection it should be noted that the principle of uti possidetis seems to have been first invoked and applied in Spanish America, inasmuch as this was the continent which first witnessed the phenomenon of decolonization involving the formation of a number of sovereign States on territory formerly belonging to a single metropolitan State. Nevertheless the principle is not a special rule which pertains solely to one specific system of international law. It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power.

21. It was for this reason that, as soon as the phenomenon of decolonization characteristic of the situation in Spanish America in the 19th century subsequently appeared in Africa in the 20th century, the principle of uti possidetis, in the sense described above, fell to be applied. The fact that the new African States have respected the administrative boundaries and frontiers established by the colonial powers must be seen not as a mere practice contributing to the gradual emergence of a principle of customary international law, limited in its impact to the African continent as it had previously been to Spanish America, but as the application in Africa of a rule of general scope.

22. The elements of uti possidetis were latent in the many declarations made by African leaders in the dawn of independence. These declarations confirmed the maintenance of the territorial status quo at the time of independence, and stated the principle of respect both for the frontiers deriving from international agreements, and for those resulting from mere internal administrative divisions. The Charter of the Organization of African Unity did not ignore the principle of uti possidetis, but made only indirect reference to it in Article 3, according to which member States solemnly affirm the principle of respect for the sovereignty and territorial integrity of every State. However, at their first summit conference after the creation of the Organization of African Unity, the African Heads of State, in their Resolution mentioned above (AGH/Res. 16 (I)), adopted in Cairo.
in July 1964, elaborately defined and stressed the principle of *uti possidetis juris* contained only in an implicit sense in the Charter of their organization.

23. There are several different aspects to this principle, in its well-known application in Spanish America. The first aspect, emphasized by the Latin genitive *juris*, is found in the pre-eminence accorded to legal title over effective possession as a basis of sovereignty. Its purpose, at the time of the achievement of independence by the former Spanish colonies of America, was to scotch any designs which non-American colonizing powers might have on regions which had been assigned by the former metropolitan State to one division or another, but which were still uninhabited or unexplored. However, there is more to the principle of *uti possidetis* than that particular aspect. The essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved. Such territorial boundaries might be no more than delimitations between different administrative divisions or colonies all subject to the same sovereign. In that case, the application of the principle of *uti possidetis* resulted in administrative boundaries being transformed into international frontiers in the full sense of the term. This is true both of the States which took shape in the regions of South America which were dependent on the Spanish Crown, and of the States Parties to the present case, which took shape within the vast territories of French West Africa. *Uti possidetis*, as a principle which upgraded former administrative delimitations, established during the colonial period, to international frontiers, is therefore a principle of a general kind which is logically connected with this form of decolonization wherever it occurs.

24. The territorial boundaries which have to be respected may also derive from international frontiers which previously divided a colony of one State from a colony of another, or indeed a colonial territory from the territory of an independent State, or one which was under protectorate, but had retained its international personality. There is no doubt that the obligation to respect pre-existing international frontiers in the event of a State succession derives from a general rule of international law, whether or not the rule is expressed in the formula *uti possidetis*. Hence the numerous solemn affirmations of the intangibility of the frontiers existing at the time of the independence of African States, whether made by senior African statesmen or by organs of the Organization of African Unity itself, are evidently declaratory rather than constitutive: they recognize and confirm an existing principle, and do not seek to consecrate a new principle or the extension to Africa of a rule previously applied only in another continent.

25. However, it may be wondered how the time-hallowed principle has been able to withstand the new approaches to international law as expressed in Africa, where the successive attainment of independence and the emergence of new States have been accompanied by a certain questioning of traditional international law. At first sight this principle conflicts outright with another one, the right of peoples to self-determination. In fact, however, the maintenance of the territorial status quo in Africa is often seen as the wisest course, to preserve what has been achieved by peoples who have struggled for their independence, and to avoid a disruption which would deprive the continent of the gains achieved by much sacrifice. The essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields, has induced African States judiciously to consent to the respecting of colonial frontiers, and to take account of it in the interpretation of the principle of self-determination of peoples.

26. Thus the principle of *uti possidetis* has kept its place among the most important legal principles, despite the apparent contradiction which explained its coexistence alongside the new norms implied. Indeed it was by deliberate choice that African States selected, among all the classic principles, that of *uti possidetis*. This remains an undeniable fact. In the light of the foregoing remarks, it is clear that the applicability of *uti possidetis* in the present case cannot be challenged merely because in 1960, the year when Mali and Burkina Faso achieved independence, the Organization of African Unity which was to proclaim this principle did not yet exist, and the above-mentioned resolution calling for respect for the pre-existing frontiers dates only from 1964.

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27. In their pleadings and oral arguments, the two Parties have advanced conflicting views on the question whether equity can be invoked in the present case. They both agree that no use should be made of the Chamber's power, under Article 38 of the Statute, to decide the case *ex aequo et bono* if they had agreed to this. However, Mali urges that account should be taken of “that form of equity which is inseparable from the application of international law”, which it sees as equivalent to equity *infra legem*. Although it did not object to this concept being resorted to, Burkina Faso considered that it was far from clear what the practical implications would be in this case. It emphasized that in the field of territorial boundary delimitation there is no equivalent to the concept of “equitable principles” so frequently referred to by the law applicable in the delimitation of maritime areas. Mali did not question this statement; it explained that what it had in mind was simply the equity which is a normal part of the due application of law.

28. It is clear that the Chamber cannot decide *ex aequo et bono* in this case. Since the Parties have not entrusted it with the task of carrying out an adjustment of their respective interests, it must also dismiss any possibility of resorting to equity *contra legem*. Nor will the Chamber apply equity *praeter legem*. On the other hand, it will have regard to equity *infra legem*, that is, that form of equity which constitutes a method of interpretation of
the law in force, and is one of its attributes. As the Court has observed: “It is not a matter of finding simply an equitable solution, but an equitable solution derived from the applicable law.” (Fisheries Jurisdiction, I.C.J. Reports 1974 p. 33, para. 78; p. 202, para. 69.) How in practice the Chamber will approach recourse to this kind of equity in the present case will emerge from its application throughout this Judgment of the principles and rules which it finds to be applicable.

* * *

29. The determination of a frontier line between two States is obviously a matter of international law, but the Parties both recognize also that the question has here to be appraised in the light of French colonial law, “droit d’outre-mer.” Since the territories of the two States had been part of French West Africa, the former boundary between them became an international frontier only at the moment when they became independent. The line which the Chamber is required to determine as being that which existed in 1959-1960, was at that time merely the administrative boundary dividing two former French colonies, called territoires d’outre-mer from 1946; as such it had to be defined not according to international law, but according to the French legislation which was applicable to such territoires.

30. One clarification is, however, necessary as concerns the application of French droit d’outre-mer. By becoming independent, a new State acquires sovereignty with the territorial base and boundaries left to it by the colonial power. This is part of the ordinary operation of the machinery of State succession. International law — and consequently the principle of uti possidetis — applies to the new State (as a State) not with retroactive effect, but immediately and from that moment onwards. It applies to the State as it is, i.e., to the “photograph” of the territorial situation then existing. The principle of uti possidetis freezes the territorial title; it stops the clock, but does not put back the hands. Hence international law does not effect any renvoi to the law established by the colonizing State, nor indeed to any legal rule unilaterally established by any State whatever; French law — especially legislation enacted by France for its colonies and territoires d’outre-mer — may play a role not in itself (as if there were a sort of continuum juris, a legal relay between such law and international law), but only as one factual element among others, or as evidence indicative of what has been called the “colonial heritage”, i.e., the “photograph of the territory” at the critical date.

* * *

31. With a view to a proper understanding of what follows, it should be recalled that from the beginning of the century up to the entry into force of the French Constitution of 27 October 1946, the territorial administration of French West Africa was centralized. It was headed by a governor-general, and was divided into colonies; the power to create or abolish these belonged to the executive in Paris. At the head of each colony was a lieutenant-governor. The colonies were themselves made up of basic units called cercles which were administered by commandants de cercle; the creation and abolition of the cercles were the sole prerogative of the governor-general, who decided their overall extent. Each cercle in turn was composed of subdivisions, administered by chefs de subdivision. Finally, the subdivisions comprised cantons, which grouped together a number of villages. The creation and abolition of subdivisions and cantons within any particular cercle came within the jurisdiction of the lieutenant-governor of the colony of which the cercle formed part.

32. For the purpose of determining in broad terms what for each of the two Parties was the colonial heritage to which the uti possidetis was to apply, the origins of the French colonies concerned will be briefly retraced. For this purpose, however, it is unnecessary to go further back in the history of the colonies of French West Africa than 1919. At that time, the present territories of Mali and Burkina Faso both formed part of the colony of Upper Senegal and Niger. By virtue of a decree of the President of the French Republic dated 1 March 1919, the cercles of Gaoua, Bobo-Dioulasso, Dédougou, Ouagadougou, Dori and Fada N’Gourma, which had until then been part of Upper Senegal and Niger, were given the name of French Sudan, and by a decree of 13 October 1922 the Civil Territory of the Niger became an independent colony. The colony of French Sudan (or Sudan) continued to exist as such, or as a territoire d’outre-mer, until 1959 when it became the Sudanese Republic, and then achieved independence, as the Federation of Mali, on 20 June 1960. On the other hand, the decree of 1 March 1919 which had created Upper Volta was rescinded by a decree of 5 September 1932, and the cercles which had comprised Upper Volta were incorporated, in whole or in part, into Niger and into French Sudan or the Ivory Coast. The Chamber refers to paragraph 73 below and to sketch-map No. 2, which shows the distribution of the cercles in the disputed frontier region. Upper Volta was reconstituted in 1947 by the law 47-1707 of 4 September 1947, which rescinded outright the decree of 5 September 1932 that had abolished the colony of Upper Volta, and stated that the boundaries of “the re-established territory of Upper Volta” were to be “those of the former colony of Upper Volta on 5 September 1932”. It was this reconstituted Upper Volta which subsequently obtained independence on 5 August 1960, and took the name of Burkina Faso in 1984.
33. For both Parties, the problem is to ascertain what is the frontier which was inherited from the French administration, that is, the frontier which existed at the moment of independence. However, their views diverge somewhat as to the exact date to be chosen for that purpose. In the opinion of Burkina Faso, the date to be taken into consideration is that of the accession of each Party to independence: 20 June 1960 for Mali and 5 August 1960 for Burkina Faso. In Mali’s opinion, it is necessary to go back to the “last date on which the French colonial authorities participated in the exercise of jurisdiction for administrative organization”, a date which, for the reasons explained in its Memorial, Mali fixes at 30 January 1959 for the Sudanese Republic and 28 February 1959 for Upper Volta. The Parties have however, while holding to their respective contentions as to the legal grounds which warrant the choice of these dates, ultimately admitted that the point has no practical implications for the case. They are requesting the Chamber to ascertain what, in the disputed area, was the frontier between the territoires d’outre-mer of Sudan and of Upper Volta as it existed in 1959-1960. Although it was said on a number of occasions, during the colonial period, that there was no frontier which was fully determined by direct or delegated legislation, the two Parties both agree that when they became independent there was a definite frontier. Both of them also accept that no modification of the frontier took place between January 1959 and August 1960, or has taken place since.

34. The Parties have expounded at length the origins of the frontier dispute which is presently before the Chamber. Since however the line of the frontier has to be defined as it existed in the years 1959-1960, and the Parties agree that no legal validity attaches to any subsequent acts of administration which may have been performed by either of them on the territory of the other, a review of the frontier incidents and the efforts made to bring the dispute to an end would hardly be pertinent. Nevertheless, one Burkinabe argument warrants particular attention. This argument is based on the conduct of the Malian Government during the negotiations which led to agreements being concluded for the delimitation of the 900 or 1,022 kilometres of frontier which are no longer in dispute, and on that Government’s attitude towards the work of a Mediation Commission of the Organization of African Unity which sat in 1975. According to Burkina Faso, Mali accepted as binding the solution to the dispute outlined by that Commission. Since this argument from acquiescence would, if correct, make it unnecessary to endeavour to establish the frontier inherited from the colonial period, it should be dealt with at the outset as a preliminary question.

35. Very soon after achieving independence, the Parties set up bilateral negotiating machinery with a view to resolving their frontier problems. Thus, as early as 29 November 1961, they gave institutional shape to the regular meetings already held during the colonial period between the heads of the frontier districts, by establishing a “mixed commission composed of the chefs de circonscription”. Subsequently, on 25 February 1964, they instituted a “joint commission” comprising for each State a government delegate, a geographer, a topographer and the commandants of the frontier cercles, its task being to make proposals by 15 June 1964 “for the delimitation of the frontier on the basis of the preparatory work of the chefs de circonscription”. This commission was replaced by a “standing joint commission” created on 8 May 1968, which comprised the Ministers of the Interior together with representatives of various ministries of both countries. The task entrusted to this latter body was a much broader one: general co-operation between the two countries. Finally, in the same year, a conference of Ministers of the Interior of both Parties created a “mixed technical commission”, comprising for each State a government representative, a topographer, a geographer and the chefs de circonscription concerned. The task of this commission was “to survey and identify the frontier in accordance with the pre-independence documents held by the Governments of Mali and Upper Volta”. The Parties have produced a number of records and documents emanating from these bodies.

36. Following an armed conflict between the two countries which broke out on 14 December 1974, appeals were made for conciliation, notably by the head of State of Somalia, then President of the Organization of African Unity, and by the President of Senegal. On 26 December 1974, the Presidents of Upper Volta, Mali and Togo met at Lomé and decided to set up a Mediation Commission composed of Togo, Niger, Guinea and Senegal. One of the tasks of the Commission as stated in the Lomé communiqué was that of “seeking a solution to the frontier dispute on the basis of existing legal documents”. The Mediation Commission met on 6 and 7 January 1975 and set up a Military Sub-Commission and a Legal Sub-Commission; the latter’s role included “drawing up an initial draft proposal for submission to the Commission, comprising ... an outline solution...”. On 11 April 1975, the head of State of Mali granted an interview to the France-Presse agency, during which he stated that:

“Mali extends over 1,240,000 square kilometres, and we cannot justify fighting for a scrap of territory 150 kilometres long. Even if the Organization of African Unity Commission decides objectively that the frontier line passes through Bamako, my Government will comply with the decision.”

37. The Legal Sub-Commission presented its report to the Mediation Commission on 14 June 1975, suggesting “that the Parties should accept the following...”. Paragraph A refers to the implementation of the prin
principle of the intangibility of colonial frontiers, and to the use for that purpose of texts and maps. In paragraph B, the Sub-Commission presents specific proposals for the frontier line. On 17 and 18 June 1975, the Mediation Commission met at Lomé. With the participation of the Presidents of Upper Volta and Mali, the Commission adopted a final communiqué stating that:

“Upper Volta and Mali undertake to bring their dispute to an end on the basis of the recommendations of the Mediation Commission.

The two Parties agree to the establishment by the Chairman of the Mediation Commission of a neutral technical committee . . . the task of this committee being to determine the location of the villages of Dionouga, Diolouna, Oukoulou and Koubo, to reconnoitre the frontier and to make proposals for its materialization to the Commission.”

On 10 July 1975, the heads of State of both Parties met again at Conakry, at the invitation of the President of the Republic of Guinea. In a joint declaration published on this occasion, the Parties

“welcome the efforts made and the results achieved by the Mediation Commission of the Organization of African Unity, and affirm their common intention to do their utmost to transcend [dépasser] these results, especially by facilitating the delimitation of the frontier between the two States in order to place the final seal on their reconciliation”.

The neutral technical committee which had been spoken of at the meeting of 17 and 18 June 1975 was in fact set up by the chairman of the Mediation Commission, but was unable to fulfil its function. To enable the committee to accomplish it, the proposal had been made by a systematic survey should be made of the frontier zone on the basis of aerial photographs, a task to be performed by the French Institut géographique national. Mali refused to grant the necessary authorizations for overflights of its territory, and despite further contacts between the Parties, this was how matters remained until the conclusion of the Special Agreement by which the case was brought before the Court.

38. The two Parties agree, in the first place, that the Mediation Commission of the Organization of African Unity was not a jurisdictional body, and lacked the power to take legally binding decisions; in the second place, that the Commission never actually completed its work, since it took no steps formally to take note of the reports of its subcommissions, and submitted no definitive overall solution for consideration by the Parties in the context of its mediating functions. However, Burkina Faso argues that there was acquiescence by Mali in the solutions outlined in this context, on two distinct grounds. On the basis of the facts described above it argues, firstly, that the final communiqué of the Lomé summit conference of 27 December 1974, setting up the Mediation Commission, has to be treated as a genuine international agreement binding upon the States parties. Further, while admitting that the Mediation Commission was not empowered to render binding decisions, Burkina Faso alleges that the report of the Legal Sub-Commission, endorsed by the plenary meeting of Heads of State or Government held at Lomé on 17 and 18 June 1975, became binding for Mali because Mali had proclaimed itself already bound by the report which might have been made by the Mediation Commission, by virtue of the declaration made by the President of Mali on 11 April 1975. The effect of the Lomé final communiqué of 18 June 1975, which according to Burkina Faso emanated from the enlarged Mediation Commission and is also an international agreement which the Parties are bound to observe, was to reinforce Mali’s obligations in the matter. Mali challenges this interpretation of the statement of its President of 11 April 1975; it observes, in the first place, that the Commission would have to have had a power of decision, which was not legally the case, and in the second place, that the comment by Mali’s head of State was merely “a witticism of the kind regularly uttered at press conferences”, which implied “no more than that Mali is anxious to consider the Commission’s recommendations with goodwill and in good faith”. Mali also challenges Burkina Faso’s interpretation of the final communiqué of 18 June 1975. In Mali’s view, the Mediation Commission did not, strictly speaking, make any recommendation, and the heads of State did not accept any predetermined line; on the contrary, in entrusting a neutral technical committee with the task of determining the position of certain villages, reconnoitring the frontier, and making proposals to the Commission for its materialization, they instructed that committee to produce new proposals, and this, in Mali’s opinion, surely indicates that the proposals of the subcommissions were not final ones.

39. The statement of Mali’s Head of State on 11 April 1975 was not made during negotiations or talks between the two Parties; at most, it took the form of a unilateral act by the Government of Mali. Such declarations “concerning legal or factual situations” may indeed “have the effect of creating legal obligations” for the State on whose behalf they are made, as the Court observed in the Nuclear Tests cases (I.C.J. Reports 1974, pp. 267, 472). But the Court also made clear in those cases that it is only “when it is the intention of the State making the declaration that it should become bound according to its terms” that “that intention confers on the declaration the character of a legal undertaking” (ibid.). Thus it all depends on the intention of the State in question, and the Court emphasized that it is for the Court to “form its own view of the meaning and scope intended by the author of a unilateral declaration which may create a legal obligation” (ibid., pp. 269, 474). In the case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), the Court examined a communication transmitted by the Junta of National Reconstruction of Nicaragua to the Organization of American
States, in which the Junta listed its objectives; but the Court was unable to find anything in that communication “from which it can be inferred that any legal undertaking was intended to exist” (I.C.J. Reports 1986, p. 132, para. 261). The Chamber considers that it has a duty to show even greater caution when it is a question of a unilateral declaration not directed to any particular recipient.

40. In order to assess the intentions of the author of a unilateral act, account must be taken of all the factual circumstances in which the act occurred. For example, in the Nuclear Tests cases, the Court took the view that since the applicant States were not the only ones concerned at the possible continuance of atmospheric testing by the French Government, that Government’s unilateral declarations had “conveyed to the world at large, including the Applicant, its intention effectively to terminate these tests” (I.C.J. Reports 1974, p. 269, para. 51; p. 474, para. 53). In the particular circumstances of those cases, the French Government could not express an intention to be bound otherwise than by unilateral declarations. It is difficult to see how it could have accepted the terms of a negotiated solution with each of the applicants without thereby jeopardizing its contention that its conduct was lawful. The circumstances of the present case are radically different. Here, there was nothing to hinder the Parties from manifesting an intention to accept the binding character of the conclusions of the Organization of African Unity Mediation Commission by the normal method: a formal agreement on the basis of reciprocity. Since no agreement of this kind was concluded between the Parties, the Chamber finds that there are no grounds to interpret the declaration made by Mali’s head of State on 11 April 1975 as a unilateral act with legal implications in regard to the present case.

41. The second argument advanced by Burkina Faso to establish acquiescence by Mali concerns the principles of delimitation approved by the Legal Sub-Commission of the Organization of African Unity Mediation Commission. In its report, the Sub-Commission did not refer solely to the principle of the intangibility of colonial frontiers; it also defined, for the purpose of applying it, the appropriate method of appraising the respective weight of the evidence produced—specifically, the texts on the one hand and the maps on the other—and of contrasting or reconciling these where necessary. Burkina Faso considers that the principles adopted by the Sub-Commission in this matter were the same as those which it contends should be applied to the delimitation of the whole of its frontier with Mali. It also claims that Mali agreed to these principles being taken into consideration for the purpose of delimiting the greater part of the common frontier. It concludes therefore that Mali may not reject their application to the determination of the frontier in the disputed area, in view of the principle that a State cannot disclaim in a particular instance rules and principles to which it has acquiesced in comparable circum-
stances, when their operation becomes disadvantageous to itself. This latter principle, according to Burkina Faso, must be combined with that of the unity of the frontier line. It thus argues that the delimitation of the frontier in the disputed area has to be approached as a whole; it takes the view that unless there are compelling reasons to the contrary, the principles of delimitation and the evidence already recognized by the Parties as relevant for the purposes of drawing their common frontier over approximately 1,000 kilometres, do not cease to be relevant in delimiting the remaining 300 kilometres. Mali however states that it could not accept the report of the Legal Sub-Commission, on its merits, as an instrument potentially offering a reasonable solution, even on a compromise basis, and claims that it never did accept it. Referring to the principles imputed by Burkina Faso to the Sub-Commission, Mali rejects the position of the other Party particularly on the questions of the importance of the maps and conduct evincing effectivity.

42. It must be recalled in this connection that the Chamber, whose judgment “shall be considered as rendered by the Court” (Statute, Art. 27), is bound to settle the present dispute “in accordance with international law” (Art. 38). Accordingly, it is on the basis of international law that the Chamber will have to fix the frontier line, weighing for that purpose the legal force of the respective evidence submitted by the Parties for its appraisal. It is therefore of little significance whether Mali adopted a particular approach, either in the course of negotiations on frontier questions, or with respect to the conclusions of the Legal Sub-Commission of the Organization of African Unity Mediation Commission, and whether that approach may or may not be construed to reflect a specific position, or indeed to signify acquiescence, towards the principles and rules, including those which determine the respective weight of the various kinds of evidence applicable to the dispute. If these principles and rules are applicable as elements of law in the present case, they remain so whatever Mali’s attitude. If the reverse is true, the Chamber could only take account of them if the two Parties had requested it to do so, or had given such principles and rules a special place in the Special Agreement, as “rules expressly recognized by the contesting States” (Art. 38, para. 1 (a), of the Statute).

“While the Court is . . . bound to have regard to all the legal sources specified in Article 38, paragraph 1, of the Statute . . . it is also bound, in accordance with paragraph 1 (a), of that Article, to apply the provisions of the Special Agreement.” (I.C.J. Reports 1982, p. 37, para. 23.)

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43. The reason why the argument from the notion of acquiescence, as set out above, has been dealt with by the Chamber at an initial stage of its Judgment is that it is in the nature of a preliminary question. If the
Chamber had upheld the contention that the report of the Legal Sub-Commission of the Mediation Commission had become binding, it would only have had to endorse it. Both the Parties have however resorted in other connections to arguments bearing upon acquiescence, estoppel or the conduct of the Parties. Mali has referred to “the inconsistency shown by Upper Volta and thereafter by Burkina Faso” towards a regulation (Order 2728 AP of 27 November 1935) on which, as will be seen later, Mali rests its claims in regard to the western part of the disputed area. For its part, Burkina Faso argues in connection with a projected definition of the boundary between the colonies of French Sudan and Niger in 1935, said to have been accepted by the Governor of Sudan as a description of the existing boundary, that “what was accepted by French Sudan is therefore binding upon Mali by virtue of State succession”. However, the Chamber considers that these questions should be reserved and examined, if necessary, when the Chamber turns to its examination of the texts in question.

* * *

44. Before turning to the various kinds of evidence invoked by the Parties to support their claims in regard to the line of the frontier, the Chamber must dispose of a further preliminary question, namely: what are its powers in the matter of fixing the tripoint which forms the end-point of the frontier between the Parties. In its Memorial, Mali observes that the tripoint Niger/Mali/Burkina Faso cannot be determined by the two Parties without Niger’s agreement, nor can it be determined by the Chamber, which may not affect the rights of a third State not a party to the proceedings. According to Mali, the eastern extremity of the frontier in the disputed area must be determined in such a way as not to infringe these rights, and this could only be done if the delimitation were to terminate at a given point which is not the end-point. Burkina Faso, on the other hand, considers that the Chamber must perform the whole of the task entrusted to it by the Special Agreement, and must for that purpose decide the position of the tripoint. In its view, if the Chamber discharges its task in this manner, it would not infringe the rights of Niger, since the sole object of its decision would be to determine the line of the frontier between the Parties. Burkina Faso believes that although the meeting-point between that frontier and the frontier of Niger is a tripoint, the determination of that point will be a consequence and not the object of the Chamber’s judgment. Mali rejects the argument that the Special Agreement requires the Chamber to determine the tripoint, pointing out that the text refers to a “disputed area” consisting of “a band of territory extending from the sector Koro (Mali) Djibo (Upper Volta) up to and including the region of the Béli”. According to Mali, the text is silent as to the actual point where the Chamber’s line is to begin or end; and the Chamber cannot determine the tripoint without simultaneously deciding the question of Niger’s rights in its relation to each of the Parties. Burkina Faso replies by, inter alia, drawing the Chamber’s attention to the preamble to the Special Agreement, according to which the Parties are seeking “the definitive delimitation and demarcation of their common frontier”. While holding to its formal submission, which mentions the “tripoint”, Burkina Faso nevertheless concedes that it might be preferable for the judgment to refer to “the eastern extremity of the common frontier” between the Parties, rather than to the tripoint.

45. In the Chamber’s opinion, it should first be recalled that there is a distinction between the question of the jurisdiction conferred upon it by the Special Agreement concluded between the Parties, and the question whether “the adjudication sought by the Applicant is one which the Court’s judicial function permits it to give”, a question considered by the Court in the case concerning the Northern Cameroons, among others (I.C.J. Reports 1963, p. 31). As it also stated in that case, “even if the Court, when seised, finds that it has jurisdiction, the Court is not compelled in every case to exercise that jurisdiction” (ibid., p. 29). But in the absence of “considerations which would lead it to decline to give judgment” (I.C.J. Reports 1974, p. 271, para. 58), the Court is bound to fulfil the functions assigned to it by its Statute. Moreover, the Court has recently confirmed the principle that it “must not exceed the jurisdiction conferred upon it by the Parties, but it must also exercise that jurisdiction to its full extent” (Continental Shelf (Libyan Arab Jamahiriya/Malta), I.C.J. Reports 1985, p. 23). In the present case, the Chamber finds it to be clear from the wording of the Special Agreement — including its preamble — that the common intention of the Parties was that the Chamber should indicate the frontier line between their respective territories throughout the whole of the “disputed area”, and that this area was for them the whole of the frontier not yet delimited by joint agreement.

46. The Chamber also considers that its jurisdiction is not restricted simply because the end-point of the frontier lies on the frontier of a third State not a party to the proceedings. The rights of the neighbouring State, Niger, are in any event safeguarded by the operation of Article 59 of the Statute of the Court, which provides that “The decision of the Court has no binding force except between the parties and in respect of that particular case”. The Parties could at any time have concluded an agreement for the delimitation of their frontier, according to whatever perception they might have had of it, and an agreement of this kind, although legally binding upon them by virtue of the principle pacta sunt servanda, would not be opposable to Niger. A judicial decision, which “is simply an alternative to the direct and friendly settlement” of the dispute between the Parties (P.C.I.J., Series A, No. 22, p. 13), merely substitutes for the solution stemming directly from their shared intention, the solution arrived at by a court under the mandate which they have given it. In both instances, the solution only has legal and binding effect as between the States which have accepted it, either directly or as a consequence of having accepted the
frontier dispute (judgment) 578

frontier dispute (judgment) 579

court's jurisdiction to decide the case. Accordingly, on the supposition that
the Chamber's judgment specifies a point which it finds to be the east-
cernmost point of the frontier, there would be nothing to prevent Niger
from claiming rights, vis-à-vis either of the Parties, to territories lying west
of the point identified by the Chamber.

47. Admittedly, in the case of the Continental Shelf (Libyan Arab Jamah-
hiriya/Malta), the Court confined its decision to a certain geographical
area because, as it explained,

"the Court has not been endowed with jurisdiction to determine what
principles and rules govern delimitations with third States, or whether
the claims of the Parties outside that area pertain to the claims
of those third States in the region" (I.C.J. Reports 1985, p. 26,
para. 21).

But the process by which a court determines the line of a land boundary
between two States can be clearly distinguished from the process by which
it identifies the principles and rules applicable to the delimitation of the
continental shelf. The legal considerations which have to be taken into
account in determining the location of the land boundary between parties
are in no way dependent on the position of the boundary between the
territory of either of those parties and the territory of a third State, even
where, as in the present case, the rights in question for all three States
derive from one and the same predecessor State. On the other hand, in
continental shelf delimitations, an agreement between the parties which is
perfectly valid and binding on the treaty level may, when the relations
between the parties and a third State are taken into consideration, prove to
be contrary to the rules of international law governing the continental shelf
(see North Sea Continental Shelf; I.C.J. Reports 1969, p. 20, para. 14;
pp. 27-28, paras. 35-36). It follows that a court dealing with a request for
the delimitation of a continental shelf must decline, even if so authorized
by the disputant parties, to rule upon rights relating to areas in which third
States have such claims as may contradict the legal considerations —
especially in regard to equitable principles — which would have formed the
basis of its decision.

48. At most, the Chamber should consider whether, in this case, con-
siderations related to the need to safeguard the interests of the third State
concerned require it to refrain from exercising its jurisdiction to determine
the whole course of the line. In this regard, the Chamber is not unmindful
of the fact that Niger and Burkina Faso agreed by the Niamey Protocol of
23 June 1964, to "treat as basic documents for the determination of the
frontier" between them a general Order issued by the Governor-General of
French West Africa on 31 August 1927, an erratum to that Order dated
5 October 1927 and a 1:200,000 scale map of the Institut géographique
national from the year 1960, these being the same documents as those
invoked by Burkina Faso in support of its contention regarding the loca-
tion of the end-point of the frontier with Mali. Pointing to this fact,
Burkina Faso infers that if this point were fixed according to the infor-
mation contained in these documents, there would be no infringement of
Niger's rights. The Chamber cannot share this view. From the mere fact
that the same documents are used as the starting-point for the Chamber's
reasoning and for the negotiations between Burkina Faso and Niger, it
cannot be inferred that the practical conclusions reached in both opera-
tions, regarding the location of the end-point of the frontier between
Burkina Faso and Mali, would necessarily be the same. It is clear that the
interpretation given by the Chamber, for the purposes of this case, of the
1927 Order and its erratum will not be opposable to Niger, which has not
participated in the proceedings and consequently has been unable to state
its views. Mali further claims, for reasons to be examined later, that the
Order of 1927 was invalidated by a factual error and is therefore inap-
licable. This argument, the correctness or otherwise of which has to be
decided by the Chamber, does not at first sight appear to have been put
forward in the context of the Niamey Protocol; but this is again a matter
outside the jurisdiction of the Chamber, which has not been called upon by
the parties to that Protocol to interpret it.

49. The fact is, as the Parties seem to have realized towards the end of
the proceedings, that the question has been wrongly defined. The Chamber
is in fact required, not to fix a tripoint, which would necessitate the consent
of all the States concerned, but to ascertain, in the light of the evidence
which the Parties have made available to it, how far the frontier which they
inherited from the colonial power extends. Certainly such a finding
implies, as a logical corollary, both that the territory of a third State lies
beyond the end-point, and that the Parties have exclusive sovereign rights
up to that point. However, this is no more than a twofold presumption
which underlies any boundary situation. This presumption remains in
principle irrefutable in the judicial context of a given case, in the sense
that neither of the disputant parties, having contended that it possesses a
common frontier with the other as far as a specific point, can change its
position to rely on the alleged existence of sovereignty pertaining to a third
State; but this presumption does not thereby create a ground of opposa-
bility outside that context and against the third State. Indeed, this is the
whole point of the above-quoted Article 59 of the Statute. It is true that in
a given case it may be clear from the record that the legal interests of a third
State "would not only be affected by a decision, but would form the very
subject-matter of the decision" (Monetary Gold Removed from Rome in
1943, I.C.J. Reports 1954, p. 32) so that the Court has to use its power "to
refuse to exercise its jurisdiction" (I.C.J. Reports 1984, p. 431, para. 88).
However, this is not the case here.

50. The Chamber therefore concludes that it has a duty to decide the
whole of the petitum entrusted to it; that is, to indicate the line of the
frontier between the Parties over the entire length of the disputed area. In
so doing, it will define the location of the end-point of the frontier in the
east, the point where this frontier ceases to divide the territories of Burkina

28
Faso and Mali; but, as explained above, this will not amount to a decision by the Chamber that this is a tripoint which affects Niger. In accordance with Article 59 of the Statute, this Judgment will also not be opposable to Niger as regards the course of that country’s frontiers.

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51. Among the evidence cited by the Parties in the present case, the basic document is the French law 47-1707 of 4 September 1947 “for the re-establishment of the territory of Upper Volta”. The decision to abolish the colony of Upper Volta had been made in the form of a decree. The reason why a law was necessary to reverse that decision was because, under Article 86 of the Constitution of the French Republic of 1946, only the French Parliament could then determine the extent, and accordingly the boundaries, of a territoire d’outre-mer. As noted above, the 1947 law provided (Art. 2) that the boundaries of the territory were to be “those of the former colony of Upper Volta on 5 September 1932”; Article 3 also provided that “the territorial boundaries defined in Article 2 may be modified following consultation with the local assemblies concerned”. As far as the disputed area is concerned, no modifications were made under this provision, so that the boundaries of Upper Volta in that area at the time of its accession to independence in 1960 remained those which had existed on 5 September 1932. However, neither the legislative and regulatory texts, nor the relevant administrative documents, contain any complete description of the course of the boundary between French Sudan and Upper Volta during the two periods when these colonies co-existed, i.e., between 1919 and 1932, and between 1947 and 1960. The principal texts of this kind which the Parties have produced to the Chamber are limited in scope, and the legal significance or the interpretation of most of these are matters of dispute between the Parties.

52. Apart from the above-mentioned law of 4 September 1947, the most important documents in question are the following (in chronological order):

- the decree of 1 March 1919, already mentioned, which created the colony of Upper Volta;
- an Order issued by the Governor-General of French West Africa on 31 December 1922 “for the reorganization of the region of Timbuktu” (French Sudan). This Order provided that “The cercle of Gao ... is delimited ... To the west by a line beginning at Saleah on the Niger ... and passing through En Amaka, Tinamassari, the pools of Oussodia Mersi and In Aabo, and, from that point, the northern boundary of Upper Volta.”

The Parties both conclude from this text that the boundary which existed between Sudan and Upper Volta in 1932 ran past the pool of In Aabo, but disagree on the question whether the line intersected the pool or was merely tangential to it;

- a general Order issued by the Governor-General ad interim of French West Africa on 31 August 1927 “fixing the boundaries of the colonies of Upper Volta and Niger”, modified by an “erratum” of 5 October 1927, published in the Journal officiel of French West Africa on 15 October 1927. Admittedly this Order, as its text makes clear, dealt with the frontier between Upper Volta and Niger, and not the frontier between Upper Volta and French Sudan. But the two Parties recognize that this text, unless shown to be invalidated by error as Mali claims, is relevant for the purposes of the present case, since the starting-point of the frontier line between Upper Volta and Niger was also the end-point of the frontier between Upper Volta and French Sudan and of the frontier between French Sudan and Niger, that is, the tripoint mentioned above;

- the decree of 5 September 1932, already mentioned, for the abolition of the colony of Upper Volta;
- an exchange of letters which took place in 1935 between the Governor-General of French West Africa and the Lieutenant-Governors of French Sudan and Niger (letter 191 CM2 of 19 February 1935 from the Governor-General to the Lieutenant-Governors; a reply by the Lieutenant-Governor of French Sudan dated 3 June 1935). It may be noted in passing that letter 191 CM2 is the only available text which mentions a point defined in terms of co-ordinates of latitude and longitude: the point 1° 24' 15" W, 14° 43' 45" N. For the sake of easier reference in the passages to follow, this point will be called “point P”;
- an Order (2728 AP) “for the delimitation of the cercles of Bafoulabé, Bamako and Mopti (French Sudan)”, issued on 27 November 1935 by the Governor-General ad interim of French West Africa. On that date, it will be remembered, Upper Volta no longer existed, since the territories which formerly comprised it had been distributed among French Sudan, Niger and the Ivory Coast. The cercle of Mopti, which was Sudanese at that time and is now Malian, bordered upon the cercle of Ouahigouya, which was also a Sudanese unit at the time, but subsequently became Voltaan again (from 1947 onwards) and is now part of Burkina Faso. Most of the boundary between these two cercles was again to form the boundary between the territoires d’outre-mer of Upper Volta and Sudan. According to Article 1 of the Order of 27 November 1935, the cercle of Mopti was bounded on the east by “a line running markedly northeast, leaving to the cercle of Mopti the villages of Yoro, Diaoulouma, Ouakoulo, Aqoulouro, Koubo ...”. A similar form of words is used in an Order of 2 August 1943 for the reorganization of the cercle of Mopti; it is not known whether this Order was ever published. The Parties do not agree upon the legal effects to be attributed to this provision. They are at odds as to whether the line indicated in the text, in “leaving” the villages in question to the cercle of
Mopti, actually gave to that cercle villages which previously belonged to another cercle, or whether the definition of this line rather implied that these villages already belonged to the cercle of Mopti.

