Santiago, Chile
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INTRODUCTION TO INTERNATIONAL LAW
PROFESSOR JORGE VIñUALES

Codification Division of the United Nations Office of Legal Affairs

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INTERNATIONAL LAW IN CONTEXT AND SOURCES OF INTERNATIONAL LAW

REQUIRED READINGS (printed format)

Legal instruments, documents and case law


2. Statute of the International Court of Justice, 26 June 1945, UNTS vol. 33, p. 993, Article 38.
   For text, see *Charter of the United Nations and Statute of the International Court of Justice*


Suggested readings (not reproduced)


**SUBJECTS OF INTERNATIONAL LAW**

**REQUIRED READINGS (printed format)**

**LEGAL INSTRUMENTS, DOCUMENTS AND CASE LAW**


**Suggested readings (not reproduced)**


FOUNDATIONAL PRINCIPLES OF INTERNATIONAL LAW

REQUIRED READINGS (printed format)

LEGAL INSTRUMENTS, DOCUMENTS AND CASE LAW

19. Universal Declaration of Human Rights, UN General Assembly resolution 217A (III) of 10 December 1948
   For text, see *The Core International Human Rights Treaties*, 2014, United Nations Publication, p. 3


   For text, see pp. 46-57

   For text, see pp. 24-35

24. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, pp. 171-181, paras. 86-113

Suggested readings (not reproduced)


NORMATIVE INTERACTIONS

REQUIRED READINGS (printed format)

LEGAL INSTRUMENTS, DOCUMENTS AND CASE LAW


33. Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities (Joined Cases C-402/05 P and C-415/05 P), Judgment, European Court of Justice, 3 September 2008, pp. 11-20, 39-45, paras. 73-106 and 278-330


Suggested readings (not reproduced)


IMPLEMENTATION

REQUIRED READINGS (printed format)

LEGAL INSTRUMENTS, DOCUMENTS AND CASE LAW


42. Prosecutor v. Duško Tadić, ICTY Appeals Chamber, 2 October 1995 (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), p. 5, para 11


44. Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC), Advisory Opinion of 2 April 2015, International Tribunal for the Law of the Sea, Case No. 21, pp. 44-49, paras. 156-174

Suggested readings (not reproduced)


International Court of Justice

Legality of the Threat or Use of Nuclear Weapons
Advisory Opinion

I.C.J. Reports 1996, p. 226
INTERNATIONAL COURT OF JUSTICE
REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

LEGALITY OF THE THREAT OR USE
OF NUCLEAR WEAPONS

ADVISORY OPINION OF 8 JULY 1996

1996

COUR INTERNATIONALE DE JUSTICE
RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

LICÉITÉ DE LA MENACE OU DE L'EMPLOI
D'ARMES NUCLÉAIRES

AVIS CONSULTATIF DU 8 JUILLET 1996

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LEGALITY OF THE THREAT OR USE OF NUCLEAR WEAPONS

Jurisdiction of the Court to give the advisory opinion requested — Article 65, paragraph 1, of the Statute — Body authorized to request an opinion — Article 96, paragraphs 1 and 2, of the Charter — Activities of the General Assembly — "Legal question" — Political aspects of the question posed — Motives said to have inspired the request and political implications that the opinion might have.

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Principles and rules of international humanitarian law — Prohibition of methods and means of warfare precluding any distinction between civilian and military targets or resulting in unnecessary suffering to combatants — Martens Clause — Principle of neutrality — Applicability of these principles and rules to nuclear weapons — Conclusions.

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Current state of international law and elements of fact available to the Court — Use of nuclear weapons in an extreme circumstance of self-defense in which the very survival of a State is at stake.

Article VI of the Non-Proliferation Treaty — Obligation to negotiate in good faith and to achieve nuclear disarmament in all its aspects.

ADVISORY OPINION


On the legality of the threat or use of nuclear weapons,

The Court,

composed as above,

gives the following Advisory Opinion:

1. The question upon which the advisory opinion of the Court has been requested is set forth in resolution 49/575 K adopted by the General Assembly of the United Nations (hereinafter called the "General Assembly") on 15 December 1994. By a letter dated 19 December 1994, received in the Registry by facsimile on 20 December 1994 and filed in the original on 6 January 1995, the Secretary-General of the United Nations officially communicated to the Registrar the decision taken by the General Assembly to submit the question to the Court for an advisory opinion. Resolution 49/575 K, the English text of which was enclosed with the letter, reads as follows:

"The General Assembly,

Conscious that the continuing existence and development of nuclear weapons pose serious risks to humanity,

Mindful that States have an obligation under the Charter of the United

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Nations to refrain from the threat or use of force against the territorial integrity or political independence of any State.


Welcoming the progress made on the prohibition and elimination of weapons of mass destruction, including the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction and the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction,

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

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

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

Noting that Article 96, paragraph 1, of the Charter empowers the General Assembly to request the International Court of Justice to give an advisory opinion on any legal question,

Recalling the recommendation of the Secretary-General, made in his report entitled "An Agenda for Peace", that United Nations organs that are authorized to take advantage of the advisory competence of the International Court of Justice turn to the Court more frequently for such opinions,

Welcoming resolution 46/40 of 14 May 1993 of the Assembly of the World Health Organization, in which the organization requested the International Court of Justice to give an advisory opinion on whether the use of nuclear weapons by a State in war or other armed conflict would be a breach of its obligations under international law, including the Constitution of the World Health Organization,

Decides, pursuant to Article 96, paragraph 1, of the Charter of the United Nations, to request the International Court of Justice urgently to render its advisory opinion on the following question: "Is the threat or use of nuclear weapons in any circumstance permitted under international law?"

1 Resolution 2826 (XXVI), annex.
3 Resolution 44/23.
4 A/47/277-S/24111."
in a document entitled “Response to submissions of other States”. The Court granted the request and, by letters dated 30 October 1995, the Deputy-Registrar notified the States to which the document had been communicated, specifying that the document consequently did not form part of the record before the Court.

8. Pursuant to Article 106 of the Rules of Court, the Court decided to make the written statements and comments submitted to the Court accessible to the public, with effect from the opening of the oral proceedings.

9. In the course of public sitting held from 30 October 1995 to 15 November 1995, the Court heard oral statements in the following order by:

for the Commonwealth of Australia: Mr. Gavan Griffith, Q.C., Solicitor-General of Australia, Counsel,
The Honourable Gareth Evans, Q.C., Senator, Minister for Foreign Affairs, Counsel;

for the Arab Republic of Egypt: Mr. George Abi-Saab, Professor of International Law, Graduate Institute of International Studies, Geneva, Member of the Institute of International Law;

for the French Republic: Mr. Marc Perrin de Brichambaut, Director of Legal Affairs, Ministry of Foreign Affairs;
Mr. Alain Pellet, Professor of International Law, University of Paris X and Institute of Political Studies, Paris;

for the Federal Republic of Germany: Mr. Hartmut Hillgenberg, Director-General of Legal Affairs, Ministry of Foreign Affairs;

for Indonesia: H.E. Mr. Johannes Berchmans Soedarmanto Kadarisman, Ambassador of Indonesia to the Netherlands;

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

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

for Italy: Mr. Umberto Leanza, Professor of International Law at the Faculty of Law at the University of Rome “Tor Vergata”, Head of the Diplomatic Legal Service at the Ministry of Foreign Affairs;

for Japan: H.E. Mr. Takekazu Kawamura, Ambassador, Director General for Arms Control and Scientific Affairs, Ministry of Foreign Affairs,
Mr. Takashi Hiraoka, Mayor of Hiroshima,
Mr. Iecho Itoh, Mayor of Nagasaki;

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

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

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

for Qatar: H.E. Mr. Najeel bin Mohammed Al-Nuaimi, Minister of Justice;

for the Russian Federation: Mr. A. G. Khodakov, Director, Legal Department, Ministry of Foreign Affairs;

for San Marino: Mrs. Federica Bigi, Embassy Counsellor, Official in Charge of Political Directorate, Department of Foreign Affairs;

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

for the Marshall Islands: The Honourable Theodore G. Kronmiller, Legal Counsel, Embassy of the Marshall Islands to the United States of America,
Mrs. Lijon Eknalang, Council Member, Rongelap Atoll Local Government;

for Solomon Islands: The Honourable Victor Ngele, Minister of Police and National Security,
Mr. Jean Salmon, Professor of Law, Université libre de Bruxelles,
Mr. Eric David, Professor of Law, Université libre de Bruxelles,
Mr. Philippe Sands, Lecturer in Law, School of Oriental and African Studies, London University, and Legal Director, Foundation for International Environmental Law and Development,
Mr. James Crawford, Wheell Professor of International Law, University of Cambridge;
for Costa Rica: Mr. Carlos Vargas-Pizarro, Legal Counsel and Special Envoy of the Government of Costa Rica;

for the United Kingdom of Great Britain and Northern Ireland: The Rt. Honourable Sir Nicholas Lyell, Q.C., M.P., Her Majesty’s Attorney-General;

for the United States of America: Mr. Conrad K. Harper, Legal Adviser, United States Department of State.
Mr. Michael J. Matheson, Principal Deputy Legal Adviser, United States Department of State.
Mr. John H. McNeill, Senior Deputy General Counsel, United States Department of Defense;


Questions were put by Members of the Court to particular participants in the oral proceedings, who replied in writing, as requested, within the prescribed time-limits; the Court having decided that the other participants could also reply to those questions on the same terms, several of them did so. Other questions put by Members of the Court were addressed, more generally, to any participant in the oral proceedings; several of them replied in writing, as requested, within the prescribed time-limits.

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10. The Court must first consider whether it has the jurisdiction to give a reply to the request of the General Assembly for an advisory opinion and whether, should the answer be in the affirmative, there is any reason it should decline to exercise any such jurisdiction.

The Court draws its competence in respect of advisory opinions from Article 65, paragraph 1, of its Statute. Under this Article, the Court

“may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request”.

11. For the Court to be competent to give an advisory opinion, it is thus necessary at the outset for the body requesting the opinion to be “authorized by or in accordance with the Charter of the United Nations to make such a request”. The Charter provides in Article 96, paragraph 1, that: “The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.

Some States which oppose the giving of an opinion by the Court argued that the General Assembly and Security Council are not entitled to ask for opinions on matters totally unrelated to their work. They suggested that, as in the case of organs and agencies acting under Article 96, paragraph 2, of the Charter, and notwithstanding the difference in wording between that provision and paragraph 1 of the same Article, the General Assembly and Security Council may ask for an advisory opinion on a legal question only within the scope of their activities.

In the view of the Court, it matters little whether this interpretation of Article 96, paragraph 1, is or is not correct; in the present case, the General Assembly has competence in any event to seise the Court. Indeed, Article 10 of the Charter has conferred upon the General Assembly a competence relating to “any questions or any matters” within the scope of the Charter. Article 11 has specifically provided it with a competence to “consider the general principles . . . in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments”. Lastly, according to Article 13, the General Assembly “shall initiate studies and make recommendations for the purpose of . . . encouraging the progressive development of international law and its codification”.

12. The question put to the Court has a relevance to many aspects of the activities and concerns of the General Assembly including those relating to the threat or use of force in international relations, the disarmament process, and the progressive development of international law. The General Assembly has a long-standing interest in these matters and in their relation to nuclear weapons. This interest has been manifested in the annual First Committee debates, and the Assembly resolutions on nuclear weapons; in the holding of three special sessions on disarmament (1978, 1982 and 1988) by the General Assembly, and the annual meetings of the Disarmament Commission since 1978; and also in the commissioning of studies on the effects of the use of nuclear weapons. In this context, it does not matter that important recent and current activities relating to nuclear disarmament are being pursued in other fora.

Finally, Article 96, paragraph 1, of the Charter cannot be read as limiting the ability of the Assembly to request an opinion only in those circumstances in which it can take binding decisions. The fact that the Assembly’s activities in the above-mentioned field have led it only to the making of recommendations thus has no bearing on the issue of whether it had the competence to put to the Court the question of which it was seized.

13. The Court must furthermore satisfy itself that the advisory opinion requested does indeed relate to a “legal question” within the meaning of its Statute and the United Nations Charter.

The Court has already had occasion to indicate that questions

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

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

The fact that this question also has political aspects, as, in the nature of things, is the case with so many questions which arise in international life, does not suffice to deprive it of its character as a "legal question" and to "deprive the Court of a competence expressly conferred on it by its Statute" (Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973, p. 172, para. 14). Whatever its political aspects, the Court cannot refuse to admit the legal character of a question which invites it to discharge an essentially judicial task, namely, an assessment of the legality of the possible conduct of States with regard to the obligations imposed upon them by international law (cf. Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter), Advisory Opinion, 1945, I.C.J. Reports 1947-1948, pp. 61-62; Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950, pp. 6-7; Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962, p. 155).

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

"Indeed, in situations in which political considerations are prominent it may be particularly necessary for an international organization to obtain an advisory opinion from the Court as to the legal principles applicable with respect to the matter under debate ..." (I.C.J. Reports 1980, p. 87, para. 33.)

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

14. Article 65, paragraph 1, of the Statute provides: "The Court may give an advisory opinion ..." (Emphasis added.) This is more than an enabling provision. As the Court has repeatedly emphasized, the Statute leaves a discretion as to whether or not it will give an advisory opinion that has been requested of it, once it has established its competence to do so. In this context, the Court has previously noted as follows:


The Court has constantly been mindful of its responsibilities as "the principal judicial organ of the United Nations" (Charter, Art. 92). When considering each request, it is mindful that it should not, in principle, refuse to give an advisory opinion. In accordance with the consistent jurisprudence of the Court, only "compelling reasons" could lead it to such a refusal (Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, Advisory Opinion, I.C.J. Reports 1956, p. 86; Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962, p. 155; Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 27; Applicability of Article 229 of the Statute of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973, p. 183; Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 21; and Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989, p. 191). There has been no refusal, based on the discretionary power of the Court, to act upon a request for advisory opinion in the history of the present Court; in the case concerning the Legality of the Use by a State of Nuclear Weapons in Armed Conflict, the refusal to give the World Health Organization the advisory opinion requested by it was justified by the Court’s lack of jurisdiction in that case. The Permanent Court of International Justice took the view on only one occasion that it could not reply to a question put to it, having regard to the very particular circumstances of the case, among which were that the question directly concerned an already existing dispute, one of the States parties to which was
neither a party to the Statute of the Permanent Court nor a Member of the League of Nations, objected to the proceedings, and refused to take part in any way (Status of Eastern Carelia, P.C.I.J., Series B, No. 5).

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

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

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

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

16. Certain States have observed that the General Assembly has not explained to the Court for what precise purposes it seeks the advisory opinion. Nevertheless, it is not for the Court itself to purport to decide whether or not an advisory opinion is needed by the Assembly for the performance of its functions. The General Assembly has the right to decide for itself on the usefulness of an opinion in the light of its own needs.

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

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

18. Finally, it has been contended by some States that in answering the question posed, the Court would be going beyond its judicial role and would be taking upon itself a law-making capacity. It is clear that the Court cannot legislate, and, in the circumstances of the present case, it is not called upon to do so. Rather its task is to engage in its normal judicial function of ascertaining the existence or otherwise of legal principles and rules applicable to the threat or use of nuclear weapons. The contention that the giving of an answer to the question posed would require the Court to legislate is based on a supposition that the present corpus juris is devoid of relevant rules in this matter. The Court could not accede to this argument; it states the existing law and does not legislate. This is so even if, in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend.
19. In view of what is stated above, the Court concludes that it has the authority to deliver an opinion on the question posed by the General Assembly, and that there exist no “compelling reasons” which would lead the Court to exercise its discretion not to do so.

An entirely different question is whether the Court, under the constraints placed upon it as a judicial organ, will be able to give a complete answer to the question asked of it. However, that is a different matter from a refusal to answer at all.

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20. The Court must next address certain matters arising in relation to the formulation of the question put to it by the General Assembly. The English text asks: “Is the threat or use of nuclear weapons in any circumstance permitted under international law?” The French text of the question reads as follows: “Est-il permis en droit international de recourir à la menace ou à l’emploi d’armes nucléaires en toute circonstance?” It was suggested that the Court was being asked by the General Assembly whether it was permitted to have recourse to nuclear weapons in every circumstance, and it was contended that such a question would inevitably invite a simple negative answer.

The Court finds it unnecessary to pronounce on the possible divergences between the English and French texts of the question posed. Its real objective is clear: to determine the legality or illegality of the threat or use of nuclear weapons.

21. The use of the word “permitted” in the question put by the General Assembly was criticized before the Court by certain States on the ground that this implied that the threat or the use of nuclear weapons would only be permissible if authorization could be found in a treaty provision or in customary international law. Such a starting point, those States submitted, was incompatible with the very basis of international law, which rests upon the principles of sovereignty and consent; accordingly, and contrary to what was implied by use of the word “permitted”, States are free to threaten or use nuclear weapons unless it can be shown that they are bound not to do so by reference to a prohibition in either treaty law or customary international law. Support for this contention was found in dicta of the Permanent Court of International Justice in the “Lotus” case that “restrictions upon the independence of States cannot . . . be presumed” and that international law leaves States “a wide measure of discretion which is only limited in certain cases by prohibitive rules” (P.C.I.J., Series A, No. 10, pp. 18 and 19). Reliance was also placed on the dictum of the present Court in the case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) that:

“in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby

the level of armaments of a sovereign State can be limited” (I.C.J. Reports 1986, p. 135, para. 269).

For other States, the invocation of these dicta in the “Lotus” case was inapposite; their status in contemporary international law and applicability in the very different circumstances of the present case were challenged. It was also contended that the above-mentioned dictum of the present Court was directed to the possession of armaments and was irrelevant to the threat or use of nuclear weapons.

Finally, it was suggested that, were the Court to answer the question put by the Assembly, the word “permitted” should be replaced by “prohibited”.

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

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

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

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

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

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

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

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

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

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

27. In both their written and oral statements, some States furthermore argued that any use of nuclear weapons would be unlawful by reference to existing norms relating to the safeguarding and protection of the environment, in view of their essential importance.

Specific references were made to various existing international treaties and instruments. These included Additional Protocol I of 1977 to the Geneva Conventions of 1949, Article 35, paragraph 3, of which prohibits the employment of “methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment”; and the Convention of 18 May 1977 on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, which prohibits the use of weapons which have “widespread, long-lasting or severe effects” on the environment (Art. 1). Also cited were Principle 21 of the Stockholm Declaration of 1973 and Principle 2 of the Rio Declaration of 1992 which express the common conviction of the States concerned that they have a duty

“to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction”.

These instruments and other provisions relating to the protection and safeguarding of the environment were said to apply at all times, in war as well as in peace, and it was contended that they would be violated by the use of nuclear weapons whose consequences would be widespread and would have transboundary effects.

28. Other States questioned the binding legal quality of these precepts of environmental law; or, in the context of the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, denied that it was concerned at all with the use of nuclear weapons in hostilities; or, in the case of Additional Protocol I, denied that they were generally bound by its terms, or recalled that they had reserved their position in respect of Article 35, paragraph 3, thereof.

It was also argued by some States that the principal purpose of environmental treaties and norms was the protection of the environment in time of peace. It was said that those treaties made no mention of nuclear weapons. It was also pointed out that warfare in general, and nuclear warfare in particular, were not mentioned in their texts and that it would be destabilizing to the rule of law and to confidence in international negotiations if those treaties were now interpreted in such a way as to prohibit the use of nuclear weapons.

29. The Court recognizes that the environment is under daily threat and that the use of nuclear weapons could constitute a catastrophe for the environment. The Court also recognizes that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The
existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.

30. However, the Court is of the view that the issue is not whether the treaties relating to the protection of the environment are or are not applicable during an armed conflict, but rather whether the obligations stemming from these treaties were intended to be obligations of total restraint during military conflict.

The Court does not consider that the treaties in question could have intended to deprive a State of the exercise of its right of self-defence under international law because of its obligations to protect the environment. Nonetheless, States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.

This approach is supported, indeed, by the terms of Principle 24 of the Rio Declaration, which provides that:

"Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary."

31. The Court notes furthermore that Articles 35, paragraph 3, and 55 of Additional Protocol I provide additional protection for the environment. Taken together, these provisions embody a general obligation to protect the natural environment against widespread, long-term and severe environmental damage; the prohibition of methods and means of warfare which are intended, or may be expected, to cause such damage; and the prohibition of attacks against the natural environment by way of reprisals.

These are powerful constraints for all the States having subscribed to these provisions.

32. General Assembly resolution 47/37 of 25 November 1992 on the "Protection of the Environment in Times of Armed Conflict" is also of interest in this context. It affirms the general view according to which environmental considerations constitute one of the elements to be taken into account in the implementation of the principles of the law applicable in armed conflict: it states that "destruction of the environment, not justified by military necessity and carried out wantonly, is clearly contrary to existing international law". Addressing the reality that certain instruments are not yet binding on all States, the General Assembly in this resolution "invites appeals to all States that have not yet done so to consider becoming parties to the relevant international conventions".

33. The Court thus finds that while the existing international law relating to the protection and safeguarding of the environment does not specifically prohibit the use of nuclear weapons, it indicates important environmental factors that are properly to be taken into account in the context of the implementation of the principles and rules of the law applicable in armed conflict.

34. In the light of the foregoing the Court concludes that the most directly relevant applicable law governing the question of which it was seised, is that relating to the use of force enshrined in the United Nations Charter and the law applicable in armed conflict which regulates the conduct of hostilities, together with any specific treaties on nuclear weapons that the Court might determine to be relevant.

35. In applying this law to the present case, the Court cannot however fail to take into account certain unique characteristics of nuclear weapons. The Court has noted the definitions of nuclear weapons contained in various treaties and accords. It also notes that nuclear weapons are explosive devices whose energy results from the fusion or fission of the atom. By its very nature, that process, in nuclear weapons as they exist today, releases not only immense quantities of heat and energy, but also powerful and prolonged radiation. According to the material before the Court, the first two causes of damage are vastly more powerful than the damage caused by other weapons, while the phenomenon of radiation is said to be peculiar to nuclear weapons. These characteristics render the nuclear weapon potentially catastrophic. The destructive power of nuclear weapons cannot be contained in either space or time. They have the potential to destroy all civilization and the entire ecosystem of the planet.

The radiation released by a nuclear explosion would affect health, agriculture, natural resources and demography over a very wide area.
Further, the use of nuclear weapons would be a serious danger to future generations. Ionizing radiation has the potential to damage the future environment, food and marine ecosystem, and to cause genetic defects and illness in future generations.

36. In consequence, in order correctly to apply to the present case the Charter law on the use of force and the law applicable in armed conflict, in particular humanitarian law, it is imperative for the Court to take account of the unique characteristics of nuclear weapons, and in particular their destructive capacity, their capacity to cause untold human suffering, and their ability to cause damage to generations to come.

* * *

37. The Court will now address the question of the legality or illegality of recourse to nuclear weapons in the light of the provisions of the Charter relating to the threat or use of force.

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

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

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

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

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

41. The submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law. As the Court stated in the case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America): there is a “specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law” (ICJ Reports 1986, p. 94, para. 176). This dual condition applies equally to Article 51 of the Charter, whatever the means of force employed.

42. The proportionality principle may thus not in itself exclude the use of nuclear weapons in self-defence in all circumstances. But at the same time, a use of force that is proportionate under the law of self-defence, must, in order to be lawful, also meet the requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian law.

43. Certain States have in their written and oral pleadings suggested that in the case of nuclear weapons, the condition of proportionality must be evaluated in the light of still further factors. They contend that the very nature of nuclear weapons, and the high probability of an escalation of nuclear exchanges, mean that there is an extremely strong risk of devastation. The risk factor is said to negate the possibility of the condition of proportionality being complied with. The Court does not find it necessary to embark upon the quantification of such risks; nor does it need to enquire into the question whether tactical nuclear weapons exist, which are sufficiently precise to limit those risks: it suffices for the Court to note that the very nature of all nuclear weapons and the profound risks associated therewith are further considerations to be borne in mind by States believing they can exercise a nuclear response in self-defence in accordance with the requirements of proportionality.

44. Beyond the conditions of necessity and proportionality, Article 51 specifically requires that measures taken by States in the exercise of the right of self-defence shall be immediately reported to the Security Council; this article further provides that these measures shall not in any way affect the authority and responsibility of the Security Council under the Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security. These requirements of Article 51 apply whatever the means of force used in self-defence.

45. The Court notes that the Security Council adopted on 11 April 1995, in the context of the extension of the Treaty on the Non-Proliferation of Nuclear Weapons, resolution 984 (1995) by the terms of which, on the one hand, it

against the use of nuclear weapons to non-nuclear-weapon States that are Parties to the Treaty on the Non-Proliferation of Nuclear Weapons;”,

and, on the other hand, it

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

46. Certain States asserted that the use of nuclear weapons in the conduct of reprisals would be lawful. The Court does not have to examine, in this context, the question of armed reprisals in time of peace, which are considered to be unlawful. Nor does it have to pronounce on the question of belligerent reprisals save to observe that in any case any right of recourse to such reprisals would, like self-defence, be governed inter alia by the principle of proportionality.

47. In order to lessen or eliminate the risk of unlawful attack, States sometimes signal that they possess certain weapons to use in self-defence against any State violating their territorial integrity or political independence. Whether a signalled intention to use force if certain events occur is or is not a “threat” within Article 2, paragraph 4, of the Charter depends upon various factors. If the envisaged use of force is itself unlawful, the stated readiness to use it would be a threat prohibited under Article 2, paragraph 4. Thus it would be illegal for a State to threaten force to secure territory from another State, or to cause it to follow or not follow certain political or economic paths. The notions of “threat” and “use” of force under Article 2, paragraph 4, of the Charter stand together in the sense that if the use of force itself in a given case is illegal — for whatever reason — the threat to use such force will likewise be illegal. In short, if it is to be lawful, the declared readiness of a State to use force must be a use of force that is in conformity with the Charter. For the rest, no State — whether or not it defended the policy of deterrence — suggested to the Court that it would be lawful to threaten to use force if the use of force contemplated would be illegal.

48. Some States put forward the argument that possession of nuclear weapons is itself an unlawful threat to use force. Possession of nuclear weapons may indeed justify an inference of preparedness to use them. In order to be effective, the policy of deterrence, by which those States possessing or under the umbrella of nuclear weapons seek to discourage military aggression by demonstrating that it will serve no purpose, necessitates that the intention to use nuclear weapons be credible. Whether this is a “threat” contrary to Article 2, paragraph 4, depends upon whether the particular use of force envisaged would be directed against the territorial integrity or political independence of a State, or against the Purposes of the United Nations or whether, in the event that it were intended as a means of defence, it would necessarily violate the principles of necessity and proportionality. In any of these circumstances the use of force, and the threat to use it, would be unlawful under the law of the Charter.

49. Moreover, the Security Council may take enforcement measures under Chapter VII of the Charter. From the statements presented to it the Court does not consider it necessary to address questions which might, in a given case, arise from the application of Chapter VII.

50. The terms of the question put to the Court by the General Assembly in resolution 49/75 K could in principle also cover a threat or use of nuclear weapons by a State within its own boundaries. However, this particular aspect has not been dealt with by any of the States which addressed the Court orally or in writing in these proceedings. The Court finds that it is not called upon to deal with an internal use of nuclear weapons.

* * *

51. Having dealt with the Charter provisions relating to the threat or use of force, the Court will now turn to the law applicable in situations of armed conflict. It will first address the question whether there are specific rules in international law regulating the legality or illegality of recourse to nuclear weapons per se; it will then examine the question put to it in the light of the law applicable in armed conflict proper, i.e. the principles and rules of humanitarian law applicable in armed conflict, and the law of neutrality.

* * *

52. The Court notes by way of introduction that international customary and treaty law does not contain any specific prescription authorizing the threat or use of nuclear weapons or any other weapon in general or in certain circumstances, in particular those of the exercise of legitimate self-defence. Nor, however, is there any principle or rule of international law which would make the legality of the threat or use of nuclear weapons or of any other weapons dependent on a specific authorization. State practice shows that the illegality of the use of certain weapons as such does not result from an absence of authorization but, on the contrary, is formulated in terms of prohibition.
53. The Court must therefore now examine whether there is any prohibition of recourse to nuclear weapons as such; it will first ascertain whether there is a conventional prescription to this effect.

54. In this regard, the argument has been advanced that nuclear weapons should be treated in the same way as poisoned weapons. In that case, they would be prohibited under:

(a) the Second Hague Declaration of 29 July 1899, which prohibits “the use of projectiles the object of which is the diffusion of asphyxiating or deleterious gases”;

(b) Article 23 (a) of the Regulations respecting the laws and customs of war on land annexed to the Hague Convention IV of 18 October 1907, whereby “it is especially forbidden: . . . to employ poison or poisoned weapons”; and

(c) the Geneva Protocol of 17 June 1925 which prohibits “the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices”.

55. The Court will observe that the Regulations annexed to the Hague Convention IV do not define what is to be understood by “poison or poisoned weapons” and that different interpretations exist on issues. Nor does the 1925 Protocol specify the meaning to be given to the term “anaologous materials or devices”. The terms have been understood, in the practice of States, in their ordinary sense as covering weapons whose prime, or even exclusive, effect is to poison or asphyxiate. This practice is clear, and the parties to those instruments have not treated them as referring to nuclear weapons.

56. In view of this, it does not seem to the Court that the use of nuclear weapons can be regarded as specifically prohibited on the basis of the above-mentioned provisions of the Second Hague Declaration of 1899, the Regulations annexed to the Hague Convention IV of 1907 or the 1925 Protocol (see paragraph 54 above).

57. The pattern until now has been for weapons of mass destruction to be declared illegal by specific instruments. The most recent such instruments are the Convention of 10 April 1972 on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction — which prohibits the possession of bacteriological and toxic weapons and reinforces the prohibition of their use — and the Convention of 13 January 1993 on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction which prohibits all use of chemical weapons and requires the destruction of existing stocks. Each of these instruments has been negotiated and adopted in its own context and for its own reasons. The Court does not find any specific prohibition of recourse to nuclear weapons in treaties expressly prohibiting the use of certain weapons of mass destruction.

58. In the last two decades, a great many negotiations have been conducted regarding nuclear weapons; they have not resulted in a treaty of general prohibition of the same kind as for bacteriological and chemical weapons. However, a number of specific treaties have been concluded in order to limit:

(a) the acquisition, manufacture and possession of nuclear weapons (Peace Treaties of 10 February 1947; State Treaty for the Re-establishment of an Independent and Democratic Austria of 15 May 1955; Treaty of Tlatelolco of 14 February 1967 for the Prohibition of Nuclear Weapons in Latin America, and its Additional Protocols; Treaty of 1 July 1968 on the Non-Proliferation of Nuclear Weapons; Treaty of Rarotonga of 6 August 1985 on the Nuclear-Weapon-Free Zone of the South Pacific, and its Protocols; Treaty of 12 September 1990 on the Final Settlement with respect to Germany);

(b) the deployment of nuclear weapons (Antarctic Treaty of 1 December 1959; Treaty of 27 January 1967 on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies; Treaty of Tlatelolco of 14 February 1967 for the Prohibition of Nuclear Weapons in Latin America, and its Additional Protocols; Treaty of 11 February 1971 on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof; Treaty of Rarotonga of 6 August 1985 on the Nuclear-Weapon-Free Zone of the South Pacific, and its Protocols); and


59. Recourse to nuclear weapons is directly addressed by two of these Conventions and also in connection with the indefinite extension of the Treaty on the Non-Proliferation of Nuclear Weapons of 1968:

(a) the Treaty of Tlatelolco of 14 February 1967 for the Prohibition of Nuclear Weapons in Latin America prohibits, in Article 1, the use of nuclear weapons by the Contracting Parties. It further includes an Additional Protocol II open to nuclear-weapon States outside the region, Article 3 of which provides:

“The Governments represented by the undersigned Plenipotentiaries also undertake not to use or threaten to use nuclear weapons against the Contracting Parties of the Treaty for the Prohibition of Nuclear Weapons in Latin America.”
The Protocol was signed and ratified by the five nuclear-weapon States. Its ratification was accompanied by a variety of declarations. The United Kingdom Government, for example, stated that “in the event of any act of aggression by a Contracting Party to the Treaty in which that Party was supported by a nuclear-weapon State”, the United Kingdom Government would “be free to reconsider the extent to which they could be regarded as committed by the provisions of Additional Protocol II”. The United States made a similar statement. The French Government, for its part, stated that it “interprets the undertaking made in article 3 of the Protocol as being without prejudice to the full exercise of the right of self-defence confirmed by Article 51 of the Charter”. China reaffirmed its commitment not to be the first to make use of nuclear weapons. The Soviet Union reserved “the right to review” the obligations imposed upon it by Additional Protocol II, particularly in the event of an attack by a State party either “in support of a nuclear-weapon State or jointly with that State”. None of these statements drew comment or objection from the parties to the Treaty of Tlatelolco.

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

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

(a) Parties to the Treaty; or
(b) any territory within the South Pacific Nuclear Free Zone for which a State that has become a Party to Protocol 1 is internationally responsible.”

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

(c) as to the Treaty on the Non-Proliferation of Nuclear Weapons, at the time of its signing in 1968 the United States, the United Kingdom and the USSR gave various security assurances to the non-nuclear-weapon States that were parties to the Treaty. In resolution 255 (1968) the Security Council took note with satisfaction of the intention expressed by those three States to

“provide or support immediate assistance, in accordance with the Charter, to any non-nuclear-weapon State Party to the Treaty on the Non-Proliferation . . . that is a victim of an act of, or an object of a threat of, aggression in which nuclear weapons are used”.

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

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

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

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

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

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

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

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

(c) these reservations met with no objection from the parties to the Tlatelolco or Rarotonga Treaties or from the Security Council.

63. These two treaties, the security assurances given in 1995 by the nuclear-weapon States and the fact that the Security Council took note of them with satisfaction, testify to a growing awareness of the need to liberate the community of States and the international public from the dangers resulting from the existence of nuclear weapons. The Court moreover notes the signing, even more recently, on 15 December 1995, at Bangkok, of a Treaty on the Southeast Asia Nuclear-Weapon-Free Zone, and on 11 April 1996, at Cairo, of a treaty on the creation of a nuclear-weapons-free zone in Africa. It does not, however, view these elements as amounting to a comprehensive and universal conventional prohibition on the use, or the threat of use, of those weapons as such.

64. The Court will now turn to an examination of customary international law to determine whether a prohibition of the threat or use of nuclear weapons as such flows from that source of law. As the Court has stated, the substance of that law must be "looked for primarily in the actual practice and opinio juris of States" (Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985, p. 29, para. 27).

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

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

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

68. According to certain States, the important series of General Assembly resolutions, beginning with resolution 1653 (XVI) of 24 November 1961, that deal with nuclear weapons and that affirm, with consistent regularity, the illegality of nuclear weapons, signify the existence of a rule of international customary law which prohibits recourse to those weapons. According to other States, however, the resolutions in question have no binding character on their own account and are not declaratory of any customary rule of prohibition of nuclear weapons; some of these States have also pointed out that this series of resolutions not only did not meet with the approval of all of the nuclear-weapon States but of many other States as well.

69. States which consider that the use of nuclear weapons is illegal indicated that those resolutions did not claim to create any new rules, but were confined to a confirmation of customary law relating to the prohibition of means or methods of warfare which, by their use, overstepped the bounds of what is permissible in the conduct of hostilities. In their view, the resolutions in question did no more than apply to nuclear weapons the existing rules of international law applicable in armed conflict; they were no more than the "envelope" or *instrumentum* containing certain pre-existing customary rules of international law. For those States it is accordingly of little importance that the *instrumentum* should have occasioned negative votes, which cannot have the effect of obliterating those customary rules which have been confirmed by treaty law.

70. The Court notes that General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule.

71. Examined in their totality, the General Assembly resolutions put before the Court declare that the use of nuclear weapons would be "a direct violation of the Charter of the United Nations"; and in certain formulations that such use "should be prohibited". The focus of these resolutions has sometimes shifted to diverse related matters; however, several of the resolutions under consideration in the present case have been adopted with substantial numbers of negative votes and abstentions; thus, although those resolutions are a clear sign of deep concern regarding the problem of nuclear weapons, they still fall short of establishing the existence of an *opinio juris* on the illegality of the use of such weapons.

72. The Court further notes that the first of the resolutions of the General Assembly expressly proclaiming the illegality of the use of nuclear weapons, resolution 1653 (XVI) of 24 November 1961 (mentioned in subsequent resolutions), after referring to certain international declarations and binding agreements, from the Declaration of St. Petersburg of 1868 to the Geneva Protocol of 1925, proceeded to qualify the legal nature of nuclear weapons, determine their effects, and apply general rules of customary international law to nuclear weapons in particular. That application by the General Assembly of general rules of customary law to the particular case of nuclear weapons indicates that, in its view, there was no specific rule of customary law which prohibited the use of nuclear weapons; if such a rule had existed, the General Assembly could simply have referred to it and would not have needed to undertake such an exercise of legal qualification.

