



# REGIONAL COURSES IN INTERNATIONAL LAW

Santiago, Chile  
24 April – 19 May 2017

**HUMAN RIGHTS LAW**  
**PROFESSOR MÓNICA PINTO**

Codification Division of the United Nations Office of Legal Affairs

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**INTERNATIONAL HUMAN RIGHTS LAW**  
**PROFESSOR MÓNICA PINTO**

**Legal Instruments and Documents**

1. Report of the United Nations High Commissioner for Human Rights on Colombia, E/CN.4/1997/11, 24 January 1997, pp. 1-4
2. Report of the Independent Expert on the situation of human rights in Guatemala, E/CN.4/1995/15, 20 December 1994, paras. 207-213
3. Communication N°2/2003, Ms A.T. v. Hungary, Views adopted by the Committee on the Elimination of Discrimination against Women on 26 January 2005, on its thirty-second session

**Case Law**

4. *Filartiga v. Peña Irala*, U.S. Court of Appeals, Second Circuit, 630 F.2d 876, 30 June 1980
5. *Velásquez Rodríguez Case*, Inter-American Court of Human Rights, Judgment of 29 July 1988, Series C No.4, paras. 149-158 & 159-188
6. *Medellín v. Texas*, Certiorari to the Court of Criminal Appeals of Texas, No.06-984, 25 March 2008
7. *Barrios Altos Case (Chumbipuna Aguirre et al. v. Peru)*, Inter-American Court of Human Rights, Judgment of 14 March 2001, Series C, No. 75 , paras. 37-49
8. *The Legal Consequences of the Construction of a Wall in Occupied Palestine Territory, Advisory Opinion*, I.C.J. Reports 2004, pp. 189-194, paras. 130-137

**Legal Writings**

9. Amnesty International, *Report of an Amnesty International Mission to Argentina*, 6- 15 November 1976 (excerpts)
10. *Core International Human Rights Treaties* (United Nations, 2014) (in hard copy)



**Report of the United Nations High Commissioner for Human Rights  
on Colombia**

E/CN.4/1997/11, 24 January 1997, pp. 1-4

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**COMMISSION ON HUMAN RIGHTS**  
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**Item 3 of the provisional agenda**

**ORGANIZATION OF THE WORK OF THE SESSION**

**Report of the United Nations High Commissioner  
for Human Rights on Colombia**  
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**Introduction**

1. This report has been prepared pursuant to the statement made by the Chairman of the Commission on Human Rights at its fifty-second session on the situation of human rights in Colombia, in which the Commission requested the High Commissioner to report to it at its fifty-third session on the setting up of a human rights office in Colombia and on the activities carried out by it in implementing its mandate.

2. In accordance with the statement made by the Chairman on 23 April 1996, the High Commissioner has the honour to submit to the Commission this report on the intensive negotiations leading to the successful conclusion and signing, on 29 November 1996, of the Agreement on the establishment of an Office of the United Nations High Commissioner for Human Rights in Colombia.

**I. STATEMENT BY THE CHAIRMAN OF THE COMMISSION ON HUMAN RIGHTS ON THE SITUATION IN COLOMBIA**

3. It will be recalled that, at the 60th meeting of the Commission on Human Rights, held on 23 April 1996 in the course of its fifty-second session, the Chairman of the Commission made the following statement on the situation of human rights in Colombia:

"The Commission on Human Rights is deeply concerned that the situation of endemic violence affecting many parts of the country and the confrontation between government and guerrilla groups have resulted in serious consequences for human rights in the country.

"The Commission on Human Rights acknowledges the efforts carried out by the Government in the field of human rights and its willingness to cooperate with the special rapporteurs and working groups; welcomes the collaboration provided by the Government of Colombia to the United Nations High Commissioner for Human Rights during the visit he paid to the country last year; and notes the establishment of a follow-up commission in charge of analysing and promoting the fulfilment of recommendations of the United Nations thematic rapporteurs and working groups, as well as of other international and regional organizations.

"The Commission on Human Rights is, however, deeply concerned about violations of the right to life, as extensively evidenced in the report of the Special Rapporteur on extrajudicial, summary or arbitrary executions. Thousands of lives are lost every year as a result of various acts of violence, especially in the context of the armed conflict between the Government and the guerrillas, as well as by the action of paramilitary groups. Such conflict

entails serious and continuous abuses and violations of humanitarian law by both State agents and guerrilla groups, the latter persisting in prohibited practices such as the taking of civilian hostages.

"The Commission on Human Rights acknowledges that the Government of Colombia has taken steps for the application of humanitarian standards in the conflict, *inter alia* by an agreement with the International Committee of the Red Cross to facilitate its humanitarian activities in the country.

"The Commission on Human Rights remains deeply preoccupied by the large number of cases of disappearances, as shown in the report of the Working Group on Enforced or Involuntary Disappearances. The application at the national level of the Declaration on the Protection of All Persons from Enforced Disappearance faces several obstacles, generating impunity.

"The Commission on Human Rights, while taking note of the intention manifested by the Government of Colombia to undertake efforts in order to enhance the rule of law, calls for the urgent adoption of more effective legislative, administrative, judicial or other measures to prevent and terminate acts of enforced disappearance in accordance with article 3 of the Declaration.