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53. Apart from the regulative or administrative texts referred to above, the Parties have produced an abundant and varied collection of cartographic materials, consisting of a series of maps and sketch-maps differing as to date, origin, technical standard and level of accuracy. They have also, both in their written pleadings and in their oral arguments, discussed in considerable detail the theoretical question of the probative force of the maps. During the proceedings the question of the legal force to be attributed to these various elements, and the respective priority to be assigned to them, was debated at length. Both Parties agree that the title which is accorded pre-eminence in the colonial system is the legislative and regulative title. Mali takes the view that the reliability of "other evidence", including the maps and the conduct of administrative authorities, has to be gauged against a particular set of criteria. For its part, Burkina Faso accepts the primacy of instruments over maps, but considers that the title may be either textual or cartographical.

54. At the present stage of its reasoning the Chamber can confine itself to the statement of a principle. Whether in frontier delimitations or in international territorial conflicts, maps merely constitute information which varies in accuracy from case to case; of themselves, and by virtue solely of their existence, they cannot constitute a territorial title, that is, a document endowed by international law with intrinsic legal force for the purpose of establishing territorial rights. Of course, in some cases maps may acquire such legal force, but where this is so the legal force does not arise solely from their intrinsic merits: it is because such maps fall into the category of physical expressions of the will of the State or States concerned. This is the case, for example, when maps are annexed to an official text of which they form an integral part. Except in this clearly defined case, maps are only extrinsic evidence of varying reliability or unreliability which may be used, along with other evidence of a circumstantial kind, to establish or reconstitute the real facts.

55. The actual weight to be attributed to maps as evidence depends on a range of considerations. Some of these relate to the technical reliability of the maps. This has considerably increased, owing particularly to the progress achieved by aerial and satellite photography since the 1950s. But the only result is a more faithful rendering of nature by the map, and an increasingly accurate match between the two. Information derived from human intervention, such as the names of places and of geographical features (the toponymy) and the depiction of frontiers and other political boundaries, does not thereby become more reliable. Of course, the reliability of the toponymic information has also increased, although to a lesser degree, owing to verification on the ground; but in the opinion of cartographers, errors are still common in the representation of frontiers, especially when these are shown in border areas to which access is difficult.

56. Other considerations which determine the weight of maps as evidence relate to the neutrality of their sources towards the dispute in question and the parties to that dispute. Since relatively distant times, judicial decisions have treated maps with a considerable degree of caution: less so in more recent decisions, at least as regards the technical reliability of maps. But even where the guarantees described above are present, maps can still have no greater legal value than that of corroborative evidence endorsing a conclusion at which a court has arrived by other means unconnected with the maps. In consequence, except when the maps are in the category of a physical expression of the will of the State, they cannot in themselves alone be treated as evidence of a frontier, since in that event they would form an irrebuttable presumption, tantamount in fact to legal title. The only value they possess is as evidence of an auxiliary or confirmatory kind, and this also means that they cannot be given the character of a rebuttable or juris tantum presumption such as to effect a reversal of the onus of proof.

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57. The Chamber now turns to the maps produced in this case. Not a single map available to the Chamber can reliably be said to reflect the intentions of the colonial administration expressed in the relevant texts concerning the disputed frontier. The law of 4 September 1947 "for the re-establishment of the territory of Upper Volta" made no reference to any map; all it contained was a reference in general terms to the boundaries "of the former colony . . . on 5 September 1932". Neither of the two Parties has been able to identify the map, if there was one, which was used by the French lawmakers in 1947 in order to obtain a clearer picture of those boundaries. As regards Order 2336 of 1927 and its erratum, Mali has produced a map bearing the inscription "New frontier of Upper Volta and Niger (according to the erratum of 5 October 1927 to the Order dated 31 August 1927)"; however, the document offers no information as to which official body compiled it or which administrative authority approved the line shown on it. A map was annexed to letter 191 CM2 from the Governor-General of French West Africa dated 19 February 1935, but this map has not been found. Finally, Order 2728 AP of 27 November 1935 defined the boundaries of the cercle of Mopti "as transcribed on the maps annexed" thereto, but here again the Parties have been unable to find the maps in question, and one of them doubts whether they ever existed. Thus
the Chamber is confronted with an unusual situation which does not ease its burden. It has no map available to it which can provide a direct official illustration of the words contained in the four texts already mentioned, which are essential to the case, even though their authors had intended two of these texts to be accompanied by such maps.

58. The cartographic documentation has assumed uncustomed proportions in this case, to the point of creating a dual paradox. On the one hand, the Chamber is faced with a considerable body of maps, sketches and drawings for a region which is nevertheless described as being partly unknown; and, on the other hand, no indisputable frontier line is discernible from this abundance of cartographic materials. To this must be added the somewhat curious fact that, as just explained, whenever there is some question of a map annexed to a regulation or enclosed with an administrative document which the Chamber has to interpret, that is the very map, of all those which the Parties have managed to assemble, which is found to be missing. These circumstances call for special vigilance from the outset when examining the file of maps.

59. Of all the maps produced, two appear to be of special overall significance for the purposes of the case. The Parties have devoted much attention to these, and Burkina Faso has referred expressly to them in its submissions. These are the 1:500,000 scale map of the colonies of French West Africa, 1925 edition, compiled by the Geographical Service of French West Africa at Dakar and printed in Paris by Blondel la Rougery (reconnaissance map; compilation of the Homборi D 30 and Ansongo D 31 sheets); and the 1:200,000 scale map of West Africa, issued by the French Institut géographique national, which was originally published between 1958 and 1960 (Ansongo, In Tillit, Dori, Tera and Djibo sheets).

60. For Burkina Faso the first of these two maps, described hereafter as the “Blondel la Rougery map”, is of special importance because, until 1960, it remained the largest-scale map published by the Geographical Service of the Governorship General of French West Africa. Relying on an administrative circular, 93 CM2 of 4 February 1930, Burkina Faso claims that the territorial authorities had to refer to this map in order to fix or to modify the administrative boundaries and that the colonial officials considered themselves bound by it. The text of circular 93 CM2 of 4 February 1930 has not been filed, and the only information about it which is available to the Chamber is contained in a letter of 11 July 1935, addressed by the Geographical Service of French West Africa to the Director of Political and Administrative Affairs in the office of the Governor-General of French West Africa. With reference to a draft text defining district boundaries, the Geographical Service stated:

“It would be appropriate to seek further information and to request the Lieutenant-Governor of the Sudan to comply with the instruc-

61. As for the IGN map of 1958-1960, the Chamber observes that it depicts a frontier line of which one segment, represented by a continuous series of crosses in the original edition, is represented in subsequent editions by a broken series of crosses. In general this map has enjoyed the approval of both Parties in its depiction of the topography. On the other hand, as regards toponyms, Burkina Faso expresses reservations as to the designation of Mount N’Gouma on this map. Mali does not accept the frontier line shown on this map by a row of small crosses. In other respects, the map is described by Mali as “a model of reliability from the standpoint of topography and toponymy” and, for Burkina Faso, the IGN maps offer guarantees of both technical precision and official authority, since they were compiled by an impartial official body directly connected with the administrative authorities of the period. Among the documents submitted to the Chamber is a note dated 27 January 1975, compiled by the IGN, on the subject of the positioning of the frontiers on the maps. According to that note, the 1:200,000 maps of the Mali/Upper Volta frontier had been surveyed before the two States became independent. The note gives the following explanation of how the frontiers were recorded on those maps:

“Then, with the help of the texts, the cartographers tried to locate the frontier in relation to the map base. Unfortunately, the inaccuracy of the texts made it impossible to draw a sufficiently reliable boun-
dary in certain areas. Some names quoted in the texts could not be found, others referred to villages which had disappeared or been moved, or again the actual nature of the terrain (course of rivers, position of mountains) appeared different from that described in the former itinerary surveys.

The actual frontier was, therefore, recorded in the light of information supplied by the heads of the frontier districts and according to information gathered on the spot from the village chiefs and local people.”

62. From this text the conclusion may be drawn that the map compiled in 1958-1960 by the IGN — a body neutral towards the Parties to the present dispute — although it does not possess the status of a legal title, is a visual portrayal both of the available texts and of information obtained on the ground. This in itself is not sufficient to permit the Chamber to infer that the frontier line depicted in the form of small crosses, whether in a continuous or a broken series, in the successive editions of the IGN map, corresponds entirely with the boundary inherited from the colonial administration. It has to consider how far the evidence offered by this or any map corroborates the other evidence produced. The Chamber cannot uphold the information given by the map where it is contradicted by other trustworthy information concerning the intentions of the colonial power. However, having regard to the date on which the surveys were made and the neutrality of the source, the Chamber considers that where all other evidence is lacking, or is not sufficient to show an exact line, the probative value of the IGN map becomes decisive.

63. Apart from the texts and maps listed above, the Parties have invoked in support of their respective contentions the “colonial effectivités”, in other words, the conduct of the administrative authorities as proof of the effective exercise of territorial jurisdiction in the region during the colonial period. For Burkina Faso, the effectivités can support an existing title, whether written or cartographical, but when their probative value has to be assessed they must be systematically compared with the title in question; in no circumstances can they be substituted for the title. For its part, Mali admits that in principle the effectivités cannot be brought into operation where they are contrary to the text of a treaty, but argues that in a situation where there is no boundary described in conventional or legislative form, it is necessary to ascertain the boundary by other methods, and an investigation of the effectivités then becomes essential. The role played in this case by such effectivités is complex, and the Chamber will have to weigh carefully the legal force of these in each particular instance. It must however state forthwith, in general terms, what legal relationship exists between such acts and the titles on which the implementation of the principle of uti possidetis is grounded. For this purpose, a distinction must be drawn among several eventualities. Where the act corresponds exactly to law, where effective administration is additional to the uti possidetis juris, the only role of effectivité is to confirm the exercise of the right derived from a legal title. Where the act does not correspond to the law, where the territory which is the subject of the dispute is effectively administered by a State other than the one possessing the legal title, preference should be given to the holder of the title. In the event that the effectivité does not co-exist with any legal title, it must invariably be taken into consideration. Finally, there are cases where the legal title is not capable of showing exactly the territorial expanse to which it relates. The effectivité can then play an essential role in showing how the title is interpreted in practice.

64. At this stage of its reasoning, the Chamber must emphasize that the present case is a decidedly unusual one as concerns the facts which have to be proven and the evidence which has been, or might have been, produced for this purpose. The Chamber has to ascertain where the frontier lay in 1932 in a region of Africa little known at the time and largely inhabited by nomads, in which transport and communications were very sketchy. In order to identify this the Chamber has to refer to the legislative and regulative texts, not all of which were even published; to the maps and sketch-maps compiled at the time, maps which are sometimes of doubtful accuracy and reliability and which contradict one another; and to administrative documents which, having been drawn up for the purposes of a system of government which ceased to exist nearly 30 years ago, have had to be obtained from various collections of archives. Although the Parties have provided it with a case file as complete as possible, the Chamber cannot however be certain of deciding the case on the basis of full knowledge of the facts. The case file shows inconsistencies and shortcomings. Some of these are already known; the Parties have informed the Chamber that they were unable to locate certain specific documents such as, for example, the cartographic documents mentioned in paragraph 57 above. But even if those documents had been located, the Chamber cannot preclude the possibility that the large body of archives from the French West Africa administration, now dispersed among several countries, may contain further documents of considerable relevance.

65. In these circumstances, it is clear that the Chamber cannot resolve the problem by means of any of the powers in the matter of evidence under Articles 48, 49 and 50 of the Statute of the Court. Nor can the solution be looked for in a systematic application of the rule concerning the burden of proof. For example, in respect of certain villages of which it is necessary to determine the administrative situation between 1927 and 1935, Mali claims that it is for Burkina Faso to demonstrate the Votan character of the villages during that period. While it is true that “ultimately . . . it is the litigant seeking to establish a fact who bears the burden of proving it” (Military and Paramilitary Activities in and against Nicaragua, I.C.J. Reports 1984, p. 437, para. 101), it is also for Mali to establish the facts underlying its
claims, that is, to demonstrate that the villages were Sudanese at that time. The Special Agreement of 20 October 1983 by which the case was brought before the Court; deals with the question of the burden of proof only in order to make it clear that it is not prejudged by the written procedure there provided for (Art. 3, para. 2). In any event, however, in a case such as this, the rejection of any particular argument on the ground that the factual allegations on which it is based have not been proved is not sufficient to warrant upholding the contrary argument. The Chamber has to indicate the line of the frontier on the basis of the documents and other evidence presented to it by the disputant Parties. Its task is further complicated by the doubts it has expressed above regarding the sufficiency of this evidence.

* * *

66. In its Memorial, Burkina Faso divided the disputed frontier into two sectors: the western part, described as the sector of the “four villages”, and the eastern sector, extending from the point with the co-ordinates 1° 24’ 15” W and 14° 43’ 45” N as far as the heights of N’Gouma. In its submissions however, throughout the proceedings, it divided the line it proposed into two sectors in relation to a different point (geographical co-ordinates 0° 40’ 47” W and 15° 00’ 03” N); the Chamber will consider later what significance is to be attached to this point. For Mali, the disputed region can also be divided into two sectors: one extending from the village of Yoro to the pool of Kétioùaire, for which, according to Mali, a fairly precise delimitation exists, and the other from the pool of Kétioùaire to the heights of N’Gouma and the Kabia ford. In its Counter-Memorial, Burkina Faso preferred to adopt a division of the frontier into three sectors: the first from Dionouga to the point with the co-ordinates 1° 24’ 15” W and 14° 43’ 45” N (the region of the four villages), the second from the former point to mount Tabakarach (the Soum region), and the third from mount Tabakarach to the tripoint. This was also the division adopted by counsel for Burkina Faso during the oral proceedings. However, these various methods for dividing the frontier rely on considerations which are closely linked with the submissions of the Party in question relating to the titles or evidence to be taken into consideration in order to determine the line of the frontier in each sector. The Chamber therefore cannot adopt any such method of division at the outset without running the risk of prejudging its decision on the opposing contentions on the merits. It is therefore appropriate for the Chamber to deal first with the legislative and regulative titles and the administrative documents invoked by the Parties, and to consider what weight to attach to each of these, in order subsequently to be able to make use of them, where appropriate, in order to indicate the course of the line in the sector to which they are deemed to relate.

* * *

67. After the decree of 1 March 1919 which created the colony of Upper Volta but did not specify its boundaries, the first of these texts in chronological order is the Order of 31 December 1922 for the reorganization of the Timbuktu region. The Parties agree in recognizing that this text is both valid and relevant; the Chamber can therefore postpone the question of its interpretation to the stage of its examination of the course of the line.

68. Next comes an Order dated 31 August 1927, issued by the Governor-General ad interim of French West Africa, according to which

“the boundaries of the colonies of Niger and Upper Volta are henceforward determined as follows:

(1) Boundaries between the cercle of Tillabéri and Upper Volta;

This boundary is determined to the North by the existing boundary with Sudan (cercle of Gao) as far as the height of N’Gourma, and to the West by a line passing through the Kabia ford, mount Darouskoy, mount Balébangou, to the west of the ruins of the village of Tokébangou, mount Doumafendé, and then heading south-east, leaving to the east the ruins of Tong-Tong . . .”

On 5 October 1927 an erratum to that Order was adopted, which replaced the above-quoted text with the following text:

“The boundaries of the colonies of Niger and Upper Volta are determined as follows:

A line starting at the heights of N’Gourma, passing through the Kabia ford (astronomical point), mount Arouskskoy, mount Balébangou to the west of the ruins of the village of Tokebangou, mount Doumafendé and the astronomical marker of Tong-Tong; this line then heads south-east . . .”

There also exists a 1:1,000,000 map, already mentioned, entitled “French West Africa : New frontier of Upper Volta and Niger (according to the erratum of 5 October 1927 to the Order dated 31 August 1927)”. Mali has laid this map before the Chamber, but observes that it contains no information as to what official body compiled it or which administrative authority approved the line shown on it. Here again, the two Parties agree that the Order and its erratum were duly adopted by the administrative authority with jurisdiction in the matter, and that these texts are relevant to the present case. However, they advance conflicting interpretations of these texts. The Chamber could in principle reserve this question for the stage of its reasoning when it turns to the course of the line in the light of the texts and the other evidence provided by the Parties. But Mali, arguing from what it considers to be the correct interpretation of the texts in relation to the geographical situation in the area, claims that the Order and
69. The two Parties have advanced various explanations of the fact that the colonial administration found it necessary to issue an erratum to the 1927 Order, and have submitted to the Chamber documents of the nature of travaux préparatoires. It should be noted at the outset that if the Chamber’s task were to interpret and apply the Order as amended on 5 October 1927 as a regulative text, for the purpose of establishing the boundaries of Upper Volta in 1932, it would have to examine its scope and appraise the relevance of the initial text of 31 August 1927, and of any travaux préparatoires, in the light of the particular rules of the legal system from which the Order derives its force as a regulation, i.e., French colonial law. But the Chamber recalls that the 1927 Order does not directly concern the boundary between Sudan and Upper Volta, but only the boundary between Upper Volta and Niger, and that for the purposes of this case, the Chamber is consulting the Order solely as evidence which may shed some light on the intentions of the colonial power concerning the course of the boundary between French Sudan and Upper Volta. In addition, from a more general perspective, the Chamber has already had occasion to emphasize (paragraph 30) that if colonial law has any role to play in this case it does so not in its own right, by way of a renvoi from international law to colonial law, but solely as evidence of the situation which existed at the time when the two States Parties achieved independence. The Chamber is therefore free to examine in this light the two successive versions of the 1927 Order, while nonetheless attributing greater weight to the text as modified by the erratum as a reflection of the definitive intentions of the colonial authorities, and to take the travaux préparatoires into consideration if this proves to be necessary.

70. It is clear from the actual wording of the text of the amended Order that the starting-point of the boundary between Niger and Upper Volta, which was also the end-point of the boundary between French Sudan and Upper Volta, was considered by the authors of this text to be the “heights of N’Gouma”, which were situated in the region of the “Kabia ford”. The location of this ford is not in doubt, nor is it a matter of disagreement between the Parties. This does not apply to the “heights of N’Gouma”. It should be noted that a neutral technical committee, comprising three cartographers appointed by the Legal Sub-Commission of the Organization of African Unity Mediation Commission, went to the spot in May 1975 with a mission “to determine the true position of mounts N’Gouma”. This committee reported having found, first, a collection of rocky spurs rising to the north of the Kabia ford and, secondly, an elevation or hill situated to the southeast of the ford. These two topographical features correspond respectively to the two possible locations of a “mount N’Gouma” according to the various maps produced by the Parties. For Burkina Faso the “heights of N’Gouma” are situated to the north of the Kabia ford, and according to Mali “mount N’Gouma” lies to the southeast of the ford; each Party has produced arguments to demonstrate why no credence should be given to whatever cartographic or other material contradicts its claim. The 1975 technical committee of cartographers reached its own conclusion on the matter, and this will be examined later (paragraph 170 below).

71. Mali argues that when the Governor-General adopted the 1927 Order and its erratum he believed he was selecting a particular point but was in fact in error on the very subject-matter of his decision, which within the compass of that error, but only so far, would invalidate the legal act in question, based as it was on wrong and inaccurate grounds of fact. Here Mali postulates that when the 1927 Order and erratum were drawn up it may well have been the 1:500,000 1925 map (Ansongo sheet) which provided the cartographic support. But this map, according to Mali, misplaces mount N’Gouma by locating it to the north of the Kabia ford; the correct position of N’Gouma, to the southeast of the ford, is that shown on the 1:200,000 map published by the IGN in 1960. In sum, Mali would exclude the 1927 Order, corrected by its erratum, as a source for locating the “heights of N’Gouma” and, consequently, the end-point of the frontier, on the ground that the text is invalidated by a factual error. This error is said to reside in the use of a position for the heights of N’Gouma which is factually inaccurate. After analysing the rules of the law of contract and French administrative law on the question, Mali concludes that, by the lights of French internal law as a whole, the Order of 1927 cannot be treated as a valid and relevant title because it contains an error in regard to the subject-matter of the decision. As for international law, Mali argues that the change of status of the territorial boundaries of French Sudan and Upper Volta, whereby they have become the international frontiers of Mali and Burkina Faso, precludes any automatic confirmation on the international plane of an act void in internal law.

72. At the present stage of its Judgment, the Chamber has only to consider whether it may or must take account of the Order of 1927, or should lay it aside as null and void. To show the invalidity of the Order, it would be necessary to establish, through evidence or arguments not themselves dependent on the validity or invalidity of the Order and erratum, and taking the matter further than the mere observation of a discrepancy between maps, that in 1927 the words “the heights of N’Gouma” denoted elevations other than those envisaged by the Governor-General at the moment of drafting the Order or the erratum. But it would thereby also be shown that the end-point of the line was located at a different spot from the one stated in the Order, and the validity or invalidity of the Order in French administrative law would then become academic. At all events, this question does not enter into the problem with which the Chamber has to deal. In the present proceedings, it is solely the evidentiary value of the Order and erratum which counts. If the Order was flawed by a factual error, this could have had some implications for the legal validity of part of the boundary between Upper Volta and Niger. The significance of the
Order as evidence of the location of the end-point of the boundary between French Sudan and Upper Volta is a separate question. Any finding on the validity of the Order may well depend on what is found as regards the position of the "heights of N'Gouma", but the converse cannot be true. Even Mali, which contends that the Order is wanting in legal validity, uses it as evidence in support of its contention regarding the true position of the end-point of the line. Consequently, it is not necessary for the Chamber further to construe the 1927 Order with the aim of determining its legal validity; it will suffice, at a later stage in this Judgment, to examine the value of the Order, of the erratum and of the travaux préparatoires, as evidence of the position of the end-point of the boundary between French Sudan and Upper Volta.

73. In chronological order, the next regulative text that has to be mentioned is the decree of 5 September 1932, one of whose effects was the outright abrogation of the decree of 1 March 1919 which had created the colony of Upper Volta, and hence the abolition of that colony. The new decree, which came into force on 1 January 1933, also provided as follows:

"Art. 2 — The cercles of Fada and Dori (except the canton of Aribinda) are annexed to the colony of Niger.

The cercle of Ouahigouya, the canton of Aribinda within the cercle of Dori and that part of the cercle of Dedougou located on the left bank of the Black Volta are annexed to the colony of French Sudan . . . ." (See sketch-map No. 2 below.)

By an Order of the Governor-General of French West Africa dated 17 November 1932, the territories of the colony of Upper Volta which had been annexed to French Sudan by the above-mentioned decree were reorganized as follows:

"1. The cercle of Ouahigouya, at present forming part of Upper Volta, and the canton of Aribinda, detached from the cercle of Dori, are to form a single unit under the name of cercle of Ouahigouya, with its chief town at Ouahigouya . . . ."

This Order also came into force on 1 January 1933. It was in this administrative setting that an exchange of letters took place between the Governor-General of French West Africa and the Lieutenant-Governors of Niger and French Sudan, and this correspondence is relied upon by Burkina Faso.

74. To appreciate the significance attached by Burkina Faso to this exchange of letters, which occurred in 1935, it must be viewed against the background of the period. As a result of the decree of 5 September 1932, Upper Volta had ceased to exist as from 1 January 1933, and the cercles
which had comprised it had been annexed, in the region in question, either to French Sudan or to Niger. Wherever Voltan territories bordering on French Sudan had become part of Niger, the former boundary between French Sudan and Upper Volta continued to divide two separate colonies, Sudan and Niger; wherever Voltan territories had been annexed to French Sudan, the former boundary between the two colonies was transformed into a boundary between two cercles within French Sudan. From the passages quoted it is clear that the dismemberment of Upper Volta was carried out on the basis of the cercles and cantons such as they existed in 1932. Hence the Chamber believes it may conclude that the boundaries between French Sudan and Upper Volta in 1932 and those between Niger and French Sudan in 1935 matched, though only in the areas referred to in the former of the hypotheses contemplated above. As the attached sketchmap No. 2 shows, the 1935 boundary between French Sudan and Niger was identical with the former boundary between French Sudan and Upper Volta from its eastern extremity, which before 1932 had been the tripoint (marked X on the sketch) between the colonies of French Sudan, Niger and Upper Volta, to another tripoint (marked Y), where the boundary between the Voltan cercles of Dori and Oualigouya had encountered, before 1932, that between French Sudan and Upper Volta. As already explained, as a result of the decree of 5 September 1932 the cercle of Dori, minus the canton of Aribinda, which was annexed to French Sudan, was allotted to Niger. The Chamber must therefore take into account any evidence as to where the boundary then lay between French Sudan and Niger, but only as regards the line between these two points. To the south (from point Y to point Z), what in 1935 was the boundary between French Sudan and Niger was transformed in 1947, owing to the reincorporation of the canton of Aribinda and the Niger cercle of Dori into the restored colony of Upper Volta, into a mere administrative boundary within that colony between two cantons of the cercle of Dori. To the west, between point Y and point W, what had been in 1935 merely an administrative boundary between two Sudanese cercles (Mopti — including Bandiagara — and Oualigouya) became once more the frontier between French Sudan and Upper Volta.

75. In letter 191 CM2 of 19 February 1935, addressed simultaneously to the Lieutenant-Governors of Niger and French Sudan, the Governor-General of French West Africa stated as follows:

“The boundary between your colony and that of Niger [Sudan] has only de facto value at present, being based on texts which do not include a geographical description of this boundary. I feel it is necessary, in order to ensure satisfactory regulation of the various administrative issues pertaining to the frontier region between Sudan and Niger, and its exact portrayal on the map, to fix the boundary in question by means of a text. To enable me to send the Department the necessary regulatory proposals, I would be glad if you would send me your opinion, as a matter of urgency, concerning the following draft projet:

‘From a point located on the Algerian frontier . . . the heights of Gorontindi, mounts Tin Garan, Ngouma, Trontikato, via the northern peak of mount Ouagou, the northern point of the pool of In Abao, and the summits of mounts Tin Eoul and Tabarakar, and then bends southwest as far as the point of latitude 14° 43’ 45” and longitude 1° 24’ 15” (west of Greenwich). . . .’

The final paragraph of the letter specified that there was a map annexed “showing the location of the various points mentioned, as derived from the most recent geographical work”; this map has not been traced.

76. In his reply of 3 June 1935 the Lieutenant-Governor of French Sudan, after noting that the Governor-General's proposals affected four Sudanese cercles (only one of which, the cercle of Mopti, requires consideration in the present proceedings), expressed the following view:

“There does not seem to be any need to alter the projected boundary described in letter 191 CM2 referred to above, except with regard to the following: (1) the part relating to the cercle of Mopti, in which the administrator is proposing that the pool of Kebanaire situated almost on the boundary of the cercles of Mopti, Gourma-Rharous and Dori (the latter forming part of the colony of Niger) should be included in the geographical description of the boundary, which would accordingly be amended as follows (letter No. 191 CM2, page 2, lines 4 and 5 from the end): ‘the summits of mounts Tin Eoul and Tabakareh and the pool of Kebanaire . . .’

It will be noted that, according to the various copies of these letters produced by the Parties the Governor-General mentioned mount “Tabakar” (or even “Tabanarak”) whereas the Lieutenant-Governor’s reply spelt the name as “Tabakareh”. From this letter it also emerges that the administrator of the cercle of Gao had proposed having a survey made between Labezanga and Anderamboukane, a region not relevant to the present dispute. For administrative reasons, this survey was not undertaken. The Governor-General’s draft remained in abeyance.

77. The Parties cannot agree on the interpretation of this exchange of letters. According to Burkina Faso, these letters

“although they do not possess the formal authority of an administrative act in due form, nevertheless constitute an authentic expression by the competent authority of the period . . . of his conviction as to the course of the boundary line”

that is, the line of a boundary which existed at the time. Mali’s opinion differs: the Governor-General’s letter is merely a preparatory document
for a draft administrative decision on delimitation between French Sudan and Niger, and is consequently without legal effect. Mali also denies that the letter has any evidentiary value as a description of the frontier in the region concerned and argues that to attribute such a value to the letter would be impossible to reconcile with the actual text of the letter, the reaction of the heads of administrative districts and the fact that nothing ever came of the draft delimitation it adumbrated, so that no legal act ever took shape.

78. If it had demonstrably been the Governor-General’s intention to define a boundary where none existed, or to modify the existing boundary in the light of the requirements of colonial administration, Mali’s objection that the proposal considered was never transformed into a regulative instrument, and therefore has no legal force, would obviously be cogent. Everything therefore depends on whether, as Burkina Faso claims, letter 191 CM2 did no more than describe an existing boundary. Mali does not argue that there was no boundary between French Sudan and Niger, but considers that the Governor-General’s letter has to be interpreted as reflecting an intention to define the legal boundary de novo, that is, to treat the existing situation as irrelevant and focus on the definition of a new situation.

79. Before considering the intentions of the Governor-General as regards the boundary in this region, the Chamber must note Burkina Faso’s contention that the absence of protest by the Lieutenant-Governor of French Sudan against the boundary line described in letter 191 CM2 did and does amount to an acceptance of that line, and that what French Sudan accepted is binding on Mali by virtue of State succession. Burkina Faso also maintains that acceptance of the course of the line by French Sudan would override any error which the Governor-General might have made concerning the position of the administrative boundary. It so contends without, however, abandoning its submission that letter 191 CM2 amounts to a description of the actual boundary in 1935, a submission supplemented by the argument from acquiescence. The Chamber will first consider that argument and next seek to determine what interpretation is warranted of letter 191 CM2, having regard to the circumstances prevailing in 1935. According to whether the letter is found to have been innovatory or merely descriptive in scope, it will then become clear, either that the argument advanced by Burkina Faso on the basis of a supposed acquiescence by Mali merits examination as a major contention, or that it is merely adjunctive to its case.

80. In the Chamber’s view, the argument from the supposed acceptance by the Lieutenant-Governor of French Sudan of the line indicated in the Governor-General’s letter is untenable, for the following reasons. The writers of the letters were not of equal standing, nor did they possess the same territorial competence: the Lieutenant-Governor in question was replying to a communication from his superior. That being so, it is difficult to see how the idea of acquiescence, which presupposes freedom of will, can arise. In addition, it must be borne in mind that the argument is based on the assumption that the description contained in letter 191 CM2 did not correspond to the existing boundary, if there was one, between the colonies of French Sudan and Niger. Now, the Chamber’s investigations relate to the boundaries of Upper Volta on the eve of its independence, boundaries which were assigned to it as a result of the 1947 law. Thus the question is whether, in 1947, the restored Upper Volta would have inherited any new boundary arising in 1935 after acceptance by the authorities of French Sudan of letter 191 CM2. The answer to that question is negative. On the one hand, the 1947 law reconstituted Upper Volta within its 1932 boundaries, and if one of them, after conversion into a boundary between French Sudan and Niger, had undergone alteration in 1935, that modification would have become ineffective on that law’s entry into force. On the other, it must not be overlooked that the Governor-General of French West Africa never issued any order to give effect to his 1935 proposal. Whatever its value as evidence, or as mere information regarding the views or intentions of the Governor-General, the 1935 exchange of letters could not in colonial administrative law, the only law applicable in the matter at the time, have resulted in the institution of an intra-colonial boundary which could have been inherited by Upper Volta.

81. The Chamber now comes to the problem of the interpretation and significance of the 1935 exchange of letters. Mali stresses that letter 191 CM2 begins with the words “the boundary ... has only de facto value [vue de fait] at present” and infers that this letter actually records the absence of any legal boundary between the two colonies. Yet it explains that, on its own interpretation of the letter, a boundary did in fact exist between French Sudan and Niger, that this boundary derived from texts which existed at the time, though it is no longer known what texts these were, and that if the Governor-General felt the need to propose a definition, that was because the cartographic representation of the boundary was not satisfactory. Setting aside for the moment the question of the meaning to be ascribed to the term “vue de fait”, it is the Chamber’s view that, if a boundary of at least such value existed in 1935, there is no reason to suppose that the same boundary did not exist in 1932, the critical date for the implementation of the provision in the 1947 law which fixed the boundaries of Upper Volta. It would then be this de facto boundary that defined the heritage bequeathed in 1960 by colonization, which it is now the Chamber’s business to discern. From that standpoint, it matters little that the Governor-General of French West Africa was unable to bring to fruition his plan “to fix the boundary in question by means of a text”. What is important in these proceedings is to ascertain where that boundary lay, taking account of all available indications, including letter 191 CM2.

82. To Mali, it is clear that the text of letter 191 CM2 was a verbal interpretation of the line drawn on the 1925 1:500,000 scale map, that is, the Blondel la Rougery map mentioned in paragraph 59 above, an excerpt
from which is annexed to this Judgment (sketch-map No. 3 below). Without at this stage expanding the correlations of detail between the wording of the letter and the place-names appearing near the line on the map, the Chamber believes that the author of the letter, most probably, had this map in front of him. Mali has also emphasized the deficiencies of this map, and maintained that no probative or descriptive value can be attributed to measures taken on the basis of information "which is either erroneous or fanciful". For the moment, however, the Chamber is considering only the question whether, as claimed, letter 191 CM2 was of an amending or declaratory nature. What must first be ascertained is what the intentions of the Governor-General may have been in that respect; and the concordance between the text of the letter and the administrative line presented by the 1925 map lends greater weight to the idea that the letter was intended to give a description of an existing boundary. This is because, if the objective were to modify an existing boundary having "de facto value", the Governor-General must then have known of this boundary, and been aware that it did not match the boundary shown on the Blondel la Rougery map, deliberately substituting the boundary on the map for the existing boundary. It is difficult to reconcile this interpretation of the facts with the text of letter 191 CM2. Whether, on the one hand, the map in question accurately represented the topography, or instead led the Governor-General into error, and what, on the other hand, would be the legal consequences of such error, are questions that will be dealt with later.

83. A further argument presented by Mali relies on the fact that the letter itself describes the indications it gives as of the Governor-General’s "projet". According to Mali, the very idea of a projet seems to preclude retroactive measures, since a projet implies preparatory work and a draft description of the contemplated action or objective. The Chamber acknowledges that this correctly defines the purpose of a projet. But it points out that the letter in question contained a draft text which might subsequently have taken the form of an order — a legislative text intended for adoption — and that such a projet might well have endorsed and defined a boundary which already existed, even if only with a "valeur de fait", without thereby forfeiting the prospective character of a projet. Mali also observes that there is nothing to show that the authority with jurisdiction to fix a colonial boundary undertook that the proposed line would be a "definitively de facto line ligne de fait d'une manière définitive": the Governor-General could not be bound by the opinions of heads of colonies or other organs failing express provision otherwise in law. The Chamber concedes that the Governor-General could well have changed his mind and issued an order defining the boundary between French Sudan and Niger in some other way. But for the Chamber it does not follow that the fact described in the letter ought not to be taken account of in law.

84. Mali also perceives, in the reactions of the chefs de circonscription to letter 191 CM2, an indication to the effect that the letter merely contained a proposal unrelated to the existing situation. The Lieutenant Governor-
General of the Sudan, in a letter-telegram dated 11 March 1935, had transmitted copies of the Governor-General's letter and of the annexed sketch-map to the Sudan circle heads concerned, requesting their opinions on the draft text. The Governor-General based his reply of 3 June 1935 to the Governor-General's letter on the replies of the circle commanders of Mopti and Gao to that letter-telegram. In the opinion of Mali, "it was the forward-looking character of the planned operation which explained this wide-ranging consultation"; "it was a tactic to avoid dealing with a problem or a difficulty which was burning everyone's fingers".

85. The Chamber does not share this view: it considers that a valuable indication of the nature of the process carried out by the Governor-General and by the Lieutenant-Governors of Sudan and Niger is found in the replies he had from them. The Lieutenant-Governor of Sudan consulted the commandants de cercle concerned, and conveyed their comments in his reply to the Governor-General of 3 June 1935. In the view of the Chamber, it is clear from these comments that the commandants de cercle started from the idea that the text submitted to them was intended to define the existing boundary, and that their superior's attention should be drawn to any aspects of the proposed definition which seemed either to depart from the existing boundary, or to resolve a factual situation which was unclear (the Labézanga/Anderamboukane boundary), or to omit some detail which might help to clarify the definition (pool of Kébanaire). In view of this consideration, and of all the other factors mentioned by the Parties during the proceedings, the Chamber reaches the conclusion that the definition of this portion of the boundary between Sudan and Niger in that part of it which is relevant in the present case, contained in the letter 191 CM2 from the Governor-General of French West Africa dated 19 February 1935, corresponded, in the mind both of the Governor-General and of all the administrators who were consulted, to the de facto situation. It still has to be ascertained whether the flaws or errors which Mali ascribes to the Blondel la Rougery map were such, given the close connections between this map and letter 191 CM2, as to render inoperative the Governor-General's intention of defining the existing situation by means of a text. The Chamber will deal with this question when it comes to apply the letter for the purpose of defining the line of the frontier in the disputed area.