73. Having said this, the Court points out that the adoption each year by the General Assembly, by a large majority, of resolutions recalling the content of resolution 1653 (XVI), and requesting the member States to conclude a convention prohibiting the use of nuclear weapons in any circumstance, reveals the desire of a very large section of the international community to take, by a specific and express prohibition of the use of nuclear weapons, a significant step forward along the road to complete nuclear disarmament. The emergence, as *lex lata*, of a customary rule specifically prohibiting the use of nuclear weapons as such is hampered by the continuing tensions between the nascent *opinio juris* on the one hand, and the still strong adherence to the practice of deterrence on the other.
74. The Court not having found a conventional rule of general scope, nor a customary rule specifically proscribing the threat or use of nuclear weapons per se, it will now deal with the question whether recourse to nuclear weapons must be considered as illegal in the light of the principles and rules of international humanitarian law applicable in armed conflict and of the law of neutrality.

75. A large number of customary rules have been developed by the practice of States and are an integral part of the international law relevant to the question posed. The “laws and customs of war” — as they were traditionally called — were the subject of efforts at codification undertaken in The Hague (including the Conventions of 1899 and 1907) and were based particularly upon the St. Petersburg Declaration of 1868 as well as the results of the Brussels Conference of 1874. This “Hague Law” and, more particularly, the Regulations Respecting the Laws and Customs of War on Land, fixed the rights and duties of belligerents in their conduct of operations and limited the choice of methods and means of injuring the enemy in an international armed conflict. One should add to this the “Geneva Law” (the Conventions of 1864, 1906, 1929 and 1949), which protects the victims of war and aims to provide safeguards for disabled armed forces personnel and persons not taking part in the hostilities. These two branches of the law applicable in armed conflict have become so closely interrelated that they are considered to have gradually formed one single complex system, known today as international humanitarian law. The provisions of the Additional Protocols of 1977 give expression and attest to the unity and complexity of that law.

76. Since the turn of the century, the appearance of new means of combat has — without calling into question the longstanding principles and rules of international law — rendered necessary some specific prohibitions of the use of certain weapons, such as explosive projectiles under 400 grammes, dum-dum bullets and asphyxiating gases. Chemical and bacteriological weapons were then prohibited by the 1925 Geneva Protocol. More recently, the use of weapons producing “non-detectable fragments”, of other types of “mines, booby traps and other devices”, and of “incendiary weapons”, was either prohibited or limited, depending on the case, by the Convention of 10 October 1980 on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects. The provisions of the Convention on “mines, booby traps and other devices” have just been amended, on 3 May 1996, and now regulate in greater detail, for example, the use of anti-personnel land mines.

77. All this shows that the conduct of military operations is governed by a body of legal prescriptions. This is so because “the right of belligerents to adopt means of injuring the enemy is not unlimited” as stated in Article 22 of the 1907 Hague Regulations relating to the laws and customs of war on land. The St. Petersburg Declaration had already condemned the use of weapons “which uselessly aggravate the suffering of disabled men or make their death inevitable”. The aforementioned Regulations relating to the laws and customs of war on land, annexed to the Hague Convention IV of 1907, prohibit the use of “arms, projectiles, or material calculated to cause unnecessary suffering” (Art. 23).

78. The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. According to the second principle, it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that second principle, States do not have unlimited freedom of choice of means in the weapons they use.

The Court would likewise refer, in relation to these principles, to the Martens Clause, which was first included in the Hague Convention II with Respect to the Laws and Customs of War on Land of 1899 and which has proved to be an effective means of addressing the rapid evolution of military technology. A modern version of that clause is to be found in Article 1, paragraph 2, of Additional Protocol I of 1977, which reads as follows:

“In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.”

In conformity with the aforementioned principles, humanitarian law, at a very early stage, prohibited certain types of weapons either because of their indiscriminate effect on combatants and civilians or because of the unnecessary suffering caused to combatants, that is to say, a harm greater than that unavoidable to achieve legitimate military objectives. If an envisaged use of weapons would not meet the requirements of humanitarian law, a threat to engage in such use would also be contrary to that law.

79. It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and “elementary considerations of humanity” as the Court put it in its Judgment of 9 April 1949 in the Corfu Channel case (I.C.J. Reports 1949, p. 22), that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.
80. The Nuremburg International Military Tribunal had already found in 1945 that the humanitarian rules included in the Regulations annexed to the Hague Convention IV of 1907 "were recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war" (Trial of the Major War Criminals, 14 November 1945-1 October 1946, Nuremberg, 1947, Vol. 1, p. 254).

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

"In the view of the Secretary-General, the application of the principle nullem criminis sine lege requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law. . . . The part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in: the Geneva Conventions of 12 August 1949 for the Protection of War Victims; the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907; the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948; and the Charter of the International Military Tribunal of 8 August 1945."

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

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

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

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

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

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

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

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

"So far as the customary law of war is concerned, the United Kingdom has always accepted that the use of nuclear weapons is subject to the general principles of the jus in bello" (United Kingdom, CR 95/34, p. 45);

and

"The United States has long shared the view that the law of armed conflict governs the use of nuclear weapons — just as it governs the use of conventional weapons" (United States of America, CR 95/34, p. 85).

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

*  

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

"The principle of neutrality, in its classic sense, was aimed at preventing the incursion of belligerent forces into neutral territory, or attacks on the persons or ships of neutrals. Thus: 'the territory of neutral powers is inviolable' (Article 1 of the Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, concluded on 18 October 1907); 'belligerents are bound to respect the sovereign rights of neutral powers . . .' (Article 1 to the Hague Convention (XIII) Respecting the Rights and Duties of Neutral Powers in Naval War, concluded on 18 October 1907), 'neutral states have equal interest in having their rights respected by belligerents . . .' (Preamble to Convention on Maritime

Neutrality, concluded on 20 February 1928). It is clear, however, that the principle of neutrality applies with equal force to transborder incursions of armed forces and to the transborder damage caused to a neutral State by the use of a weapon in a belligerent State." (Nauru, Written Statement (I), p. 35, IV E.)

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

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

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

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

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

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

and

"The reality . . . is that nuclear weapons might be used in a wide variety of circumstances with very different results in terms of likely civilian casualties. In some cases, such as the use of a low yield nuclear weapon against warships on the High Seas or troops in sparsely populated areas, it is possible to envisage a nuclear attack which caused comparatively few civilian casualties. It is by no means the case that every use of nuclear weapons against a military objective would inevitably cause very great collateral civilian casualties."
92. Another view holds that recourse to nuclear weapons could never be compatible with the principles and rules of humanitarian law and is therefore prohibited. In the event of their use, nuclear weapons would in all circumstances be unable to draw any distinction between the civilian population and combatants, or between civilian objects and military objectives, and their effects, largely uncontrollable, could not be restricted, either in time or in space, to lawful military targets. Such weapons would kill and destroy in a necessarily indiscriminate manner, on account of the blast, heat and radiation occasioned by the nuclear explosion and the effects induced; and the number of casualties which would ensue would be enormous. The use of nuclear weapons would therefore be prohibited in any circumstance, notwithstanding the absence of any explicit conventional prohibition. That view lay at the basis of the assertions by certain States before the Court that nuclear weapons are by their nature illegal under customary international law, by virtue of the fundamental principle of humanity.

93. A similar view has been expressed with respect to the effects of the principle of neutrality. Like the principles and rules of humanitarian law, that principle has therefore been considered by some to rule out the use of a weapon the effects of which simply cannot be contained within the territories of the contending States.

94. The Court would observe that none of the States advocating the legality of the use of nuclear weapons under certain circumstances, including the “clean” use of smaller, low yield, tactical nuclear weapons, has indicated what, supposing such limited use were feasible, would be the precise circumstances justifying such use; nor whether such limited use would not tend to escalate into the all-out use of high yield nuclear weapons. This being so, the Court does not consider that it has a sufficient basis for a determination on the validity of this view.

95. Nor can the Court make a determination on the validity of the view that the recourse to nuclear weapons would be illegal in any circumstance owing to their inherent and total incompatibility with the law applicable in armed conflict. Certainly, as the Court has already indicated, the principles and rules of law applicable in armed conflict — at the heart of which is the overriding consideration of humanity — make the conduct of armed hostilities subject to a number of strict requirements. Thus, methods and means of warfare, which would preclude any distinction between civilian and military targets, or which would result in unnecessary suffering to combatants, are prohibited. In view of the unique characteristics of nuclear weapons, to which the Court has referred above, the use of such weapons in fact seems scarcely reconcilable with respect for such requirements. Nevertheless, the Court considers that it does not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance.

96. Furthermore, the Court cannot lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defence, in accordance with Article 51 of the Charter, when its survival is at stake.

Nor can it ignore the practice referred to as “policy of deterrence”, to which an appreciable section of the international community adhered for many years. The Court also notes the reservations which certain nuclear-weapon States have appended to the undertakings they have given, notably under the Protocols to the Treaties of Tlatelolco and Rarotonga, and also under the declarations made by them in connection with the extension of the Treaty on the Non-Proliferation of Nuclear Weapons, not to resort to such weapons.

97. Accordingly, in view of the present state of international law viewed as a whole, as examined above by the Court, and of the elements of fact at its disposal, the Court is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake.

* * *

98. Given the eminently difficult issues that arise in applying the law on the use of force and above all the law applicable in armed conflict to nuclear weapons, the Court considers that it now needs to examine one further aspect of the question before it, seen in a broader context.

In the long run, international law, and with it the stability of the international order which it is intended to govern, are bound to suffer from the continuing difference of views with regard to the legal status of weapons as deadly as nuclear weapons. It is consequently important to put an end to this state of affairs: the long-promised complete nuclear disarmament appears to be the most appropriate means of achieving that result.

99. In these circumstances, the Court appreciates the full importance of the recognition by Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons of an obligation to negotiate in good faith a nuclear disarmament. This provision is worded as follows:

“Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.”
The legal import of that obligation goes beyond that of a mere obligation of conduct; the obligation involved here is an obligation to achieve a precise result — nuclear disarmament in all its aspects — by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith.

100. This twofold obligation to pursue and to conclude negotiations formally concerns the 182 States parties to the Treaty on the Non-Proliferation of Nuclear Weapons, or, in other words, the vast majority of the international community.

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

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

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

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

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

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

“One of the basic principles governing the creation and perform-
2) Répond de la manière suivante à la question posée par l’Assemblée générale:

A. À l’unanimité,

Ni le droit international coutumier ni le droit international conventionnel n’autorisent spécifiquement la menace ou l’emploi d’armes nucléaires;

B. Par onze voix contre trois,

Ni le droit international coutumier ni le droit international conventionnel ne comportent d’interdiction complète et universelle de la menace ou de l’emploi des armes nucléaires en tant que telles;

POUR : M. Bedjaoui, Président; M. Schwebel, Vice-Président; MM. Oda, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchétin, Ferrarí Bravo, Mᵉʳ Higgin, juges;
CONTRE: MM. Shahabudeen, Weeramantry, Koroma, juges;

C. À l’unanimité,

Est illicite la menace ou l’emploi de la force au moyen d’armes nucléaires qui serait contraire à l’article 2, paragraphe 4, de la Charte des Nations Unies et qui ne satisfait pas à toutes les prescriptions de son article 51;

D. À l’unanimité,

La menace ou l’emploi d’armes nucléaires devrait aussi être compatible avec les exigences du droit international applicable dans les conflits armés, spécialement celles des principes et règles du droit international humanitaire, ainsi qu’avec les obligations particulières en vertu des traités et autres engagements qui ont expressément trait aux armes nucléaires;

E. Par sept voix contre sept, par la voix prépondérante du Président,

Il ressort des exigences susmentionnées que la menace ou l’emploi d’armes nucléaires serait généralement contraire aux règles du droit international applicable dans les conflits armés, et spécialement aux principes et règles du droit humanitaire;

Au vu de l’état actuel du droit international, ainsi que des éléments de fait dont elle dispose, la Cour ne peut cependant conclure de façon définitive que la menace ou l’emploi d’armes nucléaires serait illicite ou illicite dans une circonstance extrême de légitime défense dans laquelle la survie même d’un État serait en cause;

POUR : M. Bedjaoui, Président; MM. Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchétin, Ferrarí Bravo, juges;
CONTRE: M. Schwebel, Vice-Président; MM. Oda, Guillaume, Shahabudeen, Weeramantry, Koroma, Mᵉʳ Higgin, juges;

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THREAT OR USE OF NUCLEAR WEAPONS (ADVISORY OPINION)

F. Unanimously,

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

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

(Signed) Mohammed BEDJAoui,
President.

(Signed) Eduardo VALENCIA-OSPINA,
Registrar.

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

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

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

(Initialled) M.B.
(Initialled) E.V.O.
International Court of Justice

Gabčikovo-Nagymaros Project (Hungary/Slovakia) Judgment

CASE CONCERNING
THE GABČÍKOVO-NAGYMAROS PROJECT
(HUNGARY/SLOVAKIA)

JUDGMENT OF 25 SEPTEMBER 1997

1997

COUR INTERNATIONALE DE JUSTICE
RECUEIL DES ARÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE RELATIVE AU PROJET
GABČÍKOVO-NAGYMAROS
(HONGRIE/SLOVAQUIE)

ARRÊT DU 25 SEPTEMBRE 1997

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ally acceptable solution. Commission involvement would depend on each Government not taking "any steps . . . which would prejudice possible actions to be undertaken on the basis of the report’s findings". The Czechoslovak Prime Minister stated in a letter to the Hungarian Prime Minister dated 23 April 1992, that his Government continued to be interested in the establishment of the proposed committee "without any preliminary conditions"; criticizing Hungary’s approach, he refused to suspend work on the provisional solution, but added, "in my opinion, there is still time, until the damming of the Danube (i.e., until October 31, 1992), for resolving disputed questions on the basis of agreement of both States".

On 7 May 1992, Hungary, in the very resolution in which it decided on the termination of the Treaty, made a proposal, this time to the Slovak Prime Minister, for a six-month suspension of work on Variant C. The Slovak Prime Minister replied that the Slovak Government remained ready to negotiate, but considered preconditions "inappropriate".

91. On 19 May 1992, the Hungarian Government transmitted to the Czechoslovak Government a Declaration notifying it of the termination by Hungary of the 1977 Treaty as of 25 May 1992. In a letter of the same date from the Hungarian Prime Minister to the Czechoslovak Prime Minister, the immediate cause for termination was specified to be Czechoslovakia’s refusal, expressed in its letter of 23 April 1992, to suspend the work on Variant C during mediation efforts of the Commission of the European Communities. In its Declaration, Hungary stated that it could not accept the deleterious effects for the environment and the conservation of nature of the implementation of Variant C which would be practically equivalent to the dangers caused by the realization of the original Project. It added that Variant C infringed numerous international agreements and violated the territorial integrity of the Hungarian State by diverting the natural course of the Danube.

* *

92. During the proceedings, Hungary presented five arguments in support of the lawfulness, and thus the effectiveness, of its notification of termination. These were the existence of a state of necessity; the impossibility of performance of the Treaty; the occurrence of a fundamental change of circumstances; the material breach of the Treaty by Czechoslovakia; and, finally, the development of new norms of international environmental law. Slovakia contested each of these grounds.

93. On the first point, Hungary stated, as Czechoslovakia had "remained inflexible" and continued with its implementation of Variant C, “a temporary state of necessity eventually became permanent, justifying termination of the 1977 Treaty”.

Slovakia, for its part, denied that a state of necessity existed on the
basis of what it saw as the scientific facts; and argued that even if such a state of necessity had existed, this would not give rise to a right to terminate the Treaty under the Vienna Convention of 1969 on the Law of Treaties.

94. Hungary's second argument relied on the terms of Article 61 of the Vienna Convention, which is worded as follows:

"Article 61

Supervening Impossibility of Performance

1. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

2. Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty."

Hungary declared that it could not be "obliged to fulfill a practically impossible task, namely to construct a barrage on its own territory that would cause irreparable environmental damage". It concluded that

"By May 1992 the essential object of the Treaty — an economic joint investment which was consistent with environmental protection and which was operated by the two parties jointly — had permanently disappeared, and the Treaty had thus become impossible to perform."

In Hungary's view, the "object indispensable for the execution of the treaty", whose disappearance or destruction was required by Article 61 of the Vienna Convention, did not have to be a physical object, but could also include, in the words of the International Law Commission, "a legal situation which was the raison d'être of the rights and obligations."

Slovakia claimed that Article 61 was the only basis for invoking impossibility of performance as a ground for termination, that paragraph 1 of that Article clearly contemplated physical "disappearance or destruction" of the object in question, and that, in any event, paragraph 2 precluded the invocation of impossibility "if the impossibility is the result of a breach by that party ... of an obligation under the treaty."

95. As to "fundamental change of circumstances", Hungary relied on Article 62 of the Vienna Convention on the Law of Treaties which states as follows:

"Article 62

Fundamental Change of Circumstances

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

(a) if the treaty establishes a boundary; or
(b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty."

Hungary identified a number of "substantive elements" present at the conclusion of the 1977 Treaty which it said had changed fundamentally by the date of notification of termination. These included the notion of "socialist integration", for which the Treaty had originally been a "vehicle", but which subsequently disappeared; the "single and indivisible operational system", which was to be replaced by a unilateral scheme; the fact that the basis of the planned joint investment had been overturned by the sudden emergence of both States into a market economy; the attitude of Czechoslovakia which had turned the "framework treaty" into an "immutable norm"; and, finally, the transformation of a treaty consistent with environmental protection into "a prescription for environmental disaster."

Slovakia, for its part, contended that the changes identified by Hungary had not altered the nature of the obligations under the Treaty from those originally undertaken, so that no entitlement to terminate it arose from them.

96. Hungary further argued that termination of the Treaty was justified by Czechoslovakia's material breaches of the Treaty, and in this regard it invoked Article 60 of the Vienna Convention on the Law of Treaties, which provides:
“Article 60
Termination or Suspension of the Operation of a Treaty
as a Consequence of Its Breach

1. A material breach of a bilateral treaty by one of the parties
entitles the other to invoke the breach as a ground for terminating
the treaty or suspending its operation in whole or in part.

2. A material breach of a multilateral treaty by one of the parties
entitles:
(a) the other parties by unanimous agreement to suspend the operation
of the treaty in whole or in part or to terminate it either:
(i) in the relations between themselves and the defaulting State,
or
(ii) as between all the parties;
(b) a party specially affected by the breach to invoke it as a ground
for suspending the operation of the treaty in whole or in part in
the relations between itself and the defaulting State;
(c) any party other than the defaulting State to invoke the breach
as a ground for suspending the operation of the treaty in whole
or in part with respect to itself if the treaty is of such a character
that a material breach of its provisions by one party radically
changes the position of every party with respect to the
further performance of its obligations under the treaty.

3. A material breach of a treaty, for the purposes of this article,
consists in:
(a) a repudiation of the treaty not sanctioned by the present
Convention; or
(b) the violation of a provision essential to the accomplishment of
the object or purpose of the treaty.

4. The foregoing paragraphs are without prejudice to any provision
in the treaty applicable in the event of a breach.

5. Paragraphs 1 to 3 do not apply to provisions relating to the
protection of the human person contained in treaties of a humanitarian
character, in particular to provisions prohibiting any form of
reprisals against persons protected by such treaties.”

Hungary claimed in particular that Czechoslovakia violated the 1977
Treaty by proceeding to the construction and putting into operation of
Variant C, as well as failing to comply with its obligations under
Articles 15 and 19 of the Treaty. Hungary further maintained that Czechoslovakia
had breached other international conventions (among them the
Convention of 31 May 1976 on the Regulation of Water Management
Issues of Boundary Waters) and general international law.

and joint operation. Consequently, the parties not having agreed otherwise, the Treaty could be terminated only on the limited grounds enumerated in the Vienna Convention.

101. The Court will now turn to the first ground advanced by Hungary, that of the state of necessity. In this respect, the Court will merely observe that, even if a state of necessity is found to exist, it is not a ground for the termination of a treaty. It may only be invoked to exonerate from its responsibility a State which has failed to implement a treaty. Even if found justified, it does not terminate a Treaty; the Treaty may be ineffective as long as the condition of necessity continues to exist; it may in fact be dormant, but — unless the parties by mutual agreement terminate the Treaty — it continues to exist. As soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revives.

102. Hungary also relied on the principle of the impossibility of performance as reflected in Article 61 of the Vienna Convention on the Law of Treaties. Hungary’s interpretation of the wording of Article 61 is, however, not in conformity with the terms of that Article, nor with the intentions of the Diplomatic Conference which adopted the Convention. Article 61, paragraph 1, requires the “permanent disappearance or destruction of an object indispensable for the execution” of the treaty to justify the termination of a treaty on grounds of impossibility of performance. During the conference, a proposal was made to extend the scope of the article by including in it cases such as the impossibility to make certain payments because of serious financial difficulties (Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March-24 May 1968, doc. A/CONF.39/11, Summary records of the plenary meetings and of the meetings of the Committee of the Whole, 62nd Meeting of the Committee of the Whole, pp. 361-365). Although it was recognized that such situations could lead to a preclusion of the wrongfulness of non-performance by a party of its treaty obligations, the participating States were not prepared to consider such situations to be a ground for terminating or suspending a treaty, and preferred to limit themselves to a narrower concept.

103. Hungary contended that the essential object of the Treaty — an economic joint investment which was consistent with environmental protection and which was operated by the two contracting parties jointly — had permanently disappeared and that the Treaty had thus become impossible to perform. It is not necessary for the Court to determine whether the term “object” in Article 61 can also be understood to embrace a legal régime as in any event, even if that were the case, it
would have to conclude that in this instance that régime had not definitively ceased to exist. The 1977 Treaty — and in particular its Articles 15, 19 and 20 — actually made available to the parties the necessary means to proceed at any time, by negotiation, to the required readjustments between economic imperatives and ecological imperatives. The Court would add that, if the joint exploitation of the investment was no longer possible, this was originally because Hungary did not carry out most of the works for which it was responsible under the 1977 Treaty; Article 61, paragraph 2, of the Vienna Convention expressly provides that impossibility of performance may not be invoked for the termination of a treaty by a party to that treaty when it results from that party’s own breach of an obligation flowing from that treaty.

* 

104. Hungary further argued that it was entitled to invoke a number of events which, cumulatively, would have constituted a fundamental change of circumstances. In this respect it specified profound changes of a political nature, the Project’s diminishing economic viability, the progress of environmental knowledge and the development of new norms and prescriptions of international environmental law (see paragraph 95 above).

The Court recalls that, in the Fisheries Jurisdiction case, it stated that “Article 62 of the Vienna Convention on the Law of Treaties, . . . may in many respects be considered as a codification of existing customary law on the subject of the termination of a treaty relationship on account of change of circumstances” (I.C.J. Reports 1973, p. 63, para. 36).

The prevailing political situation was certainly relevant for the conclusion of the 1977 Treaty. But the Court will recall that the Treaty provided for a joint investment programme for the production of energy, the control of floods and the improvement of navigation on the Danube. In the Court’s view, the prevalent political conditions were thus not so closely linked to the object and purpose of the Treaty that they constituted an essential basis of the consent of the parties and, in changing, radically altered the extent of the obligations still to be performed. The same holds good for the economic system in force at the time of the conclusion of the 1977 Treaty. Besides, even though the estimated profitability of the Project might have appeared less in 1992 than in 1977, it does not appear from the record before the Court that it was bound to diminish to such an extent that the treaty obligations of the parties would have been radically transformed as a result.

The Court does not consider that new developments in the state of environmental knowledge and of environmental law can be said to have been completely unforeseen. What is more, the formulation of Articles 15, 19 and 20, designed to accommodate change, made it possible for the parties to take account of such developments and to apply them when implementing those treaty provisions.

The changed circumstances advanced by Hungary are, in the Court’s view, not of such a nature, either individually or collectively, that their effect would radically transform the extent of the obligations still to be performed in order to accomplish the Project. A fundamental change of circumstances must have been unforeseen; the existence of the circumstances at the time of the Treaty’s conclusion must have constituted an essential basis of the consent of the parties to be bound by the Treaty. The negative and conditional wording of Article 62 of the Vienna Convention on the Law of Treaties is a clear indication moreover: that the stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases.

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105. The Court will now examine Hungary’s argument that it was entitled to terminate the 1977 Treaty on the ground that Czechoslovakia had violated its Articles 15, 19 and 20 (as well as a number of other conventions and rules of general international law); and that the planning, construction and putting into operation of Variant C also amounted to a material breach of the 1977 Treaty.

106. As to that part of Hungary’s argument which was based on other treaties and general rules of international law, the Court is of the view that it is only a material breach of the treaty itself, by a State party to that treaty, which entitles the other party to rely on it as a ground for terminating the treaty. The violation of other treaty rules or of rules of general international law may justify the taking of certain measures, including countermeasures, by the injured State, but it does not constitute a ground for termination under the law of treaties.

107. Hungary contended that Czechoslovakia had violated Articles 15, 19 and 20 of the Treaty by refusing to enter into negotiations with Hungary in order to adapt the Joint Contractual Plan to new scientific and legal developments regarding the environment. Articles 15, 19 and 20 oblige the parties jointly to take, on a continuous basis, appropriate measures necessary for the protection of water quality, of nature and of fishing interests.

Articles 15 and 19 expressly provide that the obligations they contain shall be implemented by the means specified in the Joint Contractual Plan. The failure of the parties to agree on those means cannot, on the basis of the record before the Court, be attributed solely to one party.
The Court has not found sufficient evidence to conclude that Czechoslovakia had consistently refused to consult with Hungary about the desirability or necessity of measures for the preservation of the environment. The record rather shows that, while both parties indicated, in principle, a willingness to undertake further studies, in practice Czechoslovakia refused to countenance a suspension of the works at Dunakiliti and, later, on Variant C, while Hungary required suspension as a prior condition of environmental investigations because it claimed continuation of the work would prejudice the outcome of negotiations. In this regard it cannot be left out of consideration that Hungary itself, by suspending the works at Nagymaros and Dunakiliti, contributed to the creation of a situation which was not conducive to the conduct of fruitful negotiations.

108. Hungary’s main argument for invoking a material breach of the Treaty was the construction and putting into operation of Variant C. As the Court has found in paragraph 79 above, Czechoslovakia violated the Treaty only when it diverted the waters of the Danube into the bypass canal in October 1992. In constructing the works which would lead to the putting into operation of Variant C, Czechoslovakia did not act unlawfully.

In the Court’s view, therefore, the notification of termination by Hungary on 19 May 1992 was premature. No breach of the Treaty by Czechoslovakia had yet taken place and consequently Hungary was not entitled to invoke any such breach of the Treaty as a ground for terminating it when it did.

109. In this regard, it should be noted that, according to Hungary’s Declaration of 19 May 1992, the termination of the Treaty was to take effect as from 25 May 1992, that is only six days later. Both Parties agree that Articles 65 to 67 of the Vienna Convention on the Law of Treaties, if not codifying customary law, at least generally reflect customary international law and contain certain procedural principles which are based on an obligation to act in good faith. As the Court stated in its Advisory Opinion on the Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt (in which case the Vienna Convention did not apply):

“Precisely what periods of time may be involved in the observance of the duties to consult and negotiate, and what period of notice of termination should be given, are matters which necessarily vary according to the requirements of the particular case. In principle, therefore, it is for the parties in each case to determine the length of those periods by consultation and negotiation in good faith.” (I.C.J. Reports 1980, p. 96, para. 49.)

The termination of the Treaty by Hungary was to take effect six days after its notification. On neither of these dates had Hungary suffered injury resulting from acts of Czechoslovakia. The Court must therefore confirm its conclusion that Hungary’s termination of the Treaty was premature.

110. Nor can the Court overlook that Czechoslovakia committed the internationally wrongful act of putting into operation Variant C as a result of Hungary’s own prior wrongful conduct. As was stated by the Permanent Court of International Justice:

“It is, moreover, a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that one Party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open to him.” (Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9, p. 31.)

Hungary, by its own conduct, had prejudiced its right to terminate the Treaty; this would still have been the case even if Czechoslovakia, by the time of the purported termination, had violated a provision essential to the accomplishment of the object or purpose of the Treaty.

* *

111. Finally, the Court will address Hungary’s claim that it was entitled to terminate the 1977 Treaty because new requirements of international law for the protection of the environment precluded performance of the Treaty.

112. Neither of the Parties contended that new peremptory norms of environmental law had emerged since the conclusion of the 1977 Treaty, and the Court will consequently not be required to examine the scope of Article 64 of the Vienna Convention on the Law of Treaties. On the other hand, the Court wishes to point out that newly developed norms of environmental law are relevant for the implementation of the Treaty and that the parties could, by agreement, incorporate them through the application of Articles 15, 19 and 20 of the Treaty. These articles do not contain specific obligations of performance but require the parties, in carrying out their obligations to ensure that the quality of water in the Danube is not impaired and that nature is protected, to take new environmental norms into consideration when agreeing upon the means to be specified in the Joint Contractual Plan.

By inserting these evolving provisions in the Treaty, the parties recognized the potential necessity to adapt the Project. Consequently, the
Treaty is not static, and is open to adapt to emerging norms of international law. By means of Articles 15 and 19, new environmental norms can be incorporated in the Joint Contractual Plan.

The responsibility to do this was a joint responsibility. The obligations contained in Articles 15, 19 and 20 are, by definition, general and have to be transformed into specific obligations of performance through a process of consultation and negotiation. Their implementation thus requires a mutual willingness to discuss in good faith the actual and potential environmental risks.

It is all the more important to do this because as the Court recalled in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, “the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn” (I.C.J. Reports 1996, p. 241, para. 29; see also paragraph 53 above).

The awareness of the vulnerability of the environment and the recognition that environmental risks have to be assessed on a continuous basis have become much stronger in the years since the Treaty’s conclusion. These new concerns have enhanced the relevance of Articles 15, 19 and 20.

113. The Court recognizes that both Parties agree on the need to take environmental concerns seriously and to take the required precautionary measures, but they fundamentally disagree on the consequences this has for the joint Project. In such a case, third-party involvement may be helpful and instrumental in finding a solution, provided each of the Parties is flexible in its position.

114. Finally, Hungary maintained that by their conduct both parties had repudiated the Treaty and that a bilateral treaty repudiated by both parties cannot survive. The Court is of the view, however, that although it has found that both Hungary and Czechoslovakia failed to comply with their obligations under the 1977 Treaty, this reciprocal wrongful conduct did not bring the Treaty to an end nor justify its termination. The Court would set a precedent with disturbing implications for treaty relations and the integrity of the rule pacta sunt servanda if it were to conclude that a treaty in force between States, which the parties have implemented in considerable measure and at great cost over a period of years, might be unilaterally set aside on grounds of reciprocal non-compliance. It would be otherwise, of course, if the parties decided to terminate the Treaty by mutual consent. But in this case, while Hungary purported to terminate the Treaty, Czechoslovakia consistently resisted this act and declared it to be without legal effect.

* * *

115. In the light of the conclusions it has reached above, the Court, in reply to the question put to it in Article 2, paragraph 1 (c), of the Special Agreement (see paragraph 89), finds that the notification of termination by Hungary of 19 May 1992 did not have the legal effect of terminating the 1977 Treaty and related instruments.

* * *

116. In Article 2, paragraph 2, of the Special Agreement, the Court is requested to determine the legal consequences, including the rights and obligations for the Parties, arising from its Judgment on the questions formulated in paragraph 1. In Article 5 of the Special Agreement the Parties agreed to enter into negotiations on the modalities for the execution of the Judgment immediately after the Court has rendered it.

117. The Court must first turn to the question whether Slovakia became a party to the 1977 Treaty as successor to Czechoslovakia. As an alternative argument, Hungary contended that, even if the Treaty survived the notification of termination, in any event it ceased to be in force as a treaty on 31 December 1992, as a result of the “disappearance of one of the parties”. On that date Czechoslovakia ceased to exist as a legal entity, and on 1 January 1993 the Czech Republic and the Slovak Republic came into existence.

118. According to Hungary, “There is no rule of international law which provides for automatic succession to bilateral treaties on the disappearance of a party” and such a treaty will not survive unless another State succeeds to it by express agreement between that State and the remaining party. While the second paragraph of the Preamble to the Special Agreement recites that

“the Slovak Republic is one of the two successor States of the Czech and Slovak Federal Republic and the sole successor State in respect of rights and obligations relating to the Gabčíkovo-Nagymaros Project”.

Hungary sought to distinguish between, on the one hand, rights and obligations such as “continuing property rights” under the 1977 Treaty, and, on the other hand, the treaty itself. It argued that, during the negotiations leading to signature of the Special Agreement, Slovakia had proposed a text in which it would have been expressly recognized “as the successor to the Government of the CSFR” with regard to the 1977 Treaty, but that Hungary had rejected that formulation. It contended that it had never agreed to accept Slovakia as successor to the 1977 Treaty. Hungary referred to diplomatic exchanges in which the two Parties had each submitted to the other lists of those bilateral treaties which they respectively wished should continue in force between them, for negotiation on a case-
International Court of Justice
Military and Paramilitary Activities in and against Nicaragua
(Nicaragua v. United States of America)
Merits, Judgment

27 JUNE 1986

JUDGMENT

CASE CONCERNING MILITARY AND PARAMILITARY ACTIVITIES IN AND AGAINST NICARAGUA
(NICARAGUA v. UNITED STATES OF AMERICA)

MERITS

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AFFAIRE DES ACTIVITÉS MILITAIRES ET PARAMILITAIRES AU NICARAGUA ET CONTRE CELUI-CI
(NICARAGUA c. ÉTATS-UNIS D'AMÉRIQUE)

FOND

27 JUIN 1986

ARRÊT

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

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

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

* * * * *

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

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

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

The United States contends that the only general and customary international law on which Nicaragua can base its claims is that of the Charter; in particular, the Court could not, it is said, consider the lawfulness of an alleged use of armed force without referring to the ‘principal source of the
relevant international law”, namely, Article 2, paragraph 4, of the United Nations Charter. In brief, in a more general sense “the provisions of the United Nations Charter relevant here subsume and supervene related principles of customary and general international law”. The United States concludes that “since the multilateral treaty reservation bars adjudication of claims based on treaties, it bars all of Nicaragua’s claims”. Thus the effect of the reservation in question is not, it is said, merely to prevent the Court from deciding upon Nicaragua’s claims by applying the multilateral treaties in question; it further prevents it from applying in its decision any rule of customary international law the content of which is also the subject of a provision in those multilateral treaties.

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

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

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

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

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

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

177. But as observed above (paragraph 175), even if the customary norm and the treaty norm were to have exactly the same content, this
would not be a reason for the Court to hold that the incorporation of the customary norm into treaty-law must deprive the customary norm of its applicability as distinct from that of the treaty norm. The existence of identical rules in international treaty law and customary law has been clearly recognized by the Court in the North Sea Continental Shelf cases. To a large extent, those cases turned on the question whether a rule enshrined in a treaty also existed as a customary rule, either because the treaty had merely codified the custom, or caused it to "crystallize", or because it had influenced its subsequent adoption. The Court found that this identity of content in treaty law and in customary international law did not exist in the case of the rule invoked, which appeared in one article of the treaty, but did not suggest that such identity was debarred as a matter of principle: on the contrary, it considered it to be clear that certain other articles of the treaty in question "were . . . regarded as reflecting, or as crystallizing, received or at least emergent rules of customary international law" (I.C.J. Reports 1969, p. 39, para. 63). More generally, there are no grounds for holding that when customary international law is comprised of rules identical to those of treaty law, the latter "supervenes" the former, so that the customary international law has no further existence of its own.

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

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

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

* * *

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

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

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

184. The Court notes that there is in fact evidence, to be examined below, of a considerable degree of agreement between the Parties as to the content of the customary international law relating to the non-use of force and non-intervention. This concurrence of their views does not however dispense the Court from having itself to ascertain what rules of customary international law are applicable. The mere fact that States declare their recognition of certain rules is not sufficient for the Court to consider these as being part of customary international law, and as applicable as such to those States. Bound as it is by Article 38 of its Statute to apply, inter alia,
international custom "as evidence of a general practice accepted as law", the Court may not disregard the essential role played by general practice. Where two States agree to incorporate a particular rule in a treaty, their agreement suffices to make that rule a legal one, binding upon them; but in the field of customary international law, the shared view of the Parties as to the content of what they regard as the rule is not enough. The Court must satisfy itself that the existence of the rule in the opinio juris of States is confirmed by practice.

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

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

* * *

187. The Court must therefore determine, first, the substance of the customary rules relating to the use of force in international relations, applicable to the dispute submitted to it. The United States has argued that, on this crucial question of the lawfulness of the use of force in inter-State relations, the rules of general and customary international law, and those of the United Nations Charter, are in fact identical. In its view this identity is so complete that, as explained above (paragraph 173), it constitutes an argument to prevent the Court from applying this customary law, because it is indistinguishable from the multilateral treaty law which it may not apply. In its Counter-Memorial on jurisdiction and admissibility the United States asserts that "Article 2 (4) of the Charter is customary and general international law". It quotes with approval an observation by the International Law Commission to the effect that

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

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

"In sum, the provisions of Article 2 (4) with respect to the lawfulness of the use of force are 'modern customary law' (International Law Commission, loc. cit.) and the 'embodiment of general principles of international law' (counsel for Nicaragua, Hearing of 25 April 1964, morning, loc. cit.). There is no other 'customary and general international law' on which Nicaragua can rest its claims."