"The Commission on Human Rights remains concerned about the alarming level of impunity, in particular concerning abuses by State agents that presently fall under the jurisdiction of military courts; it encourages the Government of Colombia to continue and conclude the process of reform of the military penal code in accordance with the recommendations made by the thematic rapporteur, in particular as far as the exclusion from the jurisdiction of military courts of crimes against humanity is concerned. It takes note of the establishment of a human rights unit in the Office of the National Prosecutor with competence to investigate and indict State agents, guerrillas and members of paramilitary groups responsible for violations of human rights or humanitarian law.

"The Commission on Human Rights is deeply concerned also about the persistence of the practice of torture. The report of the Special Rapporteur on the question of torture shows that the steps taken by the Government of Colombia have not resulted in a tangible improvement of the overall situation, and that the crime of torture is hardly punished. The information before the Committee against Torture indicates that the law in Colombia is not yet in accordance with several obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

"The Commission on Human Rights urges the Government of Colombia to continue strengthening ordinary justice versus special systems of justice, the misuse of which can lead to serious violations of human rights. The competence of the courts of regional jurisdiction should be limited, and should in no instance be applied to acts of legitimate political dissent and social protest. In no instance should defendants before regional courts be denied a fair trial.

"The Commission on Human Rights - while encouraging the work of the special commission set up by the Government of Colombia for the follow-up and implementation of the recommendations of the thematic rapporteurs - considers that the implementation of such recommendations and those of working groups is still not sufficient and that the human rights situation has not improved significantly, and recalls the resolution adopted by the Sub-Commission on Prevention of Discrimination and Protection of Minorities in August 1995.

"The Commission on Human Rights requests the United Nations High Commissioner for Human Rights to proceed, upon the initiative of the Government of Colombia and the identification of adequate sources of financing, to establish at the earliest possible date a permanent office in Colombia with the mandate to assist the Colombian authorities in developing policies and programmes for the promotion and protection of human rights and to observe violations of human rights in the country, making analytical reports to the High Commissioner; it requests the High Commissioner to report to the Commission at its fifty-third session on the setting up of the office and on the activities carried out by it in implementing the above mandate."

**II. NEGOTIATION AND CONCLUSION OF THE AGREEMENT ON THE ESTABLISHMENT OF AN OFFICE OF THE HIGH COMMISSIONER IN COLOMBIA**

4. The process of negotiating the recently signed Agreement on the establishment of an Office of the High Commissioner in Colombia began almost two years ago, on 13 December 1994, when the High Commissioner met

the President of the Republic in Santafé de Bogotá. On that occasion, the High Commissioner suggested that the President of the Republic might wish to consider the appointment of an expert, based in Colombia, who could provide the technical assistance needed, particularly in the areas of legislative reform and the administration of justice.

5. The President received this idea favourably and undertook to consider a more detailed proposal.
6. As a follow-up to his proposal, the High Commissioner sent an evaluation mission to visit Colombia from 21 August to 4 September 1995 in order to ascertain the country's needs and priorities regarding technical cooperation in the field of human rights.
7. One of the recommendations made by the evaluation mission in its report concerned the setting up of an office of the High Commissioner in Santafé de Bogotá to advise the Government and State institutions concerned with the protection of human rights (Public Prosecutor, Government Procurator, People's Advocate, courts) in order to strengthen their role in protecting human rights through the implementation of international instruments and relevant recommendations of United Nations human rights bodies.
8. The office would also facilitate access to United Nations protection mechanisms for all sectors of society affected by grave human rights violations. It would also set up machinery to enable the parties to a conflict to fully observe international humanitarian law, particularly in areas seriously affected by violence.

9. In March and April 1996, during the fifty-second session of the Commission on Human Rights, at the request of the Government, representatives of the High Commissioner held meetings with senior representatives of the Government of Colombia to work out a preliminary draft agreement on the establishment of an Office of the High Commissioner in Colombia.

10. Following the statement by the Chairman of the Commission on the situation of human rights in Colombia, representatives of the High Commissioner and the Government held further rounds of consultations which resulted in the adoption of a second preliminary draft agreement in August 1996.

11. The draft was the subject of extensive consultations between the Office of the High Commissioner and representatives of the Office of Legal Affairs and the Department of Political Affairs at United Nations Headquarters in New York.

12. Following these consultations, further negotiations were held with the representatives of the Government, culminating in the signing of the Agreement on the establishment of an Office of the United Nations High Commissioner for Human Rights in Colombia on 29 November 1996. The Agreement, which was signed in Geneva by the High Commissioner and the Minister for Foreign Affairs of Colombia, is accompanied by a letter, signed at the same time, concerning the selection of the premises for the High Commissioner's office in Colombia. The text of the Agreement is annexed to this report.

13. The High Commissioner is at present holding consultations on the appointment of a Director of the office in Colombia. Then, in consultation with the European Union and representatives of the International Commission of Jurists, work will begin on selecting five international staff whom the European Union has offered to finance. Local support staff will then be recruited and, in consultation with the Government, the most suitable premises in terms of neutrality, security and accessibility, will be selected.

14. The High Commissioner estimates that the office in Santafé de Bogotá will be open to the Colombian public by mid-March 1997.