86. One final observation is, however, necessary. The aforementioned description of the boundary in letter 191 CM2 (paragraph 75 above) concerned only that segment of the boundary which relates to the frontier in dispute in the present case. But the text of this letter continues as follows:

"from there [point P] it [the boundary] rejoins the Gorobat at the point of latitude 14° 27' 30" and longitude 1° 14' 45" (west of Greenwich); it follows this marigot as far as a point situated approximately 3 kilometres to the west of Tin Abalak . . . .".

This refers to the eastern boundary of the cercle of Ouahigouya, which takes account of the annexation to that cercle of the canton of Aribinda, in consequence of the Decree of 5 September 1932. Accordingly, this boundary no longer corresponds to the one shown on the Blondel la Rougery map, which dates from 1925. The Croquis de l'Afrique française on the scale 1:1,000,000, ND 30 sheet, shows an eastern boundary for the cercle of Ouahigouya, in its 1926 edition, which is identical to the one reproduced on the Blondel la Rougery map. But its 1946 edition depicts a boundary which corresponds to the above-quoted description in letter 191 CM2. No regulative text had been issued in the meantime on the basis of letter 191 CM2. The Chamber therefore takes the view that the alteration made to the sketch-map between 1926 and 1946 is evidence of the declaratory purport of letter 191 CM2.

* * *

87. On 27 November 1935, the Governor-General ad interim of French West Africa issued an Order (No. 2728 AP) "for the delimitation of the cercles of Bafoulaibé, Bamako and Mopti (French Sudan)"). The cercle of Mopti, an administrative unit which was then part of French Sudan and is now part of Mali, bordered the cercle of Ouahigouya, which had been transferred by the Decree of 5 September 1932 to the colonym of French Sudan, and into which the canton of Aribinda had been incorporated by an Order of 17 November 1932 (paragraph 73 above). According to the opening phrase of Article 1 of the Order of 27 November 1935, "the boundaries of the cercles of Bafoulaibé, Bamako and Mopti are defined as follows and as drawn on the maps annexed to this Order". It will be recalled that the maps here referred to have never been traced, so that the Chamber can only refer to the actual text of the Order. Article 1, paragraph 3, of the Order describes the eastern boundary of the Sudanese cercle of Mopti as follows:

"From this latter point a meridian line intersecting the parallel 13° 30', and then a line running markedly north-east, leaving to the cercle of Mopti the villages of Yoro, Dioulouna, Ouokou, Agoulourou, Koubo, passing to the south of the pool of Toussougou and culminating at a point located to the east of the pool of Kétiouaire."

88. The relevance of the Order 2728 AP will be apparent if the circumstances in which this Order was issued are again recalled (see paragraph 74 above). As a result of the Decree of 5 September 1932 Upper Volta had ceased to exist, and the cercles which had comprised it had, in the region in question, been transferred either to French Sudan or to Niger. Wherever Voltan territories bordering upon French Sudan had become part of Niger, the former boundary between French Sudan and Upper Volta continued
to divide two separate colonies, French Sudan and Niger; wherever Volta

territories had been annexed to French Sudan, the former boundary

between these two colonies was transformed into a boundary between two
cercles which were now Sudanese. The consequence of Order 2728 AP was
to define the administrative boundary which divided the cercle of Mopti on
the one hand, from the cercle of Ouahigouya, and on the other from the
cercle of Dor. As already stated, in 1935 the cercles of Mopti and Ouah-
igouya belonged to French Sudan, but before 1932 the cercle of Ouah-
igouya had belonged to the colony of Upper Volta, so that the law of
4 September 1947 restored it to Upper Volta. The cercle of Dor, which in
1935 belonged to Niger, had also belonged to Upper Volta before 1932,
and so underwent a similar transfer in 1947.

89. In Mali's view, Order 2728 AP, by so defining the boundary, merely
confirmed the situation which had existed in 1932, whereas for Burkina
Faso, the boundary so defined involved a modification of the pre-existing
situation. However, both Parties agree that there was no modification of
this boundary between 1932 and 1935, the year in which Order 2728 AP
was issued. Therefore, in so far as the Order proves the position of the
boundary between the cercles of Mopti and Ouahigouya before the Order
was adopted in 1935, it also proves the boundaries between French Sudan
and Upper Volta in 1932, the boundaries which were confirmed by the Law
of 4 September 1947 when the colony was re-established. Burkina Faso has
argued that Order 2728 AP is no longer a valid legal title since it was
impliedly abrogated by the Law of 4 September 1947, but solely because of
the modifying effect which that Party ascribes to the Order. This abroga-
tion does not therefore debar the Chamber from enquiring into the effects
of the Order; on the contrary, it has first to establish whether the Order
was declaratory or of a modifying nature, so as to be able subsequently to
determine whether the Law of 1947 did in fact abrogate it.

90. The Chamber will begin by considering whether there are any
indications to be derived by analysing the actual text of Order 2728 AP and
the administrative context in which it was issued, concerning the scope
which the Governor-General ad interim of French West Africa intended it
to have. The preamble to the Order refers to a number of texts, both prior
to and subsequent to the Decree of 5 September 1932 for the abolition
of the colony of Upper Volta, but makes no mention of that particular decree.
Among these texts are Order 2790 of 5 December 1925, modified by Order
1111 AP of 30 April 1928, for the abolition of the cercle of Hombori and
inter alia) the transfer of the cantons of Mondoro, Boni, Sarniéré and
Hombori to the cercle of Bandiagara (subdivision of Douentza) and Order
2862 AP, dated 15 December 1934, for the abolition of the cercle of
Bandiagara and the transfer of its territory to the cercle of Mopti. The first
of these Orders is the regulation which created the boundary which, in
1932, when the colony of Upper Volta was abolished, divided it from

Bandiagara (French Sudan). From the second Order it is clear, in the first
place, that this boundary, which was now the boundary of the cercle of
Mopti, remained unchanged (Art. 1) and, in the second place, that a
subsequent Order was to define the overall boundaries of this enlarged
cercle.

91. Having listed the texts prior to its adoption which were deemed
relevant to its purpose, Order 2728 AP continues, in the introductory
paragraph of Article 1, with the provision that "the boundaries of the
cercles of ... Mopti are defined as follows ...". This form of words
undoubtedly echoes that used in Article 2 of the above-mentioned Order
2862 AP: it therefore seems clear, in the absence of any other text which
would have to be taken into account in this respect, that Order 2728 AP
was in fact the Order contemplated by Order 2862 AP. Consequently, there
is at least a presumption that neither the aim nor the result of Order 2728
AP was to modify the boundaries which existed in 1935 between the
Sudanese cercles of Mopti and Ouahigouya, boundaries which divided the
colonies of French Sudan and Upper Volta before the abolition of the
latter pursuant to the Decree of 5 September 1932. Indeed, it seems hardly
likely that an intention would have been formed to go beyond the text
adopted the previous year. This presumption is borne out by the fact that
the title of the Order reads "Order for the delimitation of the cercles
of Bafoulabé, Bamako and Mopti (French Sudan)" and not "Order for a
territorial modification in the cercle of ...", like, for example, an Order of
17 November 1932 mentioned in the preamble to Order 2728 AP. But so
far the Chamber has merely stated that a presumption exists; it must now
enquire, therefore, whether the content of Order 2728 AP — especially the
indication of the villages bordering upon the boundary between the cercles
of Mopti and Ouahigouya — operates to reverse or to confirm this pre-
sumption. For this purpose, it is necessary to examine the documentary
and cartographic information from which these villages can be located, as
well as the various administrative communications which were contem-
poraneous with the preparation of the Order.

92. The first part of the frontier which the Chamber is required to
define, the part for which the scope of Order 2728 AP has to be ascertained,
has throughout the proceedings, been called "the sector of the four vil-
lages". The words "four villages" do not however seem always to have had
the same meaning for the two Parties to the case. The text in question refers
to five villages, the first of which (Yoro) is indisputably situated in Malian
territory and is not in issue. The four others are Dioulouna, Ouakoulou,
Agoulourou and Koubo. At its meetings of 7 and 8 October 1971, the
Standing Joint Commission established by the Parties (see paragraph 35
above) requested a mixed technical commission to ascertain, for the pur-
pose of delimiting the frontier, the exact position of the villages bearing
these names. During the proceedings before the Chamber it became clear
that, in the opinion of both Parties, Dioulouna can be identified with the
village of Dionouga. For the purposes of this Judgment the words "four
villages" will be used to denote the villages mentioned in Order 2728 AP,
that is, Dioulouma/Dionouga, Oukoulo, Agouloulo and Koubo. The Chamber reserves the question whether all these villages exist today, whether they have changed their names since 1935, or even whether they all existed then. It also notes that Mali has sometimes referred to the “four villages” of Dionouga, Kounia, Selba and Donua, that its Memorial also mentions Orotounga or Orotoungu and the Burkinabe village of Diguel, and that during the hearing, its counsel stated that for Mali the “four villages” are those of Dioulouma, Agouloulo, Koubo and Donua. Without seeking to establish at this stage whether such of these other villages as were not mentioned in Order 2728 AP are relevant for the purpose of these proceedings, the Chamber emphasizes that they are not included in the term the “four villages” as employed in this Judgment.

93. According to Burkina Faso, the fact that the 1935 Order modified the administrative situation of the villages can be inferred from the obvious discrepancy between the provisions of the Order and the official maps of the period, from the travaux preparatoires of the Order and from the attitude of the administration after 1947. As far as the maps are concerned, Burkina Faso claims that on all the maps available to it which are sufficiently detailed to show the position of the four villages, all the villages without exception are shown to the south of the relevant administrative boundary, and accordingly on territory which is now Burkinabe. As observed above (paragraph 59), Burkina Faso attaches special significance to the Blondel la Rougery map on the scale 1:500,000, which clearly leaves the villages of Oukoulo, Agouloulo and Koubo to Upper Volta. Burkina Faso also observes that the original edition of the IGN 1:200,000 map (also mentioned in paragraph 59 above), represents the whole of the western sector of the disputed frontier, that of the “four villages”, as a broken line of crosses. The Chamber has however already indicated that it cannot accept Burkina Faso’s argument that the maps compiled by the Geographical Service of the office of the Governor-General of French West Africa are to some extent administrative acts, and are sources of legal title in French administrative and colonial law.

94. Mali draws the Chamber’s attention to the fact that Burkina Faso is in this connection relying only on general maps, and has not filed any detailed sketch-map compiled by Volkton administrators. Mali has presented to the Chamber a map of the Gourma dating from 1901-1902 or 1909-1910, on which the village of Dioulouma is shown to the north of the boundary. It has also presented a sketch-map of the canton of Mondoro, compiled in 1923 by a colonial administrator and signed by the commendant of the region, annexed to a list of the villages comprising that canton. This sketch-map indicates the location of Dioulouma as well as of Donua and Ouotoutongo, villages which are not apparently in dispute. Two other sketch-maps, dating respectively from 1948 and 1953, were projected during the oral proceedings.

95. The Chamber has already stated (paragraph 65 above) why it cannot uphold Mali’s argument that the burden of proof in this respect is on Burkina Faso, in the sense that it would be for Burkina Faso to demonstrate the Voltan character of the villages between 1927 and 1935. It takes as a starting-point of its reasoning the fact, attested by Order 2728 AP, that in 1935 the administrative authorities were aware of the existence, close to the boundary between the cercles of Mopti and Ouahigouya, of four villages bearing the names of Dioulouma, Oukoulo, Agouloulo and Koubo. At this stage the Chamber must remain solely within the context of 1932 (the reference date in the 1947 law for the purpose of defining the boundaries of Upper Volta) and 1935; it is not required to consider whether the villages in question still exist today, or whether they still bear the same names. Similarly, in order to ascertain the intentions of the Governor-General in 1935, it has to consider only such maps and documents as existed at the time. As far as the maps are concerned, the location of the villages follows from the information provided by the following maps, which are broadly consistent:

- A map, untitled and undated (according to Mali it dates from 1900-1902 or 1909-1910), representing the Gourma and bearing the reference 12 D/6, and a sketch-map annexed to a 1923 census of villages belonging to the canton of Mondoro, on which Dioulouma is given, but not the other villages mentioned in Order 2728 AP. These other villages, in view of their position on the maps mentioned below, apparently should not appear on the aforementioned maps and sketch-maps since they lay outside the administrative region covered by the maps and the sketch.

- A map of central Niger on the scale 1:1,000,000, compiled by Lieutenant Desplagnes in 1905, on which each of the five villages referred to in the Order is shown: Yoro, Dioulouma (spelt “Dioukouna”), Oukoulo, Agouloulo, and Koubo.

- A map of west Africa on the scale 1:2,000,000, sheet No. 2 : Timbuktu, published by the Geographical Service for the colonies in 1922, which shows Yoro, Dioukouna, Oukoulo (spelt “Okoulo”) and Koubo, but not Agouloulo. However, a later edition of this map (1932) mentions only Yoro and Koubo.

- The map of the colonies of French West Africa on the scale 1:500,000 (the Blondel la Rougery map of 1925) which shows Yoro, Oukoulo, Agouloulo and Koubo, but not Dioulouma.

- The Atlas des cercles de l’Afrique occidentale française fascicle IV, map No. 59, cercle of Ouahigouya (Geographical Service of French West Africa, 1926), which also shows Yoro, Oukoulo, Agouloulo and Koubo, but not Dioulouma.

- A sketch-map of French Africa on the scale 1:1,000,000 (sheet ND-30, Ouagadougou) compiled in 1926, which shows Yoro, Oukoulo and Koubo, but not Dioulouma or Agouloulo.

96. As for the administrative unit or units to which the villages are
supposed to belong, all the maps, except Lieutenant Desplagnes’ 1905 map, include a line indicating an administrative boundary, but this does not follow an identical course on every map. In that respect:

- Yoro, where shown, is always situated to the north-west (the Sudanese/Malian side) of the line.
- Dioulouna/Dioukoua, where shown, is always on the Sudanese/Malian side of the line; however, the line shown on the Blondel la Rougery map and on the *Atlas des cercles* (1926) runs to the north of what, according to the other maps, is the position of Dioulouna.
- Agoulourou, Ouokoulou and Koubo, where shown, are always on the Voltan/Burkinabe side of the line.

97. The documentary evidence submitted by Mali to the Chamber includes extracts from an official publication of the office of the Governor-General of French West Africa dating from 1927, entitled *Répertoire général des localités de l’Afrique occidentale française* (fascicles IV and VIII). This publication shows that in 1927 the Governor-General’s office had recorded the following localities: in French Sudan, a village named Dioulouna in the canton of Mondoro, cercle of Bandiagara, and a village named Koubo in the canton of Hombori, also in the cercle of Bandiagara. The extracts from the *Répertoire* submitted to the Chamber are not sufficient to establish whether the same names appear on the list ofVoltan places, or whether the names of Ouokoulou and Agoulourou appear on either the Sudanese or the Voltan lists. However, the Chamber believes it is warranted in concluding from the silence of both Parties on this matter that this is not the case. By an Order 2782 AP of 15 December 1934, the Sudanese cercle of Bandiagara was abolished, and its territory was annexed to the cercle of Mopti. The Order also provides that “the overall boundaries of the cercle of... Mopti will be defined later by a General Order”. It follows from this, assuming the village named Koubo in Order 2728 AP to be identical with the village named Koubo in the *Répertoire*, that these two villages (Dioulouna and Koubo) would have been part of the cercle of Mopti both before and after the adoption of Order 2728 AP.

98. If it were contended, on the basis of the maps, especially the Blondel la Rougery map of 1925, that Agoulourou and Ouokoulou at least did not belong to the cercle of Mopti before Order 2728 AP of 1935, the conclusion would be inescapable that the colonial authorities were using the single phrase “leaving to the cercle of Mopti the villages of Yoro, Dioulouna, Ouokoulou, Agoulourou, Koubo...” to refer simultaneously to a village (Yoro) which inadmissibly did belong to the cercle of Mopti, a village (Dioulouna) as to which the maps and the administrative documents do not agree, and three villages which according to the maps did not belong to the cercle of Mopti. On careful consideration, the Chamber thinks it very unlikely that, if that had been the situation, the Governor-General would have been so imprecise. As regards the maps, the Chamber has already indicated (paragraph 55) that they may be of considerable probative value in so far as they reflect physical facts — e.g., the existence and position of a village —, but are of limited weight where they show a purely abstract line, an administrative boundary which fails to match the other evidence produced. The Chamber recognizes that it is hardly possible to arrive in this case at a solution capable of reconciling all the factors involved, and concludes that this material does not reverse the presumption, already mentioned, that Order 2728 AP was declaratory in nature.

99. As for the travaux préparatoires of Order 2728 AP, Burkina Faso has relied on a note dated 5 December 1934 bearing a marginal reference “Territorial modification in the Sudan”, in which the Director of Political and Administrative Affairs of the Governorship of French West Africa wrote as follows to the military chef de cabinet (Geographical Service):

“I have the honour to advise you that I have no objection in principle to the counter-proposals contained in your aforementioned note concerning the modifications to be made to the cercles of Bafoulabé, Bamako and Mopti consequent upon the respective annexation of the cercles of Sadadougo, Baninko and Bandiagara.”

Emphasizing the use of the word “modifications” in that note, Burkina Faso considers that it confirms that Order 2728 AP was of a modifying character. In the light of what was obviously the context of the document, i.e., the abolition of the cercle of Bandiagara and its attachment to the cercle of Mopti as a result of Order 2862 AP of 15 December 1934 (paragraph 90 above), the Chamber does not consider it possible to take the word “modifications” here to mean anything other than the effects of the proposed reorganization. This conclusion is borne out by another document from that period filed by Mali: an “Extract from the draft Order abolishing the cercles of Sadadougo, Baninko and Bandiagara, which are converted into subdivisions annexed to the cercles of Bafoulabé, Bamako and Mopti respectively”. This text is undated, but from the fact that it refers to a “draft Order” dealing with the same subject as the Order of 15 December 1934 it is clear that it is prior to that date. The text does not serve to elucidate the effects of Order 2728 AP, since the description it gives of the eastern boundary of the cercle of Mopti matches that of the former cercle of Bandiagara, as it was before the annexation to it of a part of the cercle of Hombori, in consequence of the Order of 5 December 1925, subsequently modified by the Order of 30 April 1928.

100. Turning to the travaux préparatoires which preceded the Governor-General’s adoption of Order 2728 AP, it is necessary to examine among the documents submitted particularly those which were annexed by Mali to its
Counter-Memorial. According to these documents, on 2 January 1935 the Governor of French Sudan transmitted to the administrator of the reorganized cercle of Mopti a "geographical outline" of the boundaries of that cercle produced by the Governor-General at Dakar, asking the administrator whether he had any objection to it. It appears that the administrator of Mopti, in reply to this communication, sent the Governor of Sudan a letter-telegram of 26 February 1935, no copy of which has been filed, transmitting to him maps showing the boundaries of the subdivisions of the cercle of Mopti. The Governor replied to this letter-telegram on 20 March 1935 asking the administrator to supply "general indications for determining the boundaries in question (chief geographical features encountered along the course of the boundaries: mountain, watercourse, pools, etc.)", and to mark these on the map. The case file includes further a document dated 25 May 1935 entitled "Delimitation of the subdivisions of the cercle of Mopti" and bearing the signature of the administrator of that cercle. It will be noted that according to this text the "southern" boundary of the subdivision of Douentza, after reaching the village of Yoro, "then heads northeast as far as the pool of Toussougou", and that the "eastern" boundary starts "from the pool of Toussougou", following an "undulating line running northwest". These two boundaries appear to correspond, respectively, to the boundaries "to the east" and "to the north" of the cercle of Mopti as described in Order 2728 AP. By a letter of 3 June 1935, which was not produced in the proceedings, the Governor of French Sudan apparently transmitted to the Governor-General of French West Africa a description of the boundaries of the cercle of Mopti. It is reasonable to suppose that this description was based on the document supplied by the administrator of the cercle of Mopti, dated 25 May 1935. On 15 June 1935, this description was submitted by the Director of Political Affairs to the Geographical Service "for consideration and technical advice".

101. It must be borne in mind that during this period the administrators were also studying the proposals made by the Governor-General in his letter 191 CM2 of 19 February 1935, concerning the boundary between the colonies of French Sudan and Niger. On 11 March 1935 the Governor of French Sudan asked the administrator of the cercle of Mopti, among other things, for his opinion of the draft text set out in letter 191 CM2 from the Governor-General. By a letter-telegram dated 19 March 1935 the administrator replied as follows:

"Honour inform you no amendment found necessary to draft text relating to Sudan-Niger frontier.

The pool of 'Kébanaire' situated almost on the boundary of the cercles of Mopti-Gourma-Rharous and Dori might be mentioned... as follows: 'the summits of mounts Tin Eoult and Tabarakach and the pool of Kébanaire, etc...'."

102. In reply to the communication from the Director of Political Affairs dated 15 June 1935, a note was addressed to him by the Geographical Service of French West Africa on 11 July 1935. This note, entitled "Boundaries of the cercles of Mopti, Bamako and Bafoulabé", contains the following remarks on the boundaries of the cercle of Mopti as contemplated by the Director of Political Affairs:

"But as regards the text concerning the cercle of Mopti, the description of the southern boundary (from... heading southeast, towards... to the end) and that of the eastern boundary do not seem to correspond to the current state of affairs. Moreover, I have found it impossible to follow this description on the official maps of the Geographical Service, since the points referred to in the text are not shown (pool of Ouairé, village of Dioulouma, pool of Toussougou, well of Agou, pools of Fossa and Dourgana)."

The document annexed to the communication of 15 June 1935, and which is referred to in the observations by the Geographical Service, is not among the case-file supplied by the Parties. The Chamber clearly has no means of knowing how far this draft corresponded with the text which was ultimately adopted. It may be noted in this connection that the words "heading south-east" quoted by the Geographical Service are not found in the definition of the Mopti cercle boundaries contained in Order 2728 AP. Nor does that Order mention the pool of "Ouairé", but it is apparent from the document dated 25 May 1935 entitled "Delimitation of the subdivisions of the cercle of Mopti", that this pool lay to the north-west of Yoro, and had only been referred to for the purpose of defining a subdivision boundary. Moreover, although the pool of Ketioinaire does not appear on any of the maps which have been obtained by the Parties, the Geographical Service expresses no reservations about it: it may be concluded that, if the draft which was commented upon included a mention of this pool, the Geographical Service must have known where it was.

103. On 5 August 1935, the Governor of French Sudan informed the administrator of the cercle of Mopti of the difficulties experienced by the Geographical Service, and asked him to draw the outline of the boundaries of his cercle on the "largest-scale map in existence" published by that service ("Mopti and Hombori sheet, scale 1:500,000"), i.e., the Blondel la Rougery map. The cercle administrator replied on 9 August 1935 requesting a copy of this map. On 20 September 1935 the cercle administrator returned to the Governor of French Sudan the copy which had been supplied to him by the Geographical Service, having "drawn on it in blue pencil the subdivision boundaries of the cercle which are mentioned in the attached draft Order". At the same time, the administrator pointed out that "These lines are very approximate since these maps, compiled more than 15 years ago, contain gaps and many inaccuracies". The Governor of the Sudan communicated this warning to the Governor-General simultaneously with the description of the southern and eastern boundaries of the cercle of Mopti and the maps, which have not been traced. The Geographical Service then produced, on 18 October 1935, a description of the topographical boundaries of the cercle of Mopti, corresponding to the
description in Order 2728 AP, stating that “The subdivision boundaries [of this cercle] must be fixed by local Order”.

104. Burkina Faso believes it can be inferred from the wording of the above-mentioned note of 11 July 1935, especially from the phrase observing that certain descriptions “do not seem to correspond to the current state of affairs”, that the draft of Order 2728 AP did in fact imply a modification of the boundaries of the cercle of Mopti as previously fixed. The Chamber finds it cannot endorse this view. Rather, in view of the complete text of this draft, it considers that the “state of affairs” to which the Geographical Service was referring was the one that appeared on the maps and not the one that existed on the ground. It is obvious that the Geographical Service would not have been able to ascertain, for example, whether the statement that the boundary ran “south of the pool of Tousougu” actually corresponded with the situation on the ground, since the Service did not know the position of this pool. The Chamber has already found that the maps available in 1935 do not agree with other administrative documents. Accordingly, the fact that the Geographical Service found that the draft submitted to it did not correspond, for the points indicated, to the maps it had available, may mean that this draft made changes to the existing official maps; it does not warrant a finding that the legally-established boundaries were likewise altered.

105. The Chamber believes it must be concluded that the travaux préparatoires of Order 2728 AP, taken as a whole, tend to confirm the presumption that the Order did not have either the object or the effect of modifying the boundaries of the cercle of Mopti as they existed before its adoption.

* * *

106. Having thus established how far the various regulative or administrative texts relied on by the Parties are applicable in determining the frontier line, the Chamber now comes to the question of how these can be implemented. In this respect the Chamber’s task is chiefly to identify the topographical elements used as reference points in these documents, and to locate them on the maps and on the ground in relation to the modern place-names. But when doing so, the Chamber must return to the question of the methods of division of the line used by the Parties for the purpose of their arguments. Since the Chamber has reached the conclusion that letter 191 CM2 from the Governor-General of French West Africa dated 19 February 1935 was a description of the boundary existing at the time between French Sudan and Niger, it might seem to follow that one point on the frontier, point P, is now identified (the point with the geographical co-ordinates 1° 24’ 15” W and 14° 43’ 45” N) and that Burkina Faso’s proposed division into two sectors can therefore be adopted, the one sector lying to the west of that point and the other to the east, as far as the end of the frontier between Burkina Faso and Mali. But before pronouncing on this, the Chamber must consider the relationship between the information provided by the various written texts which it has to apply.

107. The Order of 31 December 1922 “for the reorganization of the region of Timbuktu” and the letter 191 CM2 from the Governor-General of French West Africa dated 19 February 1935 bear each other out, in that both refer to the pool of In Abao (1922 Order) or Inabao (1935 letter) as one of the reference points of the boundary between Sudan and the neighbouring colony, from 1922 onwards Upper Volta, and from 1935 on Niger. Similarly, the letter 191 CM2 of 1935 agrees with the Order of 31 August 1927 “fixing the boundaries of the colonies of Upper Volta and Niger”, which implied that the end-point of the frontier between Upper Volta and French Sudan was situated at the “heights of N’Gouma”. The boundary contemplated in the 1935 letter, a boundary which no longer ended at N’Gouma because of the transfer of certain Voltaian cercles to Niger, nevertheless continued to run through (inter alia) “mounts Tin Garan, N’Gouma, Trontikato...”.

108. Even more significant, but also more complex, is the relationship between the line described in Order 2728 AP of 27 November 1935 and that given in the draft description in letter 191 CM2 of 19 February of the same year. Order 2728 AP defines the eastern and northern boundaries of the cercle of Mopti by reference to topographical elements. It gives no indication which administrative entity was separated from that cercle by each boundary. The Chamber notes that, in the region relevant to the present case, the so-called “eastern” boundary followed a southwest-northeast direction, and divided the cercle of Mopti from two cercles lying successively to the southeast of the line: the Sudanese cercle of Ouahigouya and the Niger cercle of Dori. The so-called “northern” boundary divided the cercle of Mopti from the Sudanese cercle of Gourma-Rharous. The point “located to the east of the pool of Kétouaïa” mentioned in the Order is therefore the tripoint where the cercles of Mopti, Gourma-Rharous and Dori met. However, the “eastern” boundary also ran through another tripoint, that is, the meeting-point between that boundary and the boundary between the cercles of Ouahigouya (Sudan) and Dori (Niger). The purpose of letter 191 CM2 of 19 February 1935 was to define the boundary between the colonies of French Sudan and Niger: between the two tripoints, Mopti/Ouahigouya/Dori and Mopti/Gourma-Rharous/Dori (see sketch-map No. 4, below) that boundary was identical with the line which Order 2728 AP was intended to define. The geographical coordinates given in the letter by way of definition of the end-point of the Sudan-Niger boundary are therefore those of the tripoint Mopti/Ouahigouya/Dori.

109. With regard to this latter point, it should first be noted that it corresponds to the northwestern extremity of the cercle of Dori as shown in
the maps of the *Atlas des cercles* (fascicle IV, maps 53 and 59) of 1926, as well as in the Blondel la Rougery map of 1925, maps drawn up before the abolition of Upper Volta and the transfer of the canton of Arbinda from the *cercle* of Dori to the *cercle* of Ouahigouya. The maps made available to the Chamber do not show the boundaries of that canton. However, from the successive editions of 1926 and 1933 of the sketch-map of French Africa on the scale 1:1,000,000 (ND 30 sheet: Ouagadougou, maps filed by Burkina Faso), it is plain that the modification of the boundaries of the *cercle* of Dori which resulted from the transfer of the canton of Arbinda did not result in modifying the location of the tripoint Mopti/Ouahigouya/Dori. In the second place, it may seem surprising that at the time when Order 2728 AP was compiled, in November 1935, the Geographical Service did not see fit to propose to the Governor-General that point P should be mentioned in the definition of the boundary of the *cercle* of Mopti; that was the point used in the letter 191 CM2 of February 1935 to define the western end-point of a boundary the extension of which was identical with that of the boundary which was to be defined by Order 2728 AP, at least in so far as both boundaries connected the two tripoints mentioned above. This is the more curious in that the administrator of the *cercle* of Mopti, after receiving a copy of letter 191 CM2, had informed the Lieutenant-Governor of the Sudan, by a letter-telegram of 19 March 1935, that he found “no amendment ... necessary to draft text relating to Sudan-Niger frontier” except for the suggested addition of a reference to the pool of Kébanaire. The administrator of the *cercle* of Mopti had therefore accepted that point P mentioned in the letter was indeed on the boundary of his *cercle*.

110. It might be thought that the reference in letter 191 CM2 of 1935 to a point defined by co-ordinates of latitude and longitude would have simplified the Chamber’s task, since it would thus have a firm and reliable key point for the purpose of determining the course of the line. That is however not so. From the documents of the period it seems clear that the reason for giving a precise definition of point P was not that it corresponded to a typical topographical feature the co-ordinates of which should be calculated, nor for the purpose of later fixing an astronomic marker at that point. The point to which the co-ordinates refer was the meeting-point of three *cercle* boundaries, which were themselves defined in topographical terms, and there is little doubt that it was on the basis of the data supplied by one or more maps that the author of letter 191 CM2 gave a definition of this point in figures. Paradoxically, it follows that it is the point so defined which is the least authoritative in the present case. When the boundaries described in the letter 191 CM2 or in Order 2728 AP are defined in terms of topographical features, as passing through a certain hill or pool, then once these have been identified on the ground the Chamber must necessarily ensure that the line it has to draw passes through them. But it must be borne in mind that the basic maps available in 1935, according to the IGN itself, were most inaccurately drawn, so that “the position of certain details may be misplaced by several kilometres” (Note
dated 27 January 1975 on the positioning of frontiers). If the definition of a boundary refers both to details like these and to a calculated point with co-ordinates derived from such a map, there is only one way to observe the consistency among boundaries sought by the colonial administrators: where the topography and the co-ordinates fail to agree, the topography must be preferred. In the present instance, if it were to prove to be the case, on the basis of reference-points shown on maps and in other geographical sources which are more reliable, in 1986, than those compiled with the technical data available in 1935, that the geographical co-ordinates mentioned in letter 191 CM2 are imprecise or inaccurate, then for the Chamber to give a correct interpretation of the letter it would have to correct them, or even disregard them.

111. To establish the relationship between Order 2728 AP and letter 191 CM2, particular account must be taken of the attitude of the Mopti cercle administrator. He must doubtless have had maps available to him, but he did not possess the Blondel la Rouergy map (the Hombori sheet of the 1:500,000 series), as is shown by his communication to the Governor of French Sudan on 9 August 1935. Now on 19 March 1935 this administrator himself approved, for the boundary of his cercle, the draft description set out in letter 191 CM2, that description being simply the verbal equivalent of the line shown on the Blondel la Rouergy map. If, having regard to the documentary or cartographic information in his possession, the Mopti administrator: made no objection to that description, it may be assumed that, as regards the portion of the line which was at the same time a boundary of the cercle of Mopti, the description contained in the letter corresponded to the administrative situation. It should also be noted that the Mopti administrator returned to the Lieutenant-Governor of French Sudan the Hombori and Mopti sheets of the 1:500,000 map, after drawing on them in blue pencil the boundaries as he knew them to be; and it was on the basis of these sheets, and not from a clean copy of the Hombori sheet, that the Geographical Service prepared the definition of the cercle boundaries to be set out in Order 2728 AP. This confirms the Chamber’s conclusion that it cannot accept the argument that the depiction on the 1:500,000 Hombori sheet of the villages of Koubo, Agoulooum and Oukoulou south of the boundary shown on it proves that Order 2728 AP had the effect of transferring them from the cercle of Ouahigouya to the cercle of Mopti.

112. Now that the Chamber turns to the essential part of its task, it encounters a practical problem: the Parties have not clearly indicated to it the end-point of the frontier already established between them by common agreement, that is to say, the western end of the disputed area. In its submissions, Mali requested the Chamber to decide that the frontier line in the disputed area runs through a series of defined points, the first of which is “Lofou”. According to a map also presented by Mali, entitled “Disputed area — crossing points on the frontier”, Lofou is to be found 29 kilometres to the south of Diounouga, to the west — the Malian side — of the “frontier line shown on the 1:200,000 scale map” of the IGN. Burkina Faso has not challenged the accuracy of this. One of Mali’s counsel explained during the oral proceedings that Lofou was not apparently a disputed point. This also appeared from the Counter-Memorial of Burkina Faso, where it is stated that Lofou is a “Malian village cultivated by Burkinabes”. On the map mentioned above submitted to the Chamber by Mali, there is a line in red ink, which corresponds to its submissions. This line begins at Lofou and follows the “frontier line” of the IGN map as far as a point apparently with the following geographical co-ordinates: 1° 59’ 01” W and 14° 24’ 40” N. As for Burkina Faso, it did not in its submissions identify the starting-point of the line to be drawn by the Chamber; it merely submitted to the Chamber a map (comprising an extract from a compilation of five sheets from the IGN 1:200,000 map) indicating both the frontier line which it asks the Chamber to endorse, and what it alleges to be the successive claims of Mali. On that map, the respective lines proposed by the two Parties intersect at a point lying on the “frontier line” mentioned above, but approximately 18 kilometres to the north of Lofou. Burkina Faso also states that, for the purpose of the delimitation already made by agreement, the Parties based themselves on the line on the IGN 1:200,000 scale map.

113. The Chamber considers that it can justifiably conclude that the Parties both accept the frontier line of the IGN map south of the point with the geographical co-ordinates 1° 59’ 01” W and 14° 24’ 40” N; it finds therefore that it is from that point that they are requesting the Chamber to indicate the line of their common frontier in an easterly direction.

114. The regulative texts intended to fix the district boundaries — Order 2728 AP being one of these — generally do so merely by referring to the villages comprising a canton or allocated to a certain cercle, without further geographical clarification. This therefore calls for a consideration of the meaning to be ascribed to the word “village”. The problem arises particularly because the inhabitants of the villages in the region frequently cultivate land at a distance from the village itself, sometimes separated from it by areas comprising uncultivated or arid land, and they take up residence in “farming hamlets” which form dependencies of the main village. This system further complicates the Chamber’s task of drawing a
line which, as the boundary of certain villages, constitutes the former
administrative boundary of a colony, and consequently the present fron-
tier between the territories of the Parties. The Chamber has to decide
whether, in the light of the delimitation it is asked to effect, the farming
hamlets form part of the villages on which they depend. Moreover, in a
region where it is common for villages, in the course of time, to change
their locations or names, or even disappear, it is no easy matter to decide
what was the position of farming hamlets in 1932, should this be necessary
for the delimitation which the Chamber has to effect.

115. Mali has emphasized that it is claiming those villages which were
formerly administratively Sudanese to their legal extent; that it is not
claiming land cultivated by Malians, but land which administratively
appertains to Malian villages. It quotes an Order issued by the Lieuten-
ant-Governor ad interim of the Sudan on 30 March 1935, “for the reorgan-
ization of the native administration in the colony of French Sudan”, Arti-
cle 2 of which provides that “the village is the native administrative unit.
It comprises the whole of the population residing there and all the land
dependent on it.” For Mali, “the land dependent on” a village includes
the farming hamlets. Burkina Faso argues, however, that the French admin-
istrators of the period were well aware of the phenomenon of the over-
lapping farming villages, and the impossibility of drawing an administra-
tive map taking account of attachment on a “personal” basis or in relation
to farming activities. This state of affairs necessitated a degree of flexi-
bility, which was, in Burkina Faso’s view, provided by the Order of
30 March 1935, since Article 7 provided that:

“...The chiefs of a number of neighbouring villages may prepare
amongst themselves, after consulting the councils of the villages con-
cerned, collective agreements for fisheries, hunting, farmland, grazing
lands and transhumance areas. In no circumstances may these agree-
ments modify the laws or regulations in force, and they will be sub-
mitted for approval to the district head, who will have them issued in
accordance with the terms of the decree of 2 May 1906 on native
agreements.”