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

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

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

188. The Court thus finds that both Parties take the view that the principles as to the use of force incorporated in the United Nations Charter correspond, in essentials, to those found in customary international law. The Parties thus both take the view that the fundamental principle in this area is expressed in the terms employed in Article 2, paragraph 4, of the United Nations Charter. They therefore accept a treaty-law obligation to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations. The Court has however to be satisfied that there exists in customary international law an opinio juris as to the binding character of such abstention. This opinio juris may, though with due caution, be deduced
from, *inter alia*, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions, and particularly resolution 2625 (XXV) entitled "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations". The effect of consent to the text of such resolutions cannot be understood as merely that of a "reiteration or elucidation" of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves. The principle of non-use of force, for example, may thus be regarded as a principle of customary international law, not as such conditioned by provisions relating to collective security, or to the facilities or armed contingents to be provided under Article 43 of the Charter. It would therefore seem apparent that the attitude referred to expresses an *opinio juris* respecting such rule (or set of rules), to be thenceforth treated separately from the provisions, especially those of an institutional kind, to which it is subject on the treaty-law plane of the Charter.

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

190. A further confirmation of the validity as customary international law of the principle of the prohibition of the use of force expressed in Article 2, paragraph 4, of the Charter of the United Nations may be found in the fact that it is frequently referred to in statements by State representatives as being not only a principle of customary international law but also a fundamental or cardinal principle of such law. The International Law Commission, in the course of its work on the codification of the law of treaties, expressed the view that "the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*" (paragraph (1) of the commentary of the Commission to Article 50 of its draft Articles on the Law of Treaties, *ILC Yearbook*, 1966-II, p. 247). Nicaragua in its Memorial on the Merits submitted in the present case states that the principle prohibiting the use of force embodied in Article 2, paragraph 4, of the Charter of the United Nations "has come to be recognized as *jus cogens*". The United States, in its Counter-Memorial on the questions of jurisdiction and admissibility, found it material to quote the views of scholars that this principle is a "universal norm", a "universally recognized principle of international law", and a "principle of *jus cogens*".

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

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

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

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

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

Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force."
192. Moreover, in the part of this same resolution devoted to the principle of non-intervention in matters within the national jurisdiction of States, a very similar rule is found:

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

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

"The General Assembly Resolves:

1. To reiterate solemnly the need for the member states of the Organization to observe strictly the principles of nonintervention and self-determination of peoples as a means of ensuring peaceful coexistence among them and to refrain from committing any direct or indirect act that might constitute a violation of those principles.

2. To reaffirm the obligation of those states to refrain from applying economic, political, or any other type of measures to coerce another state and obtain from it advantages of any kind.

3. Similarly, to reaffirm the obligation of these states to refrain from organizing, supporting, promoting, financing, instigating, or tolerating subversive, terrorist, or armed activities against another state and from intervening in a civil war in another state or in its internal struggles."

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

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

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

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

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

195. In the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack. Reliance on collective self-defence of course does not remove the need for this. There appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks. In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to" (inter alia) an actual armed attack conducted by regular forces, "or its substantial involvement therein". This description, contained in Article 5, paragraph (g), of the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX), may be taken to reflect customary international law. The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces. But the
Court does not believe that the concept of “armed attack” includes not
only acts by armed bands where such acts occur on a significant scale but
also assistance to rebels in the form of the provision of weapons or lo-
gistical or other support. Such assistance may be regarded as a threat or use
of force, or amount to intervention in the internal or external affairs of
other States. It is also clear that it is the State which is the victim of an
armed attack which must form and declare the view that it has been so
attacked. There is no rule in customary international law permitting
another State to exercise the right of collective self-defence on the basis of
its own assessment of the situation. Where collective self-defence is
invoked, it is to be expected that the State for whose benefit this right is
used will have declared itself to be the victim of an armed attack.

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

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

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

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

and under paragraph 2 of that Article,

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

measures which it may individually take in fulfilment of the obliga-
tion contained in the preceding paragraph and in accordance with the
principle of continental solidarity.”

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

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

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

200. At this point, the Court may consider whether in customary inter-
national law there is any requirement corresponding to that found in the
treaty law of the United Nations Charter, by which the State claiming to
use the right of individual or collective self-defence must report to an
international body, empowered to determine the conformity with inter-
national law of the measures which the State is seeking to justify on that
basis. Thus Article 51 of the United Nations Charter requires that mea-
sures taken by States in exercise of this right of self-defence must be
“immediately reported” to the Security Council. As the Court has observed
above (paragraphs 178 and 188), a principle enshrined in a treaty, if
reflected in customary international law, may well be so unencumbered
with the conditions and modalities surrounding it in the treaty. Whatever
influence the Charter may have had on customary international law in
these matters, it is clear that in customary international law it is not a
condition of the lawfulness of the use of force in self-defence that a
procedure so closely dependent on the content of a treaty commitment and
of the institutions established by it, should have been followed. On the
other hand, if self-defence is advanced as a justification for measures which
would otherwise be in breach both of the principle of customary interna-
tional law and of that contained in the Charter, it is to be expected that the
conditions of the Charter should be respected. Thus for the purpose of
enquiry into the customary law position, the absence of a report may be
one of the factors indicating whether the State in question was itself
informed that it was acting in self-defence.
201. To justify certain activities involving the use of force, the United States has relied solely on the exercise of its right of collective self-defence. However the Court, having regard particularly to the non-participation of the United States in the merits phase, considers that it should enquire whether customary international law, applicable to the present dispute, may contain other rules which may exclude the unlawfulness of such activities. It does not, however, see any need to reopen the question of the conditions governing the exercise of the right of individual self-defence, which have already been examined in connection with collective self-defence. On the other hand, the Court must enquire whether there is any justification for the activities in question, to be found not in the right of collective self-defence against an armed attack, but in the right to take counter-measures in response to conduct of Nicaragua which is not alleged to constitute an armed attack. It will examine this point in connection with an analysis of the principle of non-intervention in customary international law.

* * *

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

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

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

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

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

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

207. In considering the instances of the conduct above described, the Court has to emphasize that, as was observed in the North Sea Continental Shelf cases, for a new customary rule to be formed, not only must the acts concerned “amount to a settled practice”, but they must be accompanied by the opinio juris sive necessitatis. Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is

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

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

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

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


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

* * *

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

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

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

* * *

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

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

214. On the other hand, it is true that in order to enjoy access to ports, foreign vessels possess a customary right of innocent passage in territorial waters for the purposes of entering or leaving internal waters; Article 18, paragraph 1 (b), of the United Nations Convention on the Law of the Sea of 10 December 1982, does no more than codify customary international law on this point. Since freedom of navigation is guaranteed, first in the exclusive economic zones which may exist beyond territorial waters (Art. 58 of the Convention), and secondly, beyond territorial waters and on the high seas (Art. 87), it follows that any State which enjoys a right of access to ports for its ships also enjoys all the freedom necessary for
maritime navigation. It may therefore be said that, if this right of access to
the port is hindered by the laying of mines by another State, what is
infringed is the freedom of communications and of maritime commerce. At
all events, it is certain that interference with navigation in these areas
prejudices both the sovereignty of the coastal State over its internal waters,
and the right of free access enjoyed by foreign ships.

* * *

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

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

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

“certain general and well recognized principles, namely: elementary
considerations of humanity, even more exacting in peace than in war”

* * *

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

Award

Case No. ARB/00/7, pp. 41-48, paras. 137-157
was transferred by Mr. Ali to Mr. Sajjad's account in London in February 1989. Mr. Ali then visited the President at his residence in Kabarak, and on this occasion US$500,000 in cash was left in a brown briefcase by the wall. After the meeting, Mr. Ali said that the money had been replaced by fresh corn. Mr. Ali says that he was "uncomfortable with the idea of handing over this personal donation which appeared to be a bribe." But he adds that he did not have a choice if he wanted the investment contract and that he paid "the money on behalf of the House of Perfume, treating it as part of the consideration for the agreement and documentation." Whereupon he left.

166. Under these circumstances, such as described by Mr. Ali himself, the Tribunal has no doubt that the payments made by Mr. Ali on behalf of the House of Perfume to the President and Mr. Mat as described by the Claimant, but not all to obtain the agreement, are payments that must be regarded as a bribe made in order to obtain the conclusion of the 1989 Agreement.

B – The Consequences of the Bribe

137. Kenya submits that as a matter of international public policy, as well as Kenyan and English law, the 1989 Agreement thus obtained "does not have force of Law" and that World Duty Free's claims must therefore be dismissed.

1. International Public Policy

138. The concept of public policy ("ordre public") is rooted in most, if not all legal systems. Violation of the enforcing State's public policy is grounds for refusing recognition or enforcement of foreign judgments and awards. The principle is contained in Article V.2 of the New York Convention of 10 June 1958 and Article 353 of the UNCITRAL Model Law on Foreign Awards recommended by the General Assembly on 11 December 1985. In this respect, a number of experts and authors have concluded that a narrow concept of public policy should apply to foreign awards. This narrow concept is often referred to as "international public policy.

[Continues with legal analysis and arguments]
policy” (“ordre public international”). Although this name suggests that it is in some way a supra-national principle, it is in fact no more than domestic public policy applied to foreign awards and its content and application remains subjective to each State.

139. The term “international public policy”, however, is sometimes used with another meaning, signifying an international consensus as to universal standards and accepted norms of conduct that must be applied in all fora. It has been proposed to cover that concept in referring to “transnational public policy” or “truly international public policy” (see, for example, P. Lalove – “Transnational (or Truly International) Public Policy and International Arbitration”, ICCA Congress Series n°3, 1986 p. 257; see also the report of the International Law Association on “International Commercial Arbitration on Public Policy as a Bar to Enforcement of International Arbitral Awards”, Report of the Seventieth Conference, New Delhi, 2002).

140. Domestic courts generally refer to their own international public policy. One should nonetheless mention some judgments in which reference has been made, in one way or another, to a universal conception of public policy (see, for example, the Milan Court of Appeal decision dated 4 December 1992, reported in (1997) XXII Yearbook Com. Arb. 725; the judgment of the Paris Court of Appeal in European Gas Turbines SA v. Westman International – 30 September 1993 – Revue de l’arbitrage 1994 p. 359; the decision of the Swiss Federal Tribunal in W. –v- F. and V dated 30 December 1994 (1995) Bull. ASA 217).

141. Arbitral tribunals have more often based their decisions on universal values in using various formulations such as “good morals”, “bonas mores”, “ethics of international trade” or “transnational public policy” (see Abdulhay Sayed – Corruption in International Trade and Commercial Arbitration – Kluwer Law International 2004). But it has been rightly stressed that Tribunals must be very cautious in this respect and must carefully check the objective existence of a particular transnational public policy rule in identifying it through international conventions, comparative law and arbitral awards. (See, for example, Emmanuel Gaillard – Trente ans de Lex Mercatoria – Pour une application sélective de la méthode des principes généraux de droit – Journal du droit international 1995 p. 5).

142. In this respect, the Tribunal first notes that bribery or influence peddling, as well as both active and passive corruption, are sanctioned by criminal law in most, if not all, countries. This was the case in Kenya in particular in 1989, under the Kenyan Prevention of Corruption Act of 1956, and is still the case under the Anti-Corruption and Economic Crimes Act of 2003.

143. In order to render more effective this general condemnation, a number of international conventions were concluded during the last decade. The first was adopted within the framework of the Organisation of American States on 29 March 1996.5 A convention on combating the bribery of foreign public officials in international business transactions was then concluded within the Organisation for Economic Cooperation and Development on 21 November 1997.6 It has thus far been ratified by 36 States. Afterwards, two conventions on corruption—one relating to criminal law and one dealing with civil law—were adopted by the Council of Europe on 27 January 19997 and 4 November 1999.8 The first has been supplemented by a Protocol of 15 May 2003.9 Those three instruments are in force. The first has been signed by 45 countries and ratified by 31 countries; the second has been signed by 39 countries and ratified by 25 countries.

144. The same trend can be observed in Africa: on 11 July 2003, in Maputo, Mozambique, the Heads of States and Governments of the African Union approved a Convention on Preventing and Combating Corruption10, which has been signed by 39 African States (including Kenya) and has already been ratified by 11 of these 39 States. In this Convention, the Member States of the African Union declare themselves “concerned about the negative effects of corruption and impunity on the political, economic, social and cultural stability of African States and its devastating effects on the economic and social development of the African peoples”. They “acknowledge that corruption undermines accountability and transparency in the management of public affairs as well as socio-economic development in the continent”. Article 4 of the Convention lists the acts of corruption to which it applies and covers in particular “the solicitation or acceptance, directly or indirectly, by a public official or any other person, of any

goods of monetary value or other benefit, such as a gift, favour, promise or advantage for himself or herself or for another person or entity, in exchange of any act or omission in the performance of his or her public functions. Under Article 5 of the Convention, legislative and other measures must be taken to establish such acts as offences.

11. For its part, the General Assembly of the United Nations adopted, on 16 December 1996, a Declaration against Corruption and Bribery in International Commercial Transactions. It also established an ad hoc Committee for the preparation of a convention against corruption. This convention was later finalised and was approved by the General Assembly on 31 October 2003 (Resolution 58/4). It has been signed by 140 States and has already been ratified by 46 States (including Kenya). It entered into force on 14 December 2005. It should be noted that, in this Convention, the State Parties declared themselves “concerned about the seriousness of problems and threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law”. In order “to prevent and combat corruption effectively”, each State party to the Convention must adopt a number of legislative and other measures and it must in particular establish bribery of foreign public officials as a criminal offence (Article 16).

12. It has been signed by 140 States and has already been ratified by 46 States (including Kenya). It entered into force on 14 December 2005. It should be noted that, in this Convention, the State Parties declared themselves “concerned about the seriousness of problems and threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law”. In order “to prevent and combat corruption effectively”, each State party to the Convention must adopt a number of legislative and other measures and it must in particular establish bribery of foreign public officials as a criminal offence (Article 16).

13. These various Conventions only bind State parties and do so only from the date States become parties. They deal mainly—and sometimes exclusively—with criminal law. In concluding these Conventions, States have shown their common will to fight corruption, not only through national legislation, as they did before, but also through international cooperation. In doing so, States not only reached a new stage in the fight against corruption, but also solidly confirmed their prior condemnation of it.

14. Domestic courts also had occasion to judge that bribery is contrary to public policy. They did so in most cases by referring to their own international public policy. However, there had been some cases in which Courts also referred to transnational public policy. Thus, in the European Gas Turbines v. Westman case, the French Court of Appeal of Paris ruled, on 30 September 1993, that “a contract having influence-peddling or bribery as its motives or object is, therefore, contrary to French international public policy as well as to the ethics of international business as conceived by the largest part of the members of the international community (Abdulhay Sayed – Corruption in International Trade and Commercial Arbitration – Kluwer Law International – 2004 – page 307).

148. A number of arbitral tribunals had to consider cases involving corruption. A first award which has often been commented on was rendered in Paris in 1963 by Judge Lagergren in ICC case n° 1110. In that case, Judge Lagergren had to decide whether an agreement, entered into in 1959 between an undertaking and an Argentine businessman, for the payment to that businessman of a 10% commission for an energy project also covered the sale of equipment by the same undertaking in Argentina in 1958 for a similar project. The arbitrator observed that the commissions to be paid involved enormous amounts of money. He added in para. 20 of the award that: “[a]lthough these commissions were not to be used exclusively for bribes, a very substantial part of them must have been intended for such use. Whether one is taking the point of view of good government or that of commercial ethics it is impossible to close one’s eyes to the probable destination of amounts of this magnitude, and to the destructive effect thereof on the business pattern with consequent impairment of industrial progress. Such corruption is an international evil; it is contrary to good morals and to an international public policy common to the community of nations.”

Then, after having verified that no party had, in that particular case, been enabled “to reap the fruits of his own dishonest conduct by enriching himself at the expense of the other”, Judge Lagergren concluded:

“After weighing all the evidence I am convinced that a case such as this, involving such gross violation of good morals and international public policy, can have no countenance in any court either in the Argentine or in France, or, for that matter, in any other civilised country, nor in any arbitral tribunal. Thus, jurisdiction must be declined in this case. It follows from the foregoing, that in concluding that I have no jurisdiction, guidance has been sought from general principles denying arbitrators to entertain disputes of this nature rather than from any national rules on arbitrability. Parties who ally themselves in an enterprise of the present nature must realise that they have forfeited any right to ask for assistance of the machinery of justice (national courts or arbitral tribunals) in settling their disputes.”

(See the award in [1994] Arbitration International 277, with a note by Dr. J. Gillis Weter – “Issues of Corruption before International Arbitral Tribunals: The Authentic Text and True Meaning of Judge Gunnar Lagergren’s 1963 Award in ICC Case n° 1101”).

149. Since 1968, a number of Arbitral Tribunals have had to consider other cases of alleged corruption. They either decided that corruption was not established and applied the contract (see ICC case n° 6401 – Westinghouse and Burns v. National Power Corporation – Republic of the Philippines – in Mealey’s International Arbitration Report – Vol. 7 – (1) 1992; ICC case n° 7664 – Frontier AG and Brunner Sociedade v. Thomson CSF – reported in Abdulhay Sayed – Corruption in International Trade and Commercial Arbitration – Kluwer Law International - p. 119), or that corruption was proven and refused to apply the contract, referring themselves to international or transnational public policy.

150. In ICC case n° 3916 (Loewe), which related to the payment of commissions, the arbitrator referred to Judge Lagergren’s award and added that: “[m]ême si, dans un certain pays et à une certaine époque, la corruption de fonctionnaires est une méthode généralement acceptée dans les relations d’affaires, on ne peut du point de vue d’une bonne administration ni de celui de la moralité dans les affaires, clore ses yeux devant l’effet destructif de telles pratiques nocives” (see Yves Derains – Collection of ICC Awards 1974-1985 – Kluwer 1990 – p. 507-511). The arbitrator concluded that the contract invoked was contrary to both French and Iranian international public policy and to “ce qui est considéré être la moralité dans les affaires internationales” (see Journal du droit international – 1984 – p. 934).

151. In a similar case (ICC case n° 3913) concerning a commission claimed by a British undertaking, the arbitrator also found that “[c]ette solution n’est pas seulement conforme à l’ordre public français interne, elle résulte également de la conception de l’ordre public international tel que la plupart des nations le reconnaît. Si de telles pratiques ont pu être constatées dans certains pays, il est patent, néanmoins, que la communauté internationale des affaires et la plupart des gouvernements s’opposent à toute pratique corruptive” (see Yves Derains – Collection of ICC Awards – 1974-1985 Kluwer 1990 – p. 497-498; see also Journal de droit international 1985 p. 989).

152. In Hilmarton v. OTV, ICC case n° 5622, the first Arbitral Tribunal decided “[d]e l’occurrence, il n’a toutefois pu ainsi être établi avec certitude l’existence de versements de pots-de-vin”, but that the claimant had performed its activity in violation of an Algerian law relating to international trade. The arbitrator considered that “la violation d’une telle loi s’inscrivant dans l’ordre public international doit être jugée comme contraire à la notion de bonnes moeurs de l’art. 20 al. 1 CO faisant partie de l’ordre public suisse” (Revue de l’arbitrage – 1993 n°2 – p. 334). For this reason, the arbitrator considered the commission contract “null for contrariety aux bonnes moeurs” and rejected the application (Revue de l’arbitrage – 1993 n°2 – p. 341). The Geneva Court of Justice and the Swiss Federal Tribunal did not share the arbitrator’s qualification of the Algerian law and the award was annulled. However, the Courts, the second arbitrator and the English Courts which had later knowledge of the case all admitted—in the words of the Commercial Court in London—that “a finding of fact of corrupt practices”, if established—which it was not in this particular case—“would give rise to obvious public policy considerations” (OTV v. Hilmarton [1999] 2 Lloyd’s Rep 224).

153. In ICC case n° 7047 (Westacre v. Jugoinport) which related to the implementation of a “consultancy” contract, the Arbitral Tribunal recognised that legal provisions to fight corruption and bribery are part of the “ordre public international” (Bulletin de l’Association suisse d’arbitrage 1995 p. 332). This was not denied in the subsequent proceedings with the Swiss Federal Tribunal, the Commercial Court in London and the English Court of Appeal, which in that case left the “issue of illegality by reason of corruption to be determined by the ICC Arbitration” (Westacre v. Jugoinport – [1998] 2 Lloyd’s Rep. 131).

13 Courtesy translation: “[t]his solution is not only in conformity with domestic French law, it also results from the conception of public international law such as the majority of nations understand it. If such practices could be observed in certain countries, it is nevertheless obvious that the international business community and the majority of governments oppose any corruptive practices”.

14 Courtesy translation: “morbidity in international affairs”.

15 Courtesy translation: “[i]t is only in conformity with domestic French law, it also results from the conception of public international law such as the majority of nations understand it. If such practices could be observed in certain countries, it is nevertheless obvious that the international business community and the majority of governments oppose any corruptive practices”.

16 Courtesy translation: “as such the payment of bribes could, nonetheless, not thus be established with certainty”.

17 Courtesy translation: “this is why the violation of this Law, which falls within the framework of international public policy, must be considered as contrary to the notion of morality as set forth in Art. 20(1)CO, which is part of Swiss public policy”.

18 Courtesy translation: “null and void on the ground of violation of morality”.

19 Courtesy translation: “[t]his solution is not only in conformity with domestic French law, it also results from the conception of public international law such as the majority of nations understand it. If such practices could be observed in certain countries, it is nevertheless obvious that the international business community and the majority of governments oppose any corruptive practices”.
154. In ICC case n° 7664 (Frontier AG and Brunner Societad v. Thomson CSF, the Arbitral Tribunal decided that "un contrat ayant pour cause et pour objet l'exercice d'un trafic d'influence par le versement de pots-de-vin est [...] contraire à l'ordre public international français ainsi qu'à l'éthique des affaires internationales telle que conçue par la plus grande partie des États de la communauté internationale") (Abdulhay Sayed – *Corruption in International Trade and Commercial Arbitration* – Kluwer Law International 2004 p. 307 – Note 947).

155. Finally, in ICC case n° 8891 the Arbitral Tribunal stated that: "[s]ur la base des considerations qui précèdent, le tribunal arbitral estime qu’un contrat incitant ou favorisant la corruption des fonctionnaires est contraire à l’ordre public transnational et que, si tel s’avère être l’objet du contrat de consultance, il n’a d’autre option que d’en constater la nullité" (Journal du droit international 2000 p. 1080).

156. The Tribunal notes that, in some of these cases, it was alleged that corruption is widespread either within the purchasing country or in the particular sector of activity. However, all arbitral tribunals concluded that such facts do no alter in any way the legal consequences dictated by the prohibition of corruption (see ICC case n° 1110 paras. 19-20; ICC case n° 3916, Yves Derains – *Collection of ICC awards 1974-1985* – Kluwer 1990 – p. 509; ICC case n° 8891 – *Journal du droit international* 2000 n°4 p. 1083). They recognised that in some countries or sectors of activities, corruption is a common practice without which the award of a contract is difficult—or even impossible—but they always refused to condone such practices. The present Tribunal agrees with such conclusion.

157. In light of domestic laws and international conventions relating to corruption, and in light of the decisions taken in this matter by courts and arbitral tribunals, this Tribunal is convinced that bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy. Thus, claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal.

19 Translation by Abdulhay Sayed: “a contract having influence-peddling or bribery as its motive or object is, therefore, contrary to French international policy as well as to the ethics of international business as conceived by the largest part of the members of the international community”.

20 Courtesy translation: “[o]n the basis of the preceding considerations, the Arbitral Tribunal estimates that a contract inciting or favouring the corruption of civil servants goes against the transnational public policy and that, if such proves to be the object of the consultancy contract, it has no option other than to declare its nullity”.

International Court of Justice

Reparation for Injuries Suffered in the Service of the United Nations

Advisory Opinion

*I.C.J. Reports 1949*, pp. 177-179
COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRETS,
AVIS CONSULTATIFS ET ORDONNANCES

RÉPARATION DES DOMMAGES
SUBIS AU SERVICE
DES NATIONS UNIES

AVIS CONSULTATIF DU 11 AVRIL 1949

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

REPARATION FOR INJURIES
SUFFERED IN THE SERVICE
OF THE UNITED NATIONS

ADVISORY OPINION OF APRIL 11th, 1949

Le présent avis doit être cité comme suit:
« Réparation des dommages subis au service des Nations Unies,
Avis consultatif: C. I. J. Recueil 1949, p. 174. »

This Opinion should be cited as follows:
"Reparation for injuries suffered in the service of the United Nations,
the responsible de jure or de facto government with a view to obtaining the reparation due in respect of the damage caused (a) to the United Nations, (b) to the victim or to persons entitled through him?"

It will be useful to make the following preliminary observations:

(a) The Organization of the United Nations will be referred to usually, but not invariably, as "the Organization".

(b) Questions I (a) and I (b) refer to "an international claim against the responsible de jure or de facto government". The Court understands that these questions are directed to claims against a State, and will, therefore, in this opinion, use the expression "State" or "defendant State".

(c) The Court understands the word "agent" in the most liberal sense, that is to say, any person who, whether a paid official or not, and whether permanently employed or not, has been charged by an organ of the Organization with carrying out, or helping to carry out, one of its functions—in short, any person through whom it acts.

(d) As this question assumes an injury suffered in such circumstances as to involve a State’s responsibility, it must be supposed, for the purpose of this Opinion, that the damage results from a failure by the State to perform obligations of which the purpose is to protect the agents of the Organization in the performance of their duties.

(e) The position of a defendant State which is not a member of the Organization is dealt with later, and for the present the Court will assume that the defendant State is a Member of the Organization.

* * *

The questions asked of the Court relate to the "capacity to bring an international claim"; accordingly, we must begin by defining what is meant by that capacity, and consider the characteristics of the Organization, so as to determine whether, in general, these characteristics do, or do not, include for the Organization a right to present an international claim.

Competence to bring an international claim is, for those possessing it, the capacity to resort to the customary methods recognized by international law for the establishment, the presentation and the settlement of claims. Among these methods may be mentioned protest, request for an enquiry, negotiation, and request for submission to an arbitral tribunal or to the Court in so far as this may be authorized by the Statute.

This capacity certainly belongs to the State; a State can bring an international claim against another State. Such a claim takes the form of a claim between two political entities, equal in law, similar in form, and both the direct subjects of international law. It is dealt with by means of negotiation and cannot, in the present state of the law as to international jurisdiction, be submitted to a tribunal, except with the consent of the States concerned.

When the Organization brings a claim against one of its Members, this claim will be presented in the same manner, and regulated by the same procedure. It may, when necessary, be supported by the political means at the disposal of the Organization. In these ways the Organization would find a method for securing the observance of its rights by the Member against which it has a claim.

But, in the international sphere, has the Organization such a nature as involves the capacity to bring an international claim? In order to answer this question, the Court must first enquire whether the Charter has given the Organization such a position that it possesses, in regard to its Members, rights which it is entitled to ask them to respect. In other words, does the Organization possess international personality? This is no doubt a doctrinal expression, which has sometimes given rise to controversy. But it will be used here to mean that if the Organization is recognized as having that personality, it is an entity capable of availing itself of obligations incumbent upon its Members.

To answer this question, which is not settled by the actual terms of the Charter, we must consider what characteristics it was intended thereby to give to the Organization.

The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States. This development culminated in the establishment in June 1945 of an international organization whose purposes and principles are specified in the Charter of the United Nations. But to achieve these ends the attribution of international personality is indispensable.

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 I, 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; by authorizing the General Assembly to make recommendations to the Members;
by giving the Organization legal capacity and privileges and immunities in the territory of each of its Members; and by providing for the conclusion of agreements between the Organization and its Members. Practice—in particular the conclusion of conventions to which the Organization is a party—has confirmed this character of the Organization, which occupies a position in certain respects in detachment from its Members, and which is under a duty to remind them, if need be, of certain obligations. It must be added that the Organization is a political body, charged with political tasks of an important character, and covering a wide field namely, the maintenance of international peace and security, the development of friendly relations among nations, and the achievement of international co-operation in the solution of problems of an economic, social, cultural or humanitarian character (Article 1); and in dealing with its Members it employs political means. The "Convention on the Privileges and Immunities of the United Nations" of 1946 creates rights and duties between each of the signatories and the Organization (see, in particular, Section 35). It is difficult to see how such a convention could operate except upon the international plane and as between parties possessing international personality.

In the opinion of the Court, the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane. It is not the supreme type of international organization, and it could not carry out the intentions of its founders if it was devoid of international personality. It must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged.

Accordingly, the Court has come to the conclusion that the Organization is an international person. That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State. Still less is it the same thing as saying that it is "a super-State", whatever that expression may mean. It does not even imply that all its rights and duties must be upon the international plane, any more than all the rights and duties of a State must be upon that plane. What it does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims.

The next question is whether the sum of the international rights of the Organization comprises the right to bring the kind of international claim described in the Request for this Opinion. That is a claim against a State to obtain reparation in respect of the
International Court of Justice

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

_I.C.J. Reports 2010_, pp. 436-439, paras. 78-79
ACCORDANCE WITH INTERNATIONAL LAW
OF THE UNILATERAL
DECLARATION OF INDEPENDENCE
IN RESPECT OF KOSOVO

ADVISORY OPINION OF 22 JULY 2010

Official citation:
Accordance with International Law of the Unilateral Declaration
of Independence in Respect of Kosovo, Advisory Opinion,
I.C.J. Reports 2010, p. 403

CONFORMITÉ AU DROIT INTERNATIONAL
DE LA DÉCLARATION
UNILATéRALE D’INDéPENDANCE
RELATIVE AU KOSOVO

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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 whether the circumstances which some participants maintained would give rise to a right of “remedial secession” were actually present in Kosovo.

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

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-
Declaration on Principles of International Law concerning Friendly Relations and Co-operation 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

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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

The General Assembly,

Recalling its resolutions 1815 (XVII) of 18 December 1962, 1966 (XVIII) of 16 December 1963, 2103 (XX) of 20 December 1965, 2181 (XXI) of 12 December 1966, 2327 (XXII) of 18 December 1967, 2463 (XXIII) of 20 December 1968 and 2533 (XXIV) of 8 December 1969, in which it affirmed the importance of the progressive development and codification of the principles of international law concerning friendly relations and co-operation among States,

Having considered the report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States,¹ which met in Geneva from 31 March to 1 May 1970,

Emphasizing the paramount importance of the Charter of the United Nations for the maintenance of international peace and security and for the development of friendly relations and co-operation among States,

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 on the occasion of the twenty-fifth anniversary of the United Nations would contribute to the strengthening of world peace and constitute a landmark in the development of international law and of relations among States, in promoting the rule of law among nations and particularly the universal application of the principles embodied in the Charter,

Considering the desirability of the wide dissemination of the text of the Declaration,

1. Approves the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, the text of which is annexed to the present resolution;

2. Expresses its appreciation to the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States for its work resulting in the elaboration of the Declaration;

3. Recommends that all efforts be made so that the Declaration becomes generally known.


1883rd plenary meeting, 24 October 1970.
ANNEX

DECLARATION ON PRINCIPLES OF INTERNATIONAL LAW CONCERNING FRIENDLY RELATIONS AND CO-OPERATION AMONG STATES IN ACCORDANCE WITH THE CHARTER OF THE UNITED NATIONS

PREAMBLE

The General Assembly,

Reaffirming in the terms of the Charter of the United Nations that the maintenance of international peace and security and the development of friendly relations and co-operation between nations are among the fundamental purposes of the United Nations,

Recalling that the peoples of the United Nations are determined to practise tolerance and live together in peace with one another as good neighbours,

 Bearing in mind the importance of maintaining and strengthening international peace founded upon freedom, equality, justice and respect for fundamental human rights and of developing friendly relations among nations irrespective of their political, economic and social systems or the levels of their development,

Bearing in mind also the paramount importance of the Charter of the United Nations in the promotion of the rule of law among nations,

Considering that the faithful observance of the principles of international law concerning friendly relations and co-operation among States and the fulfillment in good faith of the obligations assumed by States, in accordance with the Charter, is of the greatest importance for the maintenance of international peace and security and for the implementation of the other purposes of the United Nations,

Noting that the great political, economic and social changes and scientific progress which have taken place in the world since the adoption of the Charter give increased importance to these principles and to the need for their more effective application in the conduct of States wherever carried on,

Recalling the established principle that outer space, including the Moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means, and mindful of the fact that consideration is being given in the United Nations to the question of establishing other appropriate provisions similarly inspired,

Convinced that the strict observance by States of the obligation not to intervene in the affairs of any other State is an essential condition to ensure that nations live together in peace with one another, since the practice of any form of intervention not only violates the spirit and letter of the Charter, but also leads to the creation of situations which threaten international peace and security,

Recalling the duty of States to refrain in their international relations from military, political, economic or any other form of coercion aimed against the political independence or territorial integrity of any State,

Considering it essential that all States 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,

Considering it equally essential that all States shall settle their international disputes by peaceful means in accordance with the Charter,

Reaffirming, in accordance with the Charter, the basic importance of sovereign equality and stressing that the purposes of the United Nations can be implemented only if States enjoy sovereign equality and comply fully with the requirements of this principle in their international relations,

Convinced that the subjection of peoples to alien subjugation, domination and exploitation constitutes a major obstacle to the promotion of international peace and security,

Convinced that the principle of equal rights and self-determination of peoples constitutes a significant contribution to contemporary international law, and that its effective application is of paramount importance for the promotion of friendly relations among States, based on respect for the principle of sovereign equality,

Convinced in consequence that any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a State or country or at its political independence is incompatible with the purposes and principles of the Charter,

Considering the provisions of the Charter as a whole and taking into account the role of relevant resolutions adopted by the competent organs of the United Nations relating to the content of the principles,

Considering that the progressive development and codification of the following principles:

(a) The 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, or in any other manner inconsistent with the purposes of the United Nations,

(b) 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,

(c) The duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter,

(d) The duty of States to co-operate with one another in accordance with the Charter,

(e) The principle of equal rights and self-determination of peoples,

(f) The principle of sovereign equality of States,

(g) The principle that States shall fulfill in good faith the obligations assumed by them in accordance with the Charter, so as to secure their more effective application within the international community, would promote the realization of the purposes of the United Nations,

Having considered the principles of international law relating to friendly relations and co-operation among States,

1. Solemnly proclaims the following principles:

The 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, or in any other manner inconsistent with the purposes of the United Nations

Every State has the duty to refrain in its 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. Such a threat or use of force constitutes a violation of international law and the Charter of the United Nations and shall never be employed as a means of settling international issues.

A war of aggression constitutes a crime against the peace, for which there is responsibility under international law.

In accordance with the purposes and principles of the United Nations, States have the duty to refrain from propaganda for wars of aggression.

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

Every State likewise has the duty to refrain from the threat or use of force to violate international lines of demarcation, such as armistice lines, established by or pursuant to an international agreement to which it is a party or which it is otherwise bound to respect. Nothing in the foregoing shall be construed as prejudices the positions of the parties concerned with regard to the status and effects of such lines under their special régimes or as affecting their temporary character.

States have a duty to refrain from acts of reprisal involving the use of force.
Every State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of 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, including mercenaries, for incursion into the territory of another State.

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

The territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter. The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal. Nothing in the foregoing shall be construed as affecting:

(a) Provisions of the Charter or any international agreement prior to the Charter régime and valid under international law; or

(b) The powers of the Security Council under the Charter.

All States shall pursue in good faith negotiations for the early conclusion of a universal treaty on general and complete disarmament under effective international control and strive to adopt appropriate measures to reduce international tensions and strengthen confidence among States.

All States shall comply in good faith with their obligations under the generally recognized principles and rules of international law with respect to the maintenance of international peace and security, and shall endeavour to make the United Nations security system based on the Charter more effective.

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 shall settle its international disputes with other States by peaceful means in such a manner that international peace and security and justice are not endangered.

States shall accordingly seek early and just settlement of their international disputes by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their choice. In seeking such a settlement the parties shall agree upon such peaceful means as may be appropriate to the circumstances and nature of the dispute.

The parties to a dispute have the duty, in the event of failure to reach a solution by any one of the above peaceful means, to continue to seek a settlement of the dispute by other peaceful means agreed upon by them.

States parties to an international dispute, as well as other States, shall refrain from any action which may aggravate the situation so as to endanger the maintenance of international peace and security, and shall act in accordance with the purposes and principles of the United Nations.

International disputes shall be settled on the basis of the sovereignty equality of States and in accordance with the principle of free choice of means. Recourse to, or acceptance of, a settlement procedure freely agreed to by States with regard to existing or future disputes to which they are parties shall not be regarded as incompatible with sovereignty equality.