#### Annex

Agreement on the establishment of an Office of the United Nations High Commissioner for Human Rights in Colombia

The Government of the Republic of Colombia, represented by the Minister for Foreign Affairs, Mrs. María Emma

Mejía Vélez, and the United Nations, represented by the High Commissioner for Human Rights, Mr. Jose Ayala Lasso, in accordance with the obligation undertaken by States in ratifying the Charter of the United Nations, particularly those concerning the duty to promote universal respect for human rights and fundamental freedoms for all and the pledge contained in Article 56 to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55 of the Charter,

REAFFIRMING the purposes and principles of the Charter of the United Nations, in particular international cooperation in promoting and encouraging respect for human rights,

RECOGNIZING the importance of observance of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and other international human rights instruments, as well as respect for international humanitarian law applicable to armed conflicts, and bearing in mind the complementarity between human rights and international humanitarian law in improving protection of the individual and respect for his dignity in situations of armed conflict,

CONSIDERING the invitation extended by the President of the Republic of Colombia to the United Nations High Commissioner for Human Rights (hereinafter: the High Commissioner) during their meeting in December 1994, and reiterated in a written communication dated 2 April 1996, to open an office of the High Commissioner in Colombia,

BEARING IN MIND the statement made by the Chairman of the United Nations Commission on Human Rights on 23 April 1996, at the Commission's fifty-second session, in which the Commission requests the High Commissioner to proceed, upon the initiative of the Government of Colombia and the identification of adequate sources of financing, to establish at the earliest possible date a permanent office in Colombia with the mandate to assist the Colombian authorities in developing policies and programmes for the promotion and protection of human rights and to observe violations of human rights in the country, making analytical reports to the High Commissioner; the Commission also requests the High Commissioner to report to it at its fifty-third session on the setting up of the office and on the activities carried out by it in implementing its mandate,

WHEREAS the establishment of the office is based on the mandate vested in the High Commissioner by the General Assembly of the United Nations in its resolution 48/141 of 20 December 1993,

BEARING IN MIND the entry into force for Colombia of Additional Protocol II to the Geneva Conventions of 1949 and the conclusion in 1996 of the agreement between the Government of Colombia and the International Committee of the Red Cross (ICRC) setting out the parameters enabling ICRC to continue its humanitarian task and facilitating its work regarding the promotion, dissemination, implementation and observance of international humanitarian law, WHEREAS the office which is the subject of this Agreement affords important opportunities for the promotion and protection of the life, integrity, freedom and other fundamental rights of the individual in the climate of violence and internal armed conflict prevailing in Colombia,

HAVE AGREED AS FOLLOWS:

#### I. DEFINITIONS

1. For the purposes of this Agreement:

- (a) "The Office of the High Commissioner" (hereinafter: the Office) means the Office opened in Santafé de Bogotá by the High Commissioner, following the request made to him by the Commission on Human Rights and the initiative of the Government of Colombia;
- (b) "Premises" means the physical premises of the Office in Santafé de Bogotá and other locations used by the Office to conduct its activities in accordance with the provisions of this Agreement;
- (c) "The Government" means the Government of the Republic of Colombia; for the purposes of this Agreement, the Government is understood to represent the Colombian State;

(d) "The Convention" means the Convention on the Privileges and Immunities of the United Nations adopted by the General Assembly of the United Nations on 13 February 1946;

(e) "The parties" means the United Nations and the Government of the Republic of Colombia;

(f) "The Director of the Office" means the United Nations official responsible for conducting and overseeing, on behalf of and under the authority of the High Commissioner, the activities of the Office, including the necessary logistical and administrative arrangements, and for ensuring coordination of the activities of the Office with the Government and the representatives of the competent international agencies present in Colombia;

(g) "Officials of the United Nations" means the staff members of the United Nations employed under the Staff Regulations and Rules of the United Nations, with the exception of persons who are recruited locally and paid hourly rates, as provided for in United Nations General Assembly resolution 76 (1) of 7 December 1946;

(h) "Experts on mission" means individuals other than officials of the United Nations coming within the scope of article VI of the Convention;

(i) "Staff of the Office" means officials of the United Nations and experts on mission assigned to the Office;

(j) "Local Office staff" means persons recruited locally and paid hourly rates.

## II. PURPOSE AND GEOGRAPHICAL SCOPE OF THE AGREEMENT

2. The purpose of this Agreement is to establish the Office of the High Commissioner in Colombia and to define the aims, criteria, functions and status of the Office and its staff.

3. Unless stipulated otherwise, the provisions of this Agreement and any obligation undertaken by the Government, or any privilege, immunity, facility or concession granted to the Office or to any member of its staff shall apply throughout the territory of Colombia and any other area under its jurisdiction.

## III. APPLICATION OF THE CONVENTION

4. The Office, its staff, property, funds and assets shall enjoy the privileges and immunities specified in the present Agreement, as well as those provided for in the Convention, to which Colombia is a Party.

## IV. GENERAL AIMS AND CRITERIA FOR THE ACTIVITIES OF THE OFFICE

5. In accordance with the mandate described in the preamble to this Agreement, the Office shall observe the human rights situation with a view to advising the Colombian authorities on the formulation and implementation of policies, programmes and measures to promote and protect human rights in the climate of violence and internal armed conflict prevailing in Colombia, and to enable the High Commissioner to make analytical reports to the Commission on Human Rights. In carrying out its mandate, the Office will focus its activities on cooperation with the Government of Colombia in order to assist in improving the human rights situation and, in conjunction with ICRC, to promote, within the limits of their respective mandates, respect for and observance of human rights and international humanitarian law in Colombia. The Office shall also advise the representatives of civil society, non-governmental human rights organizations and individuals on matters within its competence.