Burkina Faso has also drawn attention to the considerable distances
between the villages and the farming hamlets depending on them, these
distances being imposed by the poor soil and the patterns of cultivation
this necessitates. It has also pointed out that the frontier line already fixed
by joint agreement between the Parties divides numerous villages from
their farming hamlets. From this it concludes that excessive use of the
concept of farming hamlets for delimitation purposes could have unfor-
tunate results.

116. While under the colonial system a village may, for certain admini-
strative purposes, have comprised all the land depending on it, the
Chamber is by no means persuaded that when a village was a feature used
to define the composition — and therefore the geographical extent — of a
wider administrative entity, the farming hamlets had always to be taken
into consideration in drawing the boundary of that entity. In the colonial
period, the fact that the inhabitants of one village in a French colony left in
order to cultivate land lying on the territory of another neighbouring
French colony, or a fortiori on the territory of another cercle belonging to
the same colony, did not contradict the notion of a clearly-defined boun-
dary between the various colonies or cercles. This was the situation inheri-
ted by the two Parties at the moment of achieving independence; and it is
the frontier as it existed at that moment which the Chamber is required to
identify. The Parties have not requested the Chamber to decide what
should become of the land rights and other rights which, on the eve of
the independence of both States, were being exercised across the boundary
between the two pre-existing colonies. If such rights had no impact on the
position of that boundary, then they do not affect the line of the frontier,
and it is this line alone which the Parties have requested the Chamber to
indicate. From a practical point of view, the existence of such rights has
posed no major problems, as is shown by the agreements which they have
concluded to resolve the administrative problems which arise in the fron-
tier districts of the two States. For example, an agreement of 25 February
1964 deals, among other matters, with the “Problems of land and the
maintenance of rights of use on either side of the frontier”, and it provides
that “Rights of use of the nationals of the two States pertaining to far-
mland, pasturage, fisheries and waterpoints will be preserved in accordance
with regional custom”.

117. It is however also important not to over-systematize this distinc-
tion between the village as a territorial unit and the farming land depen-
dent on it. In this matter, it all depends on the circumstances. The Chamber
considers that it is only when it has examined the evidence and other
information available to it relating to the extent of a particular village that
it will be able to ascertain whether a particular piece of land is to be treated
as part of that village despite its lack of a connection with it, or as a satellite
hamlet which does not fall within the boundaries of the village in the strict
sense.

* * *

118. Since Order 2728 AP of 1935 defines the boundary between the
cercles of Mopti and Ouahigouya in terms of villages “left” to the former
cercle, these villages have to be identified, and their territorial extent
ascertained. The first village mentioned in the Order is Yoro. As we have
seen (paragraph 92 above), Burkina Faso does not deny that this village,
which is situated some 15 kilometres west of the frontier line shown on the
IGN 1:200,000 scale map, at the level of Lolofu, is Malian. As for the
geographical boundaries of this village, the Chamber notes that Mali has
stated that it has no difficulty in accepting the line of the IGN 1:200,000
scale map up to a certain point, a point determined not by reference to the
extent of the village of Yoro, but according to that of the village of Dionouga. Since this line is also that proposed by Burkina Faso, the Chamber concludes that there is no dispute concerning this first part of the frontier.

The position of the village of Dionouga, which the Parties agree in identifying with the village of “Dioulouna” mentioned in Order 2728 AP, is defined, according to the report of a technical subcommission of the Mixed Technical Commission of Mali and Upper Volta dated 14 April 1972, by the geographical co-ordinates 1° 57' 00" W and 14° 32' 12" N. On the IGN map, this village is situated in the immediate vicinity of the frontier line on the Burkinabe side, close to the point where the line bends north-eastswards. In this sector, it is therefore clear that this line can no longer represent the boundary defined in Order 2728 AP, since the latter left the village of Dioulouna/Dionouga to the cercle of Mopti. The Chamber cannot therefore uphold Burkina Faso’s submission that the frontier is “as shown on the 1/200,000 scale map of the French Institut géographique national. 1960 edition, the villages of Dioulouna . . . being located in Burkinabe territory”. Mali, on the other hand, claims that the frontier in the vicinity of Dioulouna/Dionouga should run through “the mosque-shaped enclosure situated two kilometres to the north of Diguël”.

120. In support of this submission, Mali quotes the minutes of the meeting of the Mixed Technical Commission of Mali and Upper Volta, held from 5 to 17 April 1972, and the information obtained on 5 September 1985 from the “older residents” of Dioulouna who, according to Mali, are the repository of an ancient oral tradition. Of all this information, what the Chamber finds particularly noteworthy is the fact that, on the subject of Dioulouna, the local people told the Mixed Technical Commission that:

“under the colonial régime, track-making work for Dioulouna stopped at Tendigaria, at the level of the white stone (about 10 km to the south of Dioulouna) . . .”

and as regards the Burkinabe village of Diguël,

“under the colonial régime, the track-making work stopped at Sagarabane (Gravillons Rouges) at seven (7) kilometres approximately to the north [of the village of Diguël].”

In the Chamber’s opinion, this information about the track-making works carried out at the behest of colonial administrators has a certain evidentiary value. First, this information is a guide to what, according to the aforementioned testimony, those administrators considered to be the boundaries of their districts. Only in its oral reply did Burkina Faso suggest that the recruitment of forced labour under the colonial régime was connected not with the district boundaries, but rather with the available supply of labour, but produced no evidence of this. Secondly, such information shows how important these operations were in the lives of the population under the colonial régime; thus they had an accurate and reliable recollection of them. Moreover, it is reasonable to suppose that such operations have continued to take place from time to time until a fairly recent period. On the other hand, the tradition invoked in regard to the mosque-shaped enclosure goes back to a meeting between a colonial administrator and native chiefs held about 1913; and no minutes or other written evidence of that meeting have been produced.

121. Mali concedes that there is a margin of error, estimated at 23.5 per cent, in the distances quoted above, the true distance between the villages of Dioulouna and Diguël being 13, not 17 kilometres. Mali itself suggests that “if the information [obtained from the local inhabitants] is corrected in the light of this average error, the point [i.e., the meeting-point between the two villages] is situated at 7.650 kilometres from Dionouga and at 5.350 kilometres from Diguël”. Although the Chamber does not think it necessary to endeavour to achieve such mathematical accuracy, it can nonetheless conclude that the administrative boundary at the relevant time during the colonial period intersected the track between Dioulouna/Dionouga and Diguël at a distance of approximately 7.5 kilometres to the south of Dionouga, and that the line of the frontier between Burkina Faso and Mali consequently does the same.

122. After Yoro and Dioulouna, Order 2728 AP goes on to mention the villages of Oukoulou and Agoulourou. According to Burkina Faso, Oukoulou could be the village today called Oukoulouro. Mali, in reliance mainly on a 1905 map (the map of central Niger compiled by Lieutenant Desplagnes), considers that the latter village is identical to Agoulourou in the 1935 text, and that Oukoulou is now called Kounia. The Chamber would emphasize that it is quite irrelevant to the present case whether or not the villages exist today; if in 1935, the Governor-General referred to certain villages in defining a boundary which was subsequently to become an international frontier, the fact that these villages have since disappeared does not result in any modification of the boundary so defined. The Chamber also considers it must reject the logic adopted by the Parties, of seeking to ascertain which village may nowadays be situated on the site of any one of the villages mentioned in Order 2728 AP, and to establish the present territorial limit of those villages in order to define the frontier. The boundary which the Chamber has to identify is the one which existed in 1932. The relevance of the 1935 Order lies in the fact that, as the Chamber has found, it defines in written form the situation prevailing in 1932.

123. Having concluded that the present-day village of Oukoulou and the village of Agoulourou mentioned in Order 2728 AP are identical, Mali relies on the following information obtained by the Mixed Technical Commission in April 1972:
“For fifty-four (54) years, the inhabitants of Douna (Republic of Mali) have been farming at Selba and at Okoulourou, without prior permission from anybody, for the good reason that these areas belonged to them. No Voltsans cultivate these lands.

At present, only one family from Douna is farming the Selba lands. The reason is:

(a) the impoverishment of the soil;
(b) an exodus of young people following the deportation of their elderly parents, who were opposed to their villages being annexed to the canton of Hombori.

Under the colonial régime, track-making works for Douna stopped at the level of the Selba baobab tree (not far from an astronomic marker situated at the edge of the pool of Selba). The same operations for the village of Sô (Republic of Upper Volta) stopped at the level of the same baobab. Thus this baobab is the boundary between the two villages.”

Mali therefore asks the Chamber to draw the frontier line through the Selba baobab.

124. Generally speaking, as the Chamber has observed above, track-making works are a significant element of the “effectivités” which may prove the intentions of the colonial administrators. But the question is not what was the geographical extent, taking into account the dependent land or the farming hamlets, of the village of Douna, which is neither mentioned in Order 2728 AP nor situated at the same spot as any of the villages there mentioned which have since disappeared. Even if the village of Agoulourou no longer exists, the Chamber nonetheless has to ascertain what its boundaries were in 1932-1935; the fact that a farming hamlet (Okoulourou) is now situated on the same spot and bears almost the same name, but is dependent on the village of Douna, does not warrant the conclusion that the village of Douna may determine the course of the line. At the present stage of its reasoning, the Chamber will merely state that the line it is to draw must run to the south of the villages of Koundia and Okoulourou, the location of which corresponds to that of Ouokouli and Agoulourou on the maps referred to in paragraphs 95 and 96 above, reserving for the moment the question of defining the boundaries of the two latter villages.

125. Order 2728 AP mentions next the village of Koubo, where there is some confusion of nomenclature. According to the minutes of the meetings of the Mixed Technical Commission of 8 and 9 April 1972:

“From Douna the Commission went to the village of Kobou, situated at twenty-seven (27) km approximately to the east...

When questioned, the dignitaries explained that the village Kobou and the farming hamlet Koubo should not be confused. The latter is situated about four (4) km to the south of Kobou.

We should note that although the village of Kobou is shown on the IGN 1/200,000 extract (Djibo sheet) 1960 edition, the hamlet of Koubo does not exist. On the other hand, there is a hamlet of Kobo about four (4) km to the south.”

Subsequent passages in the minutes are devoted to the village of Kobou and the hamlet found to the south of it, but that hamlet is then spelled “Koubo” instead of “Kobo” as in the last paragraph quoted and on the IGN map. The minutes add the following details, supplied by the dignitaries of the village of Kobou:

“The village of Kobou has existed for sixty-nine (69) years. The farming hamlet with the name Koubo, situated about four (4) km to the south, originated from the village and is as old as the village itself. There is a well in it which was dug by the inhabitants of Kobou fourteen (14) years ago. No Voltsans live there...

The boundary with Upper Volta is Tondegarian, to the south of Koundiri.”

Mali claims that, according to oral tradition in the villages and among the nomads of the region, the frontier in this area is the Tondigaria, a highly characteristic discontinuous outcrop of white stones. It runs through the following points, which Mali cites in its submissions as determining the course of the line: Tondigaria (approximately 18 kilometres to the south-southwest of Kobou), Fourfaré Tiaiga, Fourfaré Wandé, Gariol and Gounouré Kiri (the latter lying south-east of the pool of Soum).

126. The Chamber notes that Mali does not base its claim that the Tondigaria constitutes the frontier on anything connected with the location or extension of the village known in 1935 under the name of Koubo, whether that village now corresponds to the village of Kobou or to the hamlet of Kobo. Its claim is based solely on an oral tradition unrelated to the written title constituted by Order 2728 AP. The Chamber cannot interpret the text of the Order, which defines the boundary as “leaving to the cercle of Mopti the village of... Koubo”, as referring to a geographical or topographical feature, however characteristic, which is not mentioned in the text of the Order, and for which no evidence has been offered that it defines the southward boundary of the “land depending” on the village of Koubo. The information available to the Chamber is not sufficient to establish with certainty whether it is the village of Kobou or the hamlet of Kobo which corresponds to the village of Koubo referred to in Order 2728 AP; but given that the hamlet is only 4 kilometres from the village, the Chamber considers it reasonable to treat them as a whole, and to draw the line in such a manner as to leave both of them to Mali. Here again, the Chamber reserves for the moment the question of the exact position of this line.

* * *
127. The line described in Order 2728 AP, after leaving to the **cercle** of Mopti the five villages just discussed, continues "markedly north-east", "passing to the south of the pool of Toussougou and culminating in a point located to the east of the pool of Kétiouaire". There is a problem as to the width of these pools: none of the pools can be contemporaneously identified in the Order which the Parties have been able to present to the Chamber shows any pools bearing these names. As far as the pool of Toussougou is concerned this is not surprising, since the Geographical Service of French West Africa had already informed the Director of Political and Administrative Affairs in the aforementioned note dated 11 July 1935 (paragraph 102), that this pool was one of the points given in the text of the projected description of the boundaries of the **cercle** of Mopti which did not appear on the official maps of his service. Only around 1960 did certain IGN maps show a village of Toussougou, as well as a hydrological feature (a pool or an "area liable to flooding") to the south-west of this village called Fétô Maraboué. These maps are the 1:200,000 map of West Africa, sheet ND-30-XVII; 1:500,000 map of West Africa, sheet ND-30-N.E. This feature, according to Mali, is to be identified with the pool of Toussougou. Burkina Faso claims there are two separate pools, Toussougou and Maraboué. Burkina Faso has filed a map, compiled in 1973 for the purpose of an inventory of hydraulic resources in Upper Volta, which records the existence of two pools. Mali explains that it is a single pool, the extent of which varies with the season: it shrinks in the dry season and swells in the rainy season.

128. The Chamber notes that there is at least one pool in the region of the village of Toussougou, according to both Parties, but the only evidence they have offered on the matter consists of maps. But the maps are far from clear or definitive in this regard. On the IGN map, two symbols to the south of the village indicate the existence of two water-points; and the name "Fétô Maraboué" indicates an "area liable to flooding" which is surrounded and extended by "water logged areas". A "geological reconnaissance map of Upper Volta" filed by Burkina Faso shows two features marked in blue which seem to be pools, but do not correspond in shape or position to those on the IGN map. The cartographic base of the map of water resources, also filed by Burkina Faso, is in fact the IGN map, on which symbols have been added to denote water resources. Obviously the Chamber is here confronted with a major difficulty, since it has only contradictory cartographic documents available to it. However, it considers that the 1973 map, compiled for the very purpose of providing an inventory of water resources, is a particularly valuable piece of evidence. On this map there are two distinct symbols, each representing a non-permanent pool; the pool of Fétô Maraboué is stated as being dry for nine months of the year, no details being given for the pool of Toussougou. The Chamber believes it can be inferred from this that even during the rainy season the two pools remain separate, forming two independent water points from the viewpoint of a register of water resources. Hence there is no obvious or necessary identity between the pool of Fétô Maraboué and the pool of Toussougou referred to in Order 2728 AP.

129. What must also be taken into consideration is the impact of such an identification on the course of the line. According to the map of hydraulic resources, the pool of Toussougou is located at a latitude of approximately 14° 45'; the maximum southward extension of the pool of Fétô Maraboué lies at a latitude of approximately 14° 41'. The geographical co-ordinates of the point indicated by letter 191 CM2 are 1° 24' 15" W and 14° 43' 45" N; it therefore lies west of the two pools, on a parallel running between the southern point of the pool of Toussougou and the southern point of the pool of Fétô Maraboué. A straight line starting from the region of the villages of Kounia and Ouokoulou and heading to the south of the pool of Toussougou would pass, not through this point, but about 6 kilometres to the south of it; a line with the same starting-point heading to the south of Fétô Maraboué would pass about 8.5 kilometres to the south of the point in question. As the Chamber has pointed out, there can be no certainty that the western extremity of the boundary between French Sudan and Upper Volta, as contemplated in letter 191 CM2, lay at exactly the point P, defined by the co-ordinates mentioned in that letter. Indeed this appears not to be the case, since neither of the two lines in question here passes through this point. Nevertheless, in interpreting the reference to the pool of Toussougou in Order 2728 AP, the Chamber believes that of the two possible interpretations it must opt for the one which would reduce to a minimum the margin of error involved in defining the tripoint given in letter 191 CM2, short of compelling grounds for choosing the contrary interpretation. It is also important to bear in mind that the village of Kobou, which was "left" to the cercle of Mopti by Order 2728 AP, is situated on approximately the same latitude as point P. If the line contemplated in the Order had run as far south of this village as the line heading to the south of Fétô Maraboué, it is doubtful whether it would have been thought necessary to mention this village.

130. Before investigating the position of the pool of Kétiouaire, also mentioned in Order 2728 AP, the Chamber considers it necessary to summarize the situation regarding the first segment of the line. Beginning from the point with the geographical co-ordinates 1° 59' 01" W and 14° 24' 40" N, defined in paragraph 112 above, the line heads northward, and for a distance of approximately 3.5 kilometres it follows the line shown in a broken series of small crosses on the IGN map of 1958-1960, as far as a point with the geographical co-ordinates 1° 58' 49" W and 14° 28' 30" N. At this point it turns eastwards, intersecting the track between Dionougou and Digué about 7.5 kilometres to the south of Dionougou, and continues towards the village of Kounia. The line then has to "leave" to Mali the villages of Kounia, Ouokoulou and Koubo, before continuing in a straight line towards the pool of Toussougou. A boundary "leaving" certain villages to any particular administrative district may follow the exact
boundary of these villages, whatever shape they take, and will result in a somewhat undulating line. Provided it observes the administrative appurtenance of the villages, a boundary may also follow a straight line or consist of a series of straight lines all running in the same general direction, with some minor deviations. The colonial maps of the period, for example, the 1926 Atlas des cercles, show clearly that the latter was the form most frequently taken by the cercle boundaries. It is also of relevance that the description given by the administrator of the cercle of Mopti of the subdivision boundary corresponding to the boundary contemplated in Order 2728 AP refers to a single line starting from the village of Yoro and subsequently “heading northeastward as far as the pool of Toussougou”. The Chamber concludes that in adding the detail that the line was to “leave” to the cercle of Mopti the village of Yoro and the “four villages”, the Geographical Service of French West Africa did not intend the line to take a more complex form as a result. In addition, there is no means of determining the precise extent of the villages of Agouloulou and Oukoulou in 1935. The Chamber therefore considers that a line which skirts the present-day villages of Kounia and Ouokoulou to a distance of 2 kilometres to the south corresponds to the boundary described in Order 2728 AP, as far as the course of this boundary can be determined in 1986.

131. According to Order 2728 AP, the line must next pass “to the south of the pool of Toussougou”. For the reasons already explained, in the Chamber’s view this pool is not the pool of Fétou Marabou, but the smaller pool lying close to the village of Toussougou. The expression “to the south of the pool” does not have the same meaning as other expressions such as “passing through the southern point of the pool”, the gap between the line and the pool would be a consequence of the draftsman’s intention, in Order 2728 AP, that the line should continue as far as a point “located to the east of the pool of Kétioiau”. Before defining the course of the line in relation to the pool of Toussougou, the Chamber must attempt to locate the pool of Kétioiau.

132. The boundary of the cercle of Mopti “to the east”, the boundary which according to Order 2728 AP divided it from the cercle of Dori in 1935, terminates at “a point located to the east of the pool of Kétioiau”. It should again be recalled that when drafting this Order, the Governor-General had received the reply of the Lieutenant-Governor of French Sudan dated 3 June 1935 to his letter of 19 February 1935. In his reply the Lieutenant-Governor had stated that the administrator of the cercle of Mopti was proposing: “that the pool of Kétioiau, situated almost on the boundary of the cercles of Mopti, Gourma-Rharous and Dori . . . should be included in the geographical description of the boundary . . .” At first, both Parties concluded from this that the pool of Kétioiau and the pool of Kétioiau were one and the same, the name having been transcribed with two different spellings. During the oral proceedings, however, counsel for Burkina Faso expressed some doubt on this point. The Chamber notes that the modification proposed to the Lieutenant-Governor of French Sudan by the administrator of the cercle of Mopti (see paragraph 101 above) also reveals a certain contradiction, at least if it is interpreted strictly according to its terms. If, as the cercle administrator proposed, the words “and the pool of Kétioiau” are added between the reference to mount Tabakarakar and the words “and then bends south-west” contained in the text of the Governor-General’s letter, it appears that the pool in question would have had to lie close to mount Tabakarakar and in the vicinity of the bend between the east/west sector and the north-east/south-west sector of the line. But according to the cercle administrator himself, the pool was “situated almost on the boundary of the cercles of Mopti, Gourma-Rharous and Dori” ; but the meeting-point of these cercle boundaries, according to all the available maps, lay on the north-east/south-west sector of the line, well to the south of mount Tabakarakar.

133. The Chamber observes first, that none of the maps available to it show any pool bearing either of these names, and secondly, that the Upper Volta/Mali Mixed Technical Commission, during its working sessions between 5 and 17 April 1972, obtained little more than negative information. The local people, when questioned, were unaware of the existence of a pool of Kétioiau, and the Malian inhabitants of Soum gave a location for it which Mali has since rejected. The Chamber also notes that the technical committee of cartographers appointed by the Legal Sub-Commission of the Organization of African Unity Mediation Commission was unable to throw any further light on the situation, though it did observe to the Legal Sub-Commission that, in any event, the pool of Kétioiau could not have been situated west of point P, “since it must lie between Tabakarakar, already identified to the east, and this geographical point”.

134. It is important not to lose sight of the fact that the line described in Order 2728 AP of 1935 as the boundary “to the east” of the cercle of Mopti, before reaching its end-point which was simultaneously the tripoint between the cercles of Mopti, Gourma-Rharous and Dori, had to pass through the tripoint between the cercles of Mopti, Ouahigouya and Dori, although there is no mention of this in Order 2728 AP (see sketch-map No. 2 above). Since the Chamber has chosen to proceed from west to east when indicating the line of the frontier, it would be logical for it to define this latter point before determining the position of the former, which is further to the east. But the Chamber has already explained (paragraph 118 above) why it cannot regard it as settled that the more westerly of these two points was in fact point P, the one defined by geographical co-ordinates contained in the letter 191 CM2 of 1935. Reserving this question, the Chamber will first pursue the question of the position of the pool of Kétioiau.

135. Burkina Faso is of the opinion that, first, the pool of Kétioiau/ Kétioiau, “of which contradictory descriptions were given at a time when the region was poorly known, cannot be precisely located” and, secondly, that its localization is not necessary in order to draw the frontier line. It is true that the proposal made in 1935 by the administrator of the cercle of
Mopti, and transmitted by the Lieutenant-Governor of French Sudan to the Governor-General of French West Africa, for the incorporation in the description of the boundary between French Sudan and Niger of a reference to the pool of Kébanaire, was not apparently conceived as an essential factor in the definition of that boundary; the administrator of the cercle of Mopti seems rather to have intended it as a useful detail to make the description more precise and to facilitate its identification on the ground. The Chamber accordingly considers that it is not necessary to establish the position of the pool of Kébanaire for the purpose of interpreting the letter 191 CM2 of 1935. But this cannot be said of the interpretation of Order 2728 AP, since in that text the pool of Kétiouaire is an important element in the definition of the boundary. Burkina Faso has not had to deal with this point in its arguments, since in its view Order 2728 AP, having a modifying character, was rescinded in 1947 and cannot therefore be taken into account in defining the frontier line. Nevertheless, Burkina Faso has supplied no proof that not only the reference to the “four villages” but also the reference to the pool of Kétiouaire, was inconsistent with the situation prior to 1935. However that may be, the Chamber cannot evade its duty, to interpret Order 2728 AP and for that purpose to determine, if possible, the position of the pool of Kétiouaire.

136. Mali has attempted to situate the pool of Kébanaire/Kétiouaire with the help of a particular set of clues. The first of these is that, according to Order 2728 AP, the pool constitutes the culmination of a “line running markedly north-east, passing to the south of the pool of Toussougu”, The second and third clues are that the letter from the Lieutenant-Governor of Sudan enables the pool to be situated, first, to the south-west of Mount Tabakarach, and secondly, almost on the boundary of the three cercles there mentioned. The fourth is that the boundary described as the “northern” boundary of the cercle of Mopti in Order 2728 AP begins from the point “located to the east of the pool of Kétiouaire”, so that if the indications in the sentence defining this boundary were reversed, it would be possible to use the landmarks contained in it in order to locate the pool of Kétiouaire. The fifth of Mali’s clues is that a pool or a fossil pool cannot be looked for on a plateau or a dune. Finally, the sixth clue is Mali’s argument that the pool cannot be a pool which was known at the time by another name, otherwise that name would have been used; this means, according to Mali, that Kébanaire/Kétiouaire cannot be identified with the pool of Tin Tabore or the pool of Aferere. Mali has submitted to the Chamber a sketch-map to show the region within which it suggests that the pool must necessarily lie if its location is to comply with all these clues. Among Mali’s conclusions is that

“the most plausible position for the pool of Kétiouaire is that of the fossil pool with the geographical co-ordinates longitude 0° 46' 09" west, latitude 14° 56' 41" north. This pool, part of which is permanent, is the one named Tin Arkachen in 1977 by H. Barra of Oroni. It is the site of Forage Christine.”

137. In the Chamber’s opinion, the proper approach is not to attempt to determine at the outset whether or not the pools of Kébanaire and Kétiouaire are one and the same. It should first interpret Order 2728 AP, and then consider whether the conclusions it has reached warrant the identification of Kébanaire with Kétiouaire. If that were not established, the Chamber should take account only of the description of the boundary contained in letter 191 CM2 by the Governor-General of French West Africa, disregarding the modification proposed by the administrator of the cercle of Mopti which, as has been seen, was aimed only at making it more precise, and moreover contained an inherent contradiction.

138. Hence the question which arises is whether there is, or rather was in 1935, a pool lying both in a “markedly north-east” direction in relation to a point located “to the south of the pool of Toussougu”, and in the vicinity of the tripoint of the cercles of Mopti, Gourma-Rharous and Dori, and to the west of the latter. In the text of Order 2728 AP, the meeting-point of the northern and eastern boundaries of the cercle of Mopti was situated not merely close to the pool of Kétiouaire, but “to the east” of it. If one were to assume Kébanaire and Kétiouaire to be identical, it must be concluded that on issuing the Order the Governor-General had information additional to that provided by the commandant de cercle of Mopti, both in respect of the pool of Kébanaire, in his letter-telegram of 19 March 1935 (paragraph 101 above), and in his description of the boundaries of the subdivisions of his cercle dated 25 May 1935 (paragraph 100 above). However that may be, it is obvious that the pool of Soum, situated some 24 kilometres to the east of the pool of Toussougu, requires particular examination. However, it is clear from the file that this pool, which was mentioned for the first time under this name in 1939, was thought to lie close to the meeting-point, not of the three cercles mentioned above of Mopti, Gourma-Rharous and Dori, but of the cercles of Mopti, Ouahigouya and Dori. A communication addressed by the commandant de cercle of Dori to the Governor of Niger on 18 December 1939 mentioned “the pool of Soum” as being “situated on the boundary of the subdivision of Dounenta (cercle of Mopti) and of the cercle of Ouahigouya, to which it belongs”. On 7 July 1943, the cercle administrator of Dori asked the commandant de cercle of Mopti for information concerning the position of the pool of “Souhoum”, and “the position in relation to the latter, or in relation to the village of Kouna, of the meeting point between the cercles of Mopti, Ouahigouya and Dori”. In his reply, the commandant de cercle of Mopti stated that, according to the information he had obtained during a visit to the pool, “it was certainly on the territory of the canton of Ar—
binda”. There are no means of knowing whether, at the time of that visit, the canton of Aribinda belonged to the cercle of Dori (before 1933) or to that of Ouahigouya (after 1932).

139. According to one of the maps produced by Burkina Faso (sketch-map of French Africa on the scale 1:1,000,000, ND-30 sheet, Ouagadougou, 1946 edition (maps filed, No. 11 (C)), the distance between the two tripoints was approximately 38 kilometres. The distance between point P (assuming for the moment that the geographical co-ordinates of this point give a correct definition of the tripoint Mopti/Ouahigouya/Dori) and the pool of Soum as shown on the IGN 1:200,000 scale map of 1960, is approximately 36 kilometres. Two conclusions can be drawn from this. In the first place, the tripoint Mopti/Oourma-Rharous/Dori was not far distant from the pool of Soum, and it seems to have been located to the east of that pool. In the second place, it seems doubtful whether the tripoint Mopti/Ouahigouya/Dori can have lain as far west as implied by letter 191 CM2. It may also be thought that that letter placed the point too far to the north. It was of course based on the maps of the period, according to which the “northern” boundary of the cercle of Mopti (the course of which cannot however be very accurately discerned from these maps) was to intersect the northern boundary of the cercle of Dori in the vicinity of the point of co-ordinates 1° 01’ 47” W and 14° 57’ N, or 19.5 kilometres to the north of Soum. In an event, the pool of Soum lies in the right direction as regards the course of the line described in Order 2728 AP, in so far as concerns the segment skirting the village of Ouakouolou at a distance of 2 kilometres and then passing “to the south of the pool of Toussoucougou”. These conclusions are in fact those which lead the Chamber to reject Mali’s argument that the pool of Kébanaire/Kétiouaire is the fossil pool of Tin Arkachen which, in the Chamber’s opinion, lies too far to the east.

140. According to Order 2728 AP, the end-point of the eastern boundary of the cercle of Mopti and the starting-point of the northern boundary of the cercle was located “to the east of the pool of Kétiouaire”. According to this text, the pool accordingly lay within the acute angle formed by the meeting of the two boundaries, which means that it belonged to the cercle of Mopti. The pool of Kébanaire however, according to the administrator of the cercle of Mopti, was situated “almost on the boundary of the cercles of Mopti, Gourma-Rharous, and Dori” – that is, near the meeting-point of the eastern (Mopti/Dori) and northern (Mopti/Gourma-Rharous) boundaries of the cercle of Mopti. The proposal made by the administrator of the cercle of Mopti read as follows:

“...”

The expression “almost on the boundary” used by the administrator of

Mopti might suggest that the pool was within the cercle of Mopti, but “almost” on the boundary of that cercle. But what the administrator of the cercle of Mopti was proposing was not a clarification of the description of the boundary of the cercle which was under his own authority. As already pointed out (paragraph 132 above), his proposed modification of the drafting is only intelligible if the pool of Kébanaire lay much further to the north-east. What in fact he was proposing was that the boundary between other cercles, Gourma-Rharous and Dori, should be described as passing the pool of Kébanaire. Consequently, this pool might have been in the cercle of Gourma-Rharous or that of Dori; it could not have belonged to the cercle of Mopti without being located close to the end-point of the boundary described in letter 191 CM2. As for the pool of Soum, according to the above-quoted administrative documents it belonged either to the cercle of Dori or to that of Ouahigouya.

141. Having regard to all the available information on the subject of the pool of Kétiouaire and the pool of Kébanaire, the Chamber’s conclusion is as follows. The pool which appears on the maps subsequent to 1950 under the name of “pool of Soum” and which has been mentioned in administrative documents since 1939 seems to be the only one which might be identifiable as the one referred to in Order 2728 AP under the name of “Kétiouaire”. This Order refers to a pool lying west of the tripoint where the cercles of Mopti, Gourma-Rharous and Dori met. The position of this point is itself far from certain, but according to all the information now available, only the pool of Soum would have lain close to the probable position of this point and to the west of it. On the other hand, the pool of Soum cannot simultaneously be the one referred to in letter 191 CM2 under the name of “Kébanaire”. The Chamber must therefore observe that if the pool of Kébanaire or that of Kétiouaire had, between 1935 and 1939, acquired the new name of “pool of Soum”, it is likely that some reference to this would have appeared in an administrative document, especially in view of the fact that the pool of Kétiouaire, at least, was a sufficiently well-known topographic feature in 1935 to be used in defining the end-point of a cercle boundary. Hence there are two alternatives: either the pool of Soum is the pool called in 1935 Kétiouaire, and the position of the pool of Kébanaire remains unknown, or there is insufficient information available to the Chamber for it to identify or to locate either of these two pools. On due reflection, the Chamber does not consider that it should base its decision on the identification of the pool of Kétiouaire with the pool of Soum.

142. It is nonetheless necessary for it to examine the relationship between the pool of Soum and the administrative boundary of the 1930s which has to be defined, in the light of the documents produced by the Parties, including those which date from a more recent period, even those subsequent to the independence of both States. In applying international law, in this instance the principle of uti possidetis, to the facts of the case as they emerge from the evidence produced on either side, the Chamber finds
that the available information is not always sufficient to establish which of
two possible lines coincides with the one which existed in 1932. The
Chamber is therefore convinced that the pool of Soum is a frontier pool;
but it finds no indication dating from the colonial period from which it can
be said that the line runs to the north of the pool, to the south of it or divides
it. Furthermore, as explained above (paragraph 94), the question is not
such that, in the absence of other grounds for a decision, the principle of
the onus of proof can be brought into play.

143. Before examining more closely the situation in the region of the
pool of Soum, the Chamber considers it necessary to define that segment of
the line which lies between the village of Oukoulourou and the pool, in
relation to the village of Kobou and the pool of Toussougou. As already
seen, if the line is to comply with the wording of Order 2728 AP it must run
"to the south of the pool of Toussougou", and the gap between the line and
the pool will be a consequence of taking other landmarks into account, viz.,
the "four villages" to the west and the pool of Kétouaire to the east. It has
proved impossible to identify the pool of Kétouaire, but the line must run
through the pool of Soum. In view of what has been said above concerning
the shape of cercle boundaries in colonial administrative practice, and in
order to avoid too sharp a bend in the region of Toussougou, the Chamber
considers that the line must connect the point located 2 kilometres to the
south of Oukoulourou, mentioned in paragraph 130 above, with a point
located 2.6 kilometres to the south of the pool of Toussougou, the
geographical co-ordinates of this latter point being 1° 19'05" W and
14° 43'45" N. From there, the line continues toward the pool of Soum.
The bearing of the line Oukoulourou-Toussougou is approximately 57°,
The bearing of the line Toussougou-Soum approximately 76°, and the
bearing of the hypothetical line connecting Oukoulourou and the pool of
Soum approximately 63°. Hence the line which the Chamber has just
indicated does, in its view, meet the requirements of Order 2728 AP, which
refers to a line extending in a "markedly north-east" direction.

144. The line so defined does not pass through the point with the
groundwater co-ordinates 1° 24'15" W and 14° 43'45" N, mentioned in
letter 191 CM2 from the Governor-General of 19 February 1935. These
c-ordinates, which give an impression of precision, are taken from the
maps of the period, especially the Blondel la Rougery map and the Atlas
des cercles; that precision is nowhere warranted by the cartographical
resources used or the reliability of the surveys taken as a basis. In fact, as
the Chamber has already observed (paragraph 109 above), from an exami-
nation of the topographical sources permitting a definition of the various
cercle boundaries which together determine the western tripoint of Moopi/
Ouahigouya/Dori, the Chamber concludes that this tripoint must have
lain south-east of the point indicated by the geographical co-ordinates
quoted. If the project of the Governor-General of French West Africa had
become a regulation, it is obvious that the correctness of these co-ordinates
would have amounted to an irrebuttable presumption; but this is not the
case. In itself, the letter 191 CM2 only ranks as evidence of a boundary
having "de facto value" at the time. It now transpires that the maps
available at the time were not accurate enough to warrant defining a point
from these maps by geographical co-ordinates of such precision. Thus the
fact that these co-ordinates have been found to have been defined with an
over-optimistic degree of precision does not contradict the Governor-
General's intentions or deprive the letter of probative force.

* * *

145. The Chamber now comes to the determination of the frontier line in
the region of the pool of Soum. According to a report on rural water
resources dated 7 January 1957, produced by Burkina Faso, the pool of
Soum belongs to the category of "major temporary pools which dry out in
the dry season" and on 31 December of the same year, the report of a tour
of inspection mentions a "large pool of Soum which dries up...in March".
The report notes that "in view of the size of their herds, the Soum herdsmen
are requesting the construction of two field wells", and this work was
recommended as a "measure of highest priority", on the ground that
"Soum is the best stockbreeding centre in the Djibo subdivision" of the
cercle of Ouahigouya, in Upper Volta. In a letter transmitting the minutes
of a meeting of 15 January 1965, to be examined in the next paragraph, the
commandant de cercle of Djibo states that "by the pool of Soum is meant
the basin measuring 5 kilometres in length".

146. Mention should be made, in respect of the period subsequent to
independence, of the record, among the diplomatic and other documen-
tation submitted by both Parties to the Chamber, of an agreement
concluded on 15 January 1965 between a Voltan and a Malian delegation, com-
prising commandants de cercle and other administrators on each side, which
met "at Soum, a frontier pool". According to this record, the purpose
of the meeting was "to pursue the adjustment of the line of the remainder
of the frontier from the middle of the pool of Toussougou to the meeting-
point of the cercles of Rharous and Dori". The text continues as follows:

"After a broad exchange of views by both delegations, the following
was agreed:

A perpendicular line dividing the pool of Soum in two and running
through the centre, leaving the village of Soum to the territory of
Upper Volta and rejoining the boundary on map ND-30 XVII, July

The northern part of this area falls to the Republic of Mali: the rest
to the Republic of Upper Volta."