Nothing in the foregoing paragraphs prejudices or derogates from the applicable provisions of the Charter, in particular those relating to the Pacific settlement of international disputes.

The principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.

No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind. Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the régime of another State, or interfere in civil strife in another State.

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 affecting the relevant provisions of the Charter relating to the maintenance of international peace and security.

The duty of States to co-operate with one another in accordance with the Charter

States have the duty to co-operate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress, the general welfare of nations and international co-operation free from discrimination based on such differences.

To this end:

(a) States shall co-operate with other States in the maintenance of international peace and security;

(b) States shall co-operate in the promotion of universal respect for, and observance of, human rights and fundamental freedoms for all, and in the elimination of all forms of racial discrimination and all forms of religious intolerance;

(c) States shall conduct their international relations in the economic, social, cultural, technical and trade fields in accordance with the principles of sovereign equality and non-intervention;

(d) States Members of the United Nations have the duty to take joint and separate action in co-operation with the United Nations in accordance with the relevant provisions of the Charter.

States should co-operate in the economic, social and cultural fields as well as in the field of science and technology and for the promotion of international cultural and educational progress. States should co-operate in the promotion of economic growth throughout the world, especially that of the developing countries.

The principle of equal rights and self-determination of peoples

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.

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.

Every State has the duty to promote through joint and separate action universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter.

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.

Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.

The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the peoples of the colony or Non-Self-Governing Territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles.

Nothing in the foregoing paragraphs shall be 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 conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country.

The principle of sovereign equality of States

All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature.

In particular, sovereign equality includes the following elements:

(a) States are juridically equal;

(b) Each State enjoys the rights inherent in full sovereignty;

(c) Each State has the duty to respect the personality of other States;

(d) The territorial integrity and political independence of the State are inviolable;

(e) Each State has the right freely to choose and develop its political, social, economic and cultural systems;

(f) Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States.

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

Every State has the duty to fulfil in good faith the obligations assumed by it in accordance with the Charter of the United Nations.

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

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

Where obligations arising under international agreements are in conflict with the obligations of Members of the United Nations under the Charter of the United Nations, the obligations under the Charter shall prevail.

GENERAL PART

2. Declares that:

In their interpretation and application the above principles are interrelated and each principle should be construed in the context of the other principles.

Nothing in this Declaration shall be construed as prejudicing in any manner the provisions of the Charter or the rights and duties of Member States under the Charter or the rights of peoples under the Charter, taking into account the elaboration of these rights in this Declaration.

3. Declares further that:

The principles of the Charter which are embodied in this Declaration constitute basic principles of international law, and consequently appeals to all States to be guided by these principles in their international conduct and to develop their mutual relations on the basis of the strict observance of these principles.

2634 (XXV). Report of the International Law Commission

The General Assembly,

Having considered the report of the International Law Commission on the work of its twenty-second session,2

Emphasizing the need for the further codification and progressive development of international law in order to make it a more effective means of implementing the purposes and principles set forth in Articles 1 and 2 of the Charter of the United Nations and to give increased importance to its role in relations among nations,

Noting with satisfaction that at its twenty-second session the International Law Commission completed its provisional draft articles on relations between States and international organizations, continued the consideration of matters concerning the codification and progressive development of the international law relating to succession of States in respect of treaties and State responsibility and included in its programme of work the question of treaties concluded between States and international organizations or between two or more international organizations, as recommended by the General Assembly in resolution 2501 (XXIV) of 12 November 1969,

Noting further that the International Law Commission has proposed to hold a fourteen-week session in 1971 in order to enable it to complete the second reading of the draft articles on relations between States

2 Ibid., Supplement No. 10 (A/8010/Rev.1).
Rio Declaration on Environment and Development

A/CONF.151/26/Rev.1, vol. 1, 3-14 June 1992
Annex I

RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT

The United Nations Conference on Environment and Development,

Having met at Rio de Janeiro from 3 to 14 June 1992,

Renaffirming the Declaration of the United Nations Conference on the Human Environment, adopted at Stockholm on 16 June 1972, a/ and seeking to build upon it,

With the goal of establishing a new and equitable global partnership through the creation of new levels of cooperation among States, key sectors of societies and people,

Working towards international agreements which respect the interests of all and protect the integrity of the global environmental and developmental system,

Recognizing the integral and interdependent nature of the Earth, our home,

Proclaims that:

Principle 1

Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.

Principle 2

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

Principle 3

The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.

Principle 4

In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.

Principle 5

All States and all people shall cooperate in the essential task of eradicating poverty as an indispensable requirement for sustainable development, in order to decrease the disparities in standards of living and better meet the needs of the majority of the people of the world.

Principle 6

The special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable, shall be given special priority. International actions in the field of environment and development should also address the interests and needs of all countries.

Principle 7

States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth’s ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.

Principle 8

To achieve sustainable development and a higher quality of life for all people, States should reduce and eliminate unsustainable patterns of production and consumption and promote appropriate demographic policies.

Principle 9

States should cooperate to strengthen endogenous capacity-building for sustainable development by improving scientific understanding through exchanges of scientific and technological knowledge, and by enhancing the development, adaptation, diffusion and transfer of technologies, including new and innovative technologies.

Principle 10

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

Principle 11

States shall enact effective environmental legislation. Environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries.

Principle 12

States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation. Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus.

Principle 13

States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.

Principle 14

States should effectively cooperate to discourage or prevent the relocation and transfer to other States of any activities and substances that cause severe environmental degradation or are found to be harmful to human health.

Principle 15

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

Principle 16

National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.

Principle 17

Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.

Principle 18

States shall immediately notify other States of any natural disasters or other emergencies that are likely to produce sudden harmful effects on the environment of those States. Every effort shall be made by the international community to help States so afflicted.

Principle 19

States shall provide prompt and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith.
Principle 20

Women have a vital role in environmental management and development. Their full participation is therefore essential to achieve sustainable development.

Principle 21

The creativity, ideals and courage of the youth of the world should be mobilised to forge a global partnership in order to achieve sustainable development and ensure a better future for all.

Principle 22

Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognise and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.

Principle 23

The environment and natural resources of people under oppression, domination and occupation shall be protected.

Principle 24

Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary.

Principle 25

Peace, development and environmental protection are interdependent and indivisible.

Principle 26

States shall resolve all their environmental disputes peacefully and by appropriate means in accordance with the Charter of the United Nations.

Principle 27

States and people shall cooperate in good faith and in a spirit of partnership in the fulfilment of the principles embodied in this Declaration and in the further development of international law in the field of sustainable development.
International Court of Justice

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory
Advisory Opinion

*I.C.J. Reports* 2004, pp. 171-181, paras. 86-113
CONSÉQUENCES JURIDIQUES
DE L'ÉDIFICATION D'UN MUR
DANS LE TERRITOIRE PALESTINIEN OCCUPLÉ

AVIS CONSULTATIF DU 9 JUILLET 2004

2004

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

LEGAL CONSEQUENCES
OF THE CONSTRUCTION OF A WALL
IN THE OCCUPIED PALESTINIAN TERRITORY

ADVISORY OPINION OF 9 JULY 2004

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ADVISORY OPINION

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 reafirms 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. 53-54). The Court has referred to this principle on a number of occasions in its jurisdiction (ibid.; see also Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 110, 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).

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 4 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 I 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 depository — in a position to decide whether” “the request [dated 14 June 1989] from the Palestinian 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 peace-time, 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 the 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. 1059, para. 18, and Sovereignty over Paluq Liggian and Palau Sipadan (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 satisfied, 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 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 1949. 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, in many of its resolutions, took 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, 44 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 enquiry 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, on 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 peacetime, 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 (I), 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, Lilian Celiberti de Casariego v. Uruguay). It decided to the same effect in the case of the confiscation of an passport by a Uruguayan consulate in Germany (case No. 100/81, 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/74/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
ambiguous 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/C/78/1SR, 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 it 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 1998, 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/I/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
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it appear that this is one of the most important functions which it
can fulfil. It has, in fact, already had occasion to do so in Judgment No. 3.

Article 59 of the Statute, which has been cited by Poland, does
not exclude purely declaratory judgments. The object of this
article is simply to prevent legal principles accepted by the Court
in a particular case from being binding upon other States or in
other disputes. It should also be noted that the possibility of a
judgment having a purely declaratory effect has been foreseen in
Article 63 of the Statute, as well as in Article 36 already mentioned.

It might be asked whether a difficulty does not arise from the fact
that the Court would have to deal with the Polish law of July 14th,
1920. This, however, does not appear to be the case. From the
standpoint of International Law and of the Court which is its organ,
municipal laws are merely facts which express the will and constitute
the activities of States, in the same manner as do legal decisions or
administrative measures. The Court is certainly not called upon
to interpret the Polish law as such; but there is nothing to prevent
the Court's giving judgment on the question whether or not, in
applying that law, Poland is acting in conformity with its obligations
towards Germany under the Geneva Convention.

For the foregoing reasons the Court reserves submission No. 1
of the German Government for judgment on the merits.

* * *

Before proceeding to consider this submission upon its merits,
the Court finds it necessary to define what, in its opinion, is its real
import.

In the form finally adopted, submission No. 1, which is based on a
particular understanding of the nature of the measures permitted
or prohibited under Articles 6 to 22 of the Geneva Convention,
appears to be naturally sub-divided into two hypotheses, the first
of which concerns measures called by the Applicant "authorized
liquidation", whilst the second concerns so-called "unauthorized"
liquidation. The two parts of the submission, regarded in this way,
contain, however, a common feature: namely, the alleged incompatibility of Articles 2 and 5 of the law of July 14th, 1920, with
the whole or a portion of the provisions of Articles 6 to 22 of the
Geneva Convention. For, according to his first hypothesis, the
London Court of International Arbitration

EnCana Corporation v. Republic of Ecuador, LCIA Award

Case No. UN 3481, 3 February 2006, p. 53, para. 184
cancellation of the State’s liability to pay money on account of tax refunds due would fall within the Tribunal’s jurisdiction by virtue of Articles XII(4) and XIII(1) of the BIT.

184. The second preliminary question concerns the applicable law. The relevant clause, Article XIII(7) of the BIT, provides only a tribunal exercising jurisdiction under the BIT “shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law”. Unlike many BITs there is no express reference to the law of the host State. However for there to have been an expropriation of an investment or return (in a situation involving legal rights or claims as distinct from the seizure of physical assets) the rights affected must exist under the law which creates them. in this case, the law of Ecuador. The effect of the opening words of Article XII(4) is to permit this Tribunal to determine and apply the taxation law of Ecuador to the extent that it is necessary to do so in order to deal with a claim under Article VIII.

185. The right to tax refunds under Ecuadorian law has to be considered in relation to the period before and after the Interpretative Law of 2004. Although the Denying Resolutions related to trading periods well before 2004, the remedies sought by EnCana in its Statement of Claim covered VAT refunds in respect of periods after the Law was enacted, at least so far as AEC is concerned.

186. It is convenient to deal first with VAT refunds relating to transactions occurring after the adoption of the Interpretative Law—and leaving aside for the moment the circumstances of the effective closure of the courts (see above, paragraphs 100-106). The Claimant adduced some evidence that the Interpretative Law is unconstitutional, but no steps have been taken to contest its constitutionality in the manner provided for under the Political Constitution of Ecuador, and at least it must be presumed to be constitutional. It has been treated as valid and applied by at least one Ecuadorian court.

187. For the reasons given in paragraphs 177 and 183, it is for Ecuador to determine for the future the regime of its tax law, taking into account its international obligations including under Andean Community Law. From the Tribunal’s perspective, unless and until action is successfully taken to annul the Interpretative Law on constitutional grounds or to bring it into line with what are said to be the obligations of Ecuador within the Andean Community, that Law must be taken to define the extent to which oil companies are entitled to VAT refunds in respect of the acquisition of goods and services. As things stand no question of expropriation can arise in respect of the period after the passage of the Interpretative Law.

188. The position is different with respect to the period before 2004, and in particular for the periods covered by the Denying Resolutions. Here there are two questions: (a) did the EnCana subsidiaries have a right under Ecuadorian law to VAT refunds in respect of purchases of goods and services during these periods? And if so: (b) was that right expropriated by Ecuador?

189. As to the first question, the Occidental tribunal held that such a right did exist, following analysis of the relevant legislation and cases.\textsuperscript{129} Although this decision is not

\textsuperscript{129} Occidental Award, §§75, 77.
International Court of Justice

Lagrand Case (Germany v. USA)
Judgment

_I.C.J. Reports 2001_, pp. 485-486, 495-498 and 506-508,
paras. 50-52, 79-91 and 110-116
Germany asserts also that its fourth submission arises under principles of State responsibility, according to which Germany is entitled to a "whole range of remedies" as a consequence of the particular violations alleged in this case and that these questions of State responsibility "are clearly within the ambit of the Optional Protocol".

48. The Court considers that a dispute regarding the appropriate remedies for the violation of the Convention alleged by Germany is a dispute that arises out of the interpretation or application of the Convention and thus is within the Court's jurisdiction. Where jurisdiction exists over a dispute on a particular matter, no separate basis for jurisdiction is required by the Court to consider the remedies a party has requested for the breach of the obligation (Factory at Chorzow, P.C.I.J., Series A, No. 9, p. 22). Consequently, the Court has jurisdiction in the present case with respect to the fourth submission of Germany.

* * *

49. The United States has argued that the submissions of Germany are inadmissible on various grounds. The Court will consider these objections in the order presented by the United States.

* * *

50. The United States objects first to Germany's second, third and fourth submissions. According to the United States, these submissions are inadmissible because Germany seeks to have this Court "play the role of ultimate court of appeal in national criminal proceedings", a role which it is not empowered to perform. The United States maintains that many of Germany's arguments, in particular those regarding the rule of "procedural default", ask the Court "to address and correct... asserted violations of US law and errors of judgment by US judges" in criminal proceedings in national courts.

51. Germany denies that it requests the Court to act as an appellate criminal court, or that Germany's requests are in any way aimed at interfering with the administration of justice within the United States judicial system. It maintains that it is merely asking the Court to adjudge and declare that the conduct of the United States was inconsistent with its international legal obligations towards Germany under the Vienna Convention, and to draw from this failure certain legal consequences provided for in the international law of State responsibility.

52. The Court does not agree with these arguments of the United
States concerning the admissibility of the second, third and fourth German submissions. In the second submission, Germany asks the Court to interpret the scope of Article 36, paragraph 2, of the Vienna Convention; the third submission seeks a finding that the United States violated an Order issued by this Court pursuant to Article 41 of its Statute; and in Germany’s fourth submission, the Court is asked to determine the applicable remedies for the alleged violations of the Convention. Although Germany deals extensively with the practice of American courts as it bears on the application of the Convention, all three submissions seek to require the Court to do no more than apply the relevant rules of international law to the issues in dispute between the Parties to this case. The exercise of this function, expressly mandated by Article 38 of its Statute, does not convert this Court into a court of appeal of national criminal proceedings.

53. The United States also argues that Germany’s third submission is inadmissible because of the manner in which these proceedings were brought before the Court by Germany. It notes that German consular officials became aware of the LaGrands’ cases in 1992, but that the German Government did not express concern or protest to the United States authorities for some six and a half years. It maintains that the issue of the absence of consular notification was not raised by Germany until 22 February 1999, two days before the date scheduled for Karl LaGrand’s execution, in a letter from the German Foreign Minister to the Secretary of State of the United States (see paragraph 26 above). Germany then filed the Application instituting these proceedings, together with a request for provisional measures, after normal business hours in the Registry in the evening of 2 March 1999, some 27 hours before the execution of Walter LaGrand (see paragraph 30 above).

54. The United States rejects the contention that Germany found out only seven days before the filing of its Application that the authorities of Arizona knew as early as 1982 that the LaGrands were German nationals; according to the United States, their German nationality was referred to in pre-sentence reports prepared in 1984, which should have been familiar to German consular officers much earlier than 1999, given Germany’s claims regarding the vigour and effectiveness of its consular assistance.

55. According to the United States, Germany’s late filing compelled the Court to respond to its request for provisional measures by acting ex parte, without full information. The United States claims that the procedure followed was inconsistent with the principles of “equality of the

79. The Court will now consider Germany’s second submission, in which it asks the Court to adjudge and declare:

“that the United States, by applying rules of its domestic law, in particular the doctrine of procedural default, which barred Karl and Walter LaGrand from raising their claims under the Vienna Convention on Consular Relations, and by ultimately executing them, violated its international legal obligation to Germany under Article 36 paragraph 2 of the Vienna Convention to give full effect to the purposes for which the rights accorded under Article 36 of the said Convention are intended”.

80. Germany argues that, under Article 36, paragraph 2, of the Vienna Convention

“the United States is under an obligation to ensure that its municipal laws and regulations . . . enable full effect to be given to the purposes for which the rights accorded under this article are intended” and that it is in breach of this obligation by upholding rules of domestic law which make it impossible to successfully raise a violation of the right to consular notification in proceedings subsequent to a conviction of a defendant by a jury”.

81. Germany points out that the “procedural default” rule is among the rules of United States domestic law whose application make it impossible to invoke a breach of the notification requirement. According to Germany, this rule “is closely connected with the division of labour between federal and state jurisdiction in the United States . . . [where] [c]riminal jurisdiction belongs to the states except in cases provided for in the Constitution”. This rule, Germany explains, requires “exhaustion of remedies at the state level before a habeas corpus motion can be filed with federal Courts”.

Germany emphasizes that it is not the “procedural default” rule as such that is at issue in the present proceedings, but the manner in which it was applied in that it “deprived the brothers of the possibility to raise the violations of their right to consular notification in US criminal proceedings”.

82. Furthermore, having examined the relevant United States jurisprudence, Germany contends that the procedural default rule had “made it impossible for the LaGrand brothers to effectively raise the issue of the lack of consular notification after they had at last learned of their rights and established contact with the German consulate in Los Angeles in 1992”.

33
83. Finally, Germany states that it seeks

"[n]othing . . . more than compliance, or, at least, a system in place which does not automatically reproduce violation after violation of the Vienna Convention, only interrupted by the apologies of the United States Government."

84. The United States objects to Germany's second submission, since it considers that "Germany's position goes far beyond the wording of the Convention, the intentions of the parties when it was negotiated, and the practice of States, including Germany's practice".

85. In the view of the United States:

"[t]he Vienna Convention does not require States Party to create a national law remedy permitting individuals to assert claims involving the Convention in criminal proceedings. If there is no such requirement, it cannot violate the Convention to require that efforts to assert such claims be presented to the first court capable of adjudicating them."

According to the United States,

"[i]f there is no obligation under the Convention to create such individual remedies in criminal proceedings, the rule of procedural default — requiring that claims seeking such remedies be asserted at an appropriately early stage — cannot violate the Convention."

86. The United States believes that Article 36, paragraph 2, "has a very clear meaning" and

"means, as it says, that the rights referred to in paragraph 1 shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso that said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under the Article are intended."

In the view of the United States,

"[i]n the context of a foreign national in detention, the relevant laws and regulations contemplated by Article 36 (2) are those that may affect the exercise of specific rights under Article 36 (1), such as those addressing the timing of communications, visiting hours, and security in a detention facility. There is no suggestion in the text of Article 36 (2) that the rules of criminal law and procedure under which a defendant would be tried or have his conviction and sentence reviewed by appellate courts are also within the scope of this provision."

87. The United States concludes that Germany's second submission must be rejected "because it is premised on a misinterpretation of Article 36, paragraph 2, which reads the context of the provision — the exercise of a right under paragraph 1 — out of existence."

88. Article 36, paragraph 2, of the Vienna Convention reads as follows:

"The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended."

89. The Court cannot accept the argument of the United States which proceeds, in part, on the assumption that paragraph 2 of Article 36 applies only to the rights of the sending State and not also to those of the detained individual. The Court has already determined that Article 36, paragraph 1, creates individual rights for the detained person in addition to the rights accorded the sending State, and that consequently the reference to "rights" in paragraph 2 must be read as applying not only to the rights of the sending State, but also to the rights of the detained individual (see paragraph 77 above).

90. Turning now to the "procedural default" rule, the application of which in the present case Germany alleges violated Article 36, paragraph 2, the Court emphasizes that a distinction must be drawn between that rule as such and its specific application in the present case. In itself, the rule does not violate Article 36 of the Vienna Convention. The problem arises when the procedural default rule does not allow the detained individual to challenge a conviction and sentence by claiming, in reliance on Article 36, paragraph 1, of the Convention, that the competent national authorities failed to comply with their obligation to provide the requisite consular information "without delay", thus preventing the person from seeking and obtaining consular assistance from the sending State.

91. In this case, Germany had the right at the request of the LaGrands "to arrange for [their] legal representation" and was eventually able to provide some assistance to that effect. By that time, however, because of the failure of the American authorities to comply with their obligation under Article 36, paragraph 1 (b), the procedural default rule prevented counsel for the LaGrands to effectively challenge their convictions and sentences other than on United States constitutional grounds. As a result, although United States courts could and did examine the professional competence of counsel assigned to the indigent LaGrands by reference to United States constitutional standards, the procedural default rule prevented them from attaching any legal significance to the fact, inter alia, that the violation of the rights set forth in Article 36, paragraph 1, prevented Germany, in a timely fashion, from retaining private counsel for
them and otherwise assisting in their defence as provided for by the Convention. Under these circumstances, the procedural default rule had the effect of preventing “full effect [from being] given to the purposes for which the rights accorded under this article are intended”, and thus violated paragraph 2 of Article 36.

* * *

92. The Court will now consider Germany’s third submission, in which it asks the Court to adjudge and declare:

“that the United States, by failing to take all measures at its disposal to ensure that Walter LaGrand was not executed pending the final decision of the International Court of Justice on the matter, violated its international legal obligation to comply with the Order on provisional measures issued by the Court on 3 March 1999, and to refrain from any action which might interfere with the subject matter of a dispute while judicial proceedings are pending”.

93. In its Memorial, Germany contended that “[p]rovisional measures indicated by the International Court of Justice [were] binding by virtue of the law of the United Nations Charter and the Statute of the Court”. In support of its position, Germany developed a number of arguments in which it referred to the “principle of effectiveness”, to the “procedural prerequisites” for the adoption of provisional measures, to the binding nature of provisional measures as a “necessary consequence of the bindingness of the final decision”, to “Article 94 (1), of the United Nations Charter”, to “Article 41 (1), of the Statute of the Court” and to the “practice of the Court”.

Referring to the duty of the “parties to a dispute before the Court . . . to preserve its subject-matter”, Germany added that:

“[a]part from having violated its duties under Art. 94 (1) of the United Nations Charter and Art. 41 (1) of the Statute, the United States has also violated the obligation to refrain from any action which might interfere with the subject-matter of a dispute while judicial proceedings are pending”.

At the hearings, Germany further stated the following:

“A judgment by the Court on jurisdiction or merits cannot be treated on exactly the same footing as a provisional measure . . . Article 59 and Article 60 of the Statute do not apply to provisional measures or, to be more exact, apply to them only by implication; that is to say, to the extent that such measures, being both incidental

* * *

109. In short, it is clear that none of the sources of interpretation referred to in the relevant Articles of the Vienna Convention on the Law of Treaties, including the preparatory work, contradict the conclusions drawn from the terms of Article 41 read in their context and in the light of the object and purpose of the Statute. Thus, the Court has reached the conclusion that orders on provisional measures under Article 41 have binding effect.

* * *

110. The Court will now consider the Order of 3 March 1999. This Order was not a mere exhortation. It had been adopted pursuant to Article 41 of the Statute. This Order was consequently binding in character and created a legal obligation for the United States.

* * *

111. As regards the question whether the United States has complied with the obligation incumbent upon it as a result of the Order of 3 March 1999, the Court observes that the Order indicated two provisional measures, the first of which states that

“[t]he United States of America should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order”.

The second measure required the Government of the United States to
transmit this Order to the Governor of the State of Arizona”. The information required on the measures taken in implementation of this Order was given to the Court by a letter of 8 March 1999 from the Legal Counselor of the United States Embassy at The Hague. According to this letter, on 3 March 1999 the State Department had transmitted to the Governor of Arizona a copy of the Court’s Order. “In view of the extremely late hour of the receipt of the Court’s Order”, the letter of 8 March went on to say, “no further steps were feasible”.

The United States authorities have thus limited themselves to the mere transmission of the text of the Order to the Governor of Arizona. This certainly met the requirement of the second of the two measures indicated. As to the first measure, the Court notes that it did not create an obligation of result, but that the United States was asked to “take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings”. The Court agrees that due to the extremely late presentation of the request for provisional measures, there was certainly very little time for the United States authorities to act.

112. The Court observes, nevertheless, that the mere transmission of its Order to the Governor of Arizona without any comment, particularly without even so much as a plea for a temporary stay and an explanation that there is no general agreement on the position of the United States that orders of the International Court of Justice on provisional measures are non-binding, was certainly less than could have been done even in the short time available. The same is true of the United States Solicitor General’s categorical statement in his brief letter to the United States Supreme Court that “an order of the International Court of Justice indicating provisional measures is not binding and does not furnish a basis for judicial relief” (see paragraph 33 above). This statement went substantially further than the amicus brief referred to in a mere footnote in his letter, which was filed on behalf of the United States in earlier proceedings before the United States Supreme Court in the case of Angel Francisco Breard (see Breard v. Greene, United States Supreme Court, 14 April 1998, International Legal Materials, Vol. 37 (1998), p. 824; Memorial of Germany, Ann. 34). In that amicus brief, the same Solicitor General had declared less than a year earlier that “there is substantial disagreement among jurists as to whether an ICJ order indicating provisional measures is binding . . . The better reasoned position is that such an order is not binding.”

113. It is also noteworthy that the Governor of Arizona, to whom the Court’s Order had been transmitted, decided not to give effect to it, even though the Arizona Clemency Board had recommended a stay of execution for Walter LaGrand.

114. Finally, the United States Supreme Court rejected a separate application by Germany for a stay of execution, “[g]iven the tardiness of the plea and the jurisdictional barriers they implicate”. Yet it would have been open to the Supreme Court, as one of its members urged, to grant a preliminary stay, which would have given it “time to consider, after briefing from all interested parties, the jurisdictional and international legal issues involved . . .” (Federal Republic of Germany et al. v. United States et al., United States Supreme Court, 3 March 1999).

115. The review of the above steps taken by the authorities of the United States with regard to the Order of the International Court of Justice of 3 March 1999 indicates that the various competent United States authorities failed to take all the steps they could have taken to give effect to the Court’s Order. The Order did not require the United States to exercise powers it did not have; but it did impose the obligation to “take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings . . .”. The Court finds that the United States did not discharge this obligation.

Under these circumstances the Court concludes that the United States has not complied with the Order of 3 March 1999.

116. The Court observes finally that in the third submission Germany requests the Court to adjudge and declare only that the United States violated its international legal obligation to comply with the Order of 3 March 1999; it contains no other request regarding that violation. Moreover, the Court points out that the United States was under great time pressure in this case, due to the circumstances in which Germany had instituted the proceedings. The Court notes moreover that at the time when the United States authorities took their decision the question of the binding character of orders indicating provisional measures had been extensively discussed in the literature, but had not been settled by its jurisprudence. The Court would have taken these factors into consideration had Germany’s submission included a claim for indemnification.

* * *

117. Finally, the Court will consider Germany’s fourth submission, in which it asks the Court to adjudge and declare “that the United States shall provide Germany an assurance that it will not repeat its unlawful acts and that, in any future cases of detention or criminal proceedings against German nationals, the United States will ensure in law and practice the effective exercise of
International Court of Justice

Barcelona Traction, Light and Power Company Limited
(Belgium v. Spain)
Judgment

*I.C.J. Reports 1970*, p. 32, paras. 33-34
1970

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS, ADVISORY OPINIONS AND ORDERS

CASE CONCERNING
THE BARCELONA TRACTION, LIGHT AND POWER COMPANY, LIMITED
(NEW APPLICATION: 1962)
(BELGIUM v. SPAIN)
SECOND PHASE
JUDGMENT OF 5 FEBRUARY 1970
32. In these circumstances it is logical that the Court should first address itself to what was originally presented as the subject-matter of the third preliminary objection: namely the question of the right of Belgium to exercise diplomatic protection of Belgian shareholders in a company which is a juristic entity incorporated in Canada, the measures complained of having been taken in relation not to any Belgian national but to the company itself.

33. When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.

34. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23); others are conferred by international instruments of a universal or quasi-universal character.

35. Obligations the performance of which is the subject of diplomatic protection are not of the same category. It cannot be held, when one such obligation in particular is in question, in a specific case, that all States have a legal interest in its observance. In order to bring a claim in respect of the breach of such an obligation, a State must first establish its right to do so, for the rules on the subject rest on two suppositions:

"The first is that the defendant State has broken an obligation towards the national State in respect of its nationals. The second is that only the party to whom an international obligation is due can bring a claim in respect of its breach." (*Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, pp. 181-182.)

In the present case it is therefore essential to establish whether the losses allegedly suffered by Belgian shareholders in Barcelona Traction were the consequence of the violation of obligations of which they were the beneficiaries. In other words: has a right of Belgium been violated on account
International Court of Justice

Jurisdictional Immunities of the State
(Germany v. Italy: Greece Intervening)
Judgment

I.C.J. Reports 2012, pp. 140-142, paras. 92-97
INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

JURISDICTIONAL IMMUNITIES
OF THE STATE
(GERMANY v. ITALY: GREECE intervening)

JUDGMENT OF 3 FEBRUARY 2012

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B. The relationship between jus cogens and the rule of State immunity

92. The Court now turns to the second strand in Italy’s argument, which emphasizes the *jus cogens* status of the rules which were violated by Germany during the period 1943-1945. This strand of the argument rests on the premise that there is a conflict between *jus cogens* rules forming part of the law of armed conflict and according immunity to Germany. Since *jus cogens* rules always prevail over any inconsistent rule of international law, whether contained in a treaty or in customary international law, so the argument runs, and since the rule which accords one State immunity before the courts of another does not have the status of *jus cogens*, the rule of immunity must give way.

93. This argument therefore depends upon the existence of a conflict between a rule, or rules, of *jus cogens*, and the rule of customary law which requires one State to accord immunity to another. In the opinion of the Court, however, no such conflict exists. Assuming for this purpose that the rules of the law of armed conflict which prohibit the murder of civilians in occupied territory, the deportation of civilian inhabitants to slave labour and the deportation of prisoners of war to slave labour are *jus cogens* rules, there is no conflict between those rules and the rules on State immunity. The two sets of rules address different matters. The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful. That is why the application of the contemporary law of State immunity to proceedings concerning events which occurred in 1943-1945 does not infringe the principle that law should not be applied retrospectively to determine matters of legality and responsibility (as the Court has explained in paragraph 58 above). For the same reason, recognizing the immunity of a foreign State in accordance with customary international law does not amount to recognizing as lawful a situation created by the breach of a *jus cogens* rule, or rendering aid and assistance in maintaining that situation, and so cannot contravene the principle in Article 41 of the International Law Commission’s Articles on State Responsibility.

94. In the present case, the violation of the rules prohibiting murder, deportation and slave labour took place in the period 1943-1945. The illegality of these acts is openly acknowledged by all concerned. The application of rules of State immunity to determine whether or not the Italian courts have jurisdiction to hear claims arising out of those violations cannot involve any conflict with the rules which were violated. Nor is the argument strengthened by focusing upon the duty of the wrongdoing State to make reparation, rather than upon the original wrongful act. The duty to make reparation is a rule which exists independently of those rules which concern the means by which it is to be effected. The law of
State immunity concerns only the latter; a decision that a foreign State is immune no more conflicts with the duty to make reparation than it does with the rule prohibiting the original wrongful act. Moreover, against the background of a century of practice in which almost every peace treaty or post-war settlement has involved either a decision not to require the payment of reparations or the use of lump sum settlements and set-offs, it is difficult to see that international law contains a rule requiring the payment of full compensation to each and every individual victim as a rule accepted by the international community of States as a whole as one from which no derogation is permitted.

95. To the extent that it is argued that no rule which is not of the status of jus cogens may be applied if to do so would hinder the enforcement of a jus cogens rule, even in the absence of a direct conflict, the Court sees no basis for such a proposition. A jus cogens rule is one from which no derogation is permitted but the rules which determine the scope and extent of jurisdiction and when that jurisdiction may be exercised do not derogate from those substantive rules which possess jus cogens status, nor is there anything inherent in the concept of jus cogens which would require their modification or would displace their application. The Court has taken that approach in two cases, notwithstanding that the effect was that a means by which a jus cogens rule might be enforced was rendered unavailable. In Armed Activities, it held that the fact that a rule has the status of jus cogens does not confer upon the Court a jurisdiction which it would not otherwise possess (Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006, p. 32, para. 64, and p. 52, para. 125). In Arrest Warrant, the Court held, albeit without express reference to the concept of jus cogens, that the fact that a Minister for Foreign Affairs was accused of criminal violations of rules which undoubtedly possess the character of jus cogens did not deprive the Democratic Republic of the Congo of the entitlement which it possessed as a matter of customary international law to demand immunity on his behalf (Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 24, para. 58, and p. 33, para. 78). The Court considers that the same reasoning is applicable to the application of the customary international law regarding the immunity of one State from proceedings in the courts of another.

96. In addition, this argument about the effect of jus cogens displacing the law of State immunity has been rejected by the national courts of the United Kingdom (Jones v. Saudi Arabia, House of Lords, [2007] 1 AC 270; ILR, Vol. 129, p. 629), Canada (Bouzari v. Islamic Republic of Iran, Court of Appeal of Ontario, DLR, 4th Series, Vol. 243, p. 406; ILR, Vol. 128, p. 586), Poland (Natoniewski, Supreme Court, Polish Yearbook of International Law, Vol. XXX, 2010, p. 299), Slovenia (case No. Up-13/99, Constitutional Court of Slovenia), New Zealand (Fong v. Jiang, High Court, [2007] NZAR, p. 420; ILR, Vol. 141, p. 702) and Greece (Margel-los, Special Supreme Court, ILR, Vol. 129, p. 525), as well as by the European Court of Human Rights in Al-Adsani v. United Kingdom and Kalogeropoulou and Others v. Greece and Germany (which are discussed in paragraph 90 above), in each case after careful consideration. The Court does not consider the judgment of the French Cour de cassation of 9 March 2011 in La Réunion aérienne v. Libyen Arab Jamahiriya (case No. 09-14743, 9 March 2011, Bull. civ., March 2011, No. 49, p. 49) as supporting a different conclusion. The Cour de cassation in that case stated only that, even if a jus cogens norm could constitute a legitimate restriction on State immunity, such a restriction could not be justified on the facts of that case. It follows, therefore, that the judgments of the Italian courts which are the subject of the present proceedings are the only decisions of national courts to have accepted the reasoning on which this part of Italy’s second argument is based. Moreover, none of the national legislation on State immunity considered in paragraphs 70-71 above, has limited immunity in cases where violations of jus cogens are alleged.

97. Accordingly, the Court concludes that even on the assumption that the proceedings in the Italian courts involved violations of jus cogens rules, the applicability of the customary international law on State immunity was not affected.

C. The “last resort” argument

98. The third and final strand of the Italian argument is that the Italian courts were justified in denying Germany the immunity to which it would otherwise have been entitled, because all other attempts to secure compensation for the various groups of victims involved in the Italian proceedings had failed. Germany’s response is that in the aftermath of the Second World War it made considerable financial and other sacrifices by way of reparation in the context of a complex series of inter-State arrangements under which, reflecting the economic realities of the time, no Allied State received compensation for the full extent of the losses which its people had suffered. It also points to the payments which it made to Italy under the terms of the two 1961 Agreements and to the payments made more recently under the 2000 Federal Law to various Italians who had been unlawfully deported to forced labour in Germany. Italy maintains, however, that large numbers of Italian victims were nevertheless left without any compensation.

99. The Court notes that Germany has taken significant steps to ensure
European Court of Justice

Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities

Judgment of 3 September 2008 [Grand Chamber]

Joined cases C-402/05 P and C-415/05 P, pp. 11-20, 39-45, paras. 73-106, 278-330
competition in the internal market is not distorted (Article 3(1)(g) EC) be validly relied on, for in any event the elements presented to the Court of First Instance provided no grounds for considering that the contested regulation actually helps to avoid the risk of impediments to the free movement of capital or of appreciable distortion of competition.

The Court of First Instance held, thirdly, that the Council was competent to adopt the contested regulation which sets in motion in the Community the economic and financial sanctions provided for by Common Position 2002/402, on the joint basis of Articles 60 EC, 301 EC and 308 EC (Kadi, paragraph 135, and Yusuf and Al Barakaat, paragraph 170).

On this point, the Court of First Instance considered that account had to be taken of the bridge, explicitly established at the time of the revision caused by the Maastricht Treaty, between Community actions imposing economic sanctions under Articles 60 EC and 301 EC and the objectives of the Treaty on European Union in the sphere of external relations (Kadi, paragraph 123, and Yusuf and Al Barakaat, paragraph 159).