6. The activities of the Office shall be guided by the following criteria:

(a) All activities of the Office shall be directed towards the discharge of its mandate and attainment of its objectives;

(b) In view of the complexity of the situation in Colombia, the Office shall act, subject to the provisions of this Agreement, as a focal point, with a view to promoting a climate of trust with all sectors involved in and concerned with human rights problems and shall maintain contact and coordinate its activities with the national Government;

(c) The Office shall act with discretion and, in its relations with all sectors involved in matters within its

competence, be guided by the principles of the United Nations, such as impartiality, independence, objectivity and transparency.

## V. FUNCTIONS OF THE OFFICE

7. The functions of the Office, which are set out in its mandate and shall be performed under the authority of the High Commissioner, shall be the following:

(a) Advising the Executive Power on the overall formulation and implementation of human rights policies. In this context, it may advise the security forces. It shall also advise the Legislative Power and ensure that all draft human rights legislation is consistent with international human rights instruments;

(b) Advising representatives of civil society and individuals on any matter concerning the promotion and protection of human rights, including the use of international protection mechanisms;

(c) Advising existing and any future national institutions concerned with the promotion and protection of human rights, in particular, the Office of the Procurator-General and the Office of the People's Advocate, as well as the Office of the Public Prosecutor and members of the judiciary, with a view to strengthening their action;

(d) Advising State and non-governmental bodies on public education programmes and on programmes for the training of law-enforcement officials, lawyers and members of the judiciary;

(e) Ensuring that the recommendations and decisions of United Nations bodies are duly taken into account by government agencies with related duties and responsibilities, and advising them on the adoption of specific implementation measures;

(f) Receiving complaints on human rights violations and other abuses, including breaches of humanitarian law applicable in armed conflicts. The Office shall transmit such complaints promptly to the competent national authorities in order to expedite action on them in accordance with domestic legal procedures. When, in the opinion of the Office, such procedures are not compatible with the provisions of international instruments, it shall so notify the competent authorities and may make recommendations regarding the possibility of adopting corrective measures. When the Office deems that circumstances so require, it shall keep the identity of authors of complaints secret. The Office may also recommend and promote measures for the protection of authors of complaints which it receives, and of victims of and witnesses to the acts in question. The Office shall urge and encourage complainants to lodge their complaints with the competent authorities as quickly as possible. In considering the complaints which it receives, the Office shall not assume the functions of national and intergovernmental bodies which, under Colombian law or international treaties to which Colombia is a party, have powers of inspection, investigation and judgement. In particular, the Office shall refrain from issuing categorical statements identifying individuals or organizations as legally responsible for having committed the acts of which they are accused;

(g) Maintaining continuous contact with all competent civil and military government and State agencies and with civil organizations for the promotion and protection of human rights, with a view to observing and maintaining independent and impartial surveillance of the human rights situation, with due regard to the climate of violence and internal armed conflict prevailing in the country. To these ends, the Office shall agree with the Government and competent State agencies on the form and establishment of permanent mechanisms for communication, consultation and cooperation with the above-mentioned sectors, without prejudice to the freedom of the Office to establish any contacts it deems necessary for the conduct of its activities. When it is necessary to make contact with persons deprived of their freedom, the Office shall coordinate such contacts with the competent authorities.

8. The Office shall report to the Government regularly on its concerns and assessments regarding matters within its mandate, with a view to promoting dialogue on them and obtaining relevant observations. The Office shall make public announcements only in the form of reports and statements by the High Commissioner and the Director of the Office.

9. The Office shall report exclusively to the High Commissioner on the activities carried out within its mandate and its functions, on conditions which have facilitated or impeded them, on action-oriented commitments by the

Government and on any resulting measures, as well as recommendations for future action.

10. The High Commissioner shall present publicly to the United Nations Commission on Human Rights detailed analytical reports on the activities of the Office and on other matters referred to in the foregoing paragraph, as well as on the human rights situation in Colombia, bearing in mind the climate of violence and internal armed conflict. He shall also make any observations and recommendations he deems necessary. For the discharge of their respective mandates, the High Commissioner shall make the relevant information gathered by the Office available to the various bodies established under human rights treaties to which Colombia is a party, as well as to other United Nations human rights mechanisms and programmes.

11. The Government may express its views on the above-mentioned High Commissioner's reports and make any observations it deems necessary on their content, and may request the High Commissioner to transmit such observations to the Commission on Human Rights, without prejudice to the right of the Government to address the Commission itself when it deems necessary.

#### VI. STATUS AND COMPOSITION OF THE OFFICE

12. The Office shall have its headquarters in Santiafé de Bogotá. It may also set up sub-offices, where necessary and feasible, with the agreement of the Government.

13. The Office shall comprise six (6) professionals, appointed by the High Commissioner, and such local staff as may be deemed necessary. The Director of the Office shall be an individual of recognized relevant expertise. The number of professionals may be increased with the agreement of the Government.