In his covering letter of 18 January 1965 transmitting the report of the
meeting to the Minister of the Interior, the Djibo commandant explained
this agreement as follows:
"The Malian delegation ultimately accepted . . . that the greater part of the Soum area belongs to Upper Volta except for the crucial point: the water reservoir measuring approximately 500 metres in diameter. As neither State is justified in claiming the whole of this water reservoir, it was divided according to the data in the report [that is, an inspection report of 26 February 1951, no copy of which is included in the file of the case]."

A sketch-map was annexed to the record of the agreement, and the commandant explained that the portion of the pool shown on the sketch as being attributed to Mali "formed a pocket of approximately 250 metres, solely to enable cattle from Mali to have access to the water supply". 147. In its Memorial Mali emphasized that the only authority with jurisdiction at the time to make a definitive settlement of frontier problems was the Standing Joint Commission, on which sat the Ministers of the Interior of both countries. From this it argues that all the agreements concluded at the level of commandants de cercles which were not confirmed subsequently by that Commission must be treated as ineffectual. The Chamber agrees that such agreements, not approved by the competent authorities of each Party, do not have the binding force of a convention. Moreover, the Chamber has no intention of departing from the firmly established rule that

"The Court cannot take into account declarations, admissions or proposals which the Parties may have made during direct negotiations between themselves, when such negotiations have not led to a complete agreement." (Factory at Chorzów, Merits, P.C.I.J., Series A, No. 17, p. 51.)

The Chamber however considers that it is entitled to take note of certain facts which emerge from a document submitted to the Chamber by each Party as an annex to a written pleading, that is, one of the "relevant documents adduced in support of the contentions contained in the pleading" (Art. 50, para. 1, of the Rules of Court). Thus the Chamber observes that the commandants of the adjacent cercles of Douentza and Djibo each took a certain view; above all, they agreed that the pool of Soum was a "frontier pool", which had to be divided between the two cercles.

148. It should again be pointed out that the Chamber's task in this case is to indicate the line of the frontier inherited by both States from the colonizers on their accession to independence. For the reasons explained above, this task amounts to ascertaining and defining the lines which formed the administrative boundaries of the colony of Upper Volta on 31 December 1932. Admittedly, the Parties could have modified the frontier existing at the critical date by a subsequent agreement. If the competent authorities had endorsed the agreement of 15 January 1965, it would have been unnecessary for the purpose of the present case to ascertain whether that agreement was of a declaratory or modifying charac-

ter in relation to the 1932 boundaries. But this did not happen, and the Chamber has received no mandate from the Parties to substitute its own free choice of an appropriate frontier for theirs. The Chamber must not lose sight either of the Court's function, which is to decide in accordance with international law such disputes as are submitted to it, nor of the fact that the Chamber was requested by the Parties in their Special Agreement not to give indications to guide them in determining their common frontier, but to draw a line, and a precise line.

149. As it has explained, the Chamber can resort to that equity infra legem, which both Parties have recognized as being applicable in this case (see paragraph 27 above). In this respect the guiding concept is simply that "Equity as a legal concept is a direct emanation of the idea of justice" (Continental Shelf (Tunisia/Libyan Arab Jamahiriya), I.C.J. Reports 1982, p. 60, para. 71). The Chamber would however stress more generally that to resort to the concept of equity in order to modify an established frontier would be quite unjustified. Especially in the African context, the obvious deficiencies of many frontiers inherited from colonization, from the ethnic, geographical or administrative standpoint, cannot support an assertion that the modification of these frontiers is necessary or justifiable on the ground of considerations of equity. These frontiers, however unsatisfactory they may be, possess the authority of the uti possidetis and are thus fully in conformity with contemporary international law. Apart from the case of a decision ex aequo et bono reached with the assent of the Parties, "it is not a matter of finding simply an equitable solution, but an equitable solution derived from the applicable law" (Fisheries Jurisdiction, I.C.J. Reports 1974, p. 33, para. 78). It is with a view to achieving a solution of this kind that the Chamber has to take account, not of the agreement of 15 January 1965, but of the circumstances in which that agreement was concluded.

150. The Chamber thus concludes that it must recognize that Soum is a frontier pool; and that, in the absence of any precise indication in the texts of the position of the frontier line, the line should divide the pool of Soum in two, in an equitable manner. Although "Equity does not necessarily imply equality" (North Sea Continental Shelf, I.C.J. Reports 1969, p. 49, para. 91), where there are no special circumstances the latter is generally the best expression of the former. The line should therefore begin from the point lying south of the pool of Toussougou as described in paragraph 143 above, and continue as a straight line as far as a point situated on the west bank of the pool of Soum, with the geographical co-ordinates 1° 05' 34" W and 14° 47' 04" N. It should then cross the pool in such a way as to divide the maximum area of the pool as shown on the 1960 IGN map in equal proportions between the two States.

* * *

151. In view of the impossibility of locating the pool of Kétouaire, the Chamber can find no further indications in Order 2728 AP of 1935
whereby the frontier can be determined east of the pool of Soum. It is therefore now necessary to refer to the letter 191 CM2 of 19 February 1935 (paragraph 72 above). As already noted, Burkina Faso claims that the letter 191 CM2 is the authentic expression, by the authority possessing jurisdiction at the time, of its conviction as to the course of the boundary (paragraph 77 above), and the letter is therefore applicable for the purpose of determining the line of the frontier. For its part, the Chamber has reached the conclusion that this argument is correct (paragraph 85 above). It notes however that in its submissions Burkina Faso, when defining the reference factors to define the line which it proposes, makes a distinction between the area west of the point with the geographical co-ordinates 0° 40' 47" W and 15° 00' 03" N, and the area east of that point. To the west, the submissions are that

“the line is as shown on the 1:200,000 scale map of the French Institut géographique national (1960 edition), the villages of Dioulouma, Ououlou, Agoulourou and Koubo being located in Burkinafe territory”;

whereas east of that point,

“the line corresponds to the information given in letter 191 CM2 of 15 February 1935 and on the 1:500,000 scale map, 1925 edition, as far as the northern point of the pool of In Aabo”.

A map filed with the Burkinafe Memorial, consisting of a compilation of five sheets from the IGN 1:200,000 scale map, shows what Burkina Faso claims to be the “existing frontier” by means of a yellow band following the broken line of small crosses on that map, diverging only as regards the eastern part of the line, where the IGN line terminates at Fitili, 12 kilometres north of the Kabia ford, and the yellow band at a point some 2.5 kilometres to the north of the ford.

152. Only during the oral proceedings did Burkina Faso explain its reasons for selecting the point 6° 40' 47" W and 15° 00' 03" N as the point where, for the definition of the line to the east, the 1:500,000 scale map of 1925 is to be substituted for the 1960 1:200,000 scale map as a base map. On the one hand, this point is supposedly located approximately at the latitude of Raf Naman, where the Béli region is customarily held to begin; on the other hand, this method of deciding the disputed frontier was taken from the report of the Legal Sub-Commission of the Organization of African Unity Mediation Commission. In this report, dated 14 June 1975, the Sub-Commission states that west of this point,

“the frontier is represented by a continuous line of small crosses indicating, on the part of the authors of the 1:200,000 map [of the IGN] the existence of clearly interpreted texts or a representation of unambiguous actual situations . . .”.

However, on referring to the IGN 1:200,000 scale map, it is found that a minor calculation error has crept into the text of the Legal Sub-Commission’s report, and that this error recurred throughout the proceedings in the successive submissions by Burkina Faso: the first co-ordinate should have been 6° 50' 47" W.

153. With regard to the determination of the frontier between point P and mount Tabakarak, the Counter-Memorial of Burkina Faso emphasizes that the letter 191 CM2 indicates only that these two points are the starting-point and the finishing-point, and what was contemplated in the letter must have been a straight line between the two. Although the Blondel la Rougery map and the Atlas des cercles show the boundary as a straight line, other maps, including the IGN 1:200,000 scale map of 1960, replace it by a line with sections at different angles. The line on the IGN map consists of a straight sector running southwest as far as a point situated slightly to the northeast of the pool of Soum, and from that point a line in a west-southwest direction as far as point P. Mali drew the Chamber’s attention to the discrepancies which emerge from a comparison between these two lines, and to give a visual illustration of these filed a map which combines the lines shown on the Blondel la Rougery map and the IGN 1960 map.

154. In the Chamber’s view there is no doubt that letter 191 CM2 of 1935 was intended to define in textual form the boundary shown on the Blondel la Rougery map of 1925, and the Parties agree on this. It seems probable also that the Atlas des cercles was consulted for this purpose. But Mali has emphasized that these maps were provisional and inaccurate. In a study published in 1927, Commander Edouard de Martonne of the Geographical Service of French West Africa commented on the series of maps to which the Blondel la Rougery map belonged:

“these sheets, drawn with the help of the itinerary surveys, reconnaissance surveys and topographical work of various kinds kept at the headquarters of the Governorship General at Dakar, are, as indicated by the description ‘reconnaissance map’, basically subject to revision. Nothing could have made plainer than a map compiled like this how inadequate the existing documentation is, and how necessary it is to make a new start.”

Of the cercle maps, he states that:

“the frequent territorial changes introduce modifications to the cercle boundaries which are rarely depicted in the same way by adjacent districts”

and adds:

“as a result of the successive copying, it is not uncommon to find maps of neighbouring cercles which cannot be juxtaposed”.

84
The frontier between Upper Volta and French Sudan as shown on the Blondel la Rougery map follows a line of mountain crests. Mali argues that the majority of the place-names shown on that map had never been mentioned before (Tabakarach, Tin Eoult, Ouagou, Tabasouine) and that the orography described by this map now appears "entirely invented". Mali alleges that in this region, the Blondel la Rougery map "invented a range of mountains which could not be traced either geographically or toponymically in 1960". For its part, Burkina Faso observes that the map in question shows maps Tin Eoult and Tabakarach, which constitute, west of the pool of In Abao, the prolongation of the line of dunes and cliffs which dominates the eastern part of the marigot of the Béli. The Chamber notes that there is very little continuity as regards the use of place-names in this region, and that the orography shown on the Blondel la Rougery map is extremely sketchy; nevertheless, north of the Béli, there is a fairly marked relief from which a frontier can be defined in orographic terms.

155. The Chamber also notes that among the documents supplied by Mali is a report concerning the "Patrols of In Abao", compiled on 28 November 1940 by the head of the Ansongo subdivision (cerclle of Gao, French Sudan), accompanied by a sketch-map, which shows that the Blondel la Rougery map was still being used as a base for the preparation of sketch-maps by the administrators. It is indeed clear that the sketch-map in question had been copied from the Blondel la Rougery map; in particular, the line of the colonial boundary ["limite de colonies"] shown on it matches the one appearing on the Blondel la Rougery map. This detail is the more noteworthy because the depiction on the sketch-map of the route followed by the Ansongo patrol unquestionably proves that the patrol followed the course of the Béli between In Abao and In Tangou; it entered the territory of the cerclle of Dori, which belonged at the time to the colony of Niger. If the Béli, as Mali claims, was the frontier between the two colonies, or if there had been any doubt as to the course of this frontier, it is difficult to understand why the head of the Ansongo subdivision would have taken care to mark on his sketch-map the boundary shown on the Blondel la Rougery map, which had been made official by the letter 191 CM2 of 1935.

156. For reasons already explained above, the Chamber has not taken into account, for the frontier line, point P with the geographical co-ordinates mentioned in the letter 191 CM2, and has established that the frontier ran through the pool of Soum. In the Soum-Tabakarach sector, there is no longer any need to choose between the line shown on the Blondel la Rougery map and the line on the IGN map; in the absence of any other information to the contrary, letter 191 CM2 must necessarily be interpreted as contemplating a straight line linking Tabakarach to the tripoint at which the boundaries of the cercles of Mopti, Ouahigouya and Dori converged. That tripoint, identified in letter 191 CM2 in relation to the geodetic grid shown on the Blondel la Rougery map as correspond-
the conjunction in 1925 of the boundaries of three administrative districts, i.e., the Sudanese cercles of Gao and Hombori and the Voltan cercle of Dori. The sketch-map No. 5 below shows the contradiction between the various maps in regard to the position and area of the pool and the precise location of the above-mentioned boundaries in relation to the pool.

159. According to a document dating from 1954, originating from the Hydrological Service of French West Africa, which gives a list of waterpoints in northern Dori (Upper Volta), the pool of In Aabo, located on the Béli, had a maximum width of about 200 to 250 metres and a length of approximately 2 kilometres. There were no draining wells and the pool dried up in December-January. During a visit to the area by the members of the Mixed Technical Commission in April 1972, the pool was found to have dried up. The list of waterpoints does not give the orientation of the pool, but a 1:200,000 map compiled in 1953 by the Direction fédérale des mines et de la géologie shows that it forms part of the Béli marigot, which runs from west to east. On the 1925 Blondel la Rougery map, the pool took the form of a triangle with its base running from east to west, and the frontier line shown on that map seems to touch the northern apex of that triangle. It has been suggested that this data on the 1925 map might be confirmed by the sketch-map annexed to the report compiled by the head of the Ansongo subdivision in 1940 on the “Patrols of In Aabo” (paragraph 155 above). However, since the sketch-map was copied from the 1925 map, as already explained, it cannot constitute independent evidence.

160. The co-ordinates of the pool located by the Technical Sub-Commission in April 1972 were, as already seen: 0° 20' 40" W and 14° 59' 27" N. The broken line of small crosses appearing on the IGN 1960 map forms approximately a right angle, touching the watercourse of the Béli at a point with the approximate co-ordinates 0° 24' W and 15° 00' N. On this map the pool of Tin Kacham, which the Technical Subcommission found to lie to the east of the pool of In Aabo, is shown extending over more than 2 kilometres, between approximately 0° 17' and 0° 19' W. The 1:200,000 map of the Direction fédérale des mines et de la géologie (1953) shows In Aabo at the point with the co-ordinates 0° 28' W and 15° 02' N and Tin Kacham at the point with the co-ordinates 0° 23' W and 15° 00' N; three dotted lines apparently depicting administrative boundaries meet just north of In Aabo. Lastly, a map entitled “Hydrology of northern Dori (Upper Volta), Hydrological Service of French West Africa”, dated 1954 gives the following details: In Aabo 0° 25' W and 15° 02' N, In Kacham 0° 18' W and 15° 00' N, and a “territorial boundary” line intersecting the marigot of the Béli at In Kacham.

161. It is clear that the Chamber does not possess the necessary infor-
Abao also affects the course of the frontier line. The broken line of small crosses shown on the IGN map in the region of In Abao touches the Béli at only one point, and it is not certain that this point corresponds to the position of the pool indicating the junction of the two marigots. The Chamber concludes that the frontier must follow the IGN line as far as the point (point J, with the geographical co-ordinates 0° 26' 35" W and 15° 05' 00" N) where it turns south-east to join the Béli; and that further east it must rejoin the IGN line at point L (with the geographical co-ordinates 0° 14' 44" W and 15° 04' 46" N) where the line, after leaving the Béli to head north-eastward, again turns south-east to form an orographic boundary. It will be for the Parties, with the assistance of the experts appointed pursuant to Article IV of the Special Agreement, to fix the position of the pool of In Abao and to define two points (point J and point K) lying on the same parallel of latitude, such that a straight line drawn between these two points will divide the expanse of the pool in equal proportions between the Parties. The frontier line in this region will therefore consist of three straight lines linking, in turn, points L and J, K and L, and J and K. The line between points I and L shown on the map annexed, purely for illustrative purposes, to this Judgment (see paragraph 175 below) is based on the assumption that the centre of the pool of In Abao is situated at the point with the geographical co-ordinates 0° 23' 35" W and 15° 00' 15" N, and that the dividing line extends for 1 kilometre on either side, to the west and east of this point.

164. For the whole region of the Béli, which forms the eastern sector of the disputed area, Mali, which has rejected the letter 191 CM2 of 1935, argues in favour of a frontier running along the marigot. The two Parties have debated at length the choice which was open to the colonial power, as between a hydrographic frontier (along the Béli) and an orographic frontier (along the crest line of the elevations to the north of the marigot). Whatever may have been the general policy of the colonial administration in such matters, the Chamber considers that the letter 191 CM2 serves to prove that the orographic boundary was adopted in this instance. What has now to be defined, in the light of all the available maps and documents, is the exact course of the line described in the 1935 letter, and of which the 1925 Blondel la Rougery map could give no more than an approximate indication, in view of its technical deficiencies. The pool of In Abao, the location of which the Chamber has now indicated in relation to the frontier, is shown both on the boundary given on the Blondel la Rougery map and on the boundary indicated by a broken series of crosses on the 1960 IGN map. As the Chamber has observed, the topographical representation afforded by that map enjoys the approval of both Parties, but Mali does not accept the validity of the frontier line shown on that map by a line of crosses. As for the eastern sector of the disputed area, the broken
line of small crosses which is drawn on the IGN map seems to be a topographical adaptation of the boundary shown on the 1925 Blondel la Rougery map, and repeated in the letter 191 CM2 of 1935, defined with increased precision in 1958-1959. Mali recognizes that the IGN line "seems to be fairly similar to that on the 1925 map, with the difference that a broken line is substituted for an unbroken one". The Chamber sees no reason to depart from the broken line of small crosses, which appears to be a faithful representation of the boundary described by the letter 191 CM2, except with regard to the easternmost part of the line where the problem arises of the position of mount N'Gouma.

* * *

165. With regard to the final segment of the line, the essential question for the Chamber is therefore the position of the "heights of N'Gouma" mentioned in the erratum to the 1927 Order "fixing the boundaries of the colonies of Upper Volta and Niger". The Chamber has explained above (paragraph 72) Mali’s criticisms of this text. It concluded that that text could not be set aside in limine, on the ground that the Order was invalidated by a factual error; its value as evidence had to be weighed in order to determine the position of the end-point of the frontier. Mali considers that the Kabia ford was, in 1927, a frontier point between Niger and Upper Volta, but that the boundary between French Sudan and Upper Volta also ran through the Kabia ford, so that Kabia rather than mount N'Gouma would be the real tripoint between Niger, Burkina Faso and Mali.

166. In 1927, the map chiefly available for reference purposes was the 1925 Blondel la Rougery map which, in all probability, was based on information given in the map of the 1908-1909 Gironcourt expedition. These two maps distinctly located the Kabia ford on the Béli and showed high ground to the north of the Béli bearing the name "Mount Ngouma". The expression "hauteurs de Ngouma" which was to be employed in the erratum to the 1927 Order, appears on a map of 1908, the map of the military territory of Niger compiled by Lieutenant Petitperrin, which does not indicate the Kabia ford. On that map, to the west of the "hauteurs de N'Gouma", the word "N'Gouma" appears beside what seems to be a pool, and a "mount Kabir" is shown between the two names. Only on a sketch-map compiled by administrators in 1954, and on the 1960 IGN map (cf. paragraph 172 below) does the name "Ngouma" indicate an elevation to the southeast of the Kabia ford. This latter map, according to Mali, presents the only accurate picture of the situation.

167. The purpose of the 1927 Order was to fix the boundaries between the colonies of Upper Volta and Niger. In the region in question in the present case, the administrative districts concerned were the cercle of Dori, on the Voltan side, and the cercle of Tillaibery in Niger. The starting-point of the boundary between these two cercles also lay on the boundary between the Sudanese cercle of Gao to the north and the two cercles already mentioned. On 27 August 1927, the commandant de cercle of Dori sent the Governor of Upper Volta an inspection tour report together with a draft delimitation prepared "in consultation and in agreement with the commandant de cercle of Tillaibery". The Order fixing the boundaries between the two colonies was issued in Dakar four days later, on 31 August 1927, and the two Parties agree that, in view of the means of communication available at the time, the report and the draft from the commandant de cercle of Dori cannot possibly have been taken into account when the Order was issued. This being so, the similarities between the text proposed by the commandant de cercle and the one adopted by the Governor-General suggest that both texts were derived from a single original preliminary draft which has not been brought to light.

168. The projected delimitation between cercles proposed in the letter of 27 August 1927, begins as follows:

"The cercles of Dori and Tillaibery will henceforward be bounded as follows:

To the north by the existing boundary with Sudan (cercle of Gao) as far as the elevation [à la hauteur] of the mountain of N'Gourma, and then to the west by a line starting at the Kabia ford and heading southwards towards the Yatakala-Falagountou road . . . ."

The Order issued on 31 August 1927 by the Governor-General of French West Africa begins with the following words:

"The boundaries of the colonies of Niger and Upper Volta are henceforth determined as follows:

1. Boundaries between the cercle of Tillaibery and Upper Volta;

This boundary is determined to the north by the existing boundary with Sudan (cercle of Gao) as far as the height of N'Gourma, and to the west by a line passing through the Kabia ford, mount Darouss-koy . . . ."

On 5 October 1927 an erratum to the Order was adopted. Mali considers that this was prompted by the arrival in Dakar of the letter from the commandant de cercle of Dori, but, since the text of the erratum departs further from that of the letter of 27 August 1927 than does that of the Order itself, this seems improbable. The erratum reads as follows:

"The boundaries of the colonies of Niger and Upper Volta are determined as follows:

A line starting at the heights of N'Gourma, passing through the Kabia ford (astronomic point), mount Arounskaye . . . ."
169. As the maps show, the colony of French Sudan extended further to the east than Upper Volta, the neighbouring colony to the south, so that the boundary between Sudan and Niger in that region followed an east-west course before reaching the tripoint between Niger, Sudan and Upper Volta. From that point, the boundary between Upper Volta and Niger ran in a southerly direction. As has been seen, on the maps of the period mount N’Gouma was shown to the north of the Kabia ford. The only two factors, in the three definitions quoted above, which might give cause to believe that the tripoint was situated at the Kabia ford are, first, the expression “a line starting at the Kabia ford” which appears in the letter of 27 August 1927, and secondly, the text of this letter read in isolation, which implies that the ford was located “à la hauteur de” mount N’Gouma [i.e., “at the elevation of” or “at the geographical level of”]. However, this letter has no intrinsic legal value; it can serve only to elucidate the meaning of the Order and its erratum. As for the Order, it uses the expression “a line passing through the Kabia ford” which infers that the line originated further to the north, at “la hauteur de N’Gourma”. Finally, the erratum clearly indicates that the line began at “the heights of N’Gourma” and passed through the Kabia ford.

170. When the technical committee of cartographers appointed by the Legal Sub-Commission of the Organization of African Unity Mediation Commission examined the problem in April 1975, it found the following argument particularly important: if, as Mali suggests, one starts from the hypothesis that mount N’Gouma was to the east of the Kabia ford, any boundary which started from mount N’Gouma, passed through the ford, and then ran in the direction of mount Darouskoy (Arounskaye) would turn sharply — through something like 90 degrees — at the ford, since mount Darouskoy lies south of the ford. The text of the Order of 31 August 1927 states that the boundary “then turns to the south-east” in the neighbourhood of Tong-Tong, a turn which is much less sharp (approximately 155 degrees) than the supposed turn at the Kabia ford (see sketch-map No. 6 below). It is therefore difficult to see how the draftsman of the Order could have failed to mention that the Kabia ford was the position of such a marked turn, if that had really been the case. It may be added that, if N’Gouma lay to the east of Kabia, the line described in the letter 191 CM2 would have passed through Kabia, between mount N’Gouma and mount Trontikato. It is hardly surprising that the letter did not mention the ford, given that its text was based on the Blondel la Rougery map. But it will be recalled that the draft description of the boundary between the colonies of Niger and French Sudan set out in letter 191 CM2 of 1935 had been submitted to the commandants of the cercles concerned, including the commandant of the cercle of Gao, the southern boundary of which was to run through mount N’Gouma or the Kabia ford. This commandant de cercle replied in a letter-telegram of 14 April 1935, commenting on a disparity between a text and “the 1:500,000 map compiled by the Army Geographical Service of French West Africa” in a region not relevant to the present case. The commandant did not remark upon the reference to
mount N’Gouma in letter 191 CM2; and nowhere did he suggest the inclusion of a reference to the Kabia ford, despite this being a significant topographical feature.

171. Mali has submitted to the Chamber a map on the scale 1:1,000,000 entitled “Afrique occidentale française, nouvelle frontière de la Haute-Volta et du Niger (Suivant erratum du 5 octobre 1927 à l’arrêté en date du 31 août 1927)”[4] (“French West Africa, new frontier between Upper Volta and Niger (according to the erratum of 5 October 1927 to the Order dated 31 August 1927”). This map, already mentioned above, distinctly shows a frontier line between the two colonies running in a general west-east direction and passing to the north of the Kabia ford. The name “Hauteur de Ngouma” (“Height of Ngouma”) is marked on this line, also to the north of the ford. The map shows another frontier line, running from south to north, which passes through the ford to join the first line to the north of it, at the point marked with the name “Hauteur de Ngouma”. This map is thus absolutely positive and, if it were found to constitute an authoritative representation of the intention of the author of the erratum, there could be no doubt what conclusion should be drawn as to the interpretation of this text. However, Mali points out that this map contains no information as to which official body compiled it or which administrative authority approved the line shown on it, and moreover draws attention to the fact that in 1975 the Bureau des frontières of the French Institut géographique national stated: “To the best of our knowledge there is no specific map which interpreted the General Order of 31 August 1927 and its erratum of 5 October 1927.” The Chamber, while not ascribing to this map submitted by Mali the authoritative status of a document explaining the Order and erratum, i.e., one issued with the colonial administration’s stamp of approval, holds nevertheless that it cannot be overlooked as a piece of evidence; for even if it cannot be shown to have been drawn up by that administration, it remains certain that the map’s compiler, having perused the governing texts, and possibly the accessible maps, had acquired a very clear understanding of the intention behind the texts, which enabled him afterwards to lend that intention cartographic expression. That does not mean that the map necessarily conveys the correct interpretation of the erratum, but it does at least tend to confirm that the difficulties of interpretation which Mali perceives in the text of the Order did not exist at the time, having arisen from the perusal of certain maps published subsequently.

172. Thus far the sources considered all combine to bear out the impression given by the maps, that mount N’Gouma or the heights of N’Gouma lie north of the Kabia ford. However, a sketch-map of the cercle of Tillabéry, dating from 1954, shows the boundary of the territory of Niger as a line of crosses running east-west, intersecting the Béli at the Kabia ford and then turning south. What is more, on this sketch-map, the name “Mts. N’Gouma” is assigned to some elevations found to the east and slightly south of the ford. Burkina Faso argues that the compiler of the sketch-map must have reversed the positions of mount N’Gouma and mounts Gorotondi. As for the 1:200,000 IGN map published in 1960, it attaches the name “Ngouma” to an elevation situated southeast of the Kabia ford — and, as the Chamber has already had occasion to note, the Parties are in broad agreement on the reliability of the IGN’s work (paragraph 61 above). Mali has particularly sought to expose the shortcomings of the Blondel la Rougery map in altimetry, and has also pointed up the contrast in that respect between it and the 1960 IGN map. But from observations made on the ground in 1975 by the technical committee of cartographers, it is apparent that there are in fact features to the north of the Kabia ford which could qualify for the appellation “heights” of N’Gouma. From the altimetric information appearing on the IGN map around the Kabia ford, it may also be inferred that there are certain elevations ranged in a quarter-circle between a position north of the ford and another east-southeast of it, and that they constitute an ensemble which the name “Ngouma” could reasonably be said to cover. This is a problem of toponymy rather than topography.

173. In the Chamber’s opinion, the controversy between the Parties over the validity of the indications given by the 1960 IGN map has little relevance to the basic point at issue here. The Chamber has to construe a text dating from 1927 and for that purpose, or in the process of doing so, must seek to ascertain which elevations were called “heights of N’Gouma” at that time. It follows that, however reliable the cartographic techniques used in 1960, and however thorough the investigations carried out on the ground with a view to establishing an accurate toponymy for that precise time, these efforts would only be of value for the purpose of interpreting the 1927 Order and erratum if they had uncovered an oral tradition dating back at least to 1927 which was at variance with the indications given by the maps and documents of that earlier period. No evidence has been furnished of the existence of any such tradition. The Chamber accordingly reached the twofold conclusion that the Governor-General, in the 1927 Order, as modified by the erratum, and hence in letter 191 CM2 of 1935, described an existing boundary which passed through elevations situated north of the Kabia ford, and that the administrators, rightly or wrongly, considered that these elevations were called by the local people the “heights of N’Gouma”. The Chamber has simply to ascertain, therefore, the point where the boundary defined by the texts in question terminates within the above-described ensemble of elevations environing the ford. After minutely examining the topography shown on the IGN map, the Chamber finds that this point should be fixed 3 kilometres north of the ford, at the spot defined by the co-ordinates 0° 14’ 39” E and 14° 54’ 48” N.

174. The Chamber has already noted that the line of crosses shown on the 1:200,000 IGN map terminates in the east at a point which is too far north for this latter section of line to be deemed compatible with the terms of letter 191 CM2. It therefore remains to determine the point at which the
IGN line diverges from the line described in that letter. According to Burkina Faso, the “existing frontier” diverges from the IGN line at the point north of In Tangoum where the IGN line veers slightly northward. The Chamber notes that a straight line connecting the point on the IGN line which lies north-east of In Abao (point L, paragraph 163 above) with the end-point of the frontier line identified in the previous paragraph, coincides almost exactly with the line of small crosses shown on the IGN map between point L and the point situated north of In Tangoum. It concludes that this straight line must constitute the final segment of the line which it is required to draw.

* * *

175. The Chamber, having thus completed its examination of the case, is now in a position to fix the line of the frontier between the Parties in the disputed area. This frontier is defined, as far as possible, in terms of straight lines connecting geographic co-ordinates of points. The line of the frontier has been marked, purely for illustrative purposes, on a map which is a compilation of the relevant sheets of the 1:200,000 map of the Institut géographique national (Paris) (the sheets ND-30-XVII (Djibo, 1970 edition); ND-30-XXIV (In Tili, 1958 edition); ND-31-XIX (Ansongo, 1959 edition); ND-30-XVIII (Dori, 1960 edition); and ND-31-XIII (Tera, 1961 edition)). This compilation of sheets into one map is annexed to the sealed copies of this Judgment.

* * *

176. By the terms of the Special Agreement (Art. IV), the Parties agreed to effect the demarcation of their frontier in the disputed area within one year of the delivery of this Judgment. They also requested the Chamber to nominate, in its Judgment, three experts to assist them in the demarcation operation. Both Parties renewed this request in the respective final submissions which they read at the end of the oral proceedings. The Chamber is ready to accept the task which the Parties have entrusted to it. However, having regard to the circumstances of the present case, the Chamber is of the opinion that it is inappropriate at this juncture to make the nomination requested by the Parties. It will do so later by means of an Order, after ascertaining the views of the Parties, particularly as regards the practical aspects of the exercise by the experts of their functions.

* * *

1 A copy of this map, reduced in size, will be found in a pocket at the end of this fascicle or inside the back cover of I.C.J. Reports 1986. [Note by the Registrar.]
(IGN) (hereinafter referred to as "the IGN line") as far as the point with the geographical co-ordinates 1° 58' 49" W and 14° 28' 30" N (point B).

(2) At point B, the line turns eastwards and intersects the track connecting Dioneoua and Digueul at approximately 7.5 kilometres from Dioneoua at a point with the geographical co-ordinates 1° 54' 24" W and 14° 29' 20" N (point C).

(3) From point C, the line runs approximately 2 kilometres to the south of the villages of Kounia and Oukoulourou, passing through the point with the geographical co-ordinates 1° 46' 38" W and 14° 28' 54" N (point D), and the point with the co-ordinates 1° 40' 40" W and 14° 30' 03" N (point E).

(4) From point E, the line continues straight as far as a point with the geographical co-ordinates 1° 19' 05" W and 14° 43' 45" N (point F), situated approximately 2.6 kilometres to the south of the pool of Toussougou.

(5) From point F, the line continues straight as far as the point with the geographical co-ordinates 1° 05' 34" W and 14° 47' 04" N (point G) situated on the west bank of the pool of Soum, which it crosses in a general west-east direction and divides equally between the two States; it then turns in a generally north/north-easterly direction to rejoin the IGN line at the point with the geographical co-ordinates 0° 43' 29" W and 15° 05' 00" N (point H).

(6) From point H, the line follows the IGN line as far as the point with the geographical co-ordinates 0° 26' 35" W and 15° 05' 00" N (point I); from there it turns towards the south-east and continues straight as far as point J defined below.

(7) Points J and K, the geographical co-ordinates of which will be determined by the Parties with the assistance of the experts nominated pursuant to Article IV of the Special Agreement, fulfil three conditions: they are situated on the same parallel of latitude; point J lies on the west bank of the pool of In Abao and point K on the east bank of the pool; the line drawn between them will result in dividing the area of the pool equally between the Parties.

(8) At point K the line turns towards the north-east and continues straight as far as the point with the geographical co-ordinates 0° 14' 44" W and 15° 04' 42" N (point L), and, from that point, continues straight to a point with the geographical co-ordinates 0° 14' 39" E and 14° 54' 48" N (point M), situated approximately 3 kilometres to the north of the Kabia ford.

B. That the Chamber will at a later date, by Order, nominate three experts in accordance with Article IV, paragraph 3, of the Special Agreement of 16 September 1983.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this twenty-second day of December, one thousand nine hundred and eighty-six, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of Burkina Faso and the Government of the Republic of Mali respectively.

(Signed) Mohammed Bediaoui,
President of the Chamber.

(Signed) Santiago Torres Bernardez,
Registrar.

Judges ad hoc Lucaire and Abi-Saab append separate opinions to the Judgment of the Chamber.

(Initialled) M.B.
(Initialled) S.T.B.
African Commission on Human and Peoples’ Rights

Katangese Peoples' Congress v. Zaire
Decision of 1992

Communication 75/92
THE FACTS

1. The communication was submitted in 1992 by Mr. Gerard Moke, President of the Katangese Peoples' Congress requesting the African Commission on Human and Peoples' Rights:
   - To recognise the Katangese Peoples' Congress as a liberation movement entitled to support in the achievement of independence for Katanga.
   - To recognise the independence of Katanga.
   - To help secure the evacuation of Zaire from Katanga.

THE LAW

2. The claim is brought under Article 20(1) of the African Charter on Human Rights’. There are no allegations of specific breaches of other human rights apart from the claim of the denial of self-determination.

3. All peoples have a right to self-determination. There may however be controversy as to the definition of peoples and the content of the right. The issue in the case is not self-determination for all Zaireoise as a people but specifically for the Katangese. Whether the Katangese consist of one or more ethnic groups is, for this purpose immaterial and no evidence has been adduced to that effect.

4. The Commission believes that self-determination may be exercised in any of the following ways - independence, self-government, local government, federalism, confederalism, unitarism or any other form of relations that accords with the wishes of the people but fully cognisant of other recognised principles such as sovereignty and territorial integrity.

5. The Commission is obligated to uphold the sovereignty and territorial integrity of Zaire, a member of the OAU and a party to the African Charter on Human and Peoples' Rights.

6. In the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called to question and in the absence of evidence that the people of Katanga are denied the right to participate in government as guaranteed by Article 13(1) of the African Charter, the Commission holds the view that Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire.

FOR THE ABOVE REASONS, THE COMMISSION

declares that the case holds no evidence of violations of any rights under the African Charter. The request for independence for Katanga therefore has no merit under the African Charter on Human and Peoples' Rights.
Supreme Court of Canada

Reference by the Governor-General concerning Certain Questions relating to the Secession of Quebec from Canada
Opinion of 20 August 1998

[1998] 2 SCR 217
In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?

Issues regarding the Court's reference jurisdiction were raised by the amicus curiae. He argued that s. 53 of the Supreme Court Act was unconstitutional; that, even if the Court's reference jurisdiction was constitutionally valid, the questions submitted were outside the scope of s. 53; and, finally, that these questions were not justiciable.

Held: Section 53 of the Supreme Court Act is constitutional and the Court should answer the reference questions.

Section 101 of the Constitution Act, 1867 gives Parliament the authority to grant this Court the reference jurisdiction provided for in s. 53 of the Supreme Court Act. The words "general court of appeal" in s. 101 denote the status of the Court within the national court structure and should not be taken as a restrictive definition of the Court's functions. While, in most instances, this Court acts as the exclusive ultimate appellate court in the country, an appellate court can receive, on an exceptional basis, original jurisdiction not incompatible with its appellate jurisdiction. Even if there were any conflict between this Court's reference jurisdiction and the original jurisdiction of the provincial superior courts, any such conflict must be resolved in favour of Parliament's exercise of its plenary power to establish a "general court of appeal". A "general court of appeal" may also properly undertake other legal functions, such as the rendering of advisory opinions. There is no constitutional bar to this Court's receipt of jurisdiction to undertake an advisory role.

The reference questions are within the scope of s. 53 of the Supreme Court Act. Question 1 is directed, at least in part, to the interpretation of the Constitution Acts, which are referred to in s. 53(1)(a). Both Questions 1 and 2 fall within s. 53(1)(d), since they relate to the powers of the legislature or government of a Canadian province. Finally, all three questions are "important questions of law or fact concerning any matter" and thus come within s. 53(2). In answering Question 2, the Court is not exceeding its jurisdiction by purporting to act as an international tribunal. The Court is providing an advisory opinion to the Governor in Council in its capacity as a national court on legal questions touching and concerning the future of the Canadian federation. Further, Question 2 is not beyond the competence of this Court, as a domestic court, because it requires the Court to look at international law rather than domestic law. More importantly, Question 2 does not ask an abstract question of "pure" international law but seeks to determine the legal rights and obligations of the legislature or government of Quebec, institutions that exist as part of the Canadian legal order. International law must be addressed since it has been invoked as a consideration in the context of this Reference.