According to the Court of First Instance, Articles 60 EC and 301 EC are wholly special provisions of the EC Treaty, in that they expressly contemplate situations in which action by the Community may prove to be necessary in order to achieve not one of the objectives of the Community as fixed by the EC Treaty but rather one of the objectives specifically assigned to the European Union by Article 2 EU, namely, the implementation of a common foreign and security policy (‘CFSP’) (Kadi, paragraph 124, and Yusuf and Al Barakaat, paragraph 160).

Under Articles 60 EC and 301 EC, action by the Community is in actual fact, according to the Court of First Instance, action by the Union, the implementation of which finds its basis in the Community pillar after the Council has adopted a common position or a joint action under the CFSP (Kadi, paragraph 125, and Yusuf and Al Barakaat, paragraph 161).

Observance of Article 249 EC

In Yusuf and Al Barakaat, the Court of First Instance then went on to examine a plea raised only in the case giving rise to that judgment, alleging that the contested regulation, in so far as it directly prejudiced the rights of individuals and prescribed the imposition of individual sanctions, had no general application and therefore contravened Article 249 EC. That regulation could not, as a result, be understood to be a regulation, but rather a bundle of individual decisions.

In paragraphs 184 to 188 of that judgment the Court of First Instance rejected that plea.

In paragraph 186 of that judgment, it held that the contested regulation unarguably had general application within the meaning of the second paragraph of Article 249 EC, since it prohibits anyone to make available funds or economic resources to certain persons.

The Court of First Instance added that the fact that those persons are expressly named in Annex I to the regulation, so that they appear to be directly and individually concerned by it, within the meaning of the fourth paragraph of Article 230 EC, in no way affects the general nature of that prohibition which is effective erga omnes, as is made clear, in particular, by Article 11 of the regulation.

Concerning respect of certain fundamental rights

As regards, last, the pleas alleging, in both cases, breach of the applicants’ fundamental rights, the Court of First Instance considered it appropriate to consider, in the first place, the relationship between the international legal order under the United Nations and the domestic or Community legal order, and also the extent to which the exercise by the Community and its Member States of their powers is bound by resolutions of the Security Council adopted under Chapter VII of the Charter of the United Nations. This consideration would effectively determine the scope of the review of lawfulness, particularly having regard to fundamental rights, which that court must carry out in respect of the Community acts giving effect to such resolutions. It is only if it should find that they fall within the scope of its judicial review and that they are capable of leading to annulment of the contested regulation that the Court of First Instance would have to rule on those alleged breaches (Kadi, paragraphs 178 to 180, and Yusuf and Al Barakaat, paragraphs 228 to 230).

Examining first the relationship between the international legal order under the United Nations and the domestic legal orders or the Community legal order, the Court of First Instance ruled that, from the standpoint of international law, the Member States, as Members of the United Nations, are bound to respect the principle of the primacy of their obligations ‘under the Charter’ of the United Nations, enshrined in Article 103 thereof, which means, in particular, that the obligation, laid down in Article 25 of the Charter, to carry out the decisions of the Security Council prevails over any other obligation they may have entered into under an international agreement (Kadi, paragraphs 181 to 184, and Yusuf and Al Barakaat, paragraphs 231 to 234).

According to the Court of First Instance, that obligation of the Member States to respect the principle of the primacy of obligations undertaken by virtue of the Charter of the United Nations is not affected by the EC Treaty, for it is an obligation arising from an agreement concluded before the Treaty, and so falling within the scope of Article 307 EC. What is more, Article 297 EC is intended to ensure that that principle is observed (Kadi, paragraphs 185 to 188, and Yusuf and Al Barakaat, paragraphs 235 to 238).

The Court of First Instance concluded that resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations are binding on all the Member States of the Community which must therefore, in that capacity, take all measures necessary to ensure that those resolutions are put into effect and may, and indeed must, leave unapplied any provision of Community law, whether a provision of primary law or a general principle of Community law, that raises any impediment to the proper performance of their obligations under that Charter (Kadi, paragraphs 189 and 190, and Yusuf and Al Barakaat, paragraphs 239 and 240).

However, according to the Court of First Instance, the mandatory nature of those resolutions stemming from an obligation under international law does not bind the Community, for the latter is not, as such, directly bound by the Charter of the United Nations, not being a Member of the United Nations, or an addressee of the resolutions of the Security Council, or the successor to the rights and obligations of the Member States for the purposes of public international law (Kadi, paragraph 192, and Yusuf and Al Barakaat, paragraph 242).

Nevertheless, that mandatory force binds the Community by virtue of Community law (Kadi, paragraph 193, and Yusuf and Al Barakaat, paragraph 243).

In that regard, the Court of First Instance referring, by analogy, to Joined Cases 21/72 to 24/72 International Fruit Company and Others [1972] ECR 1219, paragraph 18, in particular, held that, in so far as under the EC Treaty the Community has assumed powers previously exercised by Member States in the area governed by the Charter of the United Nations, the provisions of that Charter have the effect of binding the Community (Kadi, paragraph 203, and Yusuf and Al Barakaat, paragraph 253).
In the following paragraph in those judgments, the Court of First Instance concluded, first, that the Community may not infringe the obligations imposed on its Member States by the Charter of the United Nations or impede their performance and, second, that in the exercise of its powers it is bound, by the very Treaty by which it was established, to adopt all the measures necessary to enable its Member States to fulfill those obligations.

218 It must be recognised that such a limitation of jurisdiction is necessary as a corollary to the principles identified above, in the Court’s examination of the relationship between the international legal order under the United Nations and the Community legal order.

As has already been explained, the resolutions of the Security Council at issue were adopted under Chapter VII of the Charter of the United Nations. In these circumstances, determining what constitutes a threat to international peace and security and the measures required to maintain or re-establish them is the responsibility of the Security Council alone and, as such, escapes the jurisdiction of national or Community authorities and courts, subject only to the inherent right of individual or collective self-defence mentioned in Article 51 of the Charter.

Where, acting pursuant to Chapter VII of the Charter of the United Nations, the Security Council, through its Sanctions Committee, decides that the funds of certain individuals or entities must be frozen, its decision is binding on the members of the United Nations, in accordance with Article 48 of the Charter.

In light of the considerations set out in paragraphs 193 to 204 above, the claim that the institutions and the United Kingdom ask the Court as a matter of principle to decline all jurisdiction to undertake such indirect review of the lawfulness of those resolutions which, as rules of international law binding on the Member States of the Community, are mandatory for the Court as they are for the Community institutions. Those parties are of the view, essentially, that the Court’s review ought to be confined, on the one hand, to ascertaining whether the rules on formal and procedural requirements and jurisdiction imposed in this case on the Community institutions were observed and, on the other hand, to ascertaining whether the Community measures at issue were appropriate and proportionate in relation to the resolutions of the Security Council which they put into effect.
to call in question, even indirectly, their lawfulness in the light of Community law. On the contrary, the Court is bound, so far as possible, to interpret and apply that law in a manner compatible with the obligations of the Member States under the Charter of the United Nations."

87 In Kadi, paragraph 226, and Yusuf and Al Barakaat, paragraph 277, the Court of First Instance found that it was, none the less, empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to jus cogens, understood as a body of higher rules of international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible.

88 In paragraphs 227 to 231 of Kadi, drawn up in terms identical to those of paragraphs 278 to 282 of Yusuf and Al Barakaat, the Court of First Instance held as follows:

‘227 In this connection, it must be noted that the Vienna Convention on the Law of Treaties, which consolidates the customary international law and Article 5 of which provides that it is to apply “to any treaty which is the constituent instrument of an international organisation and to any treaty adopted within an international organisation”, provides in Article 53 for a treaty to be void if it conflicts with a peremptory norm of general international law (jus cogens), defined as “a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”. Similarly, Article 64 of the Vienna Convention provides that: “If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates”.

228 Furthermore, the Charter of the United Nations itself presupposes the existence of mandatory principles of international law, in particular, the protection of the fundamental rights of the human person. In the preamble to the Charter, the peoples of the United Nations declared themselves determined to “reaffirm faith in fundamental human rights, in the dignity and worth of the human person”. In addition, it is apparent from Chapter I of the Charter, headed “Purposes and Principles”, that one of the purposes of the United Nations is to encourage respect for human rights and for fundamental freedoms.

229 Those principles are binding on the Members of the United Nations as well as on its bodies. Thus, under Article 24(2) of the Charter of the United Nations, the Security Council, in discharging its duties under its primary responsibility for the maintenance of international peace and security, is to act “in accordance with the Purposes and Principles of the United Nations”. The Security Council’s powers of sanction in the exercise of that responsibility must therefore be wielded in compliance with international law, particularly with the purposes and principles of the United Nations.

230 International law thus permits the inference that there exists one limit to the principle that resolutions of the Security Council have binding effect: namely, that they must observe the fundamental peremptory provisions of jus cogens. If they fail to do so, however improbable that may be, they would bind neither the Member States of the United Nations nor, in consequence, the Community.

231 The indirect judicial review carried out by the Court in connection with an action for annulment of a Community act adopted, where no discretion whatsoever may be exercised, with a view to putting into effect a resolution of the Security Council may therefore, highly exceptionally, extend to determining whether the superior rules of international law falling within the ambit of jus cogens have been observed, in particular, the mandatory provisions concerning the universal protection of human rights, from which neither the Member States nor the bodies of the United Nations may derogate because they constitute “intransgressible principles of international customary law” (Advisory Opinion of the International Court of Justice of 8 July 1996, The Legality of the Threat or Use of Nuclear Weapons, Reports 1996, p. 226, paragraph 79; see also, to that effect, Advocate General Jacobs’s Opinion in Case C-84/95 Bosphorus [1996] ECR I-3953, paragraph 65).’

89 Firstly, with particular regard to the alleged breach of the fundamental right to respect for property, the Court of First Instance considered, in Kadi, paragraph 237, and Yusuf and Al Barakaat, paragraph 288, that it fell to be assessed whether the freezing of funds provided for by the contested regulation, as amended by Regulation No 561/2003, and, indirectly, by the resolutions of the Security Council put into effect by those regulations, infringed the applicant’s fundamental rights.

90 In Kadi, paragraph 238, and Yusuf and Al Barakaat, paragraph 289, the Court of First Instance held as follows in paragraph 258 of Kadi, to which

91 In Kadi, paragraphs 290 and 291, the Court of First Instance held that the exemptions to and derogations from the obligation to freeze funds provided for in the contested regulation as a result of its amendment by Regulation No 561/2003, itself putting into effect Resolution 1452 (2002), show that it is neither the purpose nor the effect of that measure to submit the persons entered in the summary list to inhuman or degrading treatment.

92 In Kadi, paragraphs 243 to 251, and Yusuf and Al Barakaat, paragraphs 294 to 302, the Court of First Instance held, in addition, that the freezing of funds did not constitute an arbitrary, inappropriate or disproportionate interference with the right to private property of the persons concerned and could not, therefore, be regarded as contrary to jus cogens, having regard to the following facts:

– the measures in question pursue an objective of fundamental public interest for the international community, that is to say, the campaign against international terrorism, and the United Nations are entitled to undertake protective action against the activities of terrorist organisations;

– freezing of funds is a temporary precautionary measure which, unlike confiscation, does not affect the very substance of the right of the persons concerned to property in their financial assets but only the use thereof;

– the resolutions of the Security Council at issue provide for a means of reviewing, after certain periods, the overall system of sanctions;

– those resolutions set up a procedure enabling the persons concerned to present their case at any time to the Sanctions Committee for review, through the Member State of their nationality or that of their residence.

93 As regards, secondly, the alleged breach of the right to be heard, and more particularly, first, the applicants’ alleged right to be heard by the Community institutions before the contested regulation had been adopted, the Court of First Instance held as follows in paragraph 258 of Kadi, to which
The Court of First Instance held, in addition, that the Security Council's decision on the question of the admission of fresh evidence, which it reviewed in paragraph 270 of its judgment in the case of Al Barakaat, was not subject to any appeals and was final. The Court of First Instance also held that the Security Council's decision in paragraph 270 of its judgment in the case of Al Barakaat was not appealable, and that the Court of First Instance had no power to review the decision of the Security Council. The Court of First Instance further held that the decision of the Security Council in paragraph 270 of its judgment in the case of Al Barakaat was not appealable, and that the Court of First Instance had no power to review the decision of the Security Council. The Court of First Instance further held that the decision of the Security Council in paragraph 270 of its judgment in the case of Al Barakaat was not appealable, and that the Court of First Instance had no power to review the decision of the Security Council.

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themselves compatible with fundamental rights as protected by the Community legal order.

284 Nor does it fall to the Court to verify that there has been no error of assessment of the facts and evidence relied on by the Security Council in support of the measures it has taken or, subject to the limited extent defined in paragraph 282 above, to check indirectly the appropriateness and proportionality of those measures. It would be impossible to carry out such a check without trespassing on the Security Council’s prerogatives under Chapter VII of the Charter of the United Nations in relation to determining, first, whether there exists a threat to international peace and security and, second, the appropriate measures for confronting or settling such a threat. Moreover, the question whether an individual or organisation poses a threat to international peace and security, like the question of what measures must be adopted vis-à-vis the persons concerned in order to frustrate that threat, entails a political assessment and value judgments which in principle fall within the exclusive competence of the authority to which the international community has entrusted primary responsibility for the maintenance of international peace and security.

285 It must thus be concluded that, to the extent set out in paragraph 284 above, there is no judicial remedy available to the applicant, the Security Council not having thought it advisable to establish an independent court in the domestic legal order of the Member States, nor having considered it necessary to hold such a court, as a result of the immunity from jurisdiction enjoyed as a rule, in the domestic legal order of the Member States, by resolutions of the Security Council adopted under Chapter VII of the Charter of the United Nations, in accordance with the relevant principles of international law (in particular Articles 25 and 103 of [that] Charter), is inherent in that right as it is guaranteed by jus cogens.

104 In Kadi, paragraph 268, and Yusuf and Al Barakaat, paragraph 315, the Court of First Instance held that any such lacuna in the judicial protection available to the applicant is not in itself contrary to jus cogens.

105 In this respect, the Court of First Instance found as follows in paragraphs 288 to 290 of Kadi, drawn up in terms essentially identical to those of paragraphs 343 to 345 of Yusuf and Al Barakaat:

‘288 In this instance, the Court considers that the limitation of the applicant’s right of access to a court, as a result of the immunity from jurisdiction enjoyed as a rule, in the domestic legal order of the Member States of the United Nations, by resolutions of the Security Council adopted under Chapter VII of the Charter of the United Nations, in accordance with the relevant principles of international law (in particular Articles 25 and 103 of [that] Charter), is inherent in that right as it is guaranteed by jus cogens.

289 Such a limitation is justified both by the nature of the decisions that the Security Council is led to take under Chapter VII of the Charter of the United Nations and by the legitimate objective pursued. In the circumstances of this case, the applicant’s interest in having a court hear his case on its merits is not enough to outweigh the essential public interest in the maintenance of international peace and security in the face of a threat clearly identified by the Security Council in accordance with the Charter of the United Nations. In this regard, special significance must attach to the fact that, far from providing for measures for an unlimited period of application, the resolutions successively adopted by the Security Council have always provided a mechanism for re-examining whether it is appropriate to maintain those measures after 12 or 18 months at most have elapsed…

290 Last, the Court considers that, in the absence of an international court having jurisdiction to ascertain whether acts of the Security Council are lawful, the setting-up of a body such as the Sanctions Committee and the opportunity, provided for by the legislation, of applying at any time to that committee in order to have any individual case re-examined, by means of a procedure involving both the “petitioned government” and the “designating government”…,

constitute another reasonable method of affording adequate protection of the applicant’s fundamental rights as recognised by jus cogens.’

106 Consequently the Court of First Instance dismissed the pleas alleging breach of the right to effective judicial review and, as a result, the actions in their entirety.

**Forms of order sought by the parties to the appeal**

107 By his appeal, Mr Kadi claims that the Court should:

– set aside in whole the judgment in Kadi;
– declare the contested regulation null and void, and
– order the Council and/or the Commission to pay the costs in this appeal and those incurred in the proceedings before the Court of First Instance.

108 By its appeal, Al Barakaat claims that the Court should:

– set aside the judgment in Yusuf and Al Barakaat;
– declare the contested regulation null and void, and
– order the Council and the Commission to pay the costs relating to the present appeal and to the proceedings before the Court of First Instance.

109 The Council contends in both cases that the Court should reject the appeal and order the appellant to pay the costs.

110 In Case C-402/05 P the Commission contends that the Court should:

– declare that none of the grounds of appeal put forward by the appellant is capable of
– in consequence, reject the appeal; and
– order the appellant to pay the costs.

111 In Case C-415/05 P the Commission contends that the Court should:

– reject the appeal in its entirety, and
– order the appellant to pay the costs.

112 The United Kingdom has brought a cross-appeal contending that the Court should:

– dismiss the appeals, and
– set aside that part of the judgments under appeal which deal with the question of jure cogens, that is to say, paragraphs 226 to 231 of Kadi and paragraphs 277 to 281 of Yusuf and Al Barakaat.
Republic essentially agrees with that interpretation of Bosphorus.

Findings of the Court

278 Before addressing the substance of the question, the Court finds it necessary to reject the objection of inadmissibility raised by the United Kingdom in respect of the line of argument put forward by Mr Kadi in his reply, to the effect that the lawfulness of any legislation adopted by the Community institutions, including an act intended to give effect to a resolution of the Security Council remains subject, by virtue of Community law, to full review by the Court, regardless of its origin.

279 In point of fact, as Mr Kadi has stated, that is an additional argument supplementing the ground of appeal set out earlier, at least implicitly, in the notice of appeal and closely connected to that ground, to the effect that the Community, when giving effect to a resolution of the Security Council, was bound to ensure, as a condition of the lawfulness of the legislation it intended thus to introduce, that that legislation should observe the minimum criteria in the field of human rights (see, to that effect, inter alia, the order in Case C-430/00 P Dürrbeck v Commission [2001] ECR I-8547, paragraph 17).

280 The Court will now consider the heads of claim in which the appellants complain that the Court of First Instance, in essence, held that it followed from the principles governing the relationship between the international legal order under the United Nations and the Community legal order that the contested regulation, since it is designed to give effect to a resolution adopted by the Security Council under Chapter VII of the Charter of the United Nations affording no latitude in that respect, could not be subject to judicial review of its internal lawfulness, save with regard to its compatibility with the norms of jus cogens, and therefore to that extent enjoyed immunity from jurisdiction.

281 In this connection it is to be borne in mind that the Community is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the EC Treaty, which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions (Case 294/83 Les Verts v Parliament [1986] ECR 1339, paragraph 23).

282 It is also to be recalled that an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the Community legal system, observance of which is ensured by the Court by virtue of the exclusive jurisdiction conferred on it by Article 220 EC, jurisdiction that the Court has, moreover, already held to form part of the very foundations of the Community (see, to that effect, Opinion 1/91 [1991] ECR I-6079, paragraphs 35 and 71, and Case C-459/03 Commission v Ireland [2006] ECR I-4635, paragraph 123 and case-law cited).

283 In addition, according to settled case-law, fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. In that regard, the ECHR has special significance (see, inter alia, Case C-305/05 Ordre des barreaux francophones et germanophone and Others [2007] ECR I-5305, paragraph 29 and case-law cited).

284 It is also clear from the case-law that respect for human rights is a condition of the lawfulness of Community acts (Opinion 2/94, paragraph 34 and that measures incompatible with respect for human rights are not acceptable in the Community (Case C-112/00 Schmidtberger [2003] ECR I-5659, paragraph 73 and case-law cited).

285 It follows from all those considerations that the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty.

286 In this regard it must be emphasised that, in circumstances such as those of these cases, the review of lawfulness thus to be ensured by the Community judiciary applies to the Community act intended to give effect to the international agreement at issue, and not to the latter as such.

287 With more particular regard to a Community act which, like the contested regulation, is intended to give effect to a resolution adopted by the Security Council under Chapter VII of the Charter of the United Nations, it is not, therefore, for the Community judiciary, under the exclusive jurisdiction provided for by Article 220 EC, to review the lawfulness of such a resolution adopted by an international body, even if that review were to be limited to examination of the compatibility of that resolution with jus cogens.

288 However, any judgment given by the Community judiciary deciding that a Community measure intended to give effect to such a resolution is contrary to a higher rule of law in the Community legal order would not entail any challenge to the primacy of that resolution in international law.

289 The Court has thus previously annulled a decision of the Council approving an international agreement after considering the internal lawfulness of the decision in the light of the agreement in question and finding a breach of a general principle of Community law, in that instance the general principle of non-discrimination (Case C-122/95 Germany v Council [1998] ECR I-973).

290 It must therefore be considered whether, as the Court of First Instance held, as a result of the principles governing the relationship between the international legal order under the United Nations and the Community legal order, any judicial review of the conformity of the contested regulation is contrary to a higher rule of law in the Community legal order, in that instance the general principle of non-discrimination.

291 In this respect it is first to be borne in mind that the European Community must respect international law in the exercise of its powers (Poulsen and Dina Navigation, paragraph 9, and Racke, paragraph 45), the Court having in addition stated, in the same paragraph of the first of those judgments, that a measure adopted by virtue of those powers must be interpreted, and its scope limited, in the light of the relevant rules of international law.

292 Moreover, the Court has held that the powers of the Community provided for by Articles 177 EC to 181 EC in the sphere of cooperation and development must be exercised in observance of the undertakings given in the context of the United Nations and other international organisations (Case C-91/05 Commission v Council [2008] ECR I-0000, paragraph 65 and case-law cited).

293 Observance of the undertakings given in the context of the United Nations is required just as much in the sphere of the maintenance of international peace and security when the Community gives
effect, by means of the adoption of Community measures taken on the basis of Articles 60 EC and 301 EC, to resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.

294 In the exercise of that latter power it is necessary for the Community to attach special importance to the fact that, in accordance with Article 24 of the Charter of the United Nations, the adoption by the Security Council of resolutions under Chapter VII of the Charter constitutes the exercise of the primary responsibility with which that international body is invested for the maintenance of peace and security at the global level, a responsibility which, under Chapter VII, includes the power to determine what and who poses a threat to international peace and security and to take the measures necessary to maintain or restore them.

295 Next, it is to be noted that the powers provided for in Articles 60 EC and 301 EC may be exercised only in pursuance of the adoption of a common position or joint action by virtue of the provisions of the EC Treaty relating to the CFSP which provides for action by the Community.

296 Although, because of the adoption of such an act, the Community is bound to take, under the EC Treaty, the measures necessitated by that act, that obligation means, when the object is to implement a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations, that in drawing up those measures the Community is to take due account of the terms and objectives of the resolution concerned and of the relevant obligations under the Charter of the United Nations relating to such implementation.

297 Furthermore, the Court has previously held that, for the purposes of the interpretation of the contested regulation, account must also be taken of the wording and purpose of Resolution 1390 (2002) which that regulation, according to the fourth recital in the preamble thereto, is designed to implement (Möllendorf and Möllendorf-Niehaus, paragraph 54 and case-law cited).

298 It must however be noted that the Charter of the United Nations does not impose the choice of a particular model for the implementation of resolutions adopted by the Security Council under Chapter VII of the Charter, since they are to be given effect in accordance with the procedure applicable in that respect in the domestic legal order of each Member of the United Nations. The Charter of the United Nations leaves the Members of the United Nations a free choice among the various possible models for transposition of those resolutions into their domestic legal order.

299 It follows from all those considerations that it is not a consequence of the principles governing the international legal order under the United Nations that any judicial review of the internal lawfulness of the contested regulation in the light of fundamental freedoms is excluded by virtue of the fact that that measure is intended to give effect to a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations.

300 What is more, such immunity from jurisdiction for a Community measure like the contested regulation, as a corollary of the principle of the primacy at the level of international law of obligations under the Charter of the United Nations, especially those relating to the implementation of resolutions of the Security Council adopted under Chapter VII of the Charter, cannot find a basis in the EC Treaty.

301 Admittedly, the Court has previously recognised that Article 234 of the EC Treaty (now, after amendment, Article 307 EC) could, if the conditions for application have been satisfied, allow derogations even from primary law, for example from Article 113 of the EC Treaty on the common commercial policy (see, to that effect, Centro-Com, paragraphs 56 to 61).

302 It is true also that Article 297 EC implicitly permits obstacles to the operation of the common market when they are caused by measures taken by a Member State to carry out the international obligations it has accepted for the purpose of maintaining international peace and security.

303 Those provisions cannot, however, be understood to authorise any derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6(1) EU as a foundation of the Union.

304 Article 307 EC may in no circumstances permit any challenge to the principles that form part of the very foundations of the Community legal order, one of which is the protection of fundamental rights, including the review by the Community judicature of the lawfulness of Community measures as regards their consistency with those fundamental rights.

305 Nor can an immunity from jurisdiction for the contested regulation with regard to the review of its compatibility with fundamental rights, arising from the alleged absolute primacy of the resolutions of the Security Council to which that measure is designed to give effect, find any basis in the place that obligations under the Charter of the United Nations would occupy in the hierarchy of norms within the Community legal order if those obligations were to be classified in that hierarchy.

306 Article 300(7) EC provides that agreements concluded under the conditions set out in that article are to be binding on the institutions of the Community and on Member States.

307 Thus, by virtue of that provision, supposing it to be applicable to the Charter of the United Nations, the latter would have primacy over acts of secondary Community law (see, to that effect, Case C-308/06 Interanko and Others [2008] ECR I-9000, paragraph 42 and case-law cited).

308 That primacy at the level of Community law would not, however, extend to primary law, in particular to the general principles of which fundamental rights form part.

309 That interpretation is supported by Article 300(6) EC, which provides that an international agreement may not enter into force if the Court has delivered an adverse opinion on its compatibility with the EC Treaty, unless the latter has previously been amended.

310 It has however been maintained before the Court, in particular at the hearing, that the Community judicature ought, like the European Court of Human Rights, which in several recent decisions has declined jurisdiction to review the compatibility of certain measures taken in the implementing of resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations, to refrain from reviewing the lawfulness of the contested regulation in the light of fundamental freedoms, because that regulation is also intended to give effect to such resolutions.

311 In this respect, it is to be found that, as the European Court of Human Rights itself has noted, there exists a fundamental difference between the nature of the measures concerned by those decisions, with regard to which that court declined jurisdiction to carry out a review of consistency with the ECHR, and the nature of other measures with regard to which its jurisdiction would seem to be unquestionable (see Behrami and Behrami v. France and Saramenti v. France, Germany and Norway of 2 May 2007, not yet published in the Reports of Judgments and Decisions, §§151).

312 While, in certain cases before it the European Court of Human Rights has declined jurisdiction ratione personae, those cases involved actions directly attributable to the United Nations as an organisation of universal jurisdiction fulfilling its imperative collective security objective, in particular actions of a subsidiary organ of the UN created under Chapter VII of the Charter of the
313 By contrast, in paragraph 151 of Behrami and Behrami v. France and Sarunmati v. France, Germany and Norway, the European Court of Human Rights stated that in the case leading to its judgment in Bosphorus Haça Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland, concerning a seizure measure carried out by the authorities of the respondent State on its territory following a decision by one of its ministers, it had recognised its competence, notably ratione personae, vis-à-vis the respondent State, despite the fact that the source of the contested measure was a Community regulation taken, in its turn, pursuant to a resolution of the Security Council.

314 In the instant case it must be declared that the contested regulation cannot be considered to be an act directly attributable to the United Nations as an action of one of its subsidiary organs created under Chapter VII of the Charter of the United Nations or an act falling within the exercise of powers lawfully delegated by the Security Council pursuant to that chapter.

315 In addition and in any event, the question of the Court's jurisdiction to rule on the lawfulness of the contested regulation has arisen in fundamentally different circumstances.

316 As noted above in paragraphs 281 to 284, the review by the Court of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a Community-based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which is not to be prejudiced by an international agreement.

317 The question of the Court's jurisdiction arises in the context of the internal and autonomous legal order of the Community, within whose ambit the contested regulation falls and in which the Court has jurisdiction to review the validity of Community measures in the light of fundamental rights.

318 It has in addition been maintained that, having regard to the deference required of the Community institutions vis-à-vis the institutions of the United Nations, the Court must forgo the exercise of any review of the lawfulness of the contested regulation in the light of fundamental rights, even if such review were possible, given that, under the system of sanctions set up by the United Nations, having particular regard to the re-examination procedure which has recently been significantly improved by various resolutions of the Security Council, fundamental rights are adequately protected.

319 According to the Commission, so long as under that system of sanctions the individuals or entities concerned have an acceptable opportunity to be heard through a mechanism of administrative review forming part of the United Nations legal system, the Court must not intervene in any way whatsoever.

320 In this connection it may be observed, first of all, that if in fact, as a result of the Security Council's adoption of various resolutions, amendments have been made to the system of restrictive measures set up by the United Nations with regard both to entry in the summary list and to removal from it [see, in particular, Resolutions 1730 (2006) of 19 December 2006, and 1735 (2006) of 22 December 2006], those amendments were made after the contested regulation had been adopted so that, in principle, they cannot be taken into consideration in these appeals.

321 In any event, the existence, within that United Nations system, of the re-examination procedure before the Sanctions Committee, even having regard to the amendments recently made to it, cannot give rise to generalised immunity from jurisdiction within the internal legal order of the Community.

322 Indeed, such immunity, constituting a significant derogation from the scheme of judicial protection of fundamental rights laid down by the EC Treaty, appears unjustified, for clearly that re-examination procedure does not offer the guarantees of judicial protection.

323 In that regard, although it is now open to any person or entity to approach the Sanctions Committee directly, submitting a request to be removed from the summary list at what is called the 'focal' point, the fact remains that the procedure before that Committee is still in essence diplomatic and intergovernmental, the persons or entities concerned having no real opportunity of asserting their rights and that committee taking its decisions by consensus, each of its members having a right of veto.

324 The Guidelines of the Sanctions Committee, as last amended on 12 February 2007, make it plain that an applicant submitting a request for removal from the list may in no way assert his rights himself during the procedure before the Sanctions Committee or be represented for that purpose, the Government of his State of residence or of citizenship alone having the right to submit observations on that request.

325 Moreover, those Guidelines do not require the Sanctions Committee to communicate to the applicant the reasons and evidence justifying his appearance in the summary list or to give him access, even restricted, to that information. Last, if that Committee rejects the request for removal from the list, it is under no obligation to give reasons.

326 It follows from the foregoing that the Community judicature must, in accordance with the powers conferred on it by the EC Treaty, ensure the review, in principle the full review, of the lawfulness of all Community acts, including review of Community measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.

327 The Court of First Instance erred in law, therefore, when it held, in paragraphs 212 to 231 of its judgments under appeal relating to review of the contested regulation in the light of the rules of international law laid down by the EC Treaty, that it followed from the principles governing the relationship between the international legal order under the United Nations and the Community legal order that the contested regulation, since it is designed to give effect to a resolution adopted by the Security Council under Chapter VII of the Charter of the United Nations, is no longer subject to review under the rules of international law.

328 The appellants' grounds of appeal are therefore well founded on that point, with the result that the judgments under appeal must be set aside in this respect.

329 It follows that there is no longer any need to examine the heads of claim directed against that part of the judgments under appeal relating to review of the contested regulation in the light of the rules of international law falling within the ambit of jus cogens and that it is, therefore, no longer necessary to examine the United Kingdom's cross-appeal on this point either.

330 Furthermore, given that in the latter part of the judgments under appeal, relating to the specific fundamental rights invoked by the appellants, the Court of First Instance confined itself to...
examining the lawfulness of the contested regulation in the light of those rules alone, when it was its duty to carry out an examination, in principle a full examination, in the light of the fundamental rights forming part of the general principles of Community law, the latter part of those judgments must also be set aside.

Concerning the actions before the Court of First Instance

331 As provided in the second sentence of the first paragraph of Article 61 of the Statute of the Court of Justice, the latter, when it quashes the decision of the Court of First Instance, may give final judgment in the matter where the state of proceedings so permits.

332 In the circumstances, the Court considers that the actions for annulment of the contested regulation brought by the appellants are ready for judgment and that it is necessary to give final judgment in them.

333 It is appropriate to examine, first, the claims made by Mr Kadi and Al Barakaat with regard to the breach of the rights of the defence, in particular the right to be heard, and of the right to effective judicial review, caused by the measures for the freezing of funds as they were imposed on the appellants by the contested regulation.

334 In this regard, in the light of the actual circumstances surrounding the inclusion of the appellants’ names in the list of persons and entities covered by the restrictive measures contained in Annex I to the contested regulation, it must be held that the rights of the defence, in particular the right to be heard, and the right to effective judicial review of those rights, were patently not respected.

335 According to settled case-law, the principle of effective judicial protection is a general principle of Community law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the ECHR, this principle having furthermore been reaffirmed by Article 47 of the Charter of fundamental rights of the European Union, proclaimed on 7 December 2000 in Nice (OJ 2000 C 364, p. 1) (see, to this effect, Case C-432/05 Unibet [2007] ECR I-2271, paragraph 37).

336 In addition, having regard to the Court’s case-law in other fields (see, inter alia, Case 222/86 Heylens and Others [1987] ECR 4097, paragraph 15, and Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P Dansk Rørindustri and Others v Commission [2005] ECR I-5425, paragraphs 462 and 463), it must be held in this instance that the effectiveness of judicial review, which it must be possible to apply to the lawfulness of the grounds on which, in these cases, the name of a person or entity is included in the list forming Annex I to the contested regulation and leading to the imposition on those persons or entities of a body of restrictive measures, means that the Community authority in question is bound to communicate those grounds to the person or entity concerned, so far as possible, either when that inclusion is decided on or, at the very least, as swiftly as possible after that decision in order to enable those persons or entities to exercise, within the periods prescribed, their right to bring an action.

337 Observance of that obligation to communicate the grounds is necessary both to enable the persons to whom restrictive measures are addressed to defend their rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in their applying to the Community judicature (see, to that effect, Heylens and Others, paragraph 15), and to put the latter fully in a position in which it may carry out the review of the lawfulness of the Community
Reaffirming in this regard its decision in resolution 808 (1993) that an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991,

Considering that, pending the appointment of the Prosecutor of the International Tribunal, the Commission of Experts established pursuant to resolution 780 (1992) should continue on an urgent basis the collection of information relating to evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law as proposed in its interim report (S/25774),

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

1. Approves the report of the Secretary-General;

2. Decides hereby to establish an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace and to this end to adopt the Statute of the International Tribunal annexed to the above-mentioned report;

3. Requests the Secretary-General to submit to the judges of the International Tribunal, upon their election, any suggestions received from States for the rules of procedure and evidence called for in Article 15 of the Statute of the International Tribunal;

4. Decides that all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the Statute;

5. Urges States and intergovernmental and non-governmental organizations to contribute funds, equipment and services to the International Tribunal, including the offer of expert personnel;

6. Decides that the determination of the seat of the International Tribunal is subject to the conclusion of appropriate arrangements between the United Nations and the Netherlands acceptable to the Council, and that the International Tribunal may sit elsewhere when it considers it necessary for the efficient exercise of its functions;

7. Decides also that the work of the International Tribunal shall be carried out without prejudice to the right of the victims to seek, through appropriate means, compensation for damage incurred as a result of violations of international humanitarian law;

8. Requests the Secretary-General to implement urgently the present resolution and in particular to make practical arrangements for the effective
International Court of Justice

Gabčikovo-Nagymaros Project (Hungary/Slovakia) Judgment

International Court of Justice

Reports of Judgments, Advisory Opinions and Orders

Case Concerning The Gabčíkovo-Nagymaros Project (Hungary/Slovakia)

Judgment of 25 September 1997

1997

Cours Internationale de Justice

Recueil des arrêts, avis consultatifs et ordonnances

Affaire relative au projet Gabčíkovo-Nagymaros (Hongrie/Slovaquie)

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tion of the provisions of Article 27 of the 1977 Treaty (see paragraph 18 above), which it submits required prior recourse to the machinery for dispute settlement provided for in that Article.

* * *

46. The Court has no need to dwell upon the question of the applicability in the present case of the Vienna Convention of 1969 on the Law of Treaties. It needs only to be mindful of the fact that it has several times had occasion to hold that some of the rules laid down in that Convention might be considered as a codification of existing customary law. The Court takes the view that in many respects this applies to the provisions of the Vienna Convention concerning the termination and the suspension of the operation of treaties, set forth in Articles 60 to 62 (see Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports, 1971, p. 47, and Fisheries Jurisdiction (United Kingdom v. Iceland), Jurisdiction of the Court, Judgment, I.C.J. Reports 1975, p. 18; see also Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980, pp. 95-96).

Neither has the Court lost sight of the fact that the Vienna Convention is in any event applicable to the Protocol of 6 February 1989 whereby Hungary and Czechoslovakia agreed to accelerate completion of the works relating to the Gabčíkovo-Nagymaros Project.

47. Nor does the Court need to dwell upon the question of the relationship between the law of treaties and the law of State responsibility, to which the Parties devoted lengthy arguments, as those two branches of international law obviously have a scope that is distinct. A determination of whether a convention is or is not in force, and whether it has or has not been properly suspended or denounced, is to be made pursuant to the law of treaties. On the other hand, an evaluation of the extent to which the suspension or denunciation of a convention, seen as incompatible with the law of treaties, involves the responsibility of the State which proceeded to it, is to be made under the law of State responsibility.