14. The Office shall be open to the public.

15. The Office and its staff shall refrain from any activity incompatible with the international and impartial nature of their functions or contrary to the spirit of this Agreement or Colombian law. The Director of the Office shall take all necessary measures to ensure compliance with these obligations. The Government shall undertake to respect the exclusively international status of the Office.

16. The Office and any sub-offices, their property, funds and assets, wherever located and by whomsoever they are held, shall enjoy immunity except in so far as, in any particular case, the United Nations has expressly waived immunity. Such waiver shall not, however, extend to measures of execution.

(a) All premises used by the Office shall be inviolable. The property and assets of the Office and its sub-offices, wherever located and by whomsoever they are held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action;

(b) The appropriate local authorities shall not enter the premises of the Office except with the express consent of the Director of the Office and under conditions agreed to by him.

17. The archives of the Office and in general all documents belonging to it or in its possession, wherever they are located and by whomsoever they are held, shall be inviolable.

18. The Office, its assets, income and other property shall:

(a) Be exempt from all direct taxes and value added tax under the terms of section 8 of the Convention; it is understood, however, that the Office may not claim exemption from taxes which are in fact no more than charges for public utility services;

(b) Be exempt from Customs duties and prohibitions and restrictions on articles imported or exported for its official use. It is understood, however, that articles imported free of duty shall not be sold on Colombian territory, except under conditions agreed upon with the Government;

(c) Be exempt from Customs duties and prohibitions and restrictions on imports and exports in respect of its

publications.

19. The Office shall enjoy the facilities in respect of communications provided for in article III of the Convention. Accordingly, no censorship shall be applied to the official correspondence and other official communications of the Office. Such immunity shall extend to printed matter, photographic and electronic data and other forms of communication. The Office shall be entitled to use codes and to dispatch and receive correspondence either by courier or in sealed pouches, all of which shall be inviolable and not subject to censorship. The staff of the Office shall be entitled to communicate with their headquarters in Geneva and with staff members in the field by radio, telephone, fax, satellite or any other means of communication.

#### VII. STATUS OF THE STAFF OF THE OFFICE

20. The Director of the Office shall enjoy in Colombia the privileges and immunities provided for in the Convention.

21. Officials of the United Nations assigned to the Office shall enjoy the privileges and immunities provided in articles V and VII of the Convention.

22. Experts on mission for the United Nations shall enjoy the privileges and immunities provided for in article VI of the Convention.

23. Such privileges and immunities shall be accorded to officials in the interest of the United Nations and not for the benefit of the individuals themselves. The Secretary-General of the United Nations shall have the right and duty to waive the immunity of any official in any case in which, in his view, such immunity impedes the course of justice and may be waived without prejudice to the interests of the United Nations. The Office shall cooperate with the competent Colombian authorities in facilitating the proper administration of justice, ensuring compliance with public regulations and preventing any abuses in connection with such privileges, immunities and facilities.

#### VIII. ENTRY INTO, EXIT FROM AND MOVEMENT WITHIN COLOMBIA

24. The staff and officials of the Office shall enjoy unrestricted freedom of entry into and exit from Colombia, without delay or hindrance, of its members, property, supplies, equipment, spare parts and means of transport, in accordance with the Convention.

25. The staff of the Office shall enjoy unrestricted freedom of movement throughout the territory of Colombia. The Government shall facilitate freedom of movement in restricted areas, in coordination with the competent authorities. Freedom of movement shall include the following prerogatives, to be exercised in accordance with the mandate of the Office:

(a) Access to all prisons, detention centres and places of interrogation. The staff of the Office shall have the possibility of speaking in private with any person detained or present in such places, in accordance with the provisions of article V, paragraph 7 (g);

(b) Access to central and local authorities in all branches of Government, including the police and armed forces;

(c) Direct contacts with private individuals, representatives of non-governmental organizations, private institutions, hospitals and medical centres and the media;

(d) Access to all official documentary material necessary for the proper conduct of the activities of the Office, with the exception of documents which are confidential.

#### IX. FLAGS, EMBLEMS AND MARKINGS

26. The Office may display the United Nations flag and/or emblems on its premises, official vehicles and otherwise as agreed between the Parties. Vehicles of the Office shall carry a distinctive United Nations emblem or marking which shall be notified to the Government.

extension.

39. While the Agreement is in force, either of the Parties may terminate it by so notifying the other Party in writing. The termination shall take effect 90 days after the receipt of such notification.

Done in Geneva, on the twenty-ninth day of November one thousand nine hundred and ninety six, in two copies in Spanish, both texts being equally authentic.

(Signature):

For the Government of the  
Republic of Colombia  
María Emma Mjía Vélez  
Minister for Foreign Affairs

For the United Nations High  
Commissioner for Human Rights  
José Ayala Lasso

Geneva, 29 November 1996

Mrs. María Emma Mejía Vélez, Minister for Foreign Affairs (on behalf of the Government of Colombia), and Mr. José Ayala Lasso, United Nations High Commissioner for Human Rights (representing the United Nations), have agreed as follows:

1. The United Nations thanks the Government of Colombia for its generous offer to provide premises for the High Commissioner's Office in Colombia.