The reference questions are justiciable and should be answered. They do not ask the Court to usurp any democratic decision that the people of Quebec may be called upon to make. The questions, as interpreted by the Court, are strictly limited to aspects of the legal framework in which
that democratic decision is to be taken. Since the reference questions may clearly be interpreted as directed to legal issues, the Court is in a position to answer them. The Court cannot exercise its discretion to refuse to answer the questions on a pragmatic basis. The questions raise issues of fundamental public importance and they are not too imprecise or ambiguous to permit a proper legal answer. Nor has the Court been provided with insufficient information regarding the present context in which the questions arise. Finally, the Court may deal on a reference with issues that might otherwise be considered not yet "ripe" for decision.

(2) Question 1

The Constitution is more than a written text. It embraces the entire global system of rules and principles which govern the exercise of constitutional authority. A superficial reading of selected provisions of the written constitutional enactment, without more, may be misleading. It is necessary to make a more profound investigation of the underlying principles animating the whole of the Constitution, including the principles of federalism, democracy, constitutionalism and the rule of law, and respect for minorities. Those principles must inform our overall appreciation of the constitutional rights and obligations that would come into play in the event that a clear majority of Quebecers votes on a clear question in favour of secession.

The Court in this Reference is required to consider whether Quebec has a right to unilateral secession. Arguments in support of the existence of such a right were primarily based on the principle of democracy. Democracy, however, means more than simple majority rule. Constitutional jurisprudence shows that democracy exists in the larger context of other constitutional values. Since Confederation, the people of the provinces and territories have created close ties of interdependence (economic, social, political and cultural) based on shared values that include federalism, democracy, constitutionalism and the rule of law, and respect for minorities. A democratic decision of Quebecers in favour of secession would put those relationships at risk. The Constitution vouchsafes order and stability, and accordingly secession of a province "under the Constitution" could not be achieved unilaterally, that is, without principled negotiation with other participants in Confederation within the existing constitutional framework.

Our democratic institutions necessarily accommodate a continuous process of discussion and evolution, which is reflected in the constitutional right of each participant in the federation to initiate constitutional change. This right implies a reciprocal duty on the other participants to engage in discussions to address any legitimate initiative to change the constitutional order. A clear majority vote in Quebec on a clear question in favour of secession would confer democratic legitimacy on the secession initiative which all of the other participants in Confederation would have to recognize.

Quebec could not, despite a clear referendum result, purport to invoke a right of self-determination to dictate the terms of a proposed secession to the other parties to the federation. The democratic vote, by however strong a majority, would have no legal effect on its own and could not push aside the principles of federalism and the rule of law, the rights of individuals and minorities, or the operation of democracy in the other provinces or in Canada as a whole. Democratic rights under the Constitution cannot be divorced from constitutional obligations. Nor, however, can the reverse proposition be accepted; the continued existence and operation of the Canadian constitutional order could not be indifferent to a clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada. The other provinces and the federal government would have no basis to deny the right of the government of Quebec to pursue secession should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others. The negotiations that followed such a vote would address the potential act of secession as well as its possible terms should in fact secession proceed. There would be no conclusions predetermmned by law on any issue. Negotiations would need to address the interests of the other provinces, the federal government and Quebec and indeed the rights of all Canadians both within and outside Quebec, and specifically the rights of minorities.

The negotiation process would require the reconciliation of various rights and obligations by negotiation between two legitimate majorities, namely, the majority of the population of Quebec, and that of Canada as a whole. A political majority at either level that does not act in accordance with the underlying constitutional principles puts at risk the legitimacy of its exercise of its rights, and the ultimate acceptance of the result by the international community.

The task of the Court has been to clarify the legal framework within which political decisions are to be taken "under the Constitution" and not to usurp the prerogatives of the political forces that operate within that framework. The obligations identified by the Court are binding obligations under the Constitution. However, it will be for the political actors to determine what constitutes "a clear majority on a clear question" in the circumstances under which a future referendum vote may be taken. Equally, in the event of demonstrated majority support for Quebec secession, the content and process of the negotiations will be for the political actors to settle. The reconciliation of the various legitimate constitutional interests is necessarily committed to the political rather than the judicial realm precisely because that reconciliation can only be achieved through the give and take of political negotiations. To the extent issues addressed in the course of negotiation are political, the courts, appreciating their proper role in the constitutional scheme, would have no supervisory role.

(3) Question 2

The Court was also required to consider whether a right to unilateral secession exists under international law. Some supporting an affirmative answer did so on the basis of the recognized right to self-determination that belongs to all "peoples". Although much of the Quebec population certainly shares many of the characteristics of a people, it is not necessary to decide the "people" issue because, whatever may be the correct determination of this issue in the context of Quebec, a right to secession only arises under the principle of self-determination of people at international law where "a people" is governed as part of a colonial empire; where "a people" is subject to alien subjugation, domination or exploitation; and possibly where "a people" is denied any meaningful exercise of its right to self-determination within the state of which it forms a part. In other circumstances, peoples are expected to achieve self-determination within the framework of their existing state. A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements, is entitled to maintain its territorial integrity under
international law and to have that territorial integrity recognized by other states. Quebec does not meet the threshold of a colonial people or an oppressed people, nor can it be suggested that Quebecers have been denied meaningful access to government to pursue their political, economic, cultural and social development. In the circumstances, the "National Assembly, the legislature or the government of Quebec" do not enjoy a right at international law to effect the secession of Quebec from Canada unilaterally.

Although there is no right, under the Constitution or at international law, to unilateral secession, the possibility of an unconstitutional declaration of secession leading to a de facto secession is not ruled out. The ultimate success of such a secession would be dependent on recognition by the international community, which is likely to consider the legality and legitimacy of secession having regard to, amongst other facts, the conduct of Quebec and Canada, in determining whether to grant or withhold recognition. Even if granted, such recognition would not, however, provide any retroactive justification for the act of secession, either under the Constitution of Canada or at international law.

(4) Question 3

In view of the answers to Questions 1 and 2, there is no conflict between domestic and international law to be addressed in the context of this Reference.

Cases Cited


Statutes and Regulations Cited


Bill of Rights of 1689 (Eng.), 1 Will. & Mar. sess. 2, c. 2.

Canadian Charter of Rights and Freedoms, ss. 2, 3, 4, 7 to 14, 15, 25, 33.


Constitution Act, 1867, preamble, ss. 91, 92(1), 96, 101.

Constitution Act, 1982, ss. 25, 35, 52(1), (2).


Magna Carta (1215).

Statute of the Inter-American Court of Human Rights (1979), Art. 2.


Supreme Court Act, R.S.C., 1985, c. S-26, ss. 3, 53(1)(a), (d), (2).
Treaty establishing the European Community, Art. 228(6).


Authors Cited


de Smith, S. A. "Constitutional Lawyers in Revolutionary Situations" (1968), 7 West. Ont. L. Rev. 93.


REFERENCE by the Governor in Council, pursuant to s. 53 of the Supreme Court Act, concerning the secession of Quebec from Canada.


André Joli-Coeur, Michel Paradis, Louis Masson, André Binette, Clément Samson, Martin Bédard and Martin St-Amant, for the amicus curiae.

Donna J. Miller, Q.C., and Deborah L. Carlson, for the intervener the Attorney General of Manitoba.

Graeme G. Mitchell and John D. Whyte, Q.C., for the intervener the Attorney General for Saskatchewan.

Bernard W. Funston, for the intervener the Minister of Justice of the Northwest Territories.

Stuart J. Whitley, Q.C., and Howard L. Kushner, for the intervener the Minister of Justice for the Government of the Yukon Territory.

Agnès Laporte and Richard Gaudreau, for the intervener Kitigan Zibi Anishinabeg.

Claude-Armand Sheppard, Paul Joffe and Andrew Orkin, for the intervener the Grand Council of the Crees (Eeyou Estchee).

Peter W. Hutchins and Carol Hilling, for the intervener the Makivik Corporation.

Michael Sherry, for the intervener the Chiefs of Ontario.
3. In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?

Before turning to Question 1, as a preliminary matter, it is necessary to deal with the issues raised with regard to this Court's reference jurisdiction.

II. The Preliminary Objections to the Court's Reference Jurisdiction

4. The amicus curiae argued that s. 101 of the Constitution Act, 1867 does not give Parliament the authority to grant this Court the jurisdiction provided for in s. 53 of the Supreme Court Act, R.S.C., 1985, c. S-26. Alternatively, it is submitted that even if Parliament were entitled to enact s. 53 of the Supreme Court Act, the scope of that section should be interpreted to exclude the kinds of questions the Governor in Council has submitted in this Reference. In particular, it is contended that this Court cannot answer Question 2, since it is a question of "pure" international law over which this Court has no jurisdiction. Finally, even if this Court's reference jurisdiction is constitutionally valid, and even if the questions are within the purview of s. 53 of the Supreme Court Act, it is argued that the three questions referred to the Court are speculative, of a political nature, and, in any event, are not ripe for judicial decision, and therefore are not justiciable.

5. Notwithstanding certain formal objections by the Attorney General of Canada, it is our view that the amicus curiae was within his rights to make the preliminary objections, and that we should deal with them.

A. The Constitutional Validity of Section 53 of the Supreme Court Act

6. In Re References by Governor-General in Council (1910), 43 S.C.R. 536, affirmed on appeal to the Privy Council, [1912] A.C. 571 (sub nom. Attorney-General for Ontario v. Attorney-General for Canada), the constitutionality of this Court's special jurisdiction was twice upheld. The Court is asked to revisit these decisions. In light of the significant changes in the role of this Court since 1912, and the very important issues raised in this Reference, it is appropriate to reconsider briefly the constitutional validity of the Court's reference jurisdiction.

7. Section 3 of the Supreme Court Act establishes this Court both as a "general court of appeal" for Canada and as an "additional court for the better administration of the laws of Canada". These two roles reflect the two heads of power enumerated in s. 101 of the Constitution Act, 1867. However, the "laws of Canada" referred to in s. 101 consist only of federal law and statute: see Quebec North Shore Paper Co. v. Canadian Pacific Ltd., [1977] 2 S.C.R. 1054, at pp. 1065-66. As a result, the phrase "additional courts" contained in s. 101 is an insufficient basis upon which to ground the special jurisdiction established in s. 53 of the Supreme Court Act, which clearly exceeds a consideration of federal law alone (see, e.g., s. 53(2)). Section 53 must therefore be taken as enacted pursuant to Parliament's power to create a "general court of appeal" for Canada.
Section 53 of the Supreme Court Act is intravires Parliament's power under s. 101 if, in "pith and substance", it is legislation "in relation to the constitution or organization of a "general court of appeal". Section 53 is defined by two leading characteristics -- it establishes an original jurisdiction in this Court and imposes a duty on the Court to render advisory opinions. Section 53 is therefore constitutionally valid only if (1) a "general court of appeal" may properly exercise an original jurisdiction; and (2) a "general court of appeal" may properly undertake other legal functions, such as the rendering of advisory opinions.

May a Court of Appeal Exercise an Original Jurisdiction?

The words "general court of appeal" in s. 101 denote the status of the Court within the national court structure and should not be taken as a restrictive definition of the Court's functions. In most instances, this Court acts as the exclusive ultimate appellate court in the country, and, as such, is properly constituted as the "general court of appeal" for Canada. Moreover, it is clear that an appellate court can receive, on an exceptional basis, original jurisdiction not incompatible with its appellate jurisdiction.

The English Court of Appeal, the U.S. Supreme Court and certain courts of appeal in Canada exercise an original jurisdiction in addition to their appellate functions. See De Denko v. Home Secretary, [1959] A.C. 654 (H.L.), at p. 660; Re Forest and Registrar of Court of Appeal of Manitoba (1977), 77 D.L.R. (3d) 445 (Man. C.A.), at p. 453; United States Constitution, art. III, § 2. Although these courts are not constituted under a head of power similar to s. 101, they certainly provide examples which suggest that there is nothing inherently self-contradictory about an appellate court exercising original jurisdiction on an exceptional basis.

It is also argued that this Court's original jurisdiction is unconstitutional because it conflicts with the original jurisdiction of the provincial superior courts and usurps the normal appellate process. However, Parliament's power to establish a general court of appeal pursuant to s. 101 is plenary, and takes priority over the province's power to control the administration of justice in s. 92(14). See Attorney-General for Ontario v. Attorney-General for Canada, [1947] A.C. 127 (P.C.). Thus, even if it could be said that there is any conflict between this Court's reference jurisdiction and the original jurisdiction of the provincial superior courts, any such conflict must be resolved in favour of Parliament's exercise of its plenary power to establish a "general court of appeal" provided, as discussed below, advisory functions are not to be considered inconsistent with the functions of a general court of appeal.

May a Court of Appeal Undertake Advisory Functions?

The amicus curiae submits that...
This concern is groundless. In a number of previous cases, it has been necessary for this Court to look to international law to determine the rights or obligations of some actor within the Canadian legal system. For example, in Reference re Powers to Levy Rates on Foreign Legations and High Commissioners' Residences, [1943] S.C.R. 208, the Court was required to determine whether, taking into account the principles of international law with respect to diplomatic immunity, a municipal council had the power to levy rates on certain properties owned by foreign governments. In two subsequent references, this Court used international law to determine whether the federal government or a province possessed proprietary rights in certain portions of the territorial sea and continental shelf (Reference re Ownership of Offshore Mineral Rights of British Columbia, [1967] S.C.R. 792; Reference re Newfoundland Continental Shelf, [1984] 1 S.C.R. 86).

More importantly, Question 2 of this Reference does not ask an abstract question of "pure" international law but seeks to determine the legal rights and obligations of the National Assembly, legislature or government of Quebec, institutions that clearly exist as part of the Canadian legal order. As will be seen, the amicus curiae himself submitted that the success of any initiative on the part of Quebec to secede from the Canadian federation would be governed by international law. In these circumstances, a consideration of international law in the context of this Reference about the legal aspects of the unilateral secession of Quebec is not only permissible but unavoidable.

C. Justiciability

It is submitted that even if the Court has jurisdiction over the questions referred, the questions themselves are not justiciable. Three main arguments are raised in this regard:

1. the questions are not justiciable because they are too "theoretical" or speculative;

2. the questions are not justiciable because they are political in nature;

3. the questions are not yet ripe for judicial consideration.

In the context of a reference, the Court, rather than acting in its traditional adjudicative function, is acting in an advisory capacity. The very fact that the Court may be asked hypothetical questions in a reference, such as the constitutionality of proposed legislation, engages the Court in an exercise that would never entail in the context of litigation. No matter how closely the procedure on a reference may mirror the litigation process, a reference does not engage the Court in a disposition of rights. For the same reason, the Court may deal on a reference with issues that might otherwise be considered not yet "ripe" for decision.

Though a reference differs from the Court's usual adjudicative function, the Court should not, even in the context of a reference, entertain questions that would be inappropriate to answer. However, given the very different nature of a reference, the question of the appropriateness of answering a question should not focus on whether the dispute is formally adversarial or whether it disposes of cognizable rights. Rather, it should consider whether the dispute is appropriately
addressed by a court of law. As we stated in Reference re Canada Assistance Plan (B.C.), [1991] 2 S.C.R. 525, at p. 545:

While there may be many reasons why a question is non-justiciable, in this appeal the Attorney General of Canada submitted that to answer the questions would draw the Court into a political controversy and involve it in the legislative process. In exercising its discretion whether to determine a matter that is alleged to be non-justiciable, the Court's primary concern is to retain its proper role within the constitutional framework of our democratic form of government: . . . In considering its appropriate role the Court must determine whether the question is purely political in nature and should, therefore, be determined in another forum or whether it has a sufficient legal component to warrant the intervention of the judicial branch. [Emphasis added.]

Thus the circumstances in which the Court may decline to answer a reference question on the basis of "non-justiciability" include:

(i) if to do so would take the Court beyond its own assessment of its proper role in the constitutional framework of our democratic form of government or

(ii) if the Court could not give an answer that lies within its area of expertise: the interpretation of law.

As to the "proper role" of the Court, it is important to underline, contrary to the submission of the amicus curiae, that the questions posed in this Reference do not ask the Court to usurp any democratic decision that the people of Quebec may be called upon to make. The questions posed by the Governor in Council, as we interpret them, are strictly limited to aspects of the legal framework in which that democratic decision is to be taken. The attempted analogy to the U.S. "political questions" doctrine therefore has no application. The legal framework having been clarified, it will be for the population of Quebec, acting through the political process, to decide whether or not to pursue secession. As will be seen, the legal framework involves the rights and obligations of Canadians who live outside the province of Quebec, as well as those who live within Quebec.

As to the "legal" nature of the questions posed, if the Court is of the opinion that it is being asked a question with a significant extralegal component, it may interpret the question so as to answer only its legal aspects; if this is not possible, the Court may decline to answer the question. In the present Reference the questions may clearly be interpreted as directed to legal issues, and, so interpreted, the Court is in a position to answer them.

Finally, we turn to the proposition that even though the questions referred to us are justiciable in the "reference" sense, the Court must still determine whether it should exercise its discretion to refuse to answer the questions on a pragmatic basis.

Generally, the instances in which the Court has exercised its discretion to refuse to answer a reference question that is otherwise justiciable can be broadly divided into two categories. First, where the question is too imprecise or ambiguous to permit a complete or accurate answer:


There is no doubt that the questions posed in this Reference raise difficult issues and are susceptible to varying interpretations. However, rather than refusing to answer at all, the Court is guided by the approach advocated by the majority on the "conventions" issue in Reference re Resolution to Amend the Constitution, [1981] 1 S.C.R. 753 (Patriation Reference), at pp. 875-76:

If the questions are thought to be ambiguous, this Court should not, in a constitutional reference, be in a worse position than that of a witness in a trial and feel compelled simply to answer yes or no. Should it find that a question might be misleading, or should it simply avoid the risk of misunderstanding, the Court is free either to interpret the question . . . or it may qualify both the question and the answer . . . .

The Reference questions raise issues of fundamental public importance. It cannot be said that the questions are too imprecise or ambiguous to permit a proper legal answer. Nor can it be said that the Court has been provided with insufficient information regarding the present context in which the questions arise. Thus, the Court is duty bound in the circumstances to provide its answers.

III. Reference Questions

A. Question 1

Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?

(1) Introduction

As we confirmed in Reference re Objection by Quebec to a Resolution to amend the Constitution, [1982] 2 S.C.R. 793, at p. 806, "The Constitution Act, 1982 is now in force. Its legality is neither challenged nor assailable." The "Constitution of Canada" certainly includes the constitutional texts enumerated in s. 52(2) of the Constitution Act, 1982. Although these texts have a primary place in determining constitutional rules, they are not exhaustive. The Constitution also "embraces unwritten, as well as written rules", as we recently observed in the Provincial Judges
An opening to pursue federal union soon arose. The leaders of the maritime colonies had planned to meet at Charlottetown in the fall to discuss the perennial topic of maritime union. The Province of Canada secured invitations to send a Canadian delegation. On September 1, 1864, 23 delegates (five from New Brunswick, five from Nova Scotia, five from Prince Edward Island, and eight from the Province of Canada) met in Charlottetown. After five days of discussion, the delegates reached agreement on a plan for federal union.

The salient aspects of the agreement may be briefly outlined. There was to be a federal union featuring a bicameral central legislature. Representation in the Lower House was to be based on population, whereas in the Upper House it was to be based on regional equality, the regions comprising Canada East, Canada West and the Maritimes. The significance of the adoption of a federal form of government cannot be exaggerated. Without it, neither the agreement of the delegates from Canada East nor that of the delegates from the maritime colonies could have been obtained.

Several matters remained to be resolved, and so the Charlottetown delegates agreed to meet again at Quebec in October, and to invite Newfoundland to send a delegation to join them. The Quebec Conference began on October 10, 1864. Thirty-three delegates (two from Newfoundland, seven from New Brunswick, five from Nova Scotia, seven from Prince Edward Island, and twelve from the Province of Canada) met over a two and a half week period. Precise consideration of each aspect of the federal structure preoccupied the political agenda. The delegates approved 72 resolutions, addressing almost all of what subsequently made its way into the final text of the Constitution Act, 1867. These included guarantees to protect French language and culture, both directly (by making French an official language in Quebec and Canada as a whole) and indirectly (by allocating jurisdiction over education and "Property and Civil Rights in the Province") to the provinces. The protection of minorities was thus reaffirmed.

Legally, there remained only the requirement to have the Quebec Resolutions put into proper form and passed by the Imperial Parliament in London. However, politically, it was thought that more was required. Indeed, Resolution 70 provided that "The Sanction of the Imperial and Local Parliaments shall be sought for the Union of the Provinces, on the principles adopted by the Conference." (Cited in J. Pope, ed., Confederation: Being a Series of Hitherto Unpublished Documents Bearing on the British North America Act (1895), at p. 52 (emphasis added).)

Confirmation of the Quebec Resolutions was achieved more smoothly in central Canada than in the Maritimes. In February and March 1865, the Quebec Resolutions were the subject of almost six weeks of sustained debate in both houses of the Canadian legislature. The Canadian Legislative Assembly approved the Quebec Resolutions in March 1865 with the support of a majority of members from both Canada East and Canada West. The governments of both Prince Edward Island and Newfoundland chose, in accordance with popular sentiment in both colonies, not to accede to the Quebec Resolutions. In New Brunswick, a general election was required before Premier Tilley's pro-Confederation party prevailed. In Nova Scotia, Premier Tupper ultimately obtained a resolution from the House of Assembly favouring Confederation.
were expressed that this distinctive feature would cease. The idea of unity of races is
utopian -- it is impossible. Distinctions of this kind will always exist. Dissimilarities
in fact, appear to be of the physical world. But with regard to the objection based on this, the
government of this country (Upper Canada) has no intention of interfering with the
races in the political world. The French and English, and British and Irish, and many
countries, that a great nation cannot be formed because Lower Canada is in great part French
and Catholic, and Upper Canada is British and Protestant, and the Lower Provinces
will have Catholic and Protestant, English, French, Irish, and Scotch, and each by his
choice, and his interest, will have his interests and follow the interests of his
country. The federal government of this country (Upper Canada) will always
conform to the wishes of the different parts in the political system, and will always
interfere with the political system of the Lower Provinces.

The federal government of this country (Upper Canada) met in London in December 1866 to finalize the plan for Confederation. To
this end, they agreed to some slight modifications and additions to the Quebec Resolutions. Minor
changes were made to some slight modifications and additions were made for the appointment of extra
senators in the event of a deadlock between the House of Commons and the Senate, and certain
religious minorities were given the right to appeal to the federal government where their
denominational school rights were adversely affected by provincial legislation. The British North
America Bill was drafted for London by Sir George Young, who was appointed to form the
legislature in the event of a deadlock between the House of Commons and the Senate, and was introduced to the House of Lords on February 19, 1867. The Act passed third reading in the
House of Commons on March 8, received royal assent on March 29, and was proclaimed on July 1, 1867. The Dominion of Canada thus became a reality.

A federal-provincial division of powers necessitated a written constitution which
circumscribed the powers of the new Dominion and Provinces of Canada. Despite its federal
structure, the new Dominion was to have a Constitution Act similar to that of the United
Kingdom. The Constitution Act 1867, preamble. Allowing for the obvious differences between the
governance of Canada and the United Kingdom, it was nevertheless thought important to thus
emphasize the continuity of constitutional principles, including democratic institutions and the rule
of law, and the continuity of sovereign power transferred from Westminster to the
federal and provincial capitals of Canada.

After 1867, the Canadian federation continued to evolve both territorially and politically.
The neighboring province of New Brunswick has entered into the union in reliance
on having with it the sister province of Nova Scotia; and vast obligations, political
and commercial, have already been contracted on the faith of a measure so long
discussed and so solemnly adopted. It is therefore evident that the Assembly and the people of
Nova Scotia will not be surprised that the Queen's government feel that they would
not be warranted in advising the reversal of a great measure of state, attended by so
many extensive consequences already in operation. . . .

The federal and provincial capitals of Canada. After 1867, the Canadian federation continued to evolve both territorially and politically.

43 Federalism was a legal response to the underlying political and cultural realities that
existed at Confederation and continue to exist today. The Confederation political leaders of both
the federal and provincial capitals of Canada were keenly aware of the need to accommodate the
diversity of the Canadian population. Federalism was the political mechanism by which diversity
could be reconciled with unity.

The interdependence characterized by "vast obligations, political and commercial," referred to by the Colonial Secretary in 1868, has, of course, multiplied immeasurably in the last 130 years.

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The federal and provincial capitals of Canada. After 1867, the Canadian federation continued to evolve both territorially and politically.

46 Canada's evolution from colony to fully independent state was gradual. The Imperial
Parliament's passage of the Statute of Westminster, 1931 (UK), 22 & 23 Geo. 5, c. 4, confirmed in
law what had earlier been confirmed in fact by the Balfour Declaration of 1926, namely, that Canada
was an independent country. Thereafter, Canadian law alone governed in Canada, except where
Canada expressly consented to the continued application of Imperial legislation.
Our Constitution has an internal architecture, or what the majority of this Court in OPSEU v. Ontario (Attorney General), [1987] 2 S.C.R. 2, at p. 57, called a “basic constitutional structure”. The individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole. As we recently emphasized in the Provincial Judges Reference, certain underlying principles infuse our Constitution and breathe life into it. Speaking of the rule of law principle in the Manitoba Language Rights Reference, supra, at p. 750, we held that “the principle is clearly implicit in the very nature of a Constitution”. The same may be said of the other three constitutional principles we underscore today.

Although these underlying principles are not explicitly made part of the Constitution by any written provision, other than in some respects by the oblique reference in the preamble to the Constitution Act, 1867, it would be impossible to conceive of our constitutional structure without them. The principles dictate major elements of the architecture of the Constitution itself and are as such its lifeblood.

The principles assist in the interpretation of the text and the delineation of spheres of jurisdiction, the scope of rights and obligations, and the role of our political institutions. Equally important, observance of and respect for these principles is essential to the ongoing process of constitutional development and evolution of our Constitution as a “living tree”, to invoke the famous description in Edwards v. Attorney-General for Canada, [1930] A.C. 124 (P.C.), at p. 136. As this Court indicated in New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly), [1993] 1 S.C.R. 319, Canadians have long recognized the existence and importance of unwritten constitutional principles in our system of government.

Given the existence of these underlying constitutional principles, what use may the Court make of them? In the Provincial Judges Reference, supra, at paras. 93 and 104, we cautioned that the recognition of these constitutional principles (the majority opinion referred to them as “organizing principles” and described one of them, judicial independence, as an “unwritten norm”) could not be taken as an invitation to dispense with the written text of the Constitution. On the contrary, we confirmed that there are compelling reasons to insist upon the primacy of our written constitution. A written constitution promotes legal certainty and predictability, and it provides a foundation and a touchstone for the exercise of constitutional judicial review. However, we also observed in the Provincial Judges Reference that the effect of the preamble to the Constitution Act, 1867 was to incorporate certain constitutional principles by reference, a point made earlier in Fraser v. Public Service Staff Relations Board, [1985] 2 S.C.R. 455, at pp. 462-63. In the Provincial Judges Reference, at para. 104, we determined that the preamble “invites the courts to turn those principles into the premises of a constitutional argument that culminates in the filling of gaps in the express terms of the constitutional text”.

Underlying constitutional principles may in certain circumstances give rise to substantive legal obligations (have “full legal force”, as we described it in the Patriation Reference, supra, at p. 845), which constitute substantive limitations upon government action. These principles may give rise to very abstract and general obligations, or they may be more specific and precise in nature. The principles are not merely descriptive, but are also invested with a powerful normative
force, and are binding upon both courts and governments. "In other words", as this Court confirmed in the *Manitoba Language Rights Reference*, supra, at p. 752, "in the process of Constitutional adjudication, the Court may have regard to unwritten postulates which form the very foundation of the Constitution of Canada". It is to a discussion of those underlying constitutional principles that we now turn.

(b) Federalism

55 It is undisputed that Canada is a federal state. Yet many commentators have observed that, according to the precise terms of the Constitution Act, 1867, the federal system was only partial. See, e.g., K. C. Wheare, *Federal Government* (4th ed. 1963), at pp. 18-20. This was so because, on paper, the federal government retained sweeping powers which threatened to undermine the autonomy of the provinces. Here again, however, a review of the written provisions of the Constitution does not provide the entire picture. Our political and constitutional practice has adhered to an underlying principle of federalism, and has interpreted the written provisions of the Constitution in this light. For example, although the federal power of disallowance was included in the Constitution Act, 1867, the underlying principle of federalism triumphed early. Many constitutional scholars contend that the federal power of disallowance has been abandoned (e.g., P. W. Hogg, *Constitutional Law of Canada* (4th ed. 1997), at p. 120).

56 In a federal system of government such as ours, political power is shared by two orders of government: the federal government on the one hand, and the provinces on the other. Each is assigned respective spheres of jurisdiction by the Constitution Act, 1867. See, e.g., *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick*, [1892] A.C. 437 (P.C.), at pp. 441-42. It is up to the courts "to control the limits of the respective sovereignties": *Northern Telecom Canada Ltd. v. Communication Workers of Canada*, [1983] 1 S.C.R. 733, at p. 741. In interpreting our Constitution, the courts have always been concerned with the federalism principle, inherent in the structure of our constitutional arrangements, which has from the beginning been the lodestar by which the courts have been guided.

57 This underlying principle of federalism, then, has exercised a role of considerable importance in the interpretation of the written provisions of our Constitution. In the *Patriation Reference*, supra, at pp. 905-9, we confirmed that the principle of federalism runs through the political and legal systems of Canada. Indeed, Martland and Ritchie JJ., dissenting in the *Patriation Reference*, at p. 821, considered federalism to be "the dominant principle of Canadian constitutional law". With the enactment of the Charter, that proposition may have less force than it once did, but there can be little doubt that the principle of federalism remains a central organizational theme of our Constitution. Less obviously, perhaps, but certainly of equal importance, federalism is a political and legal response to underlying social and political realities.

58 The principle of federalism recognizes the diversity of the component parts of Confederation, and the autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction. The federal structure of our country also facilitates democratic participation by distributing power to the government thought to be most suited to achieving the particular societal objective having regard to this diversity. The scheme of the Constitution Act, 1867, it was said in *Re the Initiative and Referendum Act*, [1919] A.C. 935 (P.C.), at p. 942, was not to weld the Provinces into one, nor to subordinate Provincial Governments to a central authority, but to establish a central government in which these Provinces should be represented, entrusted with exclusive authority only in affairs in which they had a common interest. Subject to this each Province was to retain its independence and autonomy and to be directly under the Crown as its head.

More recently, in *Haig v. Canada*, [1993] 2 S.C.R. 995, at p. 1047, the majority of this Court held that differences between provinces "are a rational part of the political reality in the federal process". It was referring to the differential application of federal law in individual provinces, but the point applies more generally. A unanimous Court expressed similar views in *R. v. S. (S.)*, [1990] 2 S.C.R. 254, at pp. 287-88.

59 The principle of federalism facilitates the pursuit of collective goals by cultural and linguistic minorities which form the majority within a particular province. This is the case in Quebec, where the majority of the population is French-speaking, and which possesses a distinct culture. This is not merely the result of chance. The social and demographic reality of Quebec explains the existence of the province of Quebec as a political unit and indeed, was one of the essential reasons for establishing a federal structure for the Canadian union in 1867. The experience of both Canada East and Canada West under the Union Act, 1840 (U.K.), 3-4 Vict., c. 35, had not been satisfactory. The federal structure adopted at Confederation enabled French-speaking Canadians to form a numerical majority in the province of Quebec, and so exercise the considerable provincial powers conferred by the Constitution Act, 1867 in such a way as to promote their language and culture. It also made provision for certain guaranteed representation within the federal Parliament itself.

60 Federalism was also welcomed by Nova Scotia and New Brunswick, both of which also affirmed their will to protect their individual cultures and their autonomy over local matters. All new provinces joining the federation sought to achieve similar objectives, which are no less vigorously pursued by the provinces and territories as we approach the new millennium.

(c) Democracy

61 Democracy is a fundamental value in our constitutional law and political culture. While it has both an institutional and an individual aspect, the democratic principle was also argued before us in the sense of the supremacy of the sovereign will of a people, in this case potentially to be expressed by Quebecers in support of unilateral secession. It is useful to explore in a summary way these different aspects of the democratic principle.

62 The principle of democracy has always informed the design of our constitutional structure, and continues to act as an essential interpretive consideration to this day. A majority of this Court in *OPSEU v. Ontario*, supra, at p. 57, confirmed that "the basic structure of our
Constitution, as established by the Constitution Act, 1867, contemplates the existence of certain political institutions, including freely elected legislative bodies at the federal and provincial levels". As is apparent from an earlier line of decisions emanating from this Court, including Switzman v. Elbling, [1957] S.C.R. 285, Saumur v. City of Quebec, [1953] 2 S.C.R. 299, Boucher v. The King, [1951] S.C.R. 265, and Reference re Alberta Statutes, [1938] S.C.R. 100, the democracy principle can best be understood as a sort of baseline against which the framers of our Constitution, and subsequently, our elected representatives under it, have always operated. It is perhaps for this reason that the principle was not explicitly identified in the text of the Constitution Act, 1867 itself. To have done so might have appeared redundant, even silly, to the framers. As explained in the Provincial Judges Reference, supra, at para. 100, it is evident that our Constitution contemplates that Canada shall be a constitutional democracy. Yet this merely demonstrates the importance of underlying constitutional principles that are nowhere explicitly described in our constitutional texts. The representative and democratic nature of our political institutions was simply assumed.

63 Democracy is commonly understood as being a political system of majority rule. It is essential to be clear what this means. The evolution of our democratic tradition can be traced back to the Magna Carta (1215) and before, through the long struggle for Parliamentary supremacy which culminated in the English Bill of Rights of 1689, the emergence of representative political institutions in the colonial era, the development of responsible government in the 19th century, and eventually, the achievement of Confederation itself in 1867. "[T]he Canadian tradition", the majority of this Court held in Reference re Provincial Electoral Boundaries (Sask.), [1991] 2 S.C.R. 158, at p. 186, is "one of evolutionary democracy moving in uneven steps toward the goal of universal suffrage and more effective representation". Since Confederation, efforts to extend the franchise to those unjustly excluded from participation in our political system — such as women, minorities, and aboriginal peoples — have continued, with some success, to the present day.

64 Democracy is not simply concerned with the process of government. On the contrary, as suggested in Switzman v. Elbling, supra, at p. 306, democracy is fundamentally connected to substantive goals, most importantly, the promotion of self-government. Democracy accommodates cultural and group identities: Reference re Provincial Electoral Boundaries, at p. 188. Put another way, a sovereign people exercises its right to self-government through the democratic process. In considering the scope and purpose of the Charter, the Court in R. v. Oakes, [1986] 1 S.C.R. 103, articulated some of the values inherent in the notion of democracy (at p. 136):

The Court must be guided by the values and principles essential to a free and democratic society which I believe to embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.

65 In institutional terms, democracy means that each of the provincial legislatures and the federal Parliament is elected by popular franchise. These legislatures, we have said, are "at the core of the system of representative government": New Brunswick Broadcasting, supra, at p. 387. In individual terms, the right to vote in elections to the House of Commons and the provincial legislatures, and to be candidates in those elections, is guaranteed to "Every citizen of Canada" by virtue of s. 3 of the Charter. Historically, this Court has interpreted democracy to mean the process of representative and responsible government and the right of citizens to participate in the political process as voters (Reference re Provincial Electoral Boundaries, supra) and as candidates (Harvey v. New Brunswick (Attorney General), [1996] 2 S.C.R. 876). In addition, the effect of s. 4 of the Charter is to oblige the House of Commons and the provincial legislatures to hold regular elections and to permit citizens to elect representatives to their political institutions. The democratic principle is affirmed with particular clarity in that s. 4 is not subject to the notwithstanding power contained in s. 33.

66 It is, of course, true that democracy expresses the sovereign will of the people. Yet this expression, too, must be taken in the context of the other institutional values we have identified as pertinent to this Reference. The relationship between democracy and federalism means, for example, that in Canada there may be different and equally legitimate majorities in different provinces and territories and at the federal level. No one majority is more or less "legitimate" than the others as an expression of democratic opinion, although, of course, the consequences will vary with the subject matter. A federal system of government enables different provinces to pursue their policies responsive to the particular concerns and interests of people in that province. At the same time, Canada as a whole is also a democratic community in which citizens construct and achieve goals on a national scale through a federal government acting within the limits of its jurisdiction. The function of federalism is to enable citizens to participate concurrently in different collectivities and to pursue goals at both a provincial and a federal level.