Thus the Vienna Convention of 1969 on the Law of Treaties confines itself to defining — in a limitative manner — the conditions in which a treaty may lawfully be denounced or suspended; while the effects of a denunciation or suspension seen as not meeting those conditions are, on the contrary, expressly excluded from the scope of the Convention by operation of Article 73. It is moreover well established that, when a State has committed an internationally wrongful act, its international responsibility is likely to be involved whatever the nature of the obligation it has failed to respect (cf. Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase, Advisory Opinion, I.C.J. Reports 1950, p. 228; and see Article 17 of the Draft Articles on State Responsi-

48. The Court cannot accept Hungary’s argument to the effect that, in 1989, in suspending and subsequently abandoning the works for which it was still responsible at Nagymaros and at Dunakiliti, it did not, for all that, suspend the application of the 1977 Treaty itself or then reject that Treaty. The conduct of Hungary at that time can only be interpreted as an expression of its unwillingness to comply with at least some of the provisions of the Treaty and the Protocol of 6 February 1989, as specified in the Joint Contractual Plan. The effect of Hungary’s conduct was to render impossible the accomplishment of the system of works that the Treaty expressly described as “single and indivisible”.

The Court moreover observes that, when it invoked the state of necessity in an effort to justify that conduct, Hungary chose to place itself from the outset within the ambit of the law of State responsibility, thereby implying that, in the absence of such a circumstance, its conduct would have been unlawful. The state of necessity claimed by Hungary — supposing it to have been established — thus could not permit of the conclusion that, in 1989, it had acted in accordance with its obligations under the 1977 Treaty or that those obligations had ceased to be binding upon it. It would only permit the affirmation that, under the circumstances, Hungary would not incur international responsibility by acting as it did. Lastly, the Court points out that Hungary expressly acknowledged that, in any event, such a state of necessity would not exempt it from its duty to compensate its partner.

49. The Court will now consider the question of whether there was, in 1989, a state of necessity which would have permitted Hungary, without incurring international responsibility, to suspend and abandon works that it was committed to perform in accordance with the 1977 Treaty and related instruments.

50. In the present case, the Parties are in agreement in considering that the existence of a state of necessity must be evaluated in the light of the criteria laid down by the International Law Commission in Article 33 of the Draft Articles on the International Responsibility of States that it adopted on first reading. That provision is worded as follows:

"Article 33. State of Necessity

1. A state of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act of that State not in conformity with an international obligation of the State unless:

(a) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and

(b) the act did not seriously impair an essential interest of the State towards which the obligation existed.

2. In any case, a state of necessity may not be invoked by a State as a ground for precluding wrongfulness:

(a) if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law; or

(b) if the international obligation with which the act of the State is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation; or

(c) if the State in question has contributed to the occurrence of the state of necessity." (Yearbook of the International Law Commission, 1980, Vol. II, Part 2, p. 34.)

In its Commentary, the Commission defined the “state of necessity” as being

"the situation of a State whose sole means of safeguarding an essential interest threatened by a grave and imminent peril is to adopt conduct not in conformity with what is required of it by an international obligation to another State" (ibid., para. 1).

It concluded that “the notion of state of necessity is . . . deeply rooted in general legal thinking” (ibid., p. 49, para. 31).

51. The Court considers, first of all, that the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation. It observes moreover that such ground for precluding wrongfulness can only be accepted on an exceptional basis. The International Law Commission was of the same opinion when it explained that it had opted for a negative form of words in Article 33 of its Draft

"in order to show, by this formal means also, that the case of invocation of a state of necessity as a justification must be considered as really constituting an exception — and one even more rarely admissible than is the case with the other circumstances precluding wrongfulness . . ." (ibid., p. 51, para. 40).

Thus, according to the Commission, the state of necessity can only be invoked under certain strictly defined conditions which must be cumulatively satisfied: and the State concerned is not the sole judge of whether those conditions have been met.

52. In the present case, the following basic conditions set forth in Draft Article 33 are relevant: it must have been occasioned by an “essential interest” of the State which is the author of the act conflicting with one of its international obligations; that interest must have been threatened by a “grave and imminent peril”; the act being challenged must
have been the "only means" of safeguarding that interest; that act must not have "seriously impair[ed] an essential interest" of the State towards which the obligation existed; and the State which is the author of that act must not have "contributed to the occurrence of the state of necessity". Those conditions reflect customary international law.

The Court will now endeavour to ascertain whether those conditions had been met at the time of the suspension and abandonment, by Hungary, of the works that it was to carry out in accordance with the 1977 Treaty.

53. The Court has no difficulty in acknowledging that the concerns expressed by Hungary for its natural environment in the region affected by the Gabčíkovo-Nagymaros Project related to an "essential interest" of that State, within the meaning given to that expression in Article 33 of the Draft of the International Law Commission.

The Commission, in its Commentary, indicated that one should not, in that context, reduce an "essential interest" to a matter only of the "existence" of the State, and that the whole question was, ultimately, to be judged in the light of the particular case (see Yearbook of the International Law Commission, 1980, Vol. II, Part 2, p. 49, para. 32). At the same time, it included among the situations that could occasion a state of necessity, "a grave danger to ... the ecological preservation of all or some of [the] territory of a State" (ibid., p. 35, para. 5); and specified, with reference to State practice, that "it is primarily in the last two decades that safeguarding the ecological balance has come to be considered an 'essential interest' of all States." (Ibid., p. 39, para. 14.)

The Court recalls that it has recently had occasion to stress, in the following terms, the great significance that it attaches to respect for the environment, not only for States but also for the whole of mankind:

"the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment." (Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, pp. 241-242, para. 29.)

54. The verification of the existence, in 1989, of the "peril" invoked by Hungary, of its "grave and imminent" nature, as well as of the absence of any "means" to respond to it, other than the measures taken by Hungary to suspend and abandon the works, are all complex processes.

As the Court has already indicated (see paragraphs 33 et seq.), Hungary on several occasions expressed, in 1989, its "uncertainties" as to the ecological impact of putting in place the Gabčíkovo-Nagymaros barrage system, which is why it asked insistently for new scientific studies to be carried out.

The Court considers, however, that, serious though these uncertainties might have been they could not, alone, establish the objective existence of a "peril" in the sense of a component element of a state of necessity. The word "peril" certainly evokes the idea of "risk"; that is precisely what distinguishes "peril" from material damage. But a state of necessity could not exist without a "peril" duly established at the relevant point in time; the mere apprehension of a possible "peril" could not suffice in that respect. It could moreover hardly be otherwise, when the "peril" constituting the state of necessity has at the same time to be "grave" and "imminent". "Imminence" is synonymous with "immediacy" or "proximity" and goes far beyond the concept of "possibility". As the International Law Commission emphasized in its commentary, the "extremely grave and imminent" peril must "have been a threat to the interest at the actual time" (Yearbook of the International Law Commission, 1980, Vol. II, Part 2, p. 49, para. 33). That does not exclude, in the view of the Court, that a "peril" appearing in the long term might be held to be "imminent" as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable.

The Hungarian argument on the state of necessity could not convince the Court unless it was at least proven that a real, "grave" and "imminent" "peril" existed in 1989 and that the measures taken by Hungary were the only possible response to it.

Both Parties have placed on record an impressive amount of scientific material aimed at reinforcing their respective arguments. The Court has given most careful attention to this material, in which the Parties have developed their opposing views as to the ecological consequences of the Project. It concludes, however, that, as will be shown below, it is not necessary in order to respond to the questions put to it in the Special Agreement for it to determine which of those points of view is scientifically better founded.

55. The Court will begin by considering the situation at Nagymaros. As has already been mentioned (see paragraph 40), Hungary maintained that, if the works at Nagymaros had been carried out as planned, the environment — and in particular the drinking water resources — in the area would have been exposed to serious dangers on account of problems linked to the upstream reservoir on the one hand and, on the other, the risks of erosion of the riverbed downstream.

The Court notes that the dangers ascribed to the upstream reservoir were mostly of a long-term nature and, above all, that they remained uncertain. Even though the Joint Contractual Plan envisaged that the Gab-
Číkovo power plant would “mainly operate in peak-load time and continuously during high water”, the final rules of operation had not yet been determined (see paragraph 19 above); however, any dangers associated with the putting into service of the Nagymaros portion of the Project would have been closely linked to the extent to which it was operated in peak mode and to the modalities of such operation. It follows that, even if it could have been established — which, in the Court’s appreciation of the evidence before it, was not the case — that the reservoir would ultimately have constituted a “grave peril” for the environment in the area, one would be bound to conclude that the peril was not “imminent” at the time at which Hungary suspended and abandoned the works relating to the dam.

With regard to the lowering of the riverbed downstream of the Nagymaros dam, the danger could have appeared at once more serious and more pressing, in so far as it was the supply of drinking water to the city of Budapest which would have been affected. The Court would however point out that the bed of the Danube in the vicinity of Szendtenendre had already been deepened prior to 1980 in order to extract building materials, and that the river had from that time attained, in that sector, the depth required by the 1977 Treaty. The peril invoked by Hungary had thus already materialized to a large extent for a number of years, so that it could not, in 1989, represent a peril arising entirely out of the project. The Court would stress, however, that, even supposing, as Hungary maintained, that the construction and operation of the dam would have created serious risks, Hungary had means available to it, other than the suspension and abandonment of the works, of responding to that situation. It could for example have proceeded regularly to discharge gravel into the river downstream of the dam. It could likewise, if necessary, have supplied Budapest with drinking water by processing the river water in an appropriate manner. The two Parties expressly recognized that that possibility remained open even though — and this is not determinative of the state of necessity — the purification of the river water, like the other measures envisaged, clearly would have been a more costly technique.

56. The Court now comes to the Gabčíkovo sector. It will recall that Hungary’s concerns in this sector related on the one hand to the quality of the surface water in the Dunakilidi reservoir, with its effects on the quality of the groundwater in the region, and on the other hand, more generally, to the level, movement and quality of both the surface water and the groundwater in the whole of the Szigetköz, with their effects on the fauna and flora in the alluvial plain of the Danube (see paragraph 40 above).

Whether in relation to the Dunakilidi site or to the whole of the Szigetköz, the Court finds here again, that the peril claimed by Hungary was to be considered in the long term, and, more importantly, remained uncertain. As Hungary itself acknowledges, the damage that it apprehended had primarily to be the result of some relatively slow natural processes, the effects of which could not easily be assessed.

Even if the works were more advanced in this sector than at Nagymaros, they had not been completed in July 1989 and, as the Court explained in paragraph 34 above, Hungary expressly undertook to carry on with them, early in June 1989. The report dated 23 June 1989 by the ad hoc Committee of the Hungarian Academy of Sciences, which was also referred to in paragraph 35 of the present Judgment, does not express any awareness of an authenticated peril — even in the form of a definite peril, whose realization would have been inevitable in the long term — when it states that:

“The measuring results of an at least five-year monitoring period following the completion of the Gabčíkovo construction are indispensable to the trustworthy prognosis of the ecological impacts of the barrage system. There is undoubtedly a need for the establishment and regular operation of a comprehensive monitoring system, which must be more developed than at present. The examination of biological indicator objects that can sensitively indicate the changes happening in the environment, neglected till today, have to be included.”

The report concludes as follows:

“It can be stated, that the environmental, ecological and water quality impacts were not taken into account properly during the design and construction period until today. Because of the complexity of the ecological processes and lack of the measured data and the relevant calculations the environmental impacts cannot be evaluated.

The data of the monitoring system newly operating on a very limited area are not enough to forecast the impacts probably occurring over a longer term. In order to widen and to make the data more frequent a further multi-year examination is necessary to decrease the further degradation of the water quality playing a dominant role in this question. The expected water quality influences equally the aquatic ecosystems, the soils and the recreational and tourist land-use.”

The Court also notes that, in these proceedings, Hungary acknowledged that, as a general rule, the quality of the Danube waters had improved over the past 20 years, even if those waters remained subject to hypertrophic conditions.

However “grave” it might have been, it would accordingly have been difficult, in the light of what is said above, to see the alleged peril as sufficiently certain and therefore “imminent” in 1989.

The Court moreover considers that Hungary could, in this context
also, have resorted to other means in order to respond to the dangers that it apprehended. In particular, within the framework of the original Project, Hungary seemed to be in a position to control at least partially the distribution of the water between the bypass canal, the old bed of the Danube and the side-arms. It should not be overlooked that the Dunáki lít dam was located in Hungarian territory and that Hungary could construct the works needed to regulate flows along the old bed of the Danube and the side-arms. Moreover, it should be borne in mind that Article 14 of the 1977 Treaty provided for the possibility that each of the parties might withdraw quantities of water exceeding those specified in the Joint Contractual Plan, while making it clear that, in such an event, "the share of electric power of the Contracting Party benefiting from the excess withdrawal shall be correspondingly reduced".

57. The Court concludes from the foregoing that, with respect to both Nagymaros and Gabčíkovo, the perils invoked by Hungary, without prejudging their possible gravity, were not sufficiently established in 1989, nor were they "imminent"; and that Hungary had available to it at that time means of responding to these perceived perils other than the suspension and abandonment of works with which it had been entrusted. What is more, negotiations were under way which might have led to a review of the Project and the extension of some of its time-limits, without there being need to abandon it. The Court infers from this that the respect by Hungary, in 1989, of its obligations under the terms of the 1977 Treaty would not have resulted in a situation "characterized so aptly by the maxim summa prorsus summa injuria" (Yearbook of the International Law Commission, 1980, Vol. II, Part 2, p. 49, para. 31).

Moreover, the Court notes that Hungary decided to conclude the 1977 Treaty, a Treaty which — whatever the political circumstances prevailing at the time of its conclusion — was treated by Hungary as valid and in force until the date declared for its termination in May 1992. As can be seen from the material before the Court, a great many studies of a scientific and technical nature had been conducted at an earlier time, both by Hungary and by Czechoslovakia. Hungary was, then, presumably aware of the situation as then known, when it assumed its obligations under the Treaty. Hungary contended before the Court that those studies had been inadequate and that the state of knowledge at that time was not such as to make possible a complete evaluation of the ecological implications of the Gabčíkovo-Nagymaros Project. It is nonetheless the case that although the principal object of the 1977 Treaty was the construction of a System of Locks for the production of electricity, improvement of navigation on the Danube and protection against flooding, the need to ensure the protection of the environment had not escaped the parties, as can be seen from Articles 15, 19 and 20 of the Treaty.

What is more, the Court cannot fail to note the positions taken by Hungary after the entry into force of the 1977 Treaty. In 1983, Hungary asked that the works under the Treaty should go forward more slowly, for reasons that were essentially economic but also, subsidiarily, related to ecological concerns. In 1989, when, according to Hungary itself, the state of scientific knowledge had undergone a significant development, it asked for the works to be speeded up, and then decided, three months later, to suspend them and subsequently to abandon them. The Court is not however unaware that profound changes were taking place in Hungary in 1989, and that, during that transitory phase, it might have been more than usually difficult to co-ordinate the different points of view prevailing from time to time.

The Court infers from all these elements that, in the present case, even if it had been established that there was, in 1989, a state of necessity linked to the performance of the 1977 Treaty, Hungary would not have been permitted to rely upon that state of necessity in order to justify its failure to comply with its treaty obligations, as it had helped, by act or omission to bring it about.

58. It follows that the Court has no need to consider whether Hungary, by proceeding as it did in 1989, “seriously impaired an essential interest” of Czechoslovakia, within the meaning of the aforementioned Article 33 of the Draft of the International Law Commission — a finding which does not in any way prejudice the damage Czechoslovakia claims to have suffered on account of the position taken by Hungary.

Nor does the Court need to examine the argument put forward by Hungary, according to which certain breaches of Articles 15 and 19 of the 1977 Treaty, committed by Czechoslovakia even before 1989, contravened the purported state of necessity; and neither does it have to reach a decision on the argument advanced by Slovakia, according to which Hungary breached the provisions of Article 27 of the Treaty, in 1989, by taking unilateral measures without having previously had recourse to the machinery of dispute settlement for which that Article provides.

* * *

59. In the light of the conclusions reached above, the Court, in reply to the question put to it in Article 2, paragraph 1 (a), of the Special Agreement (see paragraph 27 above), finds that Hungary was not entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabčíkovo Project for which the 1977 Treaty and related instruments attributed responsibility to it.

* * *

60. By the terms of Article 2, paragraph 1 (b), of the Special Agreement, the Court is asked in the second place to decide

"(b) whether the Czech and Slovak Federal Republic was entitled to proceed, in November 1991, to the 'provisional solution'
80. Slovakia also maintained that it was acting under a duty to mitigate damages when it carried out Variant C. It stated that “It is a general principle of international law that a party injured by the non-performance of another contract party must seek to mitigate the damage he has sustained.”

It would follow from such a principle that an injured State which has failed to take the necessary measures to limit the damage sustained would not be entitled to claim compensation for that damage which could have been avoided. While this principle might thus provide a basis for the calculation of damages, it could not, on the other hand, justify an otherwise wrongful act.

81. Since the Court has found that the putting into operation of Variant C constituted an internationally wrongful act, the duty to mitigate damage invoked by Slovakia does not need to be examined further.

* *

82. Although it did not invoke the plea of countermeasures as a primary argument, since it did not consider Variant C to be unlawful, Slovakia stated that “Variant C could be presented as a justified countermeasure to Hungary’s illegal acts”.

The Court has concluded, in paragraph 78 above, that Czechoslovakia committed an internationally wrongful act in putting Variant C into operation. Thus, it now has to determine whether such wrongfulness may be precluded on the ground that the measure so adopted was in response to Hungary’s prior failure to comply with its obligations under international law.


In the first place it must be taken in response to a previous international wrongful act of another State and must be directed against that State. Although not primarily presented as a countermeasure, it is clear that Variant C was a response to Hungary’s suspension and abandon-

ment of works and that it was directed against that State; and it is equally clear, in the Court’s view, that Hungary’s actions were internationally wrongful.

84. Secondly, the injured State must have called upon the State committing the wrongful act to discontinue its wrongful conduct or to make reparation for it. It is clear from the facts of the case, as recalled above by the Court (see paragraphs 61 et seq.), that Czechoslovakia requested Hungary to resume the performance of its treaty obligations on many occasions.

85. In the view of the Court, an important consideration is that the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question.

In 1929, the Permanent Court of International Justice, with regard to navigation on the River Oder, stated as follows:

“[the] community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the user of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others” (Territorial Jurisdiction of the International Commission of the River Oder. Judgment No. 16, 1929, P.C.I.J., Series A, No. 23, p. 27).

Modern development of international law has strengthened this principle for non-navigational uses of international watercourses as well, as evidenced by the adoption of the Convention of 21 May 1997 on the Law of the Non-Navigational Uses of International Watercourses by the United Nations General Assembly.

The Court considers that Czechoslovakia, by unilaterally assuming control of a shared resource, and thereby depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube — with the continuing effects of the diversion of these waters on the ecology of the riparian area of the Szigetköz — failed to respect the proportionality which is required by international law.

86. Moreover, as the Court has already pointed out (see paragraph 78), the fact that Hungary had agreed in the context of the original Project to the diversion of the Danube (and, in the Joint Contractual Plan, to a provisional measure of withdrawal of water from the Danube) cannot be understood as having authorized Czechoslovakia to proceed with a unilateral diversion of this magnitude without Hungary’s consent.

87. The Court thus considers that the diversion of the Danube carried out by Czechoslovakia was not a lawful countermeasure because it was not proportionate. It is therefore not required to pass upon another condition for the lawfulness of a countermeasure, namely that its purpose must be to induce the wrongdoing State to comply with its obliga-
tions under international law, and that the measure must therefore be reversible.

* * *

88. In the light of the conclusions reached above, the Court, in reply to the question put to it in Article 2, paragraph 1 (a), of the Special Agreement (see paragraph 60), finds that Czechoslovakia was entitled to proceed, in November 1991, to Variant C in so far as it then confined itself to undertaking works which did not predetermine the final decision to be taken by it. On the other hand, Czechoslovakia was not entitled to put that Variant into operation from October 1992.

* * *

89. By the terms of Article 2, paragraph 1 (c), of the Special Agreement, the Court is asked, thirdly, to determine “what are the legal effects of the notification, on 19 May 1992, of the termination of the Treaty by the Republic of Hungary”.

The Court notes that it has been asked to determine what are the legal effects of the notification given on 19 May 1992 of the termination of the Treaty. It will consequently confine itself to replying to this question.

90. The Court will recall that, by early 1992, the respective parties to the 1977 Treaty had made clear their positions with regard to the resoluce by Czechoslovakia to Variant C. Hungary in a Note Verbale of 14 February 1992 had made clear its view that Variant C was a contravention of the 1977 Treaty (see paragraph 64 above); Czechoslovakia insisted on the implementation of Variant C as a condition for further negotiation. On 26 February 1992, in a letter to his Czechoslovak counterpart, the Prime Minister of Hungary described the impending diversion of the Danube as “a serious breach of international law” and stated that, unless work was suspended while further enquiries took place, “the Hungarian Government [would] have no choice but to respond to this situation of necessity by terminating the 1977 inter-State Treaty”. In a Note Verbale dated 18 March 1992, Czechoslovakia reaffirmed that, while it was prepared to continue negotiations “on every level”, it could not agree “to stop all work on the provisional solution”.

On 24 March 1992, the Hungarian Parliament passed a resolution authorizing the Government to terminate the 1977 Treaty if Czechoslovakia did not stop the works by 30 April 1992. On 13 April 1992, the Vice-President of the Commission of the European Communities wrote to both parties confirming the willingness of the Commission to chair a committee of independent experts including representatives of the two countries, in order to assist the two Governments in identifying a mutu-

and joint operation. Consequently, the parties not having agreed otherwise, the Treaty could be terminated only on the limited grounds enumerated in the Vienna Convention.

* *

101. The Court will now turn to the first ground advanced by Hungary, that of the state of necessity. In this respect, the Court will merely observe that, even if a state of necessity is found to exist, it is not a ground for the termination of a treaty. It may only be invoked to exonerate from its responsibilities a State which has failed to implement a treaty. Even if found justified, it does not terminate a Treaty; the Treaty may be ineffectue as long as the condition of necessity continues to exist; it may in fact be dormant, but — unless the parties by mutual agreement terminate the Treaty — it continues to exist. As soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revived.

* *

102. Hungary also relied on the principle of the impossibility of performance as reflected in Article 61 of the Vienna Convention on the Law of Treaties. Hungary’s interpretation of the wording of Article 61 is, however, not in conformity with the terms of that Article, nor with the intentions of the Diplomatic Conference which adopted the Convention. Article 61, paragraph 1, requires the “permanent disappearance or destruction of an object indispensable for the execution” of the treaty to justify the termination of a treaty on grounds of impossibility of performance. During the conference, a proposal was made to extend the scope of the article by including in it cases such as the impossibility to make certain payments because of serious financial difficulties (Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March–24 May 1968, doc. A/CONF.39/11, Summary records of the plenary meetings and of the meetings of the Committee of the Whole, 62nd Meeting of the Committee of the Whole, pp. 361–365). Although it was recognized that such situations could lead to a conclusion of the wrongfulness of non-performance by a party of its treaty obligations, the participating States were not prepared to consider such situations to be a ground for terminating or suspending a treaty, and preferred to limit themselves to a narrower concept.

103. Hungary contended that the essential object of the Treaty — an economic joint investment which was consistent with environmental protection and which was operated by the two contracting parties jointly — had permanently disappeared and that the Treaty had thus become impossible to perform. It is not necessary for the Court to determine whether the term “object” in Article 61 can also be understood to embrace a legal régime as in any event, even if that were the case, it
environmental knowledge and of environmental law can be said to have been completely unforeseen. What is more, the formulation of Articles 15, 19 and 20, designed to accommodate change, made it possible for the parties to take account of such developments and to apply them when implementing those treaty provisions.

The changed circumstances advanced by Hungary are, in the Court's view, not of such a nature, either individually or collectively, that their effect would radically transform the extent of the obligations still to be performed in order to accomplish the Project. A fundamental change of circumstances must have been unforeseen; the existence of the circumstances at the time of the Treaty's conclusion must have constituted an essential basis of the consent of the parties to be bound by the Treaty. The negative and conditional wording of Article 62 of the Vienna Convention on the Law of Treaties is a clear indication moreover that the stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases.

105. The Court will now examine Hungary's argument that it was entitled to terminate the 1977 Treaty on the ground that Czechoslovakia had violated its Articles 15, 19 and 20 (as well as a number of other conventions and rules of general international law); and that the planning, construction and putting into operation of Variant C also amounted to a material breach of the 1977 Treaty.

106. As to that part of Hungary's argument which was based on other treaties and general rules of international law, the Court is of the view that it is only a material breach of the treaty itself, by a State party to that treaty, which entitles the other party to rely on it as a ground for terminating the treaty. The violation of other treaty rules or of rules of general international law may justify the taking of certain measures, including countermeasures, by the injured State, but it does not constitute a ground for termination under the law of treaties.

107. Hungary contended that Czechoslovakia had violated Articles 15, 19 and 20 of the Treaty by refusing to enter into negotiations with Hungary in order to adapt the Joint Contractual Plan to new scientific and legal developments regarding the environment. Articles 15, 19 and 20 oblige the parties jointly to take, on a continuous basis, appropriate measures necessary for the protection of water quality, of nature and of fishing interests.

Articles 15 and 19 expressly provide that the obligations they contain shall be implemented by the means specified in the Joint Contractual Plan. The failure of the parties to agree on those means cannot, on the basis of the record before the Court, be attributed solely to one party.
International Court of Justice

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

CASE CONCERNING MILITARY AND PARAMILITARY ACTIVITIES IN AND AGAINST NICARAGUA
(NICARAGUA v. UNITED STATES OF AMERICA)

MERITS

JUDGMENT OF 27 JUNE 1986

1986

COUR INTERNATIONALE DE JUSTICE
RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE DES ACTIVITÉS MILITAIRES ET PARAMILITAIRES AU NICARAGUA ET CONTRE CELUI-CI
(NICARAGUA c. ÉTATS-UNIS D’AMÉRIQUE)

FOND

ARRÊT DU 27 JUIN 1986

Official citation:
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(Nicaragua v. United States of America), Merits,

Mode officiel de citation:
Activités militaires et paramilitaires au Nicaragua et contre celui-ci
(Nicaragua c. États-Unis d’Amérique), fond,
80. On this basis, the Court finds it established that, on a date in late 1983 or early 1984, the President of the United States authorized a United States government agency to lay mines in Nicaraguan ports; that in early 1984 mines were laid in or close to the ports of El Bluff, Corinto and Puerto Sandino, either in Nicaraguan internal waters or in its territorial sea or both, by persons in the pay and acting on the instructions of that agency, under the supervision and with the logistic support of United States agents; that neither before the laying of the mines, nor subsequently, did the United States Government issue any public and official warning to international shipping of the existence and location of the mines; and that personal and material injury was caused by the explosion of the mines, which also created risks causing a rise in marine insurance rates.

81. The operations which Nicaragua attributes to the direct action of United States personnel or “UCLAs”, in addition to the mining of ports, are apparently the following:

(i) 8 September 1983: an attack was made on Sandino international airport in Managua by a Cessna aircraft, which was shot down;
(ii) 13 September 1983: an underwater oil pipeline and part of the oil terminal at Puerto Sandino were blown up;
(iii) 2 October 1983: an attack was made on oil storage facilities at Benjamin Zeledon on the Atlantic coast, causing the loss of a large quantity of fuel;
(iv) 10 October 1983: an attack was made by air and sea on the port of Corinto, involving the destruction of five oil storage tanks, the loss of millions of gallons of fuel, and the evacuation of large numbers of the local population;
(v) 14 October 1983: the underwater oil pipeline at Puerto Sandino was again blown up;
(vi) 4/5 January 1984: an attack was made by speedboats and helicopters using rockets against the Potosi Naval Base;
(vii) 24/25 February 1984: an incident at El Bluff listed under this date appears to be the mine explosion already mentioned in paragraph 76;
(viii) 7 March 1984: an attack was made on oil and storage facility at San Juan del Sur by speedboats and helicopters;
(ix) 28/30 March 1984: clashes occurred at Puerto Sandino between speedboats, in the course of minelaying operations, and Nicaraguan patrol boats; intervention by a helicopter in support of the speedboats;
(x) 9 April 1984: a helicopter allegedly launched from a mother ship in international waters provided fire support for an ARDE attack on San Juan del Norte.
82. At the time these incidents occurred, they were considered to be acts of the contras, with no greater degree of United States support than the many other military and paramilitary activities of the contras. The declaration of Commander Carrión lists the incidents numbered (i), (ii), (iv) and (vi) above in the catalogue of activities of “mercenaries”, without distinguishing these items from the rest; it does not mention items (iii), (v) and (vii) to (x). According to a report in the New York Times (13 October 1983), the Nicaraguan Government, after the attack on Corinto (item (iv) above), protested to the United States Ambassador in Managua at the aid given by the United States to the contras, and addressed a diplomatic note in the same sense to the United States Secretary of State. The Nicaraguan Memorial does not mention such a protest, and the Court has not been supplied with the text of any such note.

83. On 19 October 1983, thus nine days after the attack on Corinto, a question was put to President Reagan at a press conference. Nicaragua has supplied the Court with the official transcript which, so far as relevant, reads as follows:

“Question: Mr. President, regarding the recent rebel attacks on a Nicaraguan oil depot, is it proper for the CIA to be involved in planning such attacks and supplying equipment for air raids? And do the American people have a right to be informed about any CIA role?

The President: I think covert actions have been a part of government and a part of government’s responsibilities; as long as there has been a government. I’m not going to comment on what, if any, connection such activities might have had with what has been going on, or with some of the specific operations down there. But I do believe in the right of a country when it believes that its interests are best served to practice covert activity and then, while your people may have a right to know, you can’t let your people know without letting the wrong people know, those that are in opposition to what you’re doing.”

Nicaragua presents this as one of a series of admissions “that the United States was habitually and systematically giving aid to mercenaries carrying out military operations against the Government of Nicaragua”. In the view of the Court, the President’s refusal to comment on the connection between covert activities and “what has been going on, or with some of the specific operations down there”, can, in its context, be treated as an admission that the United States had something to do with the Corinto attack, but not necessarily that United States personnel were directly involved.

84. The evidence available to the Court to show that the attacks listed above occurred, and that they were the work of United States personnel or “UCLAs”, other than press reports, is as follows. In his declaration,

Commander Carrión lists items (i), (ii), (iv) and (vi), and in his oral evidence before the Court he mentioned items (ii) and (iv). Items (vi) to (x) were listed in what was said to be a classified CIA internal memorandum or report, excerpts from which were published in the Wall Street Journal on 6 March 1985; according to the newspaper, “intelligence and congressional officials” had confirmed the authenticity of the document. So far as the Court is aware, no denial of the report was made by the United States administration. The affidavit of the former FDN leader Edgar Chamorro states that items (ii), (iv) and (vi) were the work of UCLAs despatched from a CIA “mother ship”, though the FDN was told by the CIA to claim responsibility. It is not however clear what the source of Mr. Chamorro’s information was; since there is no suggestion that he participated in the operation (he states that the FDN “had nothing whatsoever to do” with it), his evidence is probably hearsay and at the date of his affidavit, the same allegations had been published in the press. Although he did not leave the FDN until the end of 1984, he makes no mention of the attacks listed above of January to April 1984.

85. The Court considers that it should eliminate from further consideration under this heading the following items:

- the attack of 8 September 1983 on Managua airport (item (i)) : this was claimed by the ARDE; a press report is to the effect that the ARDE purchased the aircraft from the CIA, but there is no evidence of CIA planning, or the involvement of any United States personnel or UCLAs;
- the attack on Benjamin Zeledon on 2 October 1983 (item (iii)) : there is no evidence of the involvement of United States personnel or UCLAs;
- the incident of 24-25 February 1984 (item vii), already dealt with under the heading of the mining of ports.

86. On the other hand the Court finds the remaining incidents listed in paragraph 81 to be established. The general pattern followed by these attacks appears to the Court, on the basis of that evidence and of press reports quoting United States administration sources, to have been as follows. A “mother ship” was supplied (apparently leased) by the CIA; whether it was of United States registry does not appear. Speedboats, guns and ammunition were supplied by the United States administration, and the actual attacks were carried out by “UCLAs”. Helicopters piloted by Nicaraguans and others piloted by United States nationals were also involved on some occasions. According to one report the pilots were United States civilians under contract to the CIA. Although it is not proved that any United States military personnel took a direct part in the operations, agents of the United States participated in the planning, direction, support and execution of the operations. The execution was the task rather
for Nicaragua, on the impact on contra tactics of the availability of intelligence assistance and, still more important, supply aircraft.

105. It has been contended by Nicaragua that in 1983 a “new strategy” for contra operations in and against Nicaragua was adopted at the highest level of the United States Government. From the evidence offered in support of this, it appears to the Court however that there was, around this time, a change in contra strategy, and a new policy by the United States administration of more overt support for the contras, culminating in the express legislative authorization in the Department of Defense Appropriations Act, 1984, section 775, and the Intelligence Authorization Act for Fiscal Year 1984, section 108. The new contra strategy was said to be to attack “economic targets like electrical plants and storage facilities” and fighting in the cities.

106. In the light of the evidence and material available to it, the Court is not satisfied that all the operations launched by the contra force, at every stage of the conflict, reflected strategy and tactics wholly devised by the United States. However, it is in the Court’s view established that the support of the United States authorities for the activities of the contras took various forms over the years, such as logistic support, the supply of information on the location and movements of the Sandinista troops, the use of sophisticated methods of communication, the deployment of field broadcasting networks, radar coverage, etc. The Court finds it clear that the number of military and paramilitary operations by this force were decided and planned, if not actually by United States advisers, then at least in close collaboration with them, and on the basis of the intelligence and logistic support which the United States was able to offer, particularly the supply aircraft provided to the contras by the United States.

107. To sum up, despite the secrecy which surrounded it, at least initially, the financial support given by the Government of the United States to the military and paramilitary activities of the contras in Nicaragua is a fully established fact. The legislative and executive bodies of the respondent State have moreover, subsequent to the controversy which has been sparked off in the United States, openly admitted the nature, volume and frequency of this support. Indeed, they clearly take responsibility for it, this government aid having now become the major element of United States foreign policy in the region. As to the ways in which such financial support has been translated into practical assistance, the Court has been able to reach a general finding.

108. Despite the large quantity of documentary evidence and testimony which it has examined, the Court has not been able to satisfy itself that the respondent State “created” the contra force in Nicaragua. It seems certain that members of the former Somoza National Guard, together with civilian opponents to the Sandinista régime, withdrew from Nicaragua soon after that régime was installed in Managua, and sought to continue their struggle against it, even if in a disorganized way and with limited and ineffectual resources, before the Respondent took advantage of the existence of these opponents and incorporated this fact into its policies vis-à-vis the régime of the Applicant. Nor does the evidence warrant a finding that the United States gave “direct and critical combat support”, at least if that form of words is taken to mean that this support was tantamount to direct intervention by the United States combat forces, or that all contra operations reflected strategy and tactics wholly devised by the United States. On the other hand, the Court holds it established that the United States authorities largely financed, trained, equipped, armed and organized the FDN.

109. What the Court has to determine at this point is whether or no the relationship of the contras to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the contras, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government. Here it is relevant to note that in May 1983 the assessment of the Intelligence Committee, in the Report referred to in paragraph 95 above, was that the contras “constitute[d] an independent force” and that the “only element of control that could be exercised by the United States” was “cessation of aid”. Paradoxically this assessment serves to underline, a contrario, the potential for control inherent in the degree of the contras’ dependence on aid. Yet despite the heavy subsidies and other support provided to them by the United States, there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the contras as acting on its behalf.

110. So far as the potential control constituted by the possibility of cessation of United States military aid is concerned, it may be noted that after 1 October 1984 such aid was no longer authorized, though the sharing of intelligence, and the provision of “humanitarian assistance” as defined in the above-cited legislation (paragraph 97) may continue. Yet, according to Nicaragua’s own case, and according to press reports, contra activity has continued. In sum, the evidence available to the Court indicates that the various forms of assistance provided to the contras by the United States have been crucial to the pursuit of their activities, but is insufficient to demonstrate their complete dependence on United States aid. On the other hand, it indicates that in the initial years of United States assistance the contra force was so dependent. However, whether the United States Government at any stage devised the strategy and directed the tactics of the contras depends on the extent to which the United States made use of the potential for control inherent in that dependence. The Court has not indicated that it has insufficient evidence to reach a finding on this point. It is a fortiori unable to determine that the contra force may be equated for
legal purposes with the forces of the United States. This conclusion, however, does not of course suffice to resolve the entire question of the responsibility incurred by the United States through its assistance to the contras.