To this end, the following procedure shall be adopted:

(a) The High Commissioner, with the agreement of the Government of Colombia, shall select the premises which he considers suitable in terms of neutrality, security and accessibility and as being of a standard equivalent to that of other United Nations offices in Colombia;

(b) The selected premises shall be rented for the duration of the existence of the Office of the High Commissioner in Colombia;

(c) The Government of Colombia shall bear the cost of renting the premises in question through monthly payments.

2. This letter is signed in Geneva simultaneously with the signature of the Agreement for the establishment of an Office of the United Nations High Commissioner for Human Rights in Colombia.

María Emma Mjía Vélez  
Minister for Foreign Affairs

José Ayala Lasso  
United Nations High Commissioner for Human  
Rights

## X. IDENTIFICATION

27. The Government shall, at the request of the Director of the Office, issue to the staff of the Office the necessary identity documents stating that, as members of the staff of the Office, they enjoy privileges and immunities, in particular with regard to freedom of movement.

28. At the request of an authorized government official, members of the staff of the Office shall produce, but not surrender, their identity documents.

29. The Office shall, upon termination of employment or reassignment of any member of its staff, ensure that all identity documents are returned promptly to the Government.

## XI. GOVERNMENT GUARANTEES

30. The Government shall afford the Office and its staff the necessary security throughout Colombia for the effective conduct of its activities. To this end, the Office shall notify the designated government authority in good time of any proposed travel arrangements which might entail a risk to the safety of its staff.

31. The Government undertakes to respect the status of the Office and its staff and to ensure that no person who has had contact with the Office is subjected to abuse, threats, reprisals or legal proceedings on those grounds alone.

32. Wherever this Agreement refers to the privileges, immunities and rights of the Office and its staff and to the facilities the Government undertakes to provide, the Government shall have the responsibility of ensuring that the competent local authorities respect those privileges, immunities and rights and provide the facilities in question.

## XII. SETTLEMENT OF DISPUTES

33. Any dispute between the Office and the Government regarding the interpretation and application of this Agreement, or any other supplementary agreement, which is not settled by negotiation or another agreed mode of settlement shall be submitted to arbitration at the request of either Party. Each Party shall appoint one arbitrator and the two arbitrators so appointed shall appoint a third who shall be the chairman. If within thirty (30) days of the request for arbitration either Party has not appointed an arbitrator, or if within fifteen (15) days of the appointment of two arbitrators the third arbitrator has not been appointed, either Party may request the President of the International Court of Justice to appoint an arbitrator. The arbitration procedure shall be determined by the arbitrators and the costs of the arbitration shall be borne by the Parties as assessed by the arbitrators. The arbitral award, duly substantiated, shall be accepted by the Parties as final.

## XIII. LIAISON WITH THE GOVERNMENT

34. The Government shall designate a high-level liaison body with decision-making power, to ensure communication with the Office regarding all matters relating to its activities.

## XIV. SUPPLEMENTARY AGREEMENTS

35. The High Commissioner and the Government may conclude supplementary agreements to this Agreement.

## XV. FINAL PROVISIONS

36. The Office and its staff and the Government undertake to abide by the provisions of this Agreement.

37. This Agreement shall enter into force on the date of signature.

38. This Agreement shall be valid for 17 months. The Parties may extend it for periods of one year by an exchange of written communications expressing their wish to do so. Such communications shall be sent not less than 90 days before the expiration of the 17-month period referred to in this paragraph or the expiration of the current one-year

**Report of the Independent Expert on the situation of human rights  
in Guatemala**

E/CN.4/1995/15, 20 December 1994, paras. 207-213



COMMISSION ON HUMAN RIGHTS

Fifty-first session

Item 3 of the provisional agenda

ORGANIZATION OF THE WORK OF THE SESSION

Assistance to Guatemala in the field of human rights

Report by the Independent Expert, Mrs. Mónica Pinto,  
on the situation of human rights in Guatemala,  
prepared in accordance with Commission resolution 1994/58

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Peace process

207. There is no doubt that the decision to resume the peace negotiations has given a positive character to the situation in Guatemala and raised hopes of practical progress. The basic progress made in the peace negotiations in 1994 is therefore to be welcomed, particularly the Comprehensive Agreement on Human Rights, which permitted the establishment, on 21 November 1994, of the United Nations Human Rights Verification Mission in Guatemala (MINUGUA). Both parties must decisively facilitate the work of MINUGUA, since there will be a marked improvement in the human rights situation if MINUGUA can carry out its functions effectively. For the same reasons, we believe that MINUGUA's operational presence in the country will be an element in enabling the ongoing negotiations to move, as soon as possible, to a firm and lasting peace.

Action by the Commission on Human Rights

208. As shown in the present report, the human rights situation in Guatemala in 1994 continues to require close observation by the Commission on Human Rights. The

Expert is aware that this statement will be read in a context in which MINUGUA will have been working for at least three months by the time the Commission comes to take a decision. The aim is precisely to strengthen the means and methods of work of MINUGUA and of the Commission on Human Rights in order to provide greater assistance in the improvement of the human rights situation in Guatemala.