67 The consent of the governed is a value that is basic to our understanding of a free and democratic society. Yet democracy in any real sense of the word cannot exist without the rule of law. It is the law that creates the framework within which the "sovereign will" is to be ascertained and implemented. To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation. That is, they must allow for the participation of, and accountability to, the people, through public institutions created under the Constitution. Equally, however, a system of government cannot survive through adherence to the law alone. A political system must also possess legitimacy, and in our political culture, that requires an interaction between the rule of law and the democratic principle. The system must be capable of reflecting the aspirations of the people. But there is more. Our laws claim to legitimacy also rests on an appeal to moral values, many of which are imbedded in our constitutional structure. It would be a grave mistake to equate legitimacy with the "sovereign will" or majority rule alone, to the exclusion of other constitutional values.

68 Finally, we highlight that a functioning democracy requires a continuous process of discussion. The Constitution mandates government by democratic legislatures, and an executive accountable to them, "resting ultimately on public opinion reached by discussion and the interplay of ideas" (Saumur v. City of Quebec, supra, at p. 330). At both the federal and provincial level, by its very nature, the need to build majorities necessitates compromise, negotiation, and deliberation. No one has a monopoly on truth, and our system is predicated on the faith that in the marketplace of ideas, the best solutions to public problems will rise to the top. Inevitably, there will be dissenting voices. A democratic system of government is committed to considering those dissenting voices,
and seeking to acknowledge and address those voices in the laws by which all in the community must live.

The Constitution Act, 1982 gives expression to this principle, by conferring a right to initiate constitutional change on each participant in Confederation. In our view, the existence of this right imposes a corresponding duty on the participants in Confederation to engage in constitutional discussions in order to acknowledge and address democratic expressions of a desire for change in other provinces. This duty is inherent in the democratic principle which is a fundamental predicate of our system of governance.

69 Constitutionalism and the Rule of Law

70 The principles of constitutionalism and the rule of law lie at the root of our system of government. The rule of law, as observed in Ranorean v. Duplessis, [1959] S.C.R. 121, at p. 142, is "a fundamental postulate of our constitutional structure". As we noted in the Patriation Reference, supra, at pp. 805-6, "[t]he 'rule of law' is a highly textured expression, importing many things which are beyond the need of these reasons to explore but conveying, for example, a sense of orderliness, of subject to known legal rules and of executive accountability to legal authority". At its most basic level, the rule of law vouchsafes to the citizens and residents of the country a shield for individuals from arbitrary state action.

71 In the Manitoba Language Rights Reference, supra, at pp. 747-52, this Court outlined the elements of the rule of law. We emphasized, first, that the rule of law provides that the law is supreme over the acts of both government and private persons. There is, in short, one law for all. Second, we explained, at p. 749, that "the rule of law requires the creation and maintenance of an actual order of positive rules which preserves and embodies the more general principle of normative order". It was this second aspect of the rule of law that was primarily at issue in the Manitoba Language Rights Reference itself. A third aspect of the rule of law is, as recently confirmed in the Provincial Judges Reference, supra, at para. 10, that "the exercise of all public power must find its ultimate source in a legal rule". Put another way, the relationship between the state and the individual must be regulated by law. Taken together, these three considerations make up a principle of profound constitutional and political significance.

72 The constitutionalism principle bears considerable similarity to the rule of law, although they are not identical. The essence of constitutionalism in Canada is embodied in s. 52(1) of the Constitution Act, 1982, which provides that "[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." Simply put, the constitutionalism principle requires that all government action comply with the Constitution. The rule of law principle requires that all government action must comply with the law, including the Constitution. This Court has noted on several occasions that with the adoption of the Charter, the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy. The Constitution binds all governments, both federal and provincial, including the executive branch (Operation Dismantle Inc. v. The Queen, [1985] 1 S.C.R. 441, at p. 455). They may not transgress its provisions: indeed, their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source.

73 An understanding of the scope and importance of the principles of the rule of law and constitutionalism is aided by acknowledging explicitly why a constitution is entrenched beyond the reach of simple majority rule. There are three overlapping reasons.

74 First, a constitution may provide an added safeguard for fundamental human rights and individual freedoms which might otherwise be susceptible to government interference. Although democratic government is generally solicitous of those rights, there are occasions when the majority will be tempted to ignore fundamental rights in order to accomplish collective goals more easily or effectively. Constitutional entrenchment ensures that those rights will be given due regard and protection. Second, a constitution may seek to ensure that vulnerable minority groups are endowed with the institutions and rights necessary to maintain and promote their identities against the assimilative pressures of the majority. And third, a constitution may provide for a division of political power that allocates political power amongst different levels of government. That purpose would be defeated if one of those democratically elected levels of government could usurp the powers of the other simply by exercising its legislative power to allocate additional political power to itself unilaterally.

75 The argument that the Constitution may be legitimately circumvented by resort to a majority vote in a province-wide referendum is superficially persuasive, in large measure because it seems to appeal to some of the same principles that underlie the legitimacy of the Constitution itself, namely, democracy and self-government. In short, it is suggested that as the notion of popular sovereignty underlies the legitimacy of our existing constitutional arrangements, so the same popular sovereignty that originally led to the present Constitution must (it is argued) also permit "the people" in their exercise of popular sovereignty to secede by majority vote alone. However, closer analysis reveals that this argument is unsound, because it misunderstands the meaning of popular sovereignty and the essence of a constitutional democracy.

76 Canadians have never accepted that ours is a system of simple majority rule. Our principle of democracy, taken in conjunction with the other constitutional principles discussed here, is richer. Constitutional government is necessarily predicated on the idea that the political representatives of the people of a province have the capacity and the power to commit the province to be bound into the future by the constitutional rules being adopted. These rules are "binding" not in the sense of frustrating the will of a majority of a province, but as defining the majority which must be consulted in order to alter the fundamental balances of political power (including the spheres of autonomy guaranteed by the principle of federalism), individual rights, and minority rights in our society. Of course, these constitutional rules are themselves amenable to amendment, but only through a process of negotiation which ensures that there is an opportunity for the constitutionally defined rights of all the parties to be respected and reconciled.
structure even at the time of Confederation: Senate Reference, supra, at p. 71. Although Canada's record of upholding the rights of minorities is not a spotless one, that goal is one towards which Canadians have been striving since Confederation, and the process has not been without successes. The principle of protecting minority rights continues to exercise influence in the operation and interpretation of our Constitution.

82 Consistent with this long tradition of respect for minorities, which is at least as old as Canada itself, the framers of the Constitution Act, 1982 included in s. 35 explicit protection for existing aboriginal and treaty rights, and in s. 25, a non-derogation clause in favour of the rights of aboriginal peoples. The "promise" of s. 35, as it was termed in R v. Sparrow, [1990] 1 S.C.R. 1075, at p. 1083, recognized not only the ancient occupation of land by aboriginal peoples, but their contribution to the building of Canada, and the special commitments made to them by successive governments. The protection of these rights, so recently and arduously achieved, whether looked at in their own right or as part of the larger concern with minorities, reflects an important underlying constitutional value.

(4) The Operation of the Constitutional Principles in the Secession Context

83 Secession is the effort of a group or section of a state to withdraw itself from the political and constitutional authority of that state, with a view to achieving statehood for a new territorial unit on the international plane. In a federal state, secession typically takes the form of a territorial unit seeking to withdraw from the federation. Secession is a legal act as much as a political one. By the terms of Question 1 of this Reference, we are asked to rule on the legality of unilateral secession "[u]nder the Constitution of Canada". This is an appropriate question, as the legality of unilateral secession must be evaluated, at least in the first instance, from the perspective of the domestic legal order of the state from which the unit seeks to withdraw. As we shall see below, it is also argued that international law is a relevant standard by which the legality of a purported act of secession may be measured.

84 The secession of a province from Canada must be considered, in legal terms, to require an amendment to the Constitution, which perforce requires negotiation. The amendments necessary to achieve a secession could be radical and extensive. Some commentators have suggested that secession could be a change of such a magnitude that it could not be considered to be merely an amendment to the Constitution. We are not persuaded by this contention. It is of course true that the Constitution is silent as to the ability of a province to secede from Confederation but, although the Constitution neither expressly authorizes nor prohibits secession, an act of secession would purport to alter the governance of Canadian territory in a manner which undoubtedly is inconsistent with our current constitutional arrangements. The fact that those changes would be profound, or that they would purport to have a significance with respect to international law, does not negate their nature as amendments to the Constitution of Canada.

85 The Constitution is the expression of the sovereignty of the people of Canada. It lies within the power of the people of Canada, acting through their various governments duly elected and recognized under the Constitution, to effect whatever constitutional arrangements are desired within
What is the content of this obligation to negotiate? At this juncture, we confront the difficult inter-relationship between substantive obligations flowing from the Constitution and the procedural obligation to negotiate: once the nature of those obligations has been described, it is easier to assess the appropriate means of enforcement of those obligations, and to comment on the distinction between legal and legitimacy.

90. The conduct of the parties in such negotiations would be governed by the same constitutional principles which gave rise to the constitutionalism and the rule of law, and the protection of minorities. Those principles lead us to reject the absolute principle of self-determination of peoples. Only those propositions are tenable which lead to the negotiation of the logistical details of secession. This proposition is attributed to the supposition that the Constitution’s amendments would demand that considerable weight be given to a clear expression of democratic will expressed as a majority.

91. For both theoretical and practical reasons, we cannot accept this view. We shall not ask to consider whether it would be constitutional in such a circumstance for the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada. We shall not ask whether it would be constitutional in such a circumstance for the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada.

92. However, we are equally unable to accept the reverse proposition that a clear expression of self-determination by the people of Quebec would impose no obligation upon the other provinces or the federal government. The continued existence and operation of the Canadian constitutional order cannot remain indifferent to the clear expression of the democratic will of the people of Quebec that they no longer wish to remain in Canada. This would amount to the assertion that Quebecers that they no longer wish to remain in Canada.
other constitutionally recognized principles necessarily trump the clearly expressed democratic will of the people of Quebec. Such a proposition fails to give sufficient weight to the underlying constitutional principles that must inform the amendment process, including the principles of democracy and federalism. The rights of other provinces and the federal government cannot deny the right of the government of Quebec to pursue secession, should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others. Negotiations would be necessary to address the interests of the federal government, of Quebec and the other provinces, and other participants, as well as the rights of all Canadians both within and outside Quebec.

93 Is the rejection of both of these propositions reconcilable? Yes, once it is realized that none of the rights or principles under discussion is absolute to the exclusion of the others. This observation suggests that other parties cannot exercise their rights in such a way as to amount to an absolute denial of Quebec’s rights, and similarly, that so long as Quebec exercises its rights while respecting the rights of others, it may propose secession and seek to achieve it through negotiation. The negotiation process precipitated by a decision of a clear majority of the population of Quebec on a clear question to pursue secession would require the reconciliation of various rights and obligations by the representatives of two legitimate majorities, namely, the clear majority of the population of Quebec, and the clear majority of Canada as a whole, whatever that may be. There can be no suggestion that either of these majorities “transps” the other. A political majority that does not act in accordance with the underlying constitutional principles we have identified puts at risk the legitimacy of the exercise of its rights.

94 In such circumstances, the conduct of the parties assumes primary constitutional significance. The negotiation process must be conducted with an eye to the constitutional principles we have outlined, which must inform the actions of all the participants in the negotiation process.

95 Refusal of a party to conduct negotiations in a manner consistent with constitutional principles and values would seriously put at risk the legitimacy of that party’s assertion of its rights, and perhaps the negotiation process as a whole. Those who quite legitimately insist upon the importance of upholding the rule of law cannot at the same time be oblivious to the need to act in conformity with constitutional principles and values, and so do their part to contribute to the maintenance and promotion of an environment in which the rule of law may flourish.

96 No one can predict the course that such negotiations might take. The possibility that they might not lead to an agreement amongst the parties must be recognized. Negotiations following a referendum vote in favour of seeking secession would inevitably address a wide range of issues, many of great import. After 131 years of Confederation, there exists, inevitably, a high level of integration in economic, political and social institutions across Canada. The vision of those who brought about Confederation was to create a unified country, not a loose alliance of autonomous provinces. Accordingly, while there are regional economic interests, which sometimes coincide with provincial boundaries, there are also national interests and enterprises (both public and private) that would face potential dismemberment. There is a national economy and a national debt. Arguments were raised before us regarding boundary issues. There are linguistic and cultural minorities, including aboriginal peoples, unevenly distributed across the country who look to the Constitution of Canada for the protection of their rights. Of course, secession would give rise to many issues of great complexity and difficulty. These would have to be resolved within the overall framework of the rule of law, thereby assuring Canadians resident in Quebec and elsewhere a measure of stability in what would likely be a period of considerable upheaval and uncertainty. Nobody seriously suggests that our national existence, seamless in so many aspects, could be effortlessly separated along what are now the provincial boundaries of Quebec. As the Attorney General of Saskatchewan put it in his oral submission:

A nation is built when the communities that comprise it make commitments to it, when they forego choices and opportunities on behalf of a nation, . . . when the communities that comprise it make compromises, when they offer each other guarantees, when they make transfers and perhaps most pointedly, when they receive from others the benefits of national solidarity. The threads of a thousand acts of accommodation are the fabric of a nation. . . .

97 In the circumstances, negotiations following such a referendum would undoubtedly be difficult. While the negotiators would have to contemplate the possibility of secession, there would be no absolute legal entitlement to it and no assumption that an agreement reconciling all relevant rights and obligations would actually be reached. It is foreseeable that even negotiations carried out in conformity with the underlying constitutional principles could reach an impasse. We need not speculate here as to what would then transpire. Under the Constitution, secession requires that an amendment be negotiated.

98 The respective roles of the courts and political actors in discharging the constitutional obligations we have identified follows ineluctably from the foregoing observations. In the Patriation Reference, a distinction was drawn between the law of the Constitution, which, generally speaking, will be enforced by the courts, and other constitutional rules, such as the conventions of the Constitution, which carry only political sanctions. It is also the case, however, that judicial intervention, even in relation to the law of the Constitution, is subject to the Court’s appreciation of its proper role in the constitutional scheme.

99 The notion of justiciability is, as we earlier pointed out in dealing with the preliminary objection, linked to the notion of appropriate judicial restraint. We earlier made reference to the discussion of justiciability in Reference re Canada Assistance Plan, supra, at p. 545:

In exercising its discretion whether to determine a matter that is alleged to be non-justiciable, the Court’s primary concern is to retain its proper role within the constitutional framework of our democratic form of government.

In Operation Dismantle, supra, at p. 459, it was pointed out that justiciability is a "doctrine . . . founded upon a concern with the appropriate role of the courts as the forum for the resolution of
different types of disputes". An analogous doctrine of judicial restraint operates here. Also, as observed in *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49 (the *Auditor General's* case), at p. 91:

"There is an array of issues which calls for the exercise of judicial judgment on whether the questions are properly cognizable by the courts. Ultimately, such judgment depends on the appreciation by the judiciary of its own position in the constitutional scheme.

100 The role of the Court in this Reference is limited to the identification of the relevant aspects of the Constitution in their broadest sense. We have interpreted the questions as relating to the constitutional framework within which political decisions may ultimately be made. Within that framework, the workings of the political process are complex and can only be resolved by means of political judgments and evaluations. The Court has no supervisory role over the political aspects of constitutional negotiations. Equally, the initial impetus for negotiation, namely a clear majority on a clear question in favour of secession, is subject only to political evaluation, and properly so. A right and a corresponding duty to negotiate secession cannot be built on an alleged expression of democratic will if the expression of democratic will is itself fraught with ambiguities. Only the political actors would have the information and expertise to make the appropriate judgment as to the point at which, and the circumstances in which, those ambiguities are resolved one way or the other.

101 If the circumstances giving rise to the duty to negotiate were to arise, the distinction between the strong defense of legitimate interests and the taking of positions which, in fact, ignore the legitimate interests of others is one that also defies legal analysis. The Court would not have access to all of the information available to the political actors, and the methods appropriate for the search for truth in a court of law are ill-suited to getting to the bottom of constitutional negotiations. To the extent that the questions are political in nature, it is not the role of the judiciary to interpose its own views on the different negotiating positions of the parties, even were it invited to do so. Rather, it is the obligation of the elected representatives to give concrete form to the discharge of their constitutional obligations which only they and their electors can ultimately assess. The reconciliation of the various legitimate constitutional interests outlined above is necessarily committed to the political rather than the judicial realm, precisely because that reconciliation can only be achieved through the give and take of the negotiation process. Having established the legal framework, it would be for the democratically elected leadership of the various participants to resolve their differences.

102 The non-justiciability of political issues that lack a legal component does not deprive the surrounding constitutional framework of its binding status, nor does this mean that constitutional obligations could be breached without incurring serious legal repercussions. Where there are legal rights there are remedies, but as we explained in the *Auditor General's* case, *supra*, at p. 90, and *New Brunswick Broadcasting*, *supra*, the appropriate recourse in some circumstances lies through the workings of the political process rather than the courts.

103 To the extent that a breach of the constitutional duty to negotiate in accordance with the principles described above undermines the legitimacy of a party's actions, it may have important ramifications at the international level. Thus, a failure of the duty to undertake negotiations and pursue them according to constitutional principles may undermine that government's claim to legitimacy which is generally a precondition for recognition by the international community. Conversely, violations of those principles by the federal or other provincial governments responding to the request for secession may undermine their legitimacy. Thus, a Quebec that had negotiated in conformity with constitutional principles and values in the face of unreasonable intransigence on the part of other participants at the federal or provincial level would be more likely to be recognized than a Quebec which did not itself act according to constitutional principles in the negotiation process. Both the legality of the acts of the parties to the negotiation process under Canadian law, and the perceived legitimacy of such action, would be important considerations in the recognition process. In this way, the adherence of the parties to the obligation to negotiate would be evaluated in an indirect manner on the international plane.

104 Accordingly, the secession of Quebec from Canada cannot be accomplished by the National Assembly, the legislature or government of Quebec unilaterally, that is to say, without principled negotiations, and be considered a lawful act. Any attempt to effect the secession of a province from Canada must be undertaken pursuant to the Constitution of Canada, or else violate the Canadian legal order. However, the continued existence and operation of the Canadian constitutional order cannot remain unaffected by the unambiguous expression of a clear majority of Quebeckers that they no longer wish to remain in Canada. The primary means by which that expression is given effect is the constitutional duty to negotiate in accordance with the constitutional principles that we have described herein. In the event secession negotiations are initiated, our Constitution, no less than our history, would call on the participants to work to reconcile the rights, obligations and legitimate aspirations of all Canadians within a framework that emphasizes constitutional responsibilities as much as it does constitutional rights.

105 It will be noted that Question 1 does not ask how secession could be achieved in a constitutional manner, but addresses one form of secession only, namely unilateral secession. Although the applicability of various procedures to achieve lawful secession was raised in argument, each option would require us to assume the existence of facts that at this stage are unknown. In accordance with the usual rule of prudence in constitutional cases, we refrain from pronouncing on the applicability of any particular constitutional procedure to effect secession unless and until sufficiently clear facts exist to squarely raise an issue for judicial determination.

(5) *Suggested Principle of Effectivity*
For reasons already discussed, the Court does not accept the contention that Question 2 raises a question of "pure" international law which this Court has no jurisdiction to address. Question 2 is posed in the context of a Reference to address the existence or non-existence of a right of unilateral secession by a province of Canada. The amicus curiae argues that this question ultimately falls to be determined under international law. In addressing this issue, the Court does not purport to act as an arbiter between sovereign states or more generally within the international community. The Court is engaged in rendering an advisory opinion on certain legal aspects of the continued existence of the Canadian federation. International law has been invoked as a consideration and it must therefore be addressed.

In the foregoing discussion we have not overlooked the principle of effectivity, which was placed at the forefront in argument before us. For the reasons that follow, we do not think that the principle of effectivity has any application to the issues raised by Question 1. A distinction must be drawn between the right of a people to act, and their power to do so. They are not identical. A right is recognized in law: mere physical ability is not necessarily given status as a right. The fact that an individual or group can act in a certain way says nothing at all about the legal status or consequences of the act. A power may be exercised even in the absence of a right to do so, but if it is, then it is exercised without legal foundation. Our Constitution does not address powers in this sense. On the contrary, the Constitution is concerned only with the rights and obligations of individuals, groups and governments, and the structure of our institutions. It was suggested before us that the National Assembly, legislature or government of Quebec could unilaterally effect the secession of that province from Canada, but it was not suggested that they might do so as a matter of law: rather, it was contended that they simply could do so as a matter of fact. Although under the Constitution there is no right to pursue secession unilaterally, that is secession without principled negotiation, this does not rule out the possibility of an unconstitutional declaration of secession leading to a de facto secession. The ultimate success of such a secession would be dependent on effective control of a territory and recognition by the international community. The principles governing secession at international law are discussed in our answer to Question 2.

In our view, the alleged principle of effectivity has no constitutional or legal status in the sense that it does not provide an ex ante explanation or justification for an act. In essence, acceptance of a principle of effectivity would be tantamount to accepting that the National Assembly, legislature or government of Quebec may act without regard to the law, simply because it asserts the power to do so. So viewed, the suggestion is that the National Assembly, legislature or government of Quebec could purport to secede the province unilaterally from Canada in disregard of Canadian and international law. It is further suggested that if the secession bid was successful, a new legal order would be created in that province, which would then be considered an independent state.

Such a proposition is an assertion of fact, not a statement of law. It may or may not be true; in any event it is irrelevant to the questions of law before us. If, on the other hand, it is put forward as an assertion of law, then it simply amounts to the contention that the law may be broken as long as it can be broken successfully. Such a notion is contrary to the rule of law, and must be rejected.

B. Question 2

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?

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The sheer number of resolutions concerning the right of self-determination makes their enumeration impossible.

For our purposes, reference to the following conventions and resolutions is sufficient. Article 1 of both the U.N.'s *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171, and its *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3, states:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Similarly, the U.N. General Assembly's *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, GA Res. 2625 (XXV), 24 October 1970 (Declaration on Friendly Relations), states:

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

In 1993, the U.N. World Conference on Human Rights adopted the *Vienna Declaration and Programme of Action*, A/CONF.157/24, 25 June 1993, that reaffirmed Article 1 of the two above-mentioned covenants. The U.N. General Assembly's *Declaration on the Occasion of the Fiftieth Anniversary of the United Nations*, GA Res. 50/6, 9 November 1995, also emphasizes the right to self-determination by providing that the U.N.'s member states will:

1. . . .

Continue to reaffirm the right of self-determination of all peoples, taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, and recognize the right of peoples to take legitimate action in accordance with the Charter of the United Nations to realize their inalienable right of self-determination. This shall not be construed as authorizing or encouraging any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind. . . . [Emphasis added.]

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112 International law contains neither a right of unilateral secession nor the explicit denial of such a right, although such a denial is, to some extent, implicit in the exceptional circumstances required for secession to be permitted under the right of a people to self-determination, e.g., the right of secession that arises in the exceptional situation of an oppressed or colonial people, discussed below. As will be seen, international law places great importance on the territorial integrity of nation states and, by and large, leaves the creation of a new state to be determined by the domestic law of the existing state of which the seceding entity presently forms a part (R. Y. Jennings, *The Acquisition of Territory in International Law* (1963), at pp. 8-9). Where, as here, unilateral secession would be incompatible with the domestic Constitution, international law is likely to accept that conclusion subject to the right of peoples to self-determination, a topic to which we now turn.

(b) The Right of a People to Self-determination

113 While international law generally regulates the conduct of nation states, it does, in some specific circumstances, also recognize the "rights" of entities other than nation states -- such as the right of a people to self-determination.


115 Article 1 of the *Charter of the United Nations*, Can. T.S. 1945 No. 7, states in part that one of the purposes of the United Nations (U.N.) is:

*Article 1*

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

116 Article 55 of the U.N. Charter further states that the U.N. shall promote goals such as higher standards of living, full employment and human rights "[w]ith a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples".

117 This basic principle of self-determination has been carried forward and addressed in so many U.N. conventions and resolutions that, as noted by Doehring, *supra*, at p. 60:
The right to self-determination is also recognized in other international legal documents. For example, the Final Act of the Conference on Security and Co-operation in Europe, 14 I.L.M. 1292 (1975) (Helsinki Final Act), states (in Part VIII):

The participating States will respect the equal rights of peoples and their right to self-determination, acting at all times in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States.

By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development. [Emphasis added.]

As will be seen, international law expects that the right to self-determination will be exercised by peoples within the framework of existing sovereign states and consistently with the maintenance of the territorial integrity of those states. Where this is not possible, in the exceptional circumstances discussed below, a right of secession may arise.

(i) Defining "Peoples"

International law grants the right to self-determination to "peoples". Accordingly, access to the right requires the threshold step of characterizing as a people the group seeking self-determination. However, as the right to self-determination has developed by virtue of a combination of international agreements and conventions, coupled with state practice, with little formal elaboration of the definition of "peoples", the result has been that the precise meaning of the term "people" remains somewhat uncertain.

It is clear that "a people" may include only a portion of the population of an existing state. The right to self-determination has developed largely as a human right, and is generally used in documents that simultaneously contain references to "nation" and "state". The juxtaposition of these terms is indicative that the reference to "people" does not necessarily mean the entirety of a state's population. To restrict the definition of the term to the population of existing states would render the granting of a right to self-determination largely duplicative, given the parallel emphasis within the majority of the source documents on the need to protect the territorial integrity of existing states, and would frustrate its remedial purpose.

While much of the Quebec population certainly shares many of the characteristics (such as a common language and culture) that would be considered in determining whether a specific group is a "people", as do other groups within Quebec and/or Canada, it is not necessary to explore this legal characterization to resolve Question 2 appropriately. Similarly, it is not necessary for the Court to determine whether, should a Quebec people exist within the definition of public international law, such a people encompasses the entirety of the provincial population or just a portion thereof. Nor is it necessary to examine the position of the aboriginal population within Quebec. As the following discussion of the scope of the right to self-determination will make clear, whatever be the correct application of the definition of people(s) in this context, their right of self-determination cannot in the present circumstances be said to ground a right to unilateral secession.

(ii) Scope of the Right to Self-determination

The recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through internal self-determination -- a people's pursuit of its political, economic, social and cultural development within the framework of an existing state. A right to external self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises in only the most extreme of cases and, even then, under carefully defined circumstances. External self-determination can be defined as in the following statement from the Declaration on Friendly Relations as

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International law grants the right to self-determination to "peoples". Accordingly, access to the right requires the threshold step of characterizing as a people the group seeking self-determination. However, as the right to self-determination has developed by virtue of a combination of international agreements and conventions, coupled with state practice, with little formal elaboration of the definition of "peoples", the result has been that the precise meaning of the term "people" remains somewhat uncertain.

It is clear that "a people" may include only a portion of the population of an existing state. The right to self-determination has developed largely as a human right, and is generally used in documents that simultaneously contain references to "nation" and "state". The juxtaposition of these terms is indicative that the reference to "people" does not necessarily mean the entirety of a state's population. To restrict the definition of the term to the population of existing states would render the granting of a right to self-determination largely duplicative, given the parallel emphasis within the majority of the source documents on the need to protect the territorial integrity of existing states, and would frustrate its remedial purpose.

While much of the Quebec population certainly shares many of the characteristics (such as a common language and culture) that would be considered in determining whether a specific group is a "people", as do other groups within Quebec and/or Canada, it is not necessary to explore this legal characterization to resolve Question 2 appropriately. Similarly, it is not necessary for the Court to determine whether, should a Quebec people exist within the definition of public international law, such a people encompasses the entirety of the provincial population or just a portion thereof. Nor is it necessary to examine the position of the aboriginal population within Quebec. As the following discussion of the scope of the right to self-determination will make clear, whatever be the correct application of the definition of people(s) in this context, their right of self-determination cannot in the present circumstances be said to ground a right to unilateral secession.
participating states will at all times act, as stated in the Helsinki Final Act, "in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States" (emphasis added). Principle 5 of the concluding document states that the participating states (including Canada):

... confirm their commitment strictly and effectively to observe the principle of the territorial integrity of States. They will refrain from any violation of this principle and thus from any action aimed by direct or indirect means, in contravention of the purposes and principles of the Charter of the United Nations, other obligations under international law or the provisions of the [Helsinki] Final Act, at violating the territorial integrity, political independence or the unity of a State. No actions or situations in contravention of this principle will be recognized as legal by the participating States. [Emphasis added.]

Accordingly, the reference in the Helsinki Final Act to a people determining its external political status is interpreted to mean the expression of a people's external political status through the government of the existing state, save in the exceptional circumstances discussed below. As noted by Cassese, supra, at p. 287, given the history and textual structure of this document, its reference to external self-determination simply means that "no territorial or other change can be brought about by the central authorities of a State that is contrary to the will of the whole people of that State".

While the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights do not specifically refer to the protection of territorial integrity, they both define the ambit of the right to self-determination in terms that are normally attainable within the framework of an existing state. There is no necessary incompatibility between the maintenance of the territorial integrity of existing states, including Canada, and the right of a "people" to achieve a full measure of self-determination. A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its own internal arrangements, is entitled to the protection under international law of its territorial integrity.

(iii) Colonial and Oppressed Peoples

Accordingly, the general state of international law with respect to the right to self-determination is that the right operates within the overriding protection granted to the territorial integrity of "parent" states. However, as noted by Cassese, supra, at p. 334, there are certain defined contexts within which the right to the self-determination of peoples does allow that right to be exercised "externally", which, in the context of this Reference, would potentially mean secession:

... the right to external self-determination, which entails the possibility of choosing (or restoring) independence, has only been bestowed upon two classes of peoples (those under colonial rule or foreign occupation), based upon the assumption that both classes make up entities that are inherently distinct from the colonialist Power and the occupant

130 Power and that their 'territorial integrity', all but destroyed by the colonialist or occupying Power, should be fully restored. . . .

132 The right of colonial peoples to exercise their right to self-determination by breaking away from the "imperial" power is now undisputed, but is irrelevant to this Reference.

133 The other clear case where a right to external self-determination accrues is where a people is subject to alien subjugation, domination or exploitation outside a colonial context. This recognition finds its roots in the Declaration on Friendly Relations:

Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle, in order:

(a) To promote friendly relations and co-operation among States; and

(b) To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned;

and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter.

134 A number of commentators have further asserted that the right to self-determination may ground a right to unilateral secession in a third circumstance. Although this third circumstance has been described in several ways, the underlying proposition is that, when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession. The Vienna Declaration requirement that governments represent "the whole people belonging to the territory without distinction of any kind" adds credence to the assertion that such a complete blockage may potentially give rise to a right of secession.

135 Clearly, such a circumstance parallels the other two recognized situations in that the ability of a people to exercise its right to self-determination internally is somehow being totally frustrated. While it remains unclear whether this third proposition actually reflects an established international law standard, it is unnecessary for present purposes to make that determination. Even assuming that the third circumstance is sufficient to create a right to unilateral secession under international law, the current Quebec context cannot be said to approach such a threshold. As stated by the amicus curiae, Addendum to the factum of the amicus curiae, at paras. 15-16:
We would not wish to leave this aspect of our answer to Question 2 without acknowledging the importance of the submissions made to us regarding the rights and concerns of the Quebec people. However, the consensus of our finding is that there is no right applicable to the Quebec population which would support the conclusion that a right to unilateral secession exists. In the context of our finding, the answer to Question 2 is that there is no such right applicable to the Quebec population.

140. As stated, an argument advanced by the amicus curiae on this branch of the Reference was that, while international law may not provide a positive right to unilateral secession in the context of Quebec, international law equally does not prohibit secession and, in fact, international law recognizes the right to self-determination in the broadest sense. Our finding that there is no applicable legal right to unilateral secession for the Quebec people is not to be read as precluding recognition of the right to self-determination.

141. It is true that international law recognizes a right to self-determination, but it is also true that this right is not always given effect. The recognition of a right to self-determination is not the same as the enforcement of that right. The recognition of a right to self-determination is a political act that occurs when a state recognizes another state as having the right to self-determination.

142. The recognition of a right to self-determination is a political act that occurs when a state recognizes another state as having the right to self-determination. The recognition of a right to self-determination is not the same as the enforcement of that right. The recognition of a right to self-determination is not the same as the enforcement of that right. The recognition of a right to self-determination is a political act that occurs when a state recognizes another state as having the right to self-determination.

143. As indicated in responding to Question 1, one of the legal norms which may be applicable to Question 2, which asks whether a right to unilateral secession exists, is the principle of legitimacy. This principle holds that a right to unilateral secession exists when a right to self-determination is recognized by other states.

144. We do not doubt that legal consequences may flow from political facts, and that recognition of a right to self-determination in situations of former colonies; where a people is oppressed, we cannot conclude under current circumstances that those arrangements place Quebecers in a disadvantaged position within the scope of the international law rule.

145. The continuing failure to reach agreement on amendments to the Constitution, while not the exercise of pure sovereign discretion, has come to be associated with legal and political norms. Accordingly, neither the population of the province of Quebec, nor the representative institutions, the National Assembly, possess the right, under international law, to secede unilaterally from Canada.
may subsequently be reflected in a change in legal status. It is, however, quite another matter to suggest that a subsequent condonation of an initially illegal act retroactively creates a legal right to engage in the act in the first place. The broader contention is not supported by the international principle of effectivity or otherwise and must be rejected.

C. Question 3

In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?

147

In view of our answers to Questions 1 and 2, there is no conflict between domestic and international law to be addressed in the context of this Reference.

IV. Summary of Conclusions

148

As stated at the outset, this Reference has required us to consider momentous questions that go to the heart of our system of constitutional government. We have emphasized that the Constitution is more than a written text. It embraces the entire global system of rules and principles which govern the exercise of constitutional authority. A superficial reading of selected provisions of the written constitutional enactment, without more, may be misleading. It is necessary to make a more profound investigation of the underlying principles that animate the whole of our Constitution, including the principles of federalism, democracy, constitutionalism and the rule of law, and respect for minorities. Those principles must inform our overall appreciation of the constitutional rights and obligations that would come into play in the event a clear majority of Quebecers votes on a clear question in favour of secession.

149

The Reference requires us to consider whether Quebec has a right to unilateral secession. Those who support the existence of such a right found their case primarily on the principle of democracy. Democracy, however, means more than simple majority rule. As reflected in our constitutional jurisprudence, democracy exists in the larger context of other constitutional values such as those already mentioned. In the 131 years since Confederation, the people of the provinces and territories have created close ties of interdependence (economically, socially, politically and culturally) based on shared values that include federalism, democracy, constitutionalism and the rule of law, and respect for minorities. A democratic decision of Quebeckers in favour of secession would put those relationships at risk. The Constitution vouchsafes order and stability, and accordingly secession of a province "under the Constitution" could not be achieved unilaterally, that is, without principled negotiation with other participants in Confederation within the existing constitutional framework.

150

The Constitution is not a straitjacket. Even a brief review of our constitutional history demonstrates periods of momentous and dramatic change. Our democratic institutions necessarily accommodate a continuous process of discussion and evolution, which is reflected in the constitutional right of each participant in the federation to initiate constitutional change. This right
We have also considered whether a positive legal entitlement to secession exists under international law in the factual circumstances contemplated by Question 1, i.e., a clear democratic expression of support on a clear question for Quebec secession. Some of those who supported an affirmative answer to this question did so on the basis of the recognized right to self-determination. While it is true that some attempts at constitutional amendments in recent years have faltered, a clear majority vote in Quebec on a clear question implies a reciprocal duty on the other participants to engage in discussions to address any legitimate expression of support on a clear question for Quebec secession. Some of those who supported an initiative to change the constitutional order. While it is true that some attempts at constitutional amendment in recent years have faltered, a clear majority vote in Quebec on a clear question implies a reciprocal duty on the other participants to engage in discussions to address any legitimate expression of support on a clear question for Quebec secession.

151 Quebec could not, despite a clear referendum result, purport to invoke a right of self-determination to dictate the terms of a proposed secession to the other parties to the federation. The democratic vote, by however strong a majority, would have no legal effect on its own and could not push aside the principles of federalism and the rule of law, the rights of individuals and minorities, or the operation of democracy in the other provinces or in Canada as a whole. Democratic rights under the Constitution cannot be divorced from constitutional obligations. Nor, however, can the reverse proposition be accepted. The continued existence and operation of the Canadian constitutional order could not be indifferent to a clear expression of a clear majority of Quebeckers that they no longer wish to remain in Canada. The other provinces and the federal government would have no basis to deny the right of the government of Quebec to pursue secession, should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others. The negotiations that followed such a vote would address the potential act of secession as well as its possible terms should in fact secession proceed. There would be no conclusions predetermined by law on any issue. Negotiations would need to address the interests of the other provinces, the federal government, Quebec and indeed the rights of all Canadians both within and outside Quebec, and specifically the rights of minorities. No one suggests that it would be an easy set of negotiations.

152 The negotiation process would require the reconciliation of various rights and obligations by negotiation between two legitimate majorities, namely, the majority of the population of Quebec, and that of Canada as a whole. A political majority at either level that does not act in accordance with the underlying constitutional principles we have mentioned puts at risk the legitimacy of its exercise of its rights, and the ultimate acceptance of the result by the international community.