111. In the view of the Court it is established that the contra force has, at least at one period, been so dependent on the United States that it could not conduct its crucial or most significant military and paramilitary activities without the multi-faceted support of the United States. This finding is fundamental in the present case. Nevertheless, adequate direct proof that all or the great majority of contra activities during that period received this support has not been, and indeed probably could not be, advanced in every respect. It will suffice the Court to stress that a degree of control by the United States Government, as described above, is inherent in the position in which the contra force finds itself in relation to that Government.

112. To show the existence of this control, the Applicant argued before the Court that the political leaders of the contra force had been selected, installed and paid by the United States; it also argued that the purpose herein was both to guarantee United States control over this force, and to excite sympathy for the Government's policy within Congress and among the public in the United States. According to the affidavit of Mr. Chamorro, who was directly concerned, when the FDN was formed "the name of the organization, the members of the political junta, and the members of the general staff were all chosen or approved by the CIA"; later the CIA asked that a particular person be made head of the political directorate of the FDN, and this was done. However, the question of the selection, installation and payment of the leaders of the contra force is merely one aspect among others of the degree of dependency of that force. This partial dependency on the United States authorities, the exact extent of which the Court cannot establish, may certainly be inferred inter alia from the fact that the leaders were selected by the United States. But it may also be inferred from other factors, some of which have been examined by the Court, such as the organization, training and equipping of the force, the planning of operations, the choosing of targets and the operational support provided.

* * *

113. The question of the degree of control of the contras by the United States Government is relevant to the claim of Nicaragua attributing responsibility to the United States for activities of the contras whereby the United States has, it is alleged, violated an obligation of international law not to kill, wound or kidnap citizens of Nicaragua. The activities in question are said to represent a tactic which includes "the spreading of terror and danger to non-combatants as an end in itself with no attempt to observe humanitarian standards and no reference to the concept of military necessity". In support of this, Nicaragua has catalogued numerous incidents, attributed to "CIA-trained mercenaries" or "mercenary forces", of kidnapping, assassination, torture, rape, killing of prisoners, and killing of civilians not dictated by military necessity. The declaration of Commander Carrion annexed to the Memorial lists the first such incident in December 1981, and continues up to the end of 1984. Two of the witnesses called by Nicaragua (Father Loison and Mr. Glennon) gave oral evidence as to events of this kind. By way of examples of evidence to provide "direct proof of the tactics adopted by the contras under United States guidance and control", the Memorial of Nicaragua offers a statement, reported in the press, by the ex-FDN leader Mr. Edgar Chamorro, repeated in the latter's affidavit of assassinations in Nicaraguan villages; the alleged existence of a classified Defence Intelligence Agency report of July 1982, reported in the New York Times on 21 October 1984, disclosing that the contras were carrying out assassinations; and the preparation by the CIA in 1983 of a manual of psychological warfare. At the hearings, reliance was also placed on the affidavit of Mr. Chamorro.

114. In this respect, the Court notes that according to Nicaragua, the contras are no more than bands of mercenaries which have been recruited, organized, paid and commanded by the Government of the United States. This would mean that they have no real autonomy in relation to that Government. Consequently, any offences which they have committed would be imputable to the Government of the United States, like those of any other forces placed under the latter's command. In the view of Nicaragua, "stricto sensu, the military and paramilitary attacks launched by the United States against Nicaragua do not constitute a case of civil strife. They are essentially the acts of the United States." If such a finding of the imputability of the acts of the contras to the United States were to be made, no question would arise of mere complicity in these acts, or of incitement of the contras to commit them.

115. The Court has taken the view (paragraph 110 above) that United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the contras, the selection of its military or paramilitary targets, and the planning of the whole or its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the contras in the course of their military or paramilitary operations in Nicaragua. All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the contras without the control of the United
States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.

116. The Court does not consider that the assistance given by the United States to the contras warrants the conclusion that these forces are subject to the United States to such an extent that any acts they have committed are imputable to that State. It takes the view that the contras remain responsible for their acts, and that the United States is not responsible for the acts of the contras, but for its own conduct vis-à-vis Nicaragua, including conduct related to the acts of the contras. What the Court has to investigate is not the complaints relating to alleged violations of humanitarian law by the contras regarded by Nicaragua as imputable to the United States, but rather unlawful acts for which the United States may be responsible directly in connection with the activities of the contras. The lawfulness or otherwise of such acts of the United States is a question different from the violations of humanitarian law of which the contras may or may not have been guilty. It is for this reason that the Court does not have to determine whether the violations of humanitarian law attributed to the contras were in fact committed by them. At the same time, the question whether the United States Government was, or may have been, aware at the relevant time that allegations of breaches of humanitarian law were being made against the contras is relevant to an assessment of the lawfulness of the action of the United States. In this respect, the material facts are primarily those connected with the issue in 1983 of a manual of psychological operations.

117. Nicaragua has in fact produced in evidence before the Court two publications which it claims were prepared by the CIA and supplied to the contras in 1983. The first of these, in Spanish, is entitled “Operaciones psicológicas en guerra de guerrillas” (Psychological Operations in Guerrilla Warfare), by “Tayacán”; the certified copy supplied to the Court carries no publisher’s name or date. In its Preface, the publication is described as “a manual for the training of guerrillas in psychological operations, and its application to the concrete case of the Christian and democratic crusade being waged in Nicaragua by the Freedom Commandos”.

The second is entitled the Freedom Fighter’s Manual, with the subtitle “Practical guide to liberating Nicaragua from oppression and misery by paralyzing the military-industrial complex of the traitorous marxist state without having to use special tools and with minimal risk for the combatant”. The text is printed in English and Spanish, and illustrated with simple drawings; it consists of guidance for elementary sabotage techniques. The only indications available to the Court of its authorship are reports in the New York Times, quoting a United States Congressman and
International Criminal Tribunal for the former Yugoslavia

Prosecutor v. Duško Tadić a/k/a "Dule"
Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995 [Appeals Chamber]

Case No. IT-94-1-A, p. 5, para. 11
This is the meaning which it carries in all legal systems. Thus, historically, in common law, the *Termes de la ley* provide the following definition:

"jurisdiction’ is a dignity which a man hath by a power to do justice in causes of complaint made before him.” (Stroud's Judicial Dictionary, 1379 (5th ed. 1986).)

The same concept is found even in current dictionary definitions:

"[Jurisdiction] is the power of a court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties." Black's Law Dictionary, 712 (6th ed. 1990) (citing Pinner v. Pinner, 33 N.C. App. 204, 234 S.E.2d 633.)

11. A narrow concept of jurisdiction may, perhaps, be warranted in a national context but not in international law. International law, because it lacks a centralized structure, does not provide for an integrated judicial system operating an orderly division of labour among a number of tribunals, where certain aspects or components of jurisdiction as a power could be centralized or vested in one of them but not the others. In international law, every tribunal is a self-contained system (unless otherwise provided). This is incompatible with a narrow concept of jurisdiction, which presupposes a certain division of labour. Of course, the constitutive instrument of an international tribunal can limit some of its jurisdictional powers, but only to the extent to which such limitation does not jeopardize its "judicial character", as shall be discussed later on. Such limitations cannot, however, be presumed and, in any case, they cannot be deduced from the concept of jurisdiction itself.

12. In sum, if the International Tribunal were not validly constituted, it would lack the legitimate power to decide in time or space or over any person or subject-matter. The plea based on the invalidity of constitution of the International Tribunal goes to the very essence of jurisdiction as a power to exercise the judicial function within any ambit. It is more radical than, in the sense that it goes beyond and subsumes, all the other pleas concerning the scope of jurisdiction. This issue is a preliminary to and conditions all other aspects of jurisdiction.

B. Admissibility Of Plea Based On The Invalidity Of The Establishment Of The International Tribunal

13. Before the Trial Chamber, the Prosecutor maintained that:

1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 (hereinafter "International Tribunal") is seized of an appeal lodged by Appellant the Defence against a judgement rendered by the Trial Chamber II on 10 August 1995. By that judgement, Appellant's motion challenging the jurisdiction of the International Tribunal was denied.

2. Before the Trial Chamber, Appellant had launched a three-pronged attack:

   (1) the International Tribunal lacks authority to review its establishment by the Security Council (Prosecutor Trial Brief, at 10-12); and that in any case
   (2) the question whether the Security Council in establishing the International Tribunal complied with the United Nations Charter raises "political questions" which are "non-justiciable" (id. at 12-14).

The Trial Chamber approved this line of argument. This position comprises two arguments: one relating to the power of the International Tribunal to consider such a plea; and another relating to the classification of the subject-matter of the plea as a "political question" and, as such, "non-justiciable", i.e., regardless of whether or not it falls within its jurisdiction.

1. Does The International Tribunal Have Jurisdiction?

14. In its decision, the Trial Chamber declares:

"[I]t is one thing for the Security Council to have taken every care to ensure that a structure
International Court of Justice


Judgment

*ICJ Reports* 2007, pp. 201-229, paras. 384-450
CASE CONCERNING APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE (BOSNIA AND HERZEGOVINA v. SERBIA AND MONTENEGRO)

JUDGMENT OF 26 FEBRUARY 2007
APPLICATION OF THE CONVENTION ON THE PREVENTION
AND PUNISHMENT OF THE CRIME OF GENOCIDE
(BOSNIA AND HERZEGOVINA v. SERBIA AND MONTENEGRO)

26 FEBRUARY 2007
JUDGMENT

APPLICATION DE LA CONVENTION POUR LA PRÉVENTION
ET LA RÉPRESSION DU CRIME DE GÉNOCIDE
(BOSNIE-HERZÉGOVINE c. SERBIE-ET-MONTÉNÉGRO)

26 FÉVRIER 2007
ARRÊT

vention, in relation to the whole accumulation of facts constituting geno-
cide. If a State is held responsible for an act of genocide (because it was
committed by a person or organ whose conduct is attributable to the
State), or for one of the other acts referred to in Article III of the Con-
vention (for the same reason), then there is no point in asking whether it
complied with its obligation of prevention in respect of the same acts,
because logic dictates that a State cannot have satisfied an obligation to
prevent genocide in which it actively participated. On the other hand, it is
self-evident, as the Parties recognize, that if a State is not responsible for
any of the acts referred to in Article III, paragraphs (a) to (e), of the
Convention, this does not mean that its responsibility cannot be sought
for a violation of the obligation to prevent genocide and the other acts
referred to in Article III.

383. Finally, it should be made clear that, while, as noted above, a
State’s responsibility deriving from any of those acts renders moot the
question whether it satisfied its obligation of prevention in respect of the
same conduct, it does not necessarily render superfluous the question
whether the State complied with its obligation to punish the perpetrators
of the acts in question. It is perfectly possible for a State to incur respon-
sibility at once for an act of genocide (or complicity in genocide, incite-
ment to commit genocide, or any of the other acts enumerated in
Article III) committed by a person or organ whose conduct is attribut-
able to it, and for the breach by the State of its obligation to punish the
perpetrator of the act: these are two distinct internationally wrongful
acts attributable to the State, and both can be asserted against it as
bases for its international responsibility.

384. Having thus explained the interrelationship among the three issues
set out above (paragraph 379), the Court will now proceed to consider
the first of them. This is the question whether the massacres committed
at Srebrenica during the period in question, which constitute the crime
of genocide within the meaning of Articles II and III, paragraph (a), of the
Convention, are attributable, in whole or in part, to the Respondent.
This question has in fact two aspects, which the Court must consider
separately. First, it should be ascertained whether the acts committed at
Srebrenica were perpetrated by organs of the Respondent, i.e., by per-
sons or entities whose conduct is necessarily attributable to it, because
they are in fact the instruments of its action. Next, if the preceding
question is answered in the negative, it should be ascertained whether the acts
in question were committed by persons who, while not organs of the
Respondent, did nevertheless act on the instructions of, or under the
direction or control of, the Respondent.

* *
The Question of Attribution of the Srebrenica Genocide to the Respondent on the Basis of the Conduct of Its Organs

385. The first of these two questions relates to the well-established rule, one of the cornerstones of the law of State responsibility, that the conduct of any State organ is to be considered an act of the State under international law and therefore gives rise to the responsibility of the State if it constitutes a breach of an international obligation of the State. This rule, which is one of customary international law, is reflected in Article 4 of the ILC Articles on State Responsibility as follows:

"Article 4
Conduct of organs of a State

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State."

386. When applied to the present case, this rule first calls for a determination whether the acts of genocide committed in Srebrenica were perpetrated by "persons or entities" having the status of organs of the Federal Republic of Yugoslavia (as the Respondent was known at the time) under its internal law, as then in force. It must be said that there is nothing which could justify an affirmative response to this question. It has not been shown that the FRY army took part in the massacres, nor that the political leaders of the FRY had a hand in preparing, planning or in any way carrying out the massacres. It is true that there is much evidence of direct or indirect participation by the official army of the FRY, along with the Bosnian Serb armed forces, in military operations in Bosnia and Herzegovina in the years prior to the events at Srebrenica. That participation was repeatedly condemned by the political organs of the United Nations, which demanded that the FRY put an end to it (see, for example, Security Council resolutions 752 (1992), 757 (1992), 762 (1992), 819 (1993), 838 (1993)). It has however not been shown that there was any such participation in relation to the massacres committed at Srebrenica (see also paragraphs 278 to 297 above). Further, neither the Republika Srpska, nor the VRS were de jure organs of the FRY, since none of them had the status of organ of that State under its internal law.

387. The Applicant has however claimed that all officers in the VRS, including General Mladić, remained under FRY military administration, and that their salaries were paid from Belgrade right up to 2002, and accordingly contends that these officers “were de jure organs of [the FRY], intended by their superiors to serve in Bosnia and Herzegovina with the VRS”. On this basis it has been alleged by the Applicant that those officers, in addition to being officers of the VRS, remained officers of the VJ, and were thus de jure organs of the Respondent (paragraph 238 above). The Respondent however asserts that only some of the VRS officers were being “administered” by the 30th Personnel Centre in Belgrade, so that matters like their payment, promotion, pension, etc., were being handled from the FRY (paragraph 238 above); and that it has not been clearly established whether General Mladić was one of them. The Applicant has shown that the promotion of Mladić to the rank of Colonel General on 24 June 1994 was handled in Belgrade, but the Respondent emphasizes that this was merely a verification for administrative purposes of a promotion decided by the authorities of the Republika Srpska.

388. The Court notes first that no evidence has been presented that either General Mladić or any of the other officers whose affairs were handled by the 30th Personnel Centre were, according to the internal law of the Respondent, officers of the army of the Respondent — a de jure organ of the Respondent. Nor has it been conclusively established that General Mladić was one of those officers; and even on the basis that he might have been, the Court does not consider that he would, for that reason alone, have to be treated as an organ of the FRY for the purposes of the application of the rules of State responsibility. There is no doubt that the FRY was providing substantial support, inter alia, financial support, to the Republika Srpska (cf. paragraph 241 above), and that one of the forms that support took was payment of salaries and other benefits to some officers of the VRS, but this did not automatically make them organs of the FRY. Those officers were appointed to their commands by the President of the Republika Srpska, and were subordinate to the political leadership of the Republika Srpska. In the absence of evidence to the contrary, those officers must be taken to have received their orders from the Republika Srpska or the VRS, not from the FRY. The expression “State organ”, as used in customary international law and in Article 4 of the ILC Articles, applies to one or other of the individual or collective entities which make up the organization of the State and act on its behalf (cf. ILC Commentary to Art. 4, para. (1)). The functions of the VRS officers, including General Mladić, were however to act on behalf of the Bosnian Serb authorities, in particular the Republika Srpska, not on behalf of the FRY; they exercised elements of the public authority of the Republika Srpska. The particular situation of General Mladić, or of any other VRS officer present at Srebrenica who may have been “administered” from Belgrade, is not therefore such as to lead the Court to modify the conclusion reached in the previous paragraph.
389. The issue also arises as to whether the Respondent might bear responsibility for the acts of the "Scorpions" in the Srebrenica area. In this connection, the Court will consider whether it has been proved that the Scorpions were a *de jure* organ of the Respondent. It is in dispute between the Parties as to when the "Scorpions" became incorporated into the forces of the Respondent. The Applicant has ... to Belgrade. Judging on the basis of these materials, the Court is unable to find that the "Scorpions" were, in mid-1995, *de jure* organs of the Respondent. Furthermore, the Court notes that in any event the act of an organ placed by a State at the disposal of another public authority shall not be considered an act of that State if the organ was acting on behalf of the public authority at whose disposal it had been placed.

390. The argument of the Applicant however goes beyond mere contemplation of the status, under the Respondent's internal law, of the persons who committed the acts of genocide; it also raises the question as to whether the Respondent itself may be considered responsible for the acts of persons or groups of persons outside the formal structure of the FRY. The Court recalls the principle that a State's international responsibility by choice acting through persons or entities, whose supposed independence would be purely fictitious.

391. The first issue raised by this argument is whether it is possible in principle to attribute to a State conduct of persons — or groups of persons — not de jure organs of the FRY, but which have been placed at the disposal of the FRY through an official State structure. The Court reiterates that the key question is whether the conduct of the person or group in question is attributable to the FRY, in that the person or group is acting in such a manner as to be considered an organ of the FRY for international responsibility purposes. The Respondent rejects this contention, and maintains that these were not *de facto* organs of the FRY.

392. The passages quoted show that, according to the Court's jurisprudence, persons, groups or entities may, for purposes of international responsibility, be equated with organs of a State if the act of an organ placed by a State at the disposal of another public authority at whose disposal it had been placed is attributable to the FRY, in that the person or group is acting in such a manner as to be considered an organ of the FRY for international responsibility purposes. The Court reiterates that the key question is whether the conduct of the person or group in question is attributable to the FRY, in that the person or group is acting in such a manner as to be considered an organ of the FRY for international responsibility purposes. The Respondent rejects this contention, and maintains that these were not *de facto* organs of the FRY.

393. The Court can only answer this question in the negative. At the relevant time, July 1995, neither the Republika Srpska nor the VRS could have been considered an organ of the FRY for international responsibility purposes.
be regarded as mere instruments through which the FRY was acting, and as lacking any real autonomy. While the political, military and logistical relations between the federal authorities in Belgrade and the authorities in Pale, between the Yugoslav army and the VRS, had been strong and close in previous years (see paragraph 238 above), and these ties undoubtedly remained powerful, they were, at least at the relevant time, not such that the Bosnian Serbs’ political and military organizations should be equated with organs of the FRY. It is even true that differences over strategic options emerged at the time between Yugoslav authorities and Bosnian Serb leaders; at the very least, these are evidence that the latter had some qualified, but real, margin of independence. Nor, notwithstanding the very important support given by the Respondent to the Republika Srpska, without which it could not have “conducted its crucial or most significant military and paramilitary activities” (I.C.J. Reports 1986, p. 63, para. 111), did this signify a total dependence of the Republika Srpska upon the Respondent.

395. The Court now turns to the question whether the “Scorpions” were in fact acting in complete dependence on the Respondent. The Court has not been presented with materials to indicate this. The Court also notes that, in giving his evidence, General Dannatt, when asked under whose control or whose authority the paramilitary groups coming from Serbia were operating, replied, “they would have been under the command of Mladić and part of the chain of the command of the VRS”. The Parties referred the Court to the Stanišić and Simatović case (IT-03-69, pending); notwithstanding that the defendants are not charged with genocide in that case, it could have its relevance ... emerges from the pleadings and documents in the case file, and the arguments of the Parties made during the oral exchanges.

The Court therefore finds that the acts of genocide at Srebrenica cannot be attributed to the Respondent as having been committed by its organs or by persons or entities wholly dependent upon it, and thus do not on this basis entail the Respondent’s international responsibility.

* * *

(4) The Question of Attribution of the Srebrenica Genocide to the Respondent on the Basis of Direction or Control

396. As noted above (paragraph 384), the Court must now determine whether the massacres at Srebrenica were committed by persons who, although not having the status of organs of the Respondent, nevertheless acted on its instructions or under its direction or control, as the Applicant argues in the alternative; the Respondent denies that such was the case.

397. The Court must emphasize, at this stage in its reasoning, that the question just stated is not the same as those dealt with thus far. It is obvious that it is different from the question whether the persons who committed the acts of genocide had the status of organs of the Respondent under its internal law; nor however, and despite some appearance to the contrary, is it the same as the question whether those persons should be equated with State organs de facto, even though not enjoying that status under internal law. The answer to the latter question depends, as previously explained, on whether those persons were in a relationship of such complete dependence on the State that they cannot be considered otherwise than as organs of the State, so that all their actions performed in such capacity would be attributable to the State for purposes of international responsibility. Having answered that question in the negative, the Court now addresses a completely separate issue: whether, in the specific circumstances surrounding the events at Srebrenica the perpetrators of genocide were acting on the Respondent’s instructions, or under its direction or control. An affirmative answer to this question would in no way imply that the perpetrators should be characterized as organs of the FR Yugoslavia or, equated with such organs. It would merely mean that the FR Yugoslavia’s international responsibility would be incurred owing to the conduct of those of its own organs which gave the instructions or exercised the control resulting in the commission of acts in breach of its international obligations. In other words, it is no longer a question of ascertaining whether the persons who directly committed the genocide were acting as organs of the FR Yugoslavia, or could be equated with those organs — this question having already been answered in the negative. What must be determined is whether FR Yugoslavia organs — incontestably having that status under the FR Yugoslavia’s internal law — originated the genocide by issuing instructions to the perpetrators or exercising direction or control, and whether, as a result, the conduct of organs of the Respondent, having been the cause of the commission of acts in breach of its international obligations, constituted a violation of those obligations.

398. On this subject the applicable rule, which is one of customary law of international responsibility, is laid down in Article 8 of the ILC Articles on State Responsibility as follows:

"Article 8

Conduct directed or controlled by a State

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of
persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.”

399. This provision must be understood in the light of the Court’s jurisprudence on the subject, particularly that of the 1986 Judgment in the case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) referred to above (paragraph 391). In that Judgment the Court, as noted above, after having rejected the argument that the contras were to be equated with organs of the United States because they were “completely dependent” on it, added that the responsibility of the Respondent could still arise if it were proved that it had itself “directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State” (I.C.J. Reports 1986, p. 64, para. 115); this led to the following significant conclusion:

“For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.” (Ibid., p. 65.)

400. The test thus formulated differs in two respects from the test — described above — to determine whether a person or entity may be equated with a State organ even if not having that status under internal law. First, in this context it is not necessary to show that the persons who performed the acts alleged to have violated international law were in general in a relationship of “complete dependence” on the respondent State; it has to be proved that they acted in accordance with that State’s instructions or under its “effective control”. It must however be shown that this “effective control” was exercised, or that the State’s instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations.

401. The Applicant has, it is true, contended that the crime of genocide has a particular nature, in that it may be composed of a considerable number of specific acts separate, to a greater or lesser extent, in time and space. According to the Applicant, this particular nature would justify, among other consequences, assessing the “effective control” of the State allegedly responsible, not in relation to each of these specific acts, but in relation to the whole body of operations carried out by the direct perpetrators of the genocide. The Court is however of the view that the particular characteristics of genocide do not justify the Court in departing from the criterion elaborated in the Judgment in the case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (see paragraph 399 above). The rules for attributing alleged internationally wrongful conduct to a State do not vary with the nature of the wrongful act in question in the absence of a clearly expressed lex specialis. Genocide will be considered as attributable to a State if and to the extent that the physical acts constitutive of genocide that have been committed by organs or persons other than the State’s own agents were carried out, wholly or in part, on the instructions or directions of the State, or under its effective control. This is the state of customary international law, as reflected in the ILC Articles on State Responsibility.

402. The Court notes however that the Applicant has further questioned the validity of applying, in the present case, the criterion adopted in the Military and Paramilitary Activities Judgment. It has drawn attention to the Judgment of the ICTY Appeals Chamber in the Tadić case (IT-94-1-A, Judgment, 15 July 1999). In that case the Chamber did not follow the jurisprudence of the Court in the Military and Paramilitary Activities case: it held that the appropriate criterion, applicable in its view both to the characterization of the armed conflict in Bosnia and Herzegovina as international, and to imputing the acts committed by Bosnian Serbs to the FRY under the law of State responsibility, was that of the “overall control” exercised over the Bosnian Serbs by the FRY; and further that that criterion was satisfied in the case (on this point, ibid., para. 145). In other words, the Appeals Chamber took the view that acts committed by Bosnian Serbs could give rise to international responsibility of the FRY on the basis of the overall control exercised by the FRY over the Republika Srpska and the VRS, without there being any need to prove that each operation during which acts were committed in breach of international law was carried out on the FRY’s instructions, or under its effective control.

403. The Court has given careful consideration to the Appeals Chamber’s reasoning in support of the foregoing conclusion, but finds itself unable to subscribe to the Chamber’s view. First, the Court observes that the ICTY was not called upon in the Tadić case, nor is it in general called upon, to rule on questions of State responsibility, since its jurisdiction is criminal and extends over persons only. Moreover, the resolution of which is not always necessary for deciding the criminal cases before it.
404. It is the case of the doctrine laid down in the Tadić Judgment that the court is required to determine the question of whether or not an armed conflict is international, which is the sole question which the Appeals Chamber was called upon to decide. The doctrine laid down in the Tadić Judgment is not applicable to the present case, as there is no need to determine whether an armed conflict is international.

405. It should first be observed that logic does not require the same test to be adopted in resolving the two issues, which are very different in nature: the degree and nature of a State's responsibility for a specific act committed in the course of the conflict.

406. It must next be noted that the "overall control" test has the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility, as it is required to give rise to the general principle of international responsibility, a principle which is applicable to acts committed by State organs only when a State is responsible for an act committed by such organs.

407. Thus, it is on the basis of its settled jurisprudence that the Court will determine whether the Respondent has incurred responsibility under the rule of customary international law set out in Article 8 of the ILC Articles on State Responsibility.
another meeting would be held the next day in order to confirm the arrangements. Mr. Bildt had already arranged with Mr. Stoltenberg and Mr. Akashi [the Special Representative of the Secretary-General] that they would join him in Belgrade. He also requested that the UNPROFOR Commander also come to Belgrade in order to finalize some of the military details with Mladic.” (A/54/549, paras. 372-373.)

409. By 19 July, on the basis of the Belgrade meeting, Mr. Akashi was hopeful that both President Milošević and General Mladic might show some flexibility. The UNPROFOR Commander met with Mladic on 19 July and throughout the meeting kept in touch with Mr. Bildt who was holding parallel negotiations with President Milošević in Belgrade. Mladic gave his version of the events of the preceding days (his troops had “‘finished [it] in a correct way’; some “‘unfortunate small incidents’ had occurred”). The UNPROFOR Commander and Mladic then signed an agreement which provided for

“ICRC access to all ‘reception centres’ where the men and boys of Srebrenica were being held, by the next day;

UNHCR and humanitarian aid convoys to be given access to Srebrenica;

The evacuation of wounded from Potočari, as well as the hospital in Bratunac;

The return of Dutchbat weapons and equipment taken by the BSA;

The transfer of Dutchbat out of the enclave commencing on the afternoon of 21 July, following the evacuation of the remaining women, children and elderly who wished to leave.

Subsequent to the signing of this agreement, the Special Representative wrote to President Milošević, reminding him of the agreement, that had not yet been honoured, to allow ICRC access to Srebrenica. The Special Representative later also telephoned President Milošević to reiterate the same point.” (Ibid., para. 392.)

410. The Court was referred to other evidence supporting or denying the Respondent’s effective control over, participation in, involvement in, or influence over the events in and around Srebrenica in July 1995. The Respondent quotes two substantial reports prepared seven years after the events, both of which are in the public domain, and readily accessible. The first, Srebrenica — a “Safe” Area, published in 2002 by the Netherlands Institute for War Documentation was prepared over a lengthy period by an expert team. The Respondent has drawn attention to the fact that this report contains no suggestion that the FRY leadership was involved in planning the attack or inciting the killing of non-Serbs; nor

any hard evidence of assistance by the Yugoslav army to the armed forces of the Republika Srpska before the attack; nor any suggestion that the Belgrade Government had advance knowledge of the attack. The Respondent also quotes this passage from point 10 of the Epilogue to the Report relating to the “mass slaughter” and “the executions” following the fall of Srebrenica: “There is no evidence to suggest any political or military liaison with Belgrade, and in the case of this mass murder such a liaison is highly improbable.” The Respondent further observes that the Applicant’s only response to this submission is to point out that “the report, by its own admission, is not exhaustive”, and that this Court has been referred to evidence not used by the authors.

411. The Court observes, in respect of the Respondent’s submissions, that the authors of the Report do conclude that Belgrade was aware of the intended attack on Srebrenica. They record that the Dutch Military Intelligence Service and another Western intelligence service concluded that the July 1995 operations were co-ordinated with Belgrade (Part III, Chap. 7, Sect. 7). More significantly for present purposes, however, the authors state that “there is no evidence to suggest participation in the preparations for executions on the part of Yugoslav military personnel or the security agency (RDB). In fact there is some evidence to support the opposite view...” (Part IV, Chap. 2, Sect. 20). That supports the passage from point 10 of the Epilogue quoted by the Respondent, which was preceded by the following sentence: “Everything points to a central decision by the General Staff of the VRS.”

412. The second report is Balkan Battlegrounds, prepared by the United States Central Intelligence Agency, also published in 2002. The first volume under the heading “The Possibility of Yugoslav involvement” arrives at the following conclusion:

“No basis has been established to implicate Belgrade’s military or security forces in the post-Srebrenica atrocities. While there are indications that the VJ or RDB [the Serbian State Security Department] may have contributed elements to the Srebrenica battle, there is no similar evidence that Belgrade-directed forces were involved in any of the subsequent massacres. Eyewitness accounts by survivors may be imperfect recollections of events, and details may have been overlooked. Narrations and other available evidence suggest that only Bosnian Serb troops were employed in the atrocities and executions that followed the military conquest of Srebrenica.” (Balkan Battlegrounds, p. 353.)
The response of the Applicant was to quote an earlier passage which refers to reports which “suggest” that VJ troops and possibly elements of the Serbian State Security Department may have been engaged in the battle in Srebrenica — as indeed the second sentence of the passage quoted by the Respondent indicates. It is a cautious passage, and significantly gives no indication of any involvement by the Respondent in the post-conflict atrocities which are the subject of genocide-related convictions. Counsel for the Respondent also quoted from the evidence of the Deputy Commander of Dutchbat, given in the Milošević trial, in which the accused put to the officer the point quoted earlier from the Epilogue to the Netherlands report. The officer responded:

“At least for me, I did not have any evidence that it was launched in co-operation with Belgrade. And again, I read all kinds of reports and opinions and papers where all kinds of scenarios were analysed, and so forth. Again, I do not have any proof that the action, being the attack on the enclave, was launched in co-operation with Belgrade.”

The other evidence on which the Applicant relied relates to the influence, rather than the control, that President Milošević had or did not have over the authorities in Pale. It mainly consists of the evidence given at the Milošević trial by Lord Owen and General Wesley Clark and also Lord Owen’s publications. It does not establish a factual basis for finding the Respondent responsible on a basis of direction or control.

* * *

(5) Conclusion as to Responsibility for Events at Srebrenica under Article III, Paragraph (a), of the Genocide Convention

413. In the light of the information available to it, the Court finds, as indicated above, that it has not been established that the massacres at Srebrenica were committed by persons or entities ranking as organs of the Respondent (see paragraph 395 above). It finds also that it has not been established that those massacres were committed on the instructions or under the direction of organs of the respondent State, nor that the Respondent exercised effective control over the operations in the course of which those massacres, which, as indicated in paragraph 297 above, constituted the crime of genocide, were perpetrated.

The Applicant has not proved that instructions were issued by the federal authorities in Belgrade, or by any other organ of the FRY, to commit the massacres, still less that any such instructions were given with the specific intent (dolus specialis) characterizing the crime of genocide, which would have had to be present in order for the Respondent to be held responsible on this basis. All indications are to the contrary: that the decision to kill the adult male population of the Muslim community in Srebrenica was taken by some members of the VRS Main Staff, but without instructions from or effective control by the FRY.

As for the killings committed by the “Scorpions” paramilitary militias, notably at Trnovo (paragraph 289 above), even if it were accepted that they were an element of the genocide committed in the Srebrenica area, which is not clearly established by the decisions thus far rendered by the ICTY (see, in particular, the Trial Chamber’s decision of 12 April 2006 in the Stanišić and Simatović case, IT-03-69), it has not been proved that they took place either on the instructions or under the control of organs of the FRY.

414. Finally, the Court observes that none of the situations, other than those referred to in Articles 4 and 8 of the ILC’s Articles on State Responsibility, in which specific conduct may be attributed to a State, matches the circumstances of the present case in regard to the possibility of attributing the genocide at Srebrenica to the Respondent. The Court does not see itself required to decide at this stage whether the ILC’s Articles dealing with attribution, apart from Articles 4 and 8, express present customary international law, it being clear that none of them apply in this case. The acts constituting genocide were not committed by persons or entities which, while not being organs of the FRY, were empowered by it to exercise elements of the governmental authority (Art. 5), nor by organs placed at the Respondent’s disposal by another State (Art. 6), nor by persons in fact exercising elements of the governmental authority in the absence or default of the official authorities of the Respondent (Art. 9); finally, the Respondent has not acknowledged and adopted the conduct of the perpetrators of the acts of genocide as its own (Art. 11).

415. The Court concludes from the foregoing that the acts of those who committed genocide at Srebrenica cannot be attributed to the Respondent under the rules of international law of State responsibility: thus, the international responsibility of the Respondent is not engaged on this basis.

* * *

VIII. THE QUESTION OF RESPONSIBILITY, IN RESPECT OF SREBRENICA, FOR ACTS ENUMERATED IN ARTICLE III, PARAGRAPHS (b) TO (e), OF THE GENOCIDE CONVENTION

416. The Court now comes to the second of the questions set out in paragraph 379 above, namely, that relating to the Respondent’s possible responsibility on the ground of one of the acts related to genocide enumerated in Article III of the Convention. These are: conspiracy to
417. It is clear from an examination of the facts of the case that sub-
paragraphs (b) and (c) of Article III are irrelevant in the present case. It
has not been proved that organs of the FR Yugoslavia, or persons acting on
the instructions or under the effective control of that State, committed act
that could be characterized as "conspiracy to commit genocide" (Art. III,para.
(b)), or as "direct and public incitement to commit genocide" (Art. III, para.
to the Commission of a wrong act by another State.
products of the FRY, or persons acting under the effective control of the Respondent, is sufficient to exclude the latter's responsibility in this
regard. As regards subparagraph (c), none of the information brought to
the attention of the Court is sufficient to establish that organs of the
Respondent, or persons acting on its instructions or under its effective
control, had anything at all to do with the commission of a wrong act by
another State.

418. A more delicate question is whether it can be accepted that acts
which could be characterized as "complicity in genocide", within the
meaning of Article III, paragraph (e), of the Convention, can be attributed to
organ of the Respondent. While paragraph (e) could not be applied to the
FR Yugoslavia as such, it seems that the Respondent failed to prevent acts
that were committed by persons subject to its jurisdiction. As the
Respondent is responsible only for those acts that were committed under
its effective control, it is clear that the Respondent is responsible for acts
committed by the YRS while it was in control of Bosnian territories.

419. First, it is necessary to consider whether the Respondent was
derelated to the acts in question within the meaning of Article IV of the
Convention. Paragraph 300 of the Judgment states that the Respondent
was responsible for acts committed by persons under its effective control
in the territory of former Yugoslavia, as well as for acts committed by the
Yugoslav army in its territory. Paragraph 301 of the Judgment also states
that the Respondent was responsible for acts committed by persons under its
effective control in the territory of the former Yugoslavia. Paragraph 302 of
the Judgment states that the Respondent was responsible for acts commit-
ted by the YRS in its territory. Paragraph 303 of the Judgment states that
the Respondent was responsible for acts committed by the YRS in its territory.

420. In this connection, reference should be made to Article 16 of the
ILC's Articles on State Responsibility, reflecting a customary rule, which
reads as follows:

"Article 16
Aid or assistance in the commission of an internationally wrongful act
A State which aids or assists another State in the commission of
an internationally wrongful act shall be internationally responsible if:
(a) That State does so with knowledge of the circumstances of the
international act so committed;
(b) The act would be internationally wrongful if committed by that
State.

Although this provision, because it concerns a situation characterized by
a relationship between two States, is not directly relevant to the present
case, it can still be taken into account for the purposes of determining
whether the Respondent is responsible for the acts in question within the
meaning of Article III, paragraph (e), of the Convention. In this context, it
must be noted that the Respondent was responsible for acts committed by
persons under its effective control in the territory of the former Yugoslavia.