209. The Commission and MINUGUA have not been present in the country at the same time or as a result of the same sources and mandates, but they have the same objective of improving conditions for the enjoyment and exercise of the human rights protected by the international provisions that are binding on Guatemala. The Commission's consideration of human rights in Guatemala began in 1979; since then, various mandates have been granted for the investigation of violations of human rights and for the provision of assistance to the Government. The mandates must be seen in the broader context of the goal of international cooperation for the promotion and encouragement of respect for the human rights and fundamental freedoms of all without discrimination, as stated in Article 1, paragraph 3, of the Charter of the United Nations. In accordance with this guideline, in carrying out its work the Commission on Human Rights focuses on the universality, interdependence and indivisibility of human rights, as confirmed by the World Conference on Human Rights. The legal parameters of the reports submitted annually to the Commission are those contained in the Universal Declaration of Human Rights, customary international human rights law, and all the universal, regional, general and particular treaties by which Guatemala has expressed its consent to be bound. It is thus the institutionalized international community that supports the Commission's action.

210. MINUGUA, for its part, is the result of an agreement between the Government of Guatemala and URNG, and constitutes one of the key elements of the peace negotiations which are continuing and whose positive results are desired by Guatemalans and backed by the international community. The functions and competence of the Mission are defined in the instrument calling for its establishment, in which the parties wanted to place emphasis on certain civil and political rights. Its presence in the country, as accepted by the Government in a headquarters agreement to be concluded shortly, is based on the need for the direct verification of possible violations of human rights resulting from incidents and situations occurring after its establishment through the acceptance of complaints and their assessment and follow-up in order to decide whether or not violations have occurred and, accordingly, help to strengthen the institutions of the Office of the Human Rights Procurator, the Judiciary and the Public Prosecutor's Office.

211. The means and methods of work provided for in the mandates of the Commission on Human Rights and MINUGUA are also different, but complementary. The Independent Expert's mandate is to examine the human rights situation in Guatemala and evaluate the measures adopted by the Government in accordance with the recommendations made to it by the Expert and to provide assistance in the field of human rights. The former is not part of the specific mandate of MINUGUA, which is, however, empowered to follow up complaints; this the Expert cannot do, because she is not in the field, and so the mandate complements the overall examination referred to above. With regard to assistance, the recommendations made in the report submitted to the Commission are the result of the preceding evaluation and contain overall assessments whose degree of detail and practical implementation may be the subject of

technical cooperation; the substantiated opinions of MINUGUA and the Expert will undoubtedly influence any decision on this question.

212. The two mandates require reports to different bodies. The Expert's reports are thus submitted to the Commission as public documents, while MINUGUA's are, in accordance with the Comprehensive Agreement, submitted to the Secretary-General of the United Nations, to the parties and, possibly, to the General Assembly through the Secretary-General.

213. The day when Guatemala will be able to walk alone on the path of human rights unaccompanied by agencies of the international community is undoubtedly less far off than before. In any event, in the hope that this day will arrive in the best possible conditions, the United Nations should not fail in its responsibility of assisting it in the task of improving the human rights situation. This is the challenge from which the coordinated and complementary work of MINUGUA and the Commission on Human Rights must not shrink.



**Communication N°2/2003, Ms A.T. v. Hungary**

Views adopted by the Committee on the Elimination of Discrimination  
against Women on 26 January 2005, on its thirty-second session

**Views of the Committee on the Elimination of Discrimination against Women under article 7, paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women**

**Communication No.: 2/2003, Ms. A.T. v. Hungary  
(Views adopted on 26 January 2005, thirty-second session)**

Submitted by: Ms. A.T.

Alleged victim: The author

State party: Hungary

Date of communication: 10 October 2003 (initial submission)

The Committee on the Elimination of Discrimination against Women, established under article 17 of the Convention on the Elimination of All Forms of Discrimination against Women,

Meeting on: 26 January 2005

Having concluded its consideration of communication No. 2/2003, submitted to the Committee on the Elimination of Discrimination against Women by Ms. A.T. under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

**Views under article 7, paragraph 3, of the Optional Protocol**

1.1 The author of the communication dated 10 October 2003, with supplementary information dated 2 January 2004, is Ms. A.T., a Hungarian national born on 10 October 1968. She claims to be a victim of a violation by Hungary of articles 2 (a), (b) and (c), 5 (a) and 16 of the Convention on the Elimination of All Forms of Discrimination against Women. The author is representing herself. The Convention and its Optional Protocol entered into force for the State party on 3 September 1981 and 22 March 2001, respectively.

1.2 The author urgently requested effective interim measures of protection in accordance with article 5, paragraph 1, of the Optional Protocol, at the same time that she submitted her communication, because she feared for her life.

The facts as presented

2.1 The author states that for the past four years she has been subjected to regular severe domestic violence and serious threats by her common law husband, L.F., father of her two children, one of whom is severely brain-damaged. Although L.F. allegedly possesses a firearm and has threatened to kill the author and rape the children, the author has not gone to a shelter reportedly because none in the country are equipped to take in a fully disabled child together with his mother and sister. The author also states that there are currently no protection orders or restraining orders available under Hungarian law.

2.2 In March 1999, L.F. moved out of the family apartment. His subsequent visits allegedly typically included battering and/or loud shouting, aggravated by his being in a drunken state. In March 2000, L.F. reportedly moved in with a new female partner and left the family home—taking most of the furniture and household items with him. The author claims that he did not pay child support for three years, which forced her to claim the support by going to the court and to the police, and that he has used this form of financial abuse as a violent tactic in addition to continuing to threaten her physically. Hoping to protect herself and the children, the author states that she changed the lock on the door of the family's apartment on 11 March 2000. On 14 and 26 March 2000, L.F. filled the lock with glue and on 28 March 2000, he kicked in a part of the door when the author refused to allow him to enter the apartment. The author further states that, on 27 July 2001, L.F. broke into the apartment using violence.