153 The task of the Court has been to clarify the legal framework within which political decisions are to be taken "under the Constitution", not to usurp the prerogatives of the political forces that operate within that framework. The obligations we have identified are binding obligations under the Constitution of Canada. However, it will be for the political actors to determine what constitutes "a clear majority on a clear question" in the circumstances under which a future referendum vote may be taken. Equally, in the event of demonstrated majority support for Quebec secession, the content and process of the negotiations will be for the political actors to settle. The reconciliation of the various legitimate constitutional interests is necessarily committed to the political rather than the judicial realm precisely because that reconciliation can only be achieved through the give and take of political negotiations. To the extent issues addressed in the course of negotiation are political, the courts, appreciating their proper role in the constitutional scheme, would have no supervisory role.
Although there is no right, under the Constitution or at international law, to unilateral secession, that is secession without negotiation on the basis just discussed, this does not rule out the possibility of an unconstitutional declaration of secession leading to a de facto secession. The ultimate success of such a secession would be dependent on recognition by the international community, which is likely to consider the legality and legitimacy of secession having regard to, amongst other facts, the conduct of Quebec and Canada, in determining whether to grant or withhold recognition. Such recognition, even if granted, would not, however, provide any retroactive justification for the act of secession, either under the Constitution of Canada or at international law.

The reference questions are answered accordingly.

Judgment accordingly.

Solicitor for the Attorney General of Canada: George Thomson, Ottawa.

Solicitors appointed by the Court as amici curiae: Joli-Cœur Lacasse Lemieux Simard St-Pierre, Sainte-Foy.

Solicitor for the intervener the Attorney General of Manitoba: The Department of Justice, Winnipeg.

Solicitor for the intervener the Attorney General for Saskatchewan: W. Brent Cotter, Regina.

Solicitor for the intervener the Minister of Justice of the Northwest Territories: Bernard W. Funston, Gloucester.

Solicitor for the intervener the Minister of Justice for the Government of the Yukon Territory: Stuart J. Whitley, Whitehorse.

Solicitor for the intervener Kitigan Zibi Anishinabeg: Agnès Laporte, Hull.

Solicitors for the intervener the Grand Council of the Crees (Eeyou Estchee): Robinson, Sheppard, Shapiro, Montréal.

Solicitors for the intervener the Makivik Corporation: Hutchins, Soroka & Dionne, Montréal.

Solicitor for the intervener the Chiefs of Ontario: Michael Sherry, Toronto.

Solicitors for the intervener the Minority Advocacy and Rights Council: Scott & Aylen, Toronto.

Solicitors for the intervener the Ad Hoc Committee of Canadian Women on the Constitution: Eberts Symes Street & Corbett, Toronto; Centre for Refugee Studies, North York.

Solicitors for the intervener Guy Bertrand: Guy Bertrand & Associés, Québec; Patrick Monahan, North York.

Solicitors for the interveners Roopnarine Singh, Keith Owen Henderson, Claude Leclerc, Kenneth O'Donnell and Van Hoven Petteway: Stephen A. Scott, Montréal.

Solicitors for the intervener Vincent Pouliot: Paquette & Associés, Montréal.
African Court on Human and Peoples’ Rights

The African Commission on Human and Peoples’ Rights v. Great Socialist People’s Libyan Arab Jamahiriya
Order for Provisional Measures of 25 March 2011

Application No. 004/2011
The Court composed of: Gérarc NIYUNGEKO, President; Sophia A.B. AKUFFO, Vice President; Jean MUTSINZI, Bernard M. NGOEPE, Modibo T. GUINDO, Fatsah OUGUERGOUZ, Joseph N. MULENG, Augustino S.L. RAMADHANI, Duncan TAMBA, Elsie N. THOMPSON and Sylvain ORÉ - Judges; and Robert ENO - Acting Registrar,

In the matter of:

AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS

v.

GREAT SOCIALIST PEOPLE’S LIBYAN ARAB JAMAHIRIYA

After deliberations,

Having regard to the application dated the 3rd of March 2011, received at the Registry of the Court on 16 March 2011, by the African Commission on Human and Peoples’ Rights (hereinafter referred to as the Commission), instituting proceedings against the Great Socialist People’s Libyan Arab Jamahiriya (hereinafter referred to as Libya), for serious and massive violations of human rights guaranteed under the African Charter on Human and Peoples’ Rights (hereinafter referred to as the Charter);

Having regard to Article 27 (2) o the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights (hereinafter referred to as the Protocol) and Rule 51 of the Rules of Court;

Makes the following Order:

1. Whereas, in its application, the Commission submits that it received successive complaints against Libya, during its 9th Extraordinary Session held in Banjul (The Gambia) from the 23rd of February to the 3rd of March 2011;

2. Whereas, the Commission submits that the complaints allege:
- that following the detention of an opposition lawyer, peaceful demonstrations took place on the 16th of February 2011 in the Eastern Libyan city of Benghazi,
- that on the 19th of February 2011, there were other demonstrations in Benghazi, Al Baida, Ajdabiya, Zayiwa and Derna, which were violently suppressed by security forces who opened fire at random on the demonstrators killing and injuring many people,
- that hospital sources reported that on the 20th of February 2011 they received individuals who had died or been injured with bullet wounds in the chest, neck and head,
- that Libyan security forces engaged in excessive use of heavy weapons and machine guns against the population, including targeted aerial bombardment and all types of attacks, and
- that these amount to serious violations of the right to life and to the integrity of persons, freedom of expression, demonstration and assembly.

3. Whereas, the Commission concludes that these actions amount to serious and widespread violations of the rights enshrined in Articles 1, 2, 4, 5, 9, 11, 12, 13 and 23 of the Charter;

4. Whereas, on the 21st of March 2011, the Registry of the Court acknowledged receipt of the application, in accordance with Rule 34(1) of the Rules of Court;

5. Whereas, on the 22nd of March 2011, the Registry forwarded copies of the application to Libya, in accordance with Rule 35(2)(a) of the Rules of Court, and invited Libya to indicate, within thirty (30) days of receipt of the application, the names and addresses of its representatives, in accordance with Rule 35(4)(a), whereas the Registry further invited Libya to respond to the application within sixty (60) days, in accordance with Rule 37 of the Rules;

6. Whereas, by letter dated the 22nd of March 2011, the Registry informed the Chairperson of the African Union Commission, and through him, the Executive Council of the African Union, and all the other States Parties to the Protocol, of the filing of the application, in accordance with Rule 35(3) of the Rules;

7. Whereas, by letter dated the 23rd of March 2011, the Registry forwarded copies of the application to the complainants that seized the Commission, in accordance with Rule 35(2)(e) of the Rules;

8. Whereas, by letter dated the 23rd of March 2011, the Registry informed the parties to the application that, given the extreme gravity and urgency of the matter, the Court might, on its own accord, and in accordance with Article 27(2) of the Protocol and Rule 51(1) of its Rules, issue provisional measures;

9. Whereas in its application, the Commission did not request the Court to order provisional measures;

10. Whereas, however, under Article 27(2) of the Protocol and Rule 51(1) of the Rules, the Court is empowered to order provisional measures proprio motu “in cases of extreme gravity and urgency and when necessary to avoid irreparable harm to persons” and “which it deems necessary to adopt in the interest of the parties or of justice”;

11. Whereas, it is for the Court to decide in each situation if, in the light of the particular circumstances, it should make use of the power provided for by the aforementioned provisions;

12. Whereas, given the particular circumstances of the case, the Court has decided to invoke its powers under these provisions;

13. Whereas, in the present situation where there is an imminent risk of loss of human life and in view of the ongoing conflict in Libya that makes it difficult to serve the application timeously on the Respondent and to arrange a hearing accordingly, the Court decided to make an order for provisional measures without written pleadings or oral hearings;
14. Whereas, in dealing with an application, the Court has to ascertain that it has jurisdiction under Articles 3 and 5 of the Protocol;

15. Whereas, however, before ordering provisional measures, the Court need not finally satisfy itself that it has jurisdiction on the merits of the case, but simply needs to satisfy itself, *prima facie*, that it has jurisdiction;

16. Whereas, Article 3 (1) of the Protocol provides that the jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation of the Charter, this Protocol and any other relevant human rights instrument ratified by the States concerned;

17. Whereas, Libya ratified the Charter on the 19th of July 1986 which came into force on the 21st of October 1986; whereas, Libya ratified the Protocol on the 19th of November 2003 which came into force on the 25th of January 2004; and Libya is a party to both instruments;

18. Whereas, Article 5 (1) (a) of the Protocol lists the Commission as one of the entities entitled to submit cases to the Court;

19. Whereas, in the light of the foregoing, the Court has satisfied itself that, *prima facie*, it has jurisdiction to deal with the application;

20. Whereas, it appears from the application that there exists a situation of extreme gravity and urgency, as well as a risk of irreparable harm to persons who are the subject of the application;

21. Whereas, the application alleges that international organizations, mentioned below, both universal and regional, to which Libya is a member, have considered the situation prevailing in Libya:


     which continues to contribute to the loss of human life and the destruction of property";

   - On the 21st of February 2011, the Secretary General of the Arab League called for an end to violence, stating that the demands of Arab people for change are legitimate and the Arab League has suspended Libya;

   - The United Nations Security Council in Resolution 1970 (2011) adopted on the 26th of February 2011, denounced "the gross and systematic violations of human rights, including, the repression of peaceful demonstrators", noting further that "the systematic attacks currently taking place in the Libyan Arab Jamahiriya against the civilian population may amount to crimes against humanity"; and decided to refer the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the Prosecutor of the International Criminal Court;

22. Whereas, in the opinion of the Court, there is therefore a situation of extreme gravity and urgency, as well as a risk of irreparable harm to persons who are the subject of the application, in particular, in relation to the rights to life and to physical integrity of persons as guaranteed in the Charter;

23. Whereas, in the light of the foregoing, the Court finds that the circumstances require it to order, as a matter of great urgency and without any proceedings, provisional measures, in accordance with Article 27 (2) of the Protocol and Rule 51 of its Rules;

24. Whereas, measures ordered by the Court would necessarily be provisional in nature and would not in any way prejudice the findings the Court might make on its jurisdiction, the admissibility of the application and the merits of the case;
25. For these reasons,

THE COURT, unanimously orders the following provisional measures:

1) The Great Socialist People's Libyan Arab Jamahiriya must immediately refrain from any action that would result in loss of life or violation of physical integrity of persons, which could be a breach of the provisions of the Charter or of other international human rights instruments to which it is a party.

2) The Great Socialist People's Libyan Arab Jamahiriya must report to the Court within a period of fifteen (15) days from the date of receipt of the Order, on the measures taken to implement this Order.

Done at Arusha, this twenty fifth day of March in the year Two Thousand and Eleven, in Arabic, English and French, the English text being authoritative.

Signed:

Gérard NIYUNGEKO, President
Sophia A.B. AKUFFO, Vice-President
Jean MUTSINZI, Judge
Bernard M. NGOEPE, Judge
Modibo T. GUIINDO, Judge
Fatsah OUGUERGOUZ, Judge
Joseph N. MULENGA, Judge
Augustino S.L. RAMADHANI, Judge
Duncan TAMBALA, Judge

Elsie N. THOMPSON, Judge
Sylvain ORÉ, Judge, and
Robert ENO, Acting Registrar
African Commission on Human and Peoples’ Rights

The Ogoni Case: The Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria
Decision of 27 May 2002

Communication 155/96
dangers created by oil activities. Ogoni Communities have not been involved in the decisions affecting the development of Ogoniland.

5. The Government has not required oil companies or its own agencies to produce basic health and environmental impact studies regarding hazardous operations and materials relating to oil production, despite the obvious health and environmental crisis in Ogoniland. The government has even refused to permit scientists and environmental organisations from entering Ogoniland to undertake such studies. The government has also ignored the concerns of Ogoni Communities regarding oil development, and has responded to protests with massive violence and executions of Ogoni leaders.

6. The Communication alleges that the Nigerian government does not require oil companies to consult communities before beginning operations, even if the operations pose direct threats to community or individual lands.

7. The Communication alleges that in the course of the last three years, Nigerian security forces have attacked, burned and destroyed several Ogoni villages and homes under the pretext of dislodging officials and supporters of the Movement for the Survival of Ogoni People (MOSOP). These attacks have come in response to MOSOP’s non-violent campaign in opposition to the destruction of their environment by oil companies. Some of the attacks have involved uniformed combined forces of the police, the army, the air-force, and the navy, armed with armoured tanks and other sophisticated weapons. In other instances, the attacks have been conducted by unidentified gunmen, mostly at night. The military-type methods and the calibre of weapons used in such attacks strongly suggest the involvement of the Nigerian security forces. The complete failure of the Government of Nigeria to investigate these attacks, let alone punish the perpetrators, further implicates the Nigerian authorities.

8. The Nigerian Army has admitted its role in the ruthless operations which have left thousands of villagers homeless. The admission is recorded in several memos exchanged between officials of the SPDC and the Rivers State Internal Security Task Force, which has devoted itself to the suppression of the Ogoni campaign. One such memo calls for "ruthless military operations" and "wasting operations coupled with psychological tactics of displacement". At a public meeting recorded on video, Major Okunimoto, head of the Task Force, described the repeated invasion of Ogoni villages by his troops, how unarmed villagers running from the troops were shot from behind, and the homes of suspected MOSOP activists were ransacked and destroyed. He stated his commitment to rid the communities of members and supporters of MOSOP.

9. The Communication alleges that the Nigerian government has destroyed and threatened Ogoni food sources through a variety of means. The government has participated in irresponsible oil development that has poisoned much of the soil and water upon which Ogoni farming and fishing depended. In their raids on villages, Nigerian security forces have destroyed crops and killed farm animals. The security forces have created a state of terror and insecurity that has made it impossible for many Ogoni villagers to return to their fields and animals. The destruction of farmlands, rivers, crops and animals has created malnutrition and starvation among certain Ogoni Communities.
Complaint:

10. The communication alleges violations of Articles 2, 4, 14, 16, 18(l), 21, and 24 of the African Charter.

Procedure:

11. The communication was received by the Commission on 14th March 1996. The documents were sent with a video.

12. On 13th August 1996 letters acknowledging receipt of the Communication were sent to both Complainants.

13. On 13th August 1996, a copy of the Communication was sent to the Government of Nigeria.

14. At the 20th Ordinary Session held in Grand Bay, Mauritius in October 1996, the Commission declared the Communication admissible, and decided that it would be taken up with the relevant authorities by the planned mission to Nigeria.

15. On 10th December 1996, the Secretariat sent a Note Verbale and letters to this effect to the government and the Complainants respectively.

16. At its 21st Ordinary Session held in April 1997, the Commission postponed taking decision on the merits to the next session, pendding the receipt of written submissions from the Complainants to assist it in its decision. The Commission also awaits further analysis of its report of the mission to Nigeria.

17. On 22nd May 1997, the Complainants were informed of the Commission’s decision, while the State was informed on 28th May 1997.

18. At the 22nd Ordinary Session, the Commission postponed taking a decision on the case pending the discussion of the Nigerian Mission report.

19. At the 23rd Ordinary Session held in Banjul, The Gambia the Commission postponed consideration of the case to the next session due to lack of time.

20. On 25th June 1998, the Secretariat of the Commission sent letters to all parties concerned informing them of the status of the Communication.

21. At the 24th Ordinary Session, the Commission postponed consideration of the above Communication to the next session.

22. On 26th November 1998, the parties were informed of the Commission’s decision.

23. At the 25th Ordinary Session of the Commission held in Bujumbura, Burundi, the Commission further postponed consideration of this communication to the 26th Ordinary Session.

24. The above decision was conveyed through separate letters of 11th May 1999 to the parties.

25. At its 26th Ordinary Session held in Kigali, Rwanda, the Commission deferred taking a decision on the merits of the case to the next session.

26. This decision was communicated to the parties on 24th January 2000.

27. Following the request of the Nigerian authorities through a Note Verbale of 16th February 2000 on the status of pending communications, the Secretariat, among other things, informed the government that this communication was set down for a decision on the merits at the next session.

28. At the 27th Ordinary Session of the Commission held in Algeria from 27th April to 11th May 2000, the Commission deferred further consideration of the case to the 28th Ordinary Session.

29. The above decision was communicated to the parties on 12th July 2000.

30. At the 28th Ordinary Session of the Commission held in Cotonou, Benin from 26th October to 6th November 2000, the Commission deferred further consideration of the case to the next session. During that session, the Respondent State submitted a Note Verbale stating the actions taken by the Government of the Federal Republic of Nigeria in respect of all the communications filed against it, including the present one. In respect of the instant communication, the note verbale admitted the gravamen of the complaints but went on to state the remedial measures being taken by the new civilian administration and they included -:

- Establishing for the first time in the history of Nigeria, a Federal Ministry of Environment with adequate resources to address environmental related issues prevalent in Nigeria and as a matter of priority in the Niger delta area
- Enacting into law the establishment of the Niger Delta Development Commission (NDDC) with adequate funding to address the environmental and social related problems of the Niger delta area and other oil producing areas of Nigeria
- Inaugurating the Judicial Commission of Inquiry to investigate the issues of human rights violations. In addition, the representatives of the Ogoni people have submitted petitions to the Commission of Inquiry on these issues and these are presently being reviewed in Nigeria as a top priority matter

31. The above decision was communicated to the parties on 14th November 2000.

32. At the 29th Ordinary Session held in Tripoli, Libya from 23rd April to 7th May 2001, the Commission decided to defer the final consideration of the case to the next session to be held in Banjul, the Gambia in October 2001.

33. The above decision was communicated to the parties on 6th June 2001.
34. At its 30\textsuperscript{th} session held in Banjul, the Gambia from 13\textsuperscript{th} to 27\textsuperscript{th} October 2001, the African Commission reached a decision on the merits of this communication.

**LAW**

**Admissibility**

35. Article 56 of the African Charter governs admissibility. All of the conditions of this Article are met by the present communication. Only the exhaustion of local remedies requires close scrutiny.

36. Article 56(5) requires that local remedies, if any, be exhausted, unless these are unduly prolonged.

37. One purpose of the exhaustion of local remedies requirement is to give the domestic courts an opportunity to decide upon cases before they are brought to an international forum, thus avoiding contradictory judgements of law at the national and international levels. Where a right is not well provided for in domestic law such that no case is likely to be heard, potential conflict does not arise. Similarly, if the right is not well provided for, there cannot be effective remedies, or any remedies at all.

38. Another rationale for the exhaustion requirement is that a government should have notice of a human rights violation in order to have the opportunity to remedy such violation, before being called to account by an international tribunal. (See the Commission’s decision on Communications 25/89, 47/90, 56/91 and 100/93 World Organisation Against Torture et al./Zaire: 53). The exhaustion of domestic remedies requirement should be properly understood as ensuring that the State concerned has ample opportunity to remedy the situation of which applicants complain. It is not necessary here to recount the international attention that Ogoniland has received to argue that the Nigerian government has had ample notice and, over the past several decades, more than sufficient opportunity to give domestic remedies.

39. Requiring the exhaustion of local remedies also ensures that the African Commission does not become a tribunal of first instance for cases for which an effective domestic remedy exists.

40. The present communication does not contain any information on domestic court actions brought by the Complainants to halt the violations alleged. However, the Commission on numerous occasions brought this complaint to the attention of the government at the time but no response was made to the Commission’s requests. In such cases the Commission has held that in the absence of a substantive response from the Respondent State it must decide on the facts provided by the Complainants and treat them as given. (See Communications 25/89, 47/90, 56/91, 100/93, World Organisation Against Torture et al./Zaire, Communication 60/91 Constitutional Right Project/Nigeria and Communication 101/93 Civil Liberties Organisation/Nigeria).

41. The Commission takes cognisance of the fact that the Federal Republic of Nigeria has incorporated the African Charter on Human and Peoples’ Rights into its domestic law with the result that all the rights contained therein can be invoked in Nigerian courts including those violations alleged by the Complainants. However, the Commission is aware that at the time of submitting this communication, the then Military government of Nigeria had enacted various decrees ousting the jurisdiction of the courts and thus depriving the people in Nigeria of the right to seek redress in the courts for acts of government that violate their fundamental human rights. In such instances, and as in the instant communication, the Commission is of the view that no adequate domestic remedies are existent (See Communication 129/94 Civil Liberties Organisation/Nigeria).

42. It should also be noted that the new government in their Note Verbale referenced 127/2000 submitted at the 28\textsuperscript{th} session of the Commission held in Cotonou, Benin, admitted to the violations committed then by stating, “there is no denying the fact that a lot of atrocities were and are still being committed by the oil companies in Ogoni Land and indeed in the Niger Delta area”.

The Commission therefore declared the communication admissible.

**Merits**

43. The present Communication alleges a concerted violation of a wide range of rights guaranteed under the African Charter for Human and Peoples’ Rights. Before we venture into the inquiry whether the Government of Nigeria has violated the said rights as alleged in the Complaint, it would be proper to establish what is generally expected of governments under the Charter and more specifically vis-à-vis the rights themselves.

44. Internationally accepted ideas of the various obligations engendered by human rights indicate that all rights—both civil and political rights and social and economic—generate at least four levels of duties for a State that undertakes to adhere to a rights regime, namely the duty to respect, protect, promote, and fulfil these rights. These obligations universally apply to all rights and entail a combination of negative and positive duties. As a human rights instrument, the African Charter is not alien to these concepts and the order in which they are dealt with here is chosen as a matter of convenience and in no way should it imply the priority accorded to them. Each layer of obligation is equally relevant to the rights in question.\(^1\)

45. At a primary level, the obligation to respect entails that the State should refrain from interfering in the enjoyment of all fundamental rights; it should respect right-holders, their freedoms, autonomy, resources, and liberty of their action.\(^2\) With respect to socio economic rights, this means that the State is obliged to respect the free use of resources owned or at the disposal of the individual alone or in any form of association with others, including the household or the family, for the purpose of

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\(^1\) See The Constitution (Suspension and Modification) Decree 1993


rights-related needs. And with regard to a collective group, the resources belonging to it should be respected, as it has to use the same resources to satisfy its needs.

46. At a secondary level, the State is obliged to **protect** right-holders against other subjects by legislation and provision of effective remedies. This obligation requires the State to take measures to protect beneficiaries of the protected rights against political, economic and social interferences. Protection generally entails the creation and maintenance of an atmosphere or framework by an effective interplay of laws and regulations so that individuals will be able to freely realize their rights and freedoms. This is very much intertwined with the tertiary obligation of the State to **promote** the enjoyment of all human rights. The State should make sure that individuals are able to exercise their rights and freedoms, for example, by promoting tolerance, raising awareness, and even building infrastructures.

47. The last layer of obligation requires the State to **fulfil** the rights and freedoms it freely undertook under the various human rights regimes. It is more of a positive expectation on the part of the State to move its machinery towards the actual realisation of the rights. This is also very much intertwined with the duty to promote mentioned in the preceding paragraph. It could consist in the direct provision of basic needs such as food or resources that can be used for food (direct food aid or social security).  

48. Thus States are generally burdened with the above set of duties when they commit themselves under human rights instruments. Emphasising the all embracing nature of their obligations, the International Covenant on Economic, Social, and Cultural Rights, for instance, under Article 2(1), stipulates exemplarily that States "undertake to take steps...by all appropriate means, including particularly the adoption of legislative measures." Depending on the type of rights under consideration, the level of emphasis in the application of these duties varies. But sometimes, the need to meaningfully enjoy some of the rights demands a concerted action from the State in terms of more than one of the said duties. Whether the government of Nigeria has, by its conduct, violated the provisions of the African Charter as claimed by the Complainants is examined here below.

49. In accordance with Articles 60 and 61 of the African Charter, this communication is examined in the light of the provisions of the African Charter and the relevant international and regional human rights instruments and principles. The Commission thanks the two human rights NGOs who brought the matter under its purview: the Social and Economic Rights Action Center (Nigeria) and the Center for Economic and Social Rights (USA). Such is a demonstration of the usefulness to the Commission and individuals of **actio popularis**, which is wisely allowed under the African Charter. It is a matter of regret that the only written response from the government of Nigeria is an admission of the gravamen of the complaints which is contained in a note verbale and which we have reproduced above at paragraph 30. In the circumstances, the Commission is compelled to proceed with the examination of the matter on the basis of the uncontested allegations of the Complainants, which are consequently accepted by the Commission.

50. The Complainants allege that the Nigerian government violated the right to health and the right to clean environment as recognized under Articles 16 and 24 of the African Charter by failing to fulfill the minimum duties required by these rights. This, the Complainants allege, the government has done by:

- Directly participating in the contamination of air, water and soil and thereby harming the health of the Ogoni population,
- Failing to protect the Ogoni population from the harm caused by the NNPC Shell Consortium but instead using its security forces to facilitate the damage,
- Failing to provide or permit studies of potential or actual environmental and health risks caused by the oil operations.

Article 16 of the African Charter reads:

"(1) Every individual shall have the right to enjoy the best attainable state of physical and mental health.

(2) States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick."

Article 24 of the African Charter reads:

"All peoples shall have the right to a general satisfactory environment favourable to their development."

51. These rights recognise the importance of a clean and safe environment that is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual. As has been rightly observed by Alexander Kiss, "an environment degraded by pollution and defaced by the destruction of all beauty and variety is as contrary to satisfactory living conditions and the development as the breakdown of the fundamental ecologic equilibria is harmful to physical and moral health."

52. The right to a general satisfactory environment, as guaranteed under Article 24 of the African Charter or the right to a healthy environment, as it is widely known, therefore imposes clear obligations upon a government. It requires the State to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources. Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), to which Nigeria is a party, requires governments to take necessary steps for the improvement of all aspects of environmental and industrial hygiene. The right to enjoy the best attainable state of physical and mental health enunciated in

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4 Drewnicki, ibid.
5 See Eide, in Eide, Krause and Rosas, op cit., p. 38
6 See also General Comment No. 14 (2000) of the Committee on Economic, Social and Cultural rights
7 Human Rights in the Twenty first Century: A Global Challenge Edited by Kathleen E. Mahoney and Paul Mahoney. Article by Alexander Kiss " Concept and Possible Implications of the Right to Environment at page 553
Article 16(1) of the African Charter and the right to a general satisfactory environment favourable to development (Article 16(3)) already noted obligate governments to desist from directly threatening the health and environment of their citizens. The State is under an obligation to respect the just noted rights and this entails largely non-interventionist conduct from the State for example, not from carrying out, sponsoring or tolerating any practice, policy or legal measures violating the integrity of the individual9.

53. Government compliance with the spirit of Articles 16 and 24 of the African Charter must also include ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicising environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.

54. We now examine the conduct of the government of Nigeria in relation to Articles 16 and 24 of the African Charter. Undoubtedly and admitted, the government of Nigeria, through NNPC has the right to produce oil, the income from which will be used to fulfil the economic and social rights of Nigerians. But the care that should have been taken as outlined in the preceding paragraph and which would have protected the rights of the victims of the violations complained of was not taken. To exacerbate the situation, the security forces of the government engaged in conduct in violation of the rights of the Ogonis by attacking, burning and destroying several Ogoni villages and homes.

55. The Complainants also allege a violation of Article 21 of the African Charter by the government of Nigeria. The Complainants allege that the Military government of Nigeria was involved in oil production and thus did not monitor or regulate the operations of the oil companies and in so doing paved a way for the Oil Consortiums to exploit oil reserves in Ogoniland. Furthermore, in all their dealings with the Oil Consortiums, the government did not involve the Ogoni Communities in the decisions that affected the development of Ogoniland. The destructive and selfish role-played by oil development in Ogoniland, closely tied with repressive tactics of the Nigerian Government, and the lack of material benefits accruing to the local population9, may well be said to constitute a violation of Article 21.

Article 21 provides

1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.
2. In case of exploitation the displaced people shall have the right to the lawful recovery of its property as well as to an adequate compensation.

56. The origin of this provision may be traced to colonialism, during which the human and material resources of Africa were largely exploited for the benefit of outside powers, creating tragedy for Africans themselves, depriving them of their birthright and alienating them from the land. The aftermath of colonial exploitation has left Africa's precious resources and people still vulnerable to foreign misappropriation. The drafters of the Charter obviously wanted to remind African governments of the continent's painful legacy and restore co-operative economic development to its traditional place at the heart of African Society.

57. Governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts that may be perpetrated by private parties (See Union des Jeunes Avocats /Chad10). This duty calls for positive action on part of governments in fulfilling their obligation under human rights instruments. The practice before other tribunals also enhances this requirement as is evidenced in the case Velásquez Rodríguez v. Honduras11. In this landmark judgment, the Inter-American Court of Human Rights held that when a State allows private persons or groups to act freely and with impunity to the detriment of the rights recognised, it would be in clear violation of its obligations to protect the human rights of its citizens. Similarly, this obligation of the State is further emphasised in the practice of the European Court of Human Rights, in X and Y v. Netherlands12. In that case, the Court pronounced that there was an obligation on authorities to take steps to make sure that the enjoyment of the rights is not interfered with by any other private person.

58. The Commission notes that in the present case, despite its obligation to protect persons against interferences in the enjoyment of their rights, the Government of Nigeria facilitated the destruction of the Ogoniland. Contrary to its Charter obligations and despite such internationally established principles, the Nigerian Government has given the green light to private actors, and the oil Companies in particular, to devastatingly affect the well-being of the Ogonis. By any measure of standards, its practice falls short of the minimum conduct expected of governments, and therefore, is in violation of Article 21 of the African Charter.

9 See a report by the Industry and Energy Operations Division West Central Africa Department "Defining an Environmental Development Strategy for the Niger Delta" Volume 1 - Paragraph B(1.6 - 1.7) at Page 2-3
10 Communication 74/92
11 See, Inter-American Court of Human Rights, Velásquez Rodríguez Case, Judgment of July 19, 1988, Series C, No. 4
12 91 ECHR (1985) (Ser. A) at 32.
59. The Complainants also assert that the Military government of Nigeria massively and systematically violated the right to adequate housing of members of the Ogoni community under Article 14 and implicitly recognised by Articles 16 and 18(1) of the African Charter.

Article 14 of the Charter reads:

"The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws."

Article 18(1) provides:

"The family shall be the natural unit and basis of society. It shall be protected by the State..."

60. Although the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health, cited under Article 16 above, the right to property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health, and family life are adversely affected. It is thus noted that the combined effect of Articles 14, 16 and 18(1) reads into the Charter a right to shelter or housing which the Nigerian Government has apparently violated.

61. At a very minimum, the right to shelter obliges the Nigerian government not to destroy the housing of its citizens and not to obstruct efforts by individuals or communities to rebuild lost homes. The State's obligation to respect housing rights requires it, and thereby all of its organs and agents, to refrain from carrying out, sponsoring or tolerating any practice, policy or legal measure violating the integrity of the individual or infringing upon his or her freedom to use those material or other resources available to them in a way they find most appropriate to satisfy individual, family, household or community housing needs. Its obligations to protect obliges it to prevent the violation of any individual's right to housing by any other individual or non-state actors like landlords, property developers, and land owners, and where such infringements occur, it should act to preclude further deprivations as well as guaranteeing access to legal remedies. The right to shelter even goes further than a roof over one's head. It extends to embody the individual's right to be let alone and to live in peace—whether under a roof or not.

62. The protection of the rights guaranteed in Articles 14, 16 and 18(1) leads to the same conclusion. As regards the earlier right, and in the case of the Ogoni People, the Government of Nigeria has failed to fulfil these two minimum obligations. The government has destroyed Ogoni houses and villages and then, through its security forces, obstructed, harassed, beaten and, in some cases, shot and killed innocent citizens who have attempted to return to rebuild their ruined homes. These actions constitute massive violations of the right to shelter, in violation of Articles 14, 16, and 18(1) of the African Charter.

63. The particular violation by the Nigerian Government of the right to adequate housing as implicitly protected in the Charter also encompasses the right to protection against forced evictions. The African Commission draws inspiration from the definition of the term "forced evictions" by the Committee on Economic Social and Cultural Rights which defines this term as "the permanent removal against their will of individuals, families and/or communities from the homes and/or which they occupy, without the provision of, and access to, appropriate forms of legal or other protection. Wherever and whenever they occur, forced evictions are extremely traumatic. They cause physical, psychological and emotional distress; they entail losses of means of economic sustenance and increase impoverishment. They can also cause physical injury and in some cases sporadic deaths... Evictions break up families and increase existing levels of homelessness." In this regard, General Comment No. 4 (1991) of the Committee on Economic, Social and Cultural Rights on the right to adequate housing states that "all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats" (E/1992/23, annex III, Paragraph 8(a)). The conduct of the Nigerian government clearly demonstrates a violation of this right enjoyed by the Ogonis as a collective right.

64. The Communication argues that the right to food is implicit in the African Charter, in such provisions as the right to life (Art. 4), the right to health (Art. 16) and the right to economic, social and cultural development (Art. 22). By its violation of these rights, the Nigerian Government trampled upon not only the explicitly protected rights but also upon the right to food implicitly guaranteed.

65. The right to food is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfillment of such other rights as health, education, work and political participation. The African Charter and international law require and bind Nigeria to protect and improve existing food sources and to ensure access to adequate food for all citizens. Without touching on the duty to improve food production and to guarantee access, the minimum core of the right to food requires that the Nigerian Government should not destroy or contaminate food sources. It should not allow private parties to destroy or contaminate food sources, and prevent peoples' efforts to feed themselves.

66. The government's treatment of the Ogonis has violated all three minimum duties of the right to food. The government has destroyed food sources through its security forces and State Oil Company; has allowed private oil companies to destroy food sources; and, through terror, has created significant obstacles to Ogoni communities trying to feed themselves. The Nigerian government has again fallen short of what is

13 Scott Leckie, "The Right to Housing" in Eide, Krause and Rosas, op cit., 107-123, at p. 113

14 ibid. pp. 113-114

15 See General Comment No.7 (1997) on the right to adequate housing (Article 11.1): Forced Evictions

16 Ibid. p. 113
expected of it as under the provisions of the African Charter and international human rights standards, and hence, is in violation of the right to food of the Ogonis.

67. The Complainants also allege that the Nigerian Government has violated Article 4 of the Charter which guarantees the inviolability of human beings and everyone’s right to life and integrity of the person respected. Given the wide spread violations perpetrated by the Government of Nigeria and by private actors (be it following its clear blessing or not), the most fundamental of all human rights, the right to life has been violated. The Security forces were given the green light to decisively deal with the Ogonis, which was illustrated by the wide spread terrorisations and killings. The pollution and environmental degradation to a level humaingly unacceptable has made it living in the Ogoni land a nightmare. The survival of the Ogonis depended on their land and farms that were destroyed by the direct involvement of the Government. These and similar brutalities not only persecuted individuals in Ogoniland but also the whole of the Ogoni Community as a whole. They affected the life of the Ogoni Society as a whole. The Commission conducted a mission to Nigeria from the 7th – 14th March 1997 and witnessed first hand the deplorable situation in Ogoni land including the environmental degradation.

68. The uniqueness of the African situation and the special qualities of the African Charter on Human and Peoples’ Rights imposes upon the African Commission an important task. International law and human rights must be responsive to African circumstances. Clearly, collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa. The African Commission will apply any of the diverse rights contained in the African Charter. It welcomes this opportunity to make clear that there is no right in the African Charter that cannot be made effective. As indicated in the preceding paragraphs, however, the Nigerian Government did not live up to the minimum expectations of the African Charter.

69. The Commission does not wish to fault governments that are labouring under difficult circumstances to improve the lives of their people. The situation of the people of Ogoniland, however, requires, in the view of the Commission, a reconsideration of the Government’s attitude to the allegations contained in the instant communication. The intervention of multinational corporations may be a potentially positive force for development if the State and the people concerned are ever mindful of the common good and the sacred rights of individuals and communities. The Commission however takes note of the efforts of the present civilian administration to redress the atrocities that were committed by the previous military administration as illustrated in the Note Verba referred to in paragraph 30 of this decision.

For the above reasons, the Commission,

Finds the Federal Republic of Nigeria in violation of Articles 2, 4, 14, 16, 18(1), 21 and 24 of the African Charter on Human and Peoples’ Rights;

Appeals to the government of the Federal Republic of Nigeria to ensure protection of the environment, health and livelihood of the people of Ogoniland by:

- Stopping all attacks on Ogoni communities and leaders by the Rivers State Internal Securities Task Force and permitting citizens and independent investigators free access to the territory;
- Conducting an investigation into the human rights violations described above and prosecuting officials of the security forces, NNPC and relevant agencies involved in human rights violations;
- Ensuring adequate compensation to victims of the human rights violations, including relief and resettlement assistance to victims of government sponsored raids, and undertaking a comprehensive cleanup of lands and rivers damaged by oil operations;
- Ensuring that appropriate environmental and social impact assessments are prepared for any future oil development and that the safe operation of any further oil development is guaranteed through effective and independent oversight bodies for the petroleum industry; and
- Providing information on health and environmental risks and meaningful access to regulatory and decision-making bodies to communities likely to be affected by oil operations.

Urges the government of the Federal Republic of Nigeria to keep the African Commission informed of the outcome of the work of:

- The Federal Ministry of Environment which was established to address environmental and environment related issues prevalent in Nigeria, and as a matter of priority, in the Niger Delta area including the Ogoni land;
- The Niger Delta Development Commission (NDDC) enacted into law to address the environmental and other social related problems in the Niger Delta area and other oil producing areas of Nigeria; and
- The Judicial Commission of Inquiry inaugurated to investigate the issues of human rights violations.

Done at the 30th Ordinary Session, held in Banjul, The Gambia from 13th to 27th October 2001