421. It is clear from the facts of the case that sub-paragraphs (b) and
(c) of Article III, paragraph (e), of the Convention, are irrelevant in the present
case. It has not been proved that organs of the FR Yugoslavia, or persons acting
under the effective control of that State, committed acts that could be
characterized as "aid or assistance in the commission of an internationally
wrongful act". As regards subparagraph (c), none of the information brought
to the attention of the Court is sufficient to establish that organs of the
Respondent, or persons acting on its instructions or under its effective
control, had anything at all to do with the commission of wrong acts by
another State.
421. Before the Court turns to an examination of the facts, one further comment is required. It concerns the link between the specific intent (dolus specialis) which characterizes the crime of genocide and the motives which inspire the actions of an accomplice (meaning a person providing aid or assistance to the direct perpetrators of the crime): the question arises whether complicity presupposes that the accomplice shares the specific intent (dolus specialis) of the principal perpetrator. But whatever the reply to this question, there is no doubt that the conduct of an organ or a person furnishing aid or assistance to the principal perpetrator, unless at the least that organ or person acted knowingly, that is to say, in particular, was aware of the specific intent (dolus specialis) of the principal perpetrator. If that condition is not fulfilled, that is sufficient to exclude categorization as complicity. The Court will proceed to determine whether, if it replies to that question of fact in the affirmative, it will need to determine the legal point referred to above.

422. The Court is not convinced by the evidence furnished by the Applicant that the above conditions were met. Undoubtedly, the quite substantial aid of a political, military and administrative nature, which the Applicant, in its submissions, purports to establish, is only relevant as evidence of the specific intent (dolus specialis) characterizing genocide, namely, the intent to destroy, in whole or in part, a human group, as such.

423. A point which is clearly decisive in this connection is that it was not conclusively shown that the decision to eliminate physically the adult male population of the Muslim community from the territory of Srebrenica was taken in full awareness of the specific intent (dolus specialis) characterizing genocide. It is thus not established beyond reasonable doubt that the FRY supplied aid to the perpetrators of the genocide in full awareness that the aid supplied would be used to commit genocide.

424. The Court concludes from the above that the international responsibility of the Respondent is not engaged for acts of complicity in genocide mentioned in Article III, paragraph (e), of the Convention. In the light of this finding, and of the findings above relating to the other paragraphs of Article III, the international responsibility of the Respondent is not engaged under Article III as a whole.

IX. THE QUESTION OF RESPONSIBILITY FOR BREACH OF THE OBLIGATIONS TO PREVENT AND PUNISH GENOCIDE

425. The Court now turns to the third and last of the questions set out in paragraph 379 above: has the respondent State complied with its obligations to prevent and punish genocide under Article I of the Convention?

426. It is true that, simply by its wording, Article I of the Convention brings out the close link between prevention and punishment: “The Contracting Parties confirm that genocide, whether committed in whole or in part, is a mortal sin under international law which no State can commit with impunity.” However, it is not the case that the obligation to prevent is, as it were, absorbed by the obligation to punish. Despite the close links between the duty to prevent and punishment under Article I of the Convention, it is not possible to understand the obligations under Article I as either a duty to prevent, or a duty to punish, or both simultaneously. This is because the obligations under Article I are distinct, each of which must be considered in isolation. The Court must first determine whether the respondent State, in its response to the allegations of genocide, has failed to act in accordance with its obligations under Article I of the Convention.

427. The Court notes that the Respondent’s response to the allegations of genocide, in particular the statement that the Respondent is not responsible for any of the other acts committed in the territory of the Republika Srpska and the VRS, does not address the specific obligations set out in Article I of the Convention. The Respondent’s response instead focuses on the Respondent’s position in relation to the events in Srebrenica.

428. The Court concludes that the Respondent has not fulfilled its obligations under Article I of the Convention.
obligation to punish, which is therefore the only duty the performance of which may be subject to review by the Court. The obligation on each contracting State to prevent genocide is both normative and compelling. It is not merged in the duty to punish, nor can it be regarded as simply a component of that duty. It has its own scope, which extends beyond the particular case envisaged in Article VIII, namely reference to the competent organs of the United Nations, for them to take such action as they deem appropriate. Even if and when these organs have been called upon, this does not mean that the States parties to the Convention are relieved of the obligation to take such action as they can to prevent genocide from occurring, while respecting the United Nations Charter and any decisions that may have been taken by its competent organs.

This is the reason why the Court will first consider the manner in which the Respondent has performed its obligation to prevent before examining the situation as regards the obligation to punish.

(1) The Obligation to Prevent Genocide

428. As regards the obligation to prevent genocide, the Court thinks it necessary to begin with the following introductory remarks and clarifications, amplifying the observations already made above.

429. First, the Genocide Convention is not the only international instrument providing for an obligation on the States parties to it to take certain steps to prevent the acts it seeks to prohibit. Many other instruments include a similar obligation, in various forms: see, for example, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 (Art. 2); the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, of 14 December 1973 (Art. 4); the Convention on the Safety of United Nations and Associated Personnel of 9 December 1994 (Art. 11); the International Convention on the Suppression of Terrorist Bombings of 15 December 1997 (Art. 15).

The content of the duty to prevent varies from one instrument to another, according to the wording of the relevant provisions, and depending on the nature of the acts to be prevented.

The decision of the Court does not, in this case, purport to establish a general jurisprudence applicable to all cases where a treaty instrument, or other binding legal norm, includes an obligation for States to prevent certain acts. Still less does the decision of the Court purport to find whether, apart from the texts applicable to specific fields, there is a general obligation on States to prevent the commission by other persons or entities of acts contrary to certain norms of general international law. The Court will therefore confine itself to determining the specific scope of the duty to prevent in the Genocide Convention, and to the extent that such a determination is necessary to the decision to be given on the dispute before it. This will, of course, not absolve it of the need to refer, if need be, to the rules of law whose scope extends beyond the specific field covered by the Convention.

430. Secondly, it is clear that the obligation in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible. A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide. In this area the notion of "due diligence", which calls for an assessment in concreto, is of critical importance. Various parameters operate when assessing whether a State has duly discharged the obligation concerned. The first, which varies greatly from one State to another, is clearly the capacity to influence effectively the action of persons likely to commit, or already committing, genocide. This capacity itself depends, among other things, on the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events. The State's capacity to influence must also be assessed by legal criteria, since it is clear that every State may only act within the limits permitted by international law; seen thus, a State's capacity to influence may vary depending on its particular legal position vis-à-vis the situations and persons facing the danger, or the reality, of genocide. On the other hand, it is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide. As well as being generally difficult to prove, this is irrelevant to the breach of the obligation of conduct in question, the more so since the possibility remains that the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result — averting the commission of genocide — which the efforts of only one State were insufficient to produce.

431. Thirdly, a State can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed. It is at the time when commission of the prohibited act (genocide or any of the other acts listed in Article III of the Convention) begins that the breach
In the second place, as also noted above, there cannot be a finding of complicity against a State unless its organs were aware, and if the aid and assistance was supplied, from the moment at which its organs or those charged with its administration were aware, of the perpetrators of the criminal act or of those who were on the point of committing them, enabled or facilitated the perpetration of the criminal acts or the perpetration of the crimes against humanity, the.14, paragraph 3, of its Articles on State Responsibility: “...the breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.” This obviously does not mean that the obligation to prevent genocide commences; that only comes into being when the breach has occurred, since the occurrence of the event is the breach of the obligation to prevent, or the omission, the corresponding duty to act, which in law, of course, is an obligation to do something. It means that the obligations of States under Article 14, paragraph 3, of the ILC Articles on State Responsibility are not the same as the obligations of States under Article 14, paragraph 1, of the ILC Articles on State Responsibility which require States to take such measures as may be necessary to prevent breaches of international obligations. In the first case, there is no act in law that is required to be done; in the second case, there is an act in law that is required to be done. In the first case, the obligation to prevent is an obligation to refrain from doing something; in the second case, it is an obligation to do something.

432. Fourth and finally, the Court believes it especially important to lay stress on the differences between the requirements to be met before a State can be held to have violated the Convention for “complicity in genocide” (Article III, paragraph (e) of the ILC Articles on State Responsibility) and those to be met before a State can be held to have violated the Convention for “complicity in war crimes” (Article III, paragraph (d) of the ILC Articles on State Responsibility). There are two main differences; they are so significant as to make it impossible to treat the two types of violation in the same way.

In consequence, in the present case the Court will have to consider the positive action of the genocide, while a violation of the obligation to prevent results from mere failure to adopt and implement adequate measures to prevent genocide from being committed. In other words, while complicity in genocide occurs as soon as a State has failed to do what it was required by the Convention to do, complicity in war crimes requires, as a minimum, that the State in question has taken positive steps to cause the commission of war crimes.

433. In light of the foregoing, the Court will now consider the facts of the case. For the reasons stated above (paragraph 431), it will confine its examination of events which occurred before the 9th of July 1995 to the FRY’s conduct vis-à-vis the Srebrenica massacres.

434. The Court would first note that, during the period under consideration, the FRY was in a position of influence over the Bosnian Serbs and the VRS on the one hand, and the undisturbed political and military control over the Republika Srpska and the VRS on the other. The strength of the political and military links between the FRY and the Republika Srpska and the VRS is such that, although not as strong as during the period of the war, there was still a form of control between the two entities.

435. Secondly, the Court cannot but note that, on the relevant date, the FRY was bound by very specific obligations by virtue of the two Orders indicating provisional measures delivered by the Court in 1993 and 1994. In particular, in its Order of 8 April 1993, the Court stated, inter alia, that although not able, at that early stage in the proceedings, to make “ definitive findings of fact or of imputability” (I.C.J. Reports 1993, p. 22, para. 44) the FRY was required to ensure...
“that any military, paramilitary or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, do not commit any acts of genocide, of conspiracy to commit genocide, of direct and public incitement to commit genocide, or of complicity in genocide...” (I.C.J. Reports 1993, p. 24, para. 52 A (2)).

The Court’s use, in the above passage, of the term “influence” is particularly revealing of the fact that the Order concerned not only the persons or entities whose conduct was attributable to the FRY, but also all those with whom the Respondent maintained close links and on which it could exert a certain influence. Although in principle the two issues are separate, and the second will be examined below, it is not possible, when considering the way the Respondent discharged its obligation of prevention under the Convention, to fail to take account of the obligation incumbent upon it, albeit on a different basis, to implement the provisional measures indicated by the Court.

436. Thirdly, the Court recalls that although it has not found that the information available to the Belgrade authorities indicated, as a matter of certainty, that genocide was imminent (which is why complicity in genocide was not upheld above; paragraph 424), they could hardly have been unaware of the serious risk of it once the VRS forces had decided to occupy the Srebrenica enclave. Among the documents containing information clearly suggesting that such an awareness existed, mention should be made of the above-mentioned report (see paragraphs 283 and 285 above) of the United Nations Secretary-General prepared pursuant to General Assembly resolution 53/35 on the “fall of Srebrenica” (United Nations doc. A/54/549), which recounts the visit to Belgrade on 14 July 1995 of the European Union negotiator Mr. Bildt to meet Mr. Milošević. Mr. Bildt, in substance, informed Mr. Milošević of his serious concern and

“pressed the President to arrange immediate access for the UNHCR to assist the people of Srebrenica, and for the ICRC to start to register those who were being treated by the BSA [Bosnian Serb Army] as prisoners of war”.

437. The Applicant has drawn attention to certain evidence given by General Wesley Clark before the ICTY in the Milošević case. General Clark referred to a conversation that he had had with Milošević during the negotiation of the Dayton Agreement. He stated that

“I went to Milošević and I asked him. I said, ‘If you have so much influence over these [Bosnian] Serbs, how could you have allowed General Mladić to have killed all those people at Srebrenica?’ And he looked to me — at me. His expression was very grave. He paused before he answered, and he said, ‘Well, General Clark, I warned him not to do this, but he didn’t listen to me.’ And it was in the context of all the publicity at the time about the Srebrenica massacre.’” (Milošević, IT-02-54-T, Transcript, 16 December 2003, pp. 30494-30495).

General Clark gave it as his opinion, in his evidence before the ICTY, that the circumstances indicated that Milošević had foreknowledge of what was to be “a military operation combined with a massacre” (ibid., p. 30497). The ICTY record shows that Milošević denied ever making the statement to which General Clark referred, but the Trial Chamber nevertheless relied on General Clark’s testimony in its Decision of 16 June 2004 when rejecting the Motion for Judgment of Acquittal (Milošević, IT-02-54-T, Decision on Motion for Judgment of Acquittal, 16 June 2004, para. 280).

438. In view of their undeniable influence and of the information, voicing serious concern, in their possession, the Yugoslav federal authorities should, in the view of the Court, have made the best efforts within their power to try and prevent the tragic events then taking shape, whose scale, though it could not have been foreseen with certainty, might at least have been surmised. The FRY leadership, and President Milošević above all, were fully aware of the climate of deep-seated hatred which reigned between the Bosnian Serbs and the Muslims in the Srebrenica region. As the Court has noted in paragraph 423 above, it has not been shown that the decision to eliminate physically the whole of the adult male population of the Muslim community of Srebrenica was brought to the attention of the Belgrade authorities. Nevertheless, given all the international concern about what looked likely to happen at Srebrenica, given Milošević’s own observations to Mladić, which made it clear that the dangers were known and that these dangers seemed to be of an order that could suggest intent to commit genocide, unless brought under control, it must have been clear that there was a serious risk of genocide in Srebrenica. Yet the Respondent has not shown that it took any initiative to prevent what happened, or any action on its part to avert the atrocities which were committed. It must therefore be concluded that the organs of the Respondent did nothing to prevent the Srebrenica massacres, claiming that they were powerless to do so, which hardly tallies with their known influence over the VRS. As indicated above, for a State to be held responsible for breaching its obligation of prevention, it does not need to be proven that the State concerned definitely had the power to prevent the genocide; it is sufficient that it had the means to do so and that it manifestly refrained from using them.
Such is the case here. In view of the foregoing, the Court concludes that the Respondent violated its obligation to prevent the Srebrenica genocide in such a manner as to engage its international responsibility.

* * *

(2) The Obligation to Punish Genocide

439. The Court now turns to the question of the Respondent’s compliance with its obligation to punish the crime of genocide stemming from Article I and the other relevant provisions of the Convention.

440. In its fifth final submission, Bosnia and Herzegovina requests the Court to adjudge and declare:

“5. That Serbia and Montenegro has violated and is violating its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide for having failed and for failing to punish acts of genocide or any other act prohibited by the Convention on the Prevention and Punishment of the Crime of Genocide, and for having failed and for failing to transfer individuals accused of genocide or any other act prohibited by the Convention to the International Criminal Tribunal for the former Yugoslavia and to fully co-operate with this Tribunal.”

441. This submission implicitly refers to Article VI of the Convention, according to which:

“Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.”

442. The Court would first recall that the genocide in Srebrenica, the commission of which it has established above, was not carried out in the Respondent’s territory. It concludes from this that the Respondent cannot be charged with not having tried before its own courts those accused of having participated in the Srebrenica genocide, either as principal perpetrators or as accomplices, or of having committed one of the other acts mentioned in Article III of the Convention in connection with the Srebrenica genocide. Even if Serbian domestic law granted jurisdiction to its criminal courts to try those accused, and even supposing such proceedings were compatible with Serbia’s other international obligations, *inter alia* its obligation to co-operate with the ICTY, to which the Court will revert below, an obligation to try the perpetrators of the Srebrenica massacre in Serbia’s domestic courts cannot be deduced from Article VI. Article VI only obliges the Contracting Parties to institute and exercise territorial criminal jurisdiction; while it certainly does not prohibit States, with respect to genocide, from conferring jurisdiction on their criminal courts based on criteria other than where the crime was committed which are compatible with international law, in particular the nationality of the accused, it does not oblige them to do so.

443. It is thus to the obligation for States parties to co-operate with the “international penal tribunal” mentioned in the above provision that the Court must now turn its attention. For it is certain that once such a court has been established, Article VI obliges the Contracting Parties “which shall have accepted its jurisdiction” to co-operate with it, which implies that they will arrest persons accused of genocide who are in their territory — even if the crime of which they are accused was committed outside it — and, failing prosecution of them in the parties’ own courts, that they will hand them over for trial by the competent international tribunal.

444. In order to determine whether the Respondent has fulfilled its obligations in this respect, the Court must first answer two preliminary questions: does the ICTY constitute an “international penal tribunal” within the meaning of Article VI? And must the Respondent be regarded as having “accepted the jurisdiction” of the tribunal within the meaning of that provision?

445. As regards the first question, the Court considers that the reply must definitely be in the affirmative. The notion of an “international penal tribunal” within the meaning of Article VI must at least cover all international criminal courts created after the adoption of the Convention (at which date no such court existed) of potentially universal scope, and competent to try the perpetrators of genocide or any of the other acts enumerated in Article III. The nature of the legal instrument by which such a court is established is without importance in this respect. When drafting the Genocide Convention, its authors probably thought that such a court would be created by treaty: a clear pointer to this lies in the reference to “those Contracting Parties which shall have accepted [the] jurisdiction” of the international penal tribunal. Yet, it would be contrary to the object of the provision to interpret the notion of “international penal tribunal” restrictively in order to exclude from it a court which, as in the case of the ICTY, was created pursuant to a United Nations Security Council resolution adopted under Chapter VII of the Charter. The Court has found nothing to suggest that such a possibility was considered by the authors of the Convention, but no intention of seeking to exclude it can be imputed to them.

446. The question whether the Respondent must be regarded as having “accepted the jurisdiction” of the ICTY within the meaning of Article VI must consequently be formulated as follows: is the Respondent obliged to accept the jurisdiction of the ICTY, and to co-operate with the Tribunal by virtue of the Security Council resolution which established it, or of
447. For the purposes of the present case, the Court only has to determine whether the FRY was under an obligation to cooperate with the ICTY, and if so, on what basis, from when the tribunal under Article 127 of the Convention, in particular the ICTY, was established. From 1 June 1995, the year after and the period after its admission as a Member of the United Nations, at any event from 14 December 1995 onwards.

448. Turning now to the facts of the case, the question the Court must answer is whether the Respondent has fully cooperated with the ICTY, in particular by arresting and handing over to the ICTY any fugitive. The authenticity and accuracy of those statements have not been disputed by the Respondent at any time.

449. It therefore appears to the Court sufficiently established that the Respondent failed in its duty to cooperate fully with the ICTY. This failure constitutes a violation by the Respondent of the Convention, and its international responsibility is thereby engaged. The Court is of the opinion that the Respondent's contributions to the ICTY, pursuant to Article 127 of the Convention, are insufficient to discharge its obligations under the Convention, and the Court is therefore unable to conclude, on the basis of the procedure of the ICTY, that the Respondent has fulfilled its obligations under the Convention.
International Tribunal for the Law of the Sea

Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)
Advisory Opinion of 2 April 2015

ITLOS Reports, vol. 15, 2015 pp. 44-49, paras. 156-174
156. The Tribunal will now deal with the issue of liability of an international organization where fishing licences are issued within the framework of a fisheries access agreement between the SRFC Member States and the organization.

157. The Tribunal emphasizes that the third question is not to be understood as relating to international organizations in general, but only to international organizations, referred to in articles 305, paragraph 1(f), and 306 of the Convention, and Annex IX to the Convention, to which their member States, which are parties to the Convention, have transferred competence over matters governed by it; in the present case the matter in question is fisheries.

158. In accordance with its articles 305, paragraph 1(f), and 306 as well as its Annex IX, the Convention is open for participation by international organizations. An international organization may become a party to the Convention upon the deposit of an instrument of formal confirmation or of accession. On that basis, the European Community (hereinafter “the EC”) became a party to the Convention on 1 May 1998, following the deposit of its instrument of formal confirmation.

159. At present, the only such organization party to the Convention is the European Union (hereinafter “the EU”), which, on 1 December 2009, succeeded and replaced the EC (see article 1, Consolidated Version of the Treaty on European Union (TEU), Official Journal of the European Union, C 326, 26 October 2012, p. 16).

160. According to article 4, paragraphs 1, 2 and 3, of Annex IX to the Convention:

1. The instrument of formal confirmation or of accession of an international organization shall contain an undertaking to accept the rights and obligations of States under this Convention in respect of matters relating to which competence has been transferred to it by its member States which are Parties to this Convention.

2. An international organization shall be a Party to this Convention to the extent that it has competence in accordance with the declarations, communications of information or notifications referred to in article 5 of this Annex.
3. Such an international organization shall exercise the rights and perform the obligations which its member States which are Parties would otherwise have under this Convention, on matters relating to which competence has been transferred to it by those member States. The member States of that international organization shall not exercise competence which they have transferred to it.

161. In depositing its instrument of formal confirmation, the EC declared “its acceptance, in respect of matters for which competence has been transferred to it by those of its member States which are parties to the Convention, of the rights and obligations laid down for States in the Convention and the Agreement” relating to the implementation of Part XI. The EC also stated that “[t]he scope and the exercise of such Community competences are, by their nature, subject to continuous development, and the Community will complete or amend this declaration, if necessary, in accordance with article 5(4) of Annex IX to the Convention.”

162. The Tribunal notes that the declaration by the EC concerning competence under article 5, paragraph 1, of Annex IX, attached to the instrument of formal confirmation, specifies the matters governed by the Convention in respect of which competence has been transferred to the organization by its member States, all of which are parties to the Convention.

163. In this declaration, the EC specified certain matters of exclusive competence, as well as matters of shared competence with its member States. The respective parts of the declaration are reproduced below:

1. Matters for which the Community has exclusive competence:

   The Community points out that its Member States have transferred competence to it with regard to the conservation and management of sea fishing resources. Hence in this field it is for the Community to adopt the relevant rules and regulations (which are enforced by the Member States) and, within its competence, to enter into external undertakings with third States or competent international organizations. This competence applies to waters under national fisheries jurisdiction and to the high seas. Nevertheless, in respect of measures relating to the exercise of jurisdiction over vessels, flagging and registration of vessels and the enforcement of penal and administrative sanctions, competence rests with the Member States whilst respecting Community law. Community law also provides for administrative sanctions.

2. Matters for which the Community shares competence with its Member States:

   With regard to fisheries, for a certain number of matters that are not directly related to the conservation and management of sea fishing resources, for example research and technological development and development cooperation, there is shared competence.

164. The Tribunal notes that in the present case, pursuant to the declaration of the EU with regard to “the conservation and management of sea fishing resources”, it is only the exclusive competence of the EU that is relevant.


166. The Tribunal is of the view that the issue of liability in respect of vessels that are owned or operated by a national of a member State of an international organization and which are flying the flag of a State that is not a member of that international organization is beyond the scope of the third question.

167. The Tribunal takes note of the statement made by the EU in the course of the oral proceedings that “[i]n the European Union, international agreements concluded by the EU are binding on its institutions and its member States.” The EU added that “[a]s envisaged in question 3, the European Union is the only contracting party with the coastal State, exercising competence in respect of the EU member States” and that “[i]t follows from that that it is only the EU – the organization – that is potentially liable under international law for violations of the obligations under these agreements.”

168. The Tribunal wishes to point out that, in the present case, the liability of an international organization for an internationally wrongful act is linked to its
competence. This is clearly spelled out in article 6, paragraph 1, of Annex IX to the Convention, which provides that parties which have competence under article 5 of that Annex have responsibility for failure to comply with obligations or for any other violation of the Convention. It follows that an international organization which in a matter of its competence undertakes an obligation, in respect of which compliance depends on the conduct of its member States, may be held liable if a member State fails to comply with such obligation and the organization did not meet its obligation of “due diligence”.

169. The Tribunal further notes that the EU stated in the course of the oral proceedings that the fisheries access agreements “are an integral part of the EU legal order and ... are implemented within the Union by the Member States’ authorities” and that “[i]f a member State of the European Union fails to fulfil the obligations stemming from the agreement, it is still the Union which is internationally liable.”

170. The Tribunal considers that the liability of an international organization for a violation of the fisheries legislation of the coastal State by a vessel flying the flag of a member State holding a fishing license issued within the framework of a fisheries access agreement depends on whether the relevant agreement contains specific provisions regarding liability for such violation. In the absence of such provisions in the agreement, the general rules of international law apply. The Tribunal notes that the EU expressed a similar view during the proceedings, stating:

The liability of the flag State or the international agency for the violation of the fisheries legislation of the coastal State depends on the content of the international agreement applicable to it, possibly including specific provisions regarding liability of the flag State. In the absence of specific provisions, the general rules of international law on State responsibility for a breach by the State of its international obligations are applicable.

171. The activities of fishing vessels of the EU operating in the exclusive economic zone of an SRFC Member State under a fisheries access agreement with the EU are, according to these agreements, subject to the fisheries laws and regulations of that State. In this regard, the Tribunal takes note of the statement made by the EU in the course of the oral proceedings that “[f]ishing operations need to be authorized and conducted in conformity with the law of coastal States, as the agreements concluded by the European Union consistently provide”, that “[t]hese agreements commit the Union “[t]o take appropriate steps required to ensure that its vessels comply with the Agreement and the legislation governing fisheries”, and that “[o]n that basis the EU would investigate alleged violations of such legislation by the Union vessels and take additional measures, as necessary, in line with both the content of the agreement and with the due-diligence obligation”.

172. The Tribunal holds that in cases where an international organization, in the exercise of its exclusive competence in fisheries matters, concludes a fisheries access agreement with an SRFC Member State, which provides for access by vessels flying the flag of its member States to fish in the exclusive economic zone of that State, the obligations of the flag State become the obligations of the international organization. The international organization, as the only contracting party to the fisheries access agreement with the SRFC Member State, must therefore ensure that vessels flying the flag of a member State comply with the fisheries laws and regulations of the SRFC Member State and do not conduct IUU fishing activities within the exclusive economic zone of that State.

173. Accordingly, only the international organization may be held liable for any breach of its obligations arising from the fisheries access agreement, and not its member States. Therefore, if the international organization does not meet its “due diligence” obligations, the SRFC Member States may hold the international organization liable for the violation of their fisheries laws and regulations by a vessel flying the flag of a member State of that organization and fishing in the exclusive economic zones of the SRFC Member States within the framework of a fisheries access agreement between that organization and such Member States.

174. The SRFC Member States may, pursuant to article 6, paragraph 2, of Annex IX to the Convention, request an international organization or its member States which are parties to the Convention for information as to who has responsibility in respect of any specific matter. The organization and the member States concerned must provide this information. Failure to do so within a reasonable
time or the provision of contradictory information results in joint and several liability of the international organization and the member States concerned.

VIII. Question 4

175. The fourth question submitted to the Tribunal is as follows:

_What are the rights and obligations of the coastal State in ensuring the sustainable management of shared stocks and stocks of common interest, especially the small pelagic species and tuna?_

176. In its written submission, the SRFC gives the following details as to the background of this question posed to the Tribunal:

Small pelagic species and tuna are migratory species that concentrate seasonally, depending on the environmental conditions, in the waters under national jurisdiction of several coastal States. Accordingly, the concerned States should take concerted action for their sustainable management.

It has to be highlighted that, in general, the concerned States do not consult each other when setting up management measures on those resources. In fact, these pelagic resources are subject to fishing authorization through fishing agreement signed between the coastal State and foreign companies without consultation with neighbouring coastal States that are along the migration routes of those resources.

177. The SRFC adds that “some Member States continue to act in isolation, issuing fishing licenses on the shared resources, thereby undermining the interests of neighbouring States and the initiatives of the SRFC.” The SRFC concludes that “[t]oday, the practice shows the lack of cooperation among SRFC Member States in managing sustainably the stocks of common interest or shared stocks.”

178. Before addressing the rights and obligations of the coastal State, certain preliminary issues need to be clarified, namely: which States are covered by the reference to the coastal State; what is the scope of the rights and obligations; what do the expressions “shared stocks”, “stocks of common interest” and “sustainable management” as used in this question mean?
Second Report on State Responsibility: The Origin of International Responsibility

YEARBOOK
OF THE
INTERNATIONAL
LAW COMMISSION
1970
Volume II

Documents of the twenty-second session
including the report of the Commission
to the General Assembly

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[Agenda item 4]

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Second report on State responsibility, by Mr. Roberto Ago, Special Rapporteur

The origin of international responsibility

[Original text: French]
[20 April 1970]

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* The translation for the French terms “fait illicite international” and “fait internationalement illicite”, provisionally established by the Secretariat, was “international illicit act”. However, during the discussion of this report at the twenty-second session of the International Law Commission the English-speaking members of the Commission expressed their preference for the term “internationally wrongful act”, already used in previous reports. Accordingly, the term “internationally wrongful act” has been used throughout in the final edition of the present report.

Introduction

1. When presenting to the International Law Commission, at its twenty-first session,1 his first report on the international responsibility of States (A/CN.4/217 and Add.1),2 containing a review of previous work on the codification of this topic, the Special Rapporteur stated that his intention was to provide the Commission with a general conspectus of that work so that it could study the past and derive from it some useful guidance for its future work. The main aim was to avoid, in the future, the obstacles which in the past had prevented the codification of this branch of international law.

2. In this context the Special Rapporteur was concerned to illustrate some of the most serious difficulties encountered when dealing with the topic of international responsibility and to bring out the reasons for those difficulties as they emerge from an examination of the various documents of international tribunals relating to State responsibility (ibid., p. 132, document A/CN.4/169).
attempts at codification made hitherto under the auspices of official bodies, in particular the League of Nations and the United Nations itself. On concluding this review the Special Rapporteur drew attention to the ideas which had guided the International Law Commission since the time when, having had to recognize that its previous efforts had reached a deadlock, it had decided to resume the study of the topic of responsibility from a new viewpoint; in particular, he summarized the methodological conclusions reached by the Sub-Committee on State Responsibility, created in 1962, and later by the Commission itself at its fifteenth (1963) and nineteenth (1967) sessions, on the basis of which the Commission decided to take up the work of codification again and try to achieve some positive results.

3. After this introduction, the International Law Commission discussed the Special Rapporteur's first report in detail. All the members of the Commission present at the twenty-first session participated fully in the discussion. Replying to comments and summing up the debate, the Special Rapporteur gave an account of the views of members and in doing so was able to note that there was a great identity of ideas in the Commission as to the most appropriate way of continuing the work on State responsibility and as to the criteria that should govern the preparation of the different parts of the draft articles which the Commission proposes to draw up. The Commission's conclusions were subsequently set out in chapter IV of the report on its twenty-first session, which was devoted to State responsibility. The summary records show that these conclusions were in the main favourably received by the members of the Sixth Committee of the General Assembly, who referred to the problem of State responsibility in their comments on the International Law Commission's report.

4. The criteria laid down by the Commission, on the basis of which the draft articles contained in this report have been prepared, and by which future reports will also be guided, may be summarized as follows.

5. (A) Adhering to the system it has always adopted hitherto for all the topics it has undertaken to codify, the Commission intends to confine its study of international responsibility for the time being to the responsibility of States. Nevertheless, it does not underrate the importance of studying questions relating to the responsibility of subjects of international law other than States; but the overriding need to ensure clarity in the examination of the topic, and the organic nature of the draft, are obvious reasons for deferring consideration of these other questions.

6. (B) While recognizing the importance, alongside that of responsibility for internationally wrongful acts, of questions relating to responsibility arising out of the performance of certain lawful activities—such as spatial and nuclear activities—the Commission believes that questions in this latter category should not be dealt with simultaneously with those in the former category. Owing to the entirely different basis of the so-called responsibility for risk, the different nature of the rules governing it, its content and the forms it may assume, a simultaneous examination of the two subjects could only make both of them more difficult to grasp. The Commission will therefore proceed first to consider the topic of the responsibility of States for internationally wrongful acts. It intends to consider separately the topic of responsibility arising from lawful activities, as soon as progress with its programme of work permits.

7. (C) The Commission agreed on the need to concentrate its study on the determination of the principles which govern the responsibility of States for internationally wrongful acts, maintaining a strict distinction between this task and the task of defining the rules that place obligations on States, the violation of which may generate responsibility. A consideration of the various kinds of obligation placed on States in international law, and in particular a grading of such obligations according to their importance to the international community, may have to be regarded as a necessary element for assessing the gravity of an internationally wrongful act and as a criterion for determining the consequences it should have. But this must not obscure the essential fact that it is one thing to define a rule and the content of the obligation it imposes and another to determine whether that obligation has been violated and what should be the consequences of the violation. Only the second aspect comes within the sphere of responsibility proper; to encourage any confusion on this point would be to raise an obstacle which might once again frustrate the hope of successful codification.

8. (D) The study of the international responsibility of States to which the Commission is to devote itself comprises two broad, separate phases, the first covering the origin of international responsibility and the second the content of that responsibility. The first task is to determine what facts and what circumstances must be established in order to impute to a State the existence of an internationally wrongful act which, as such, is a source of international responsibility. The second task is to determine the consequences attached by international law to an internationally wrongful act in various cases, in order to arrive on this basis at a definition of the content, forms and degrees of responsibility. Once these two essential tasks have been accomplished, the Commission will be able to decide whether a third should be added in the same context, namely, the consideration of certain problems concerning what has been termed the "implementation" of the international responsibility of States and of questions concerning the settlement of disputes arising out of the application of rules relating to responsibility.

9. Having laid down these directives, the Commission is now in a position to consider, in succession, the many and diverse questions raised by the topic as a whole. The Special Rapporteur therefore proposes, in the first phase of the work, to focus his examination on the subjective and objective conditions for the existence of an internationally wrongful act. The first task, which may seem limited in scope, but which is particularly delicate because

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8 Ibid., vol. I, 1011th, 1012th, 1013th and 1036th meetings.
of its possible implications, consists in formulating the basic general principles; it is to this specific issue that the present report is devoted. Once these principles have been established, the next step will be to deal with all the questions relating to the imputability of the State, as a subject of international law, of the conduct (action or omission) in particular circumstances, of certain persons, certain groups or certain entities. It will also be necessary to determine in what conditions the action or omission thus imputed to the State can be regarded as constituting a violation of an international legal obligation and thus having the constituent elements of an internationally wrongful act which, as such, generates State responsibility at the inter-State level. All this would by followed by an examination of the questions arising in connexion with the various circumstances which, may possibly result in the conduct imputed to the State not being wrongful: force majeure and act of God, consent of the injured State, legitimate application of a sanction, self-defence and state of necessity. After that, it will be possible to go on to the second phase of the work, that covering the content, forms and degrees of international responsibility.

10. In accordance with the decisions taken at the twenty-first session, the successive reports on this subject will be so conceived as to provide the Commission with a basis for the preparation of draft articles, with a view to the eventual conclusion of an international codification convention. It seemed advisable as from this report to adopt the following method: to specify the questions arising in connexion with each of the points successively considered and then to state the differences of opinion which have appeared regarding them and the ways in which they have in fact been settled in international life. Reference will therefore be made to the most important cases which have arisen in diplomatic practice and international jurisprudence. Here, a certain disparity may be noted between the different questions, owing to the fact that there are a great many precedents in some cases, but relatively few in others. In each case, too, the positions taken by international law writers will be mentioned, having particular regard to the most recent trends in different countries. In order to avoid overburdening the report, however, the references will generally be confined to the views of the very numerous writers who have dealt specifically with the points in question. On the basis of this material the Special Rapporteur will indicate the reasons which, in his opinion, militate in favour of a particular solution, and conclude with the text of the draft article he proposes to the Commission as a basis for discussion. To make the work which will have to be completed during the first phase of the study more easily understandable, all the draft articles proposed will be reproduced together at the end.

11. One final remark seems appropriate. Responsibility differs widely, in its aspects, from the other subjects which the Commission has previously set out to codify. In its previous drafts, the Commission has generally concentrated on defining the rules of international law which, in one sector of inter-State relations or another, impose particular obligations on States, and which may, in a certain sense, be termed "primary", as opposed to the other rules—precisely those covering the field of responsibility—which may be termed "secondary", inasmuch as they are concerned with determining the consequences of failure to fulfil obligations established by the primary rules. Now the statement of primary rules often calls for the drafting of a great many articles, not all of which necessarily require very extensive commentaries. Responsibility, on the other hand, comprises relatively few principles, which often need to be formulated very concisely. But the possible brevity of the formulation is by no means indicative of simplicity in the subject-matter. On the contrary, on every point there may be a whole host of complex questions, which must all be examined, since they affect the formulation to be adopted. It should come as no surprise, therefore, that the present report contains very long passages dealing with a whole series of problems, followed by a few short articles.

**Chapter I**

**General rules**

**I. THE INTERNATIONALLY WRONGFUL ACT AS A SOURCE OF RESPONSIBILITY**

12. One of the principles most deeply rooted in the theory of international law and most strongly upheld by State practice and judicial decisions is the principle that any conduct of a State which international law classifies as a legally wrongful act entails the responsibility of that State in international law. In other words, whenever a State is guilty of an internationally wrongful act against another State, international responsibility is established "immediately as between the two States", as was held by the Permanent Court of International Justice in the *Phosphates in Morocco* case. Moreover, as stated by the Italian-United States Conciliation Commission set up under article 83 of the Treaty of Peace of 10 February 1947, no State may "escape the responsibility arising out of the exercise of an illicit action from the viewpoint of the general principles of international law".

13. A justification for the existence of this fundamental rule has usually been found in the actual existence of an international legal order and in the legal nature of the obligations it imposes on its subjects. For it is obvious that if one attempts, as certain advocates of State absolutism have done in the past, to deny the idea of State responsibility because it allegedly conflicts with the idea

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6 The Special Rapporteur intends to supply the Commission with a separate document containing as complete and up-to-date a bibliography as possible on international responsibility.