2.3 L.F. is said to have battered the author severely on several occasions beginning in March 1998. Since then, ten medical certificates have been issued in connection with separate incidents of severe physical violence that the author submits constitutes a continuum of violence—even after L.F. left the family residence. The most recent incident took place on 27 July 2001—when L.F. broke into the apartment and subjected the author to a severe beating, which necessitated her hospitalization.

2.4 The author states that there have been civil proceedings regarding L.F.'s access to the family's residence, a 2 ½ room apartment (of 54/56 square metres) jointly owned by L.F. and the author. Decisions by the court of the first instance (Pesti Központi Kerületi Bíróság) were rendered on 9 March 2001 and 13 September 2002 (supplementary decision). On 4 September 2003, the Budapest Regional Court (Fővárosi Bíróság) issued a final decision authorizing L.F. to return and use the apartment. The judges reportedly based their decision on the following grounds: (1) lack of substantiation of the claim that L.F. regularly battered the author; and (2) that L.F.'s right to the property, including possession, could not be restricted. Since that date, and on the basis of the earlier attacks and verbal threats by her former partner, the author claims that her physical integrity, physical and mental health, and life have been at serious risk and that she lives in constant fear. The author reportedly submitted to the Supreme Court a petition for review of the 4 September 2003 decision that was pending at the time of her submission of supplementary information to the Committee on 2 January 2004.

2.5 The author states that she also initiated civil proceedings regarding division of the property, which have been suspended. She claims that L.F. refused her offer to be compensated for half of the value of the apartment and turn over ownership to her. In these proceedings the author reportedly submitted a motion for injunctive relief (for her exclusive right to use the apartment), which was rejected on 25 July 2000.

2.6 The author states that there have been two ongoing criminal procedures against L.F., one that began in 1999 at the Pest Central District Court (Pesti Központi Kerületi Bíróság) concerning two incidents of battery and assault causing her bodily harm and the second that began in July 2001 concerning an incident of battery and assault that resulted in her being hospitalized for a week with a serious kidney injury. In her submission of 2 January 2004, the author states that there would be a trial on 9 January 2004. Reportedly, the latter procedure was initiated by the hospital *ex officio*. The author further states that L.F. has not been detained at any time in this connection and that no action has been taken by the Hungarian authorities to protect the author from him. The author claims that she has not been privy to the court documents as a victim and, therefore, cannot submit them to the Committee.

2.7 The author also submits that she has requested assistance in writing, in person and by phone, from the local child protection authorities, but that her requests have been to no avail, since the authorities allegedly feel unable to do anything in such situations.

#### The Claim

3.1 The author alleges that she is a victim of violations by Hungary of articles 2 (a), (b) and (c), 5 (a) and 16 of the Convention on the Elimination of All Forms of Discrimination against Women for its failure to provide effective protection from her former common law husband. She claims that the State party passively neglected its “positive” obligations under the Convention and supported the continuation of a situation of domestic violence against her.

3.2 She claims that the irrationally lengthy criminal procedures against L.F., the lack of protection orders or restraining orders under current Hungarian law, and the fact that L.F. has not spent any time in custody, constitute violations of her rights under the Convention as well as violations of General Recommendation 19 of the Committee. She maintains that these criminal procedures can hardly be considered effective and/or immediate protection.

3.3 The author is seeking justice for herself and her children, including fair compensation, for suffering and for the violation of the letter and spirit of the Convention by the State party.

3.4 The author is also seeking the Committee’s intervention into the intolerable situation, which affects many women from all segments of Hungarian society. In particular, she calls for the (i) introduction of effective and immediate protection for victims of domestic violence into the legal system, (ii) provision of gender-sensitivity and Convention on the Elimination of All Forms of Discrimination against Women/Optional Protocol training programmes, including for judges, prosecutors, police and practising

lawyers, and (iii) provision of free legal aid to victims of gender-based violence, including domestic violence.

3.5 As to the admissibility of the communication, the author maintains that she has exhausted all available domestic remedies. She refers, however, to a pending petition for review that she submitted to the Supreme Court in respect of the decision of 4 September 2003. The author describes this remedy as an extraordinary remedy and one which is only available in cases of a violation of the law by lower courts; such cases reportedly take some six months to be resolved. The author believes that it is very unlikely that the Supreme Court will find a violation of the law because allegedly Hungarian courts do not consider the Convention to be law that is to be applied by them. She submits that this should not mean that she has failed to exhaust domestic remedies for the purposes of the Optional Protocol.

3.6 The author contends that, although most of the incidents complained of took place prior to March 2001 when the Optional Protocol entered into force for Hungary, they constitute elements of a clear continuum of regular domestic violence and that her life continues to be in danger. She alleges that one serious violent act took place in July 2001 - that is after the Optional Protocol came into force for Hungary. She also claims that Hungary has been bound by the Convention since becoming party to it in 1982. The author further argues that Hungary has in effect assisted in the continuation of violence through lengthy proceedings, the failure to take protective measures, including timely conviction of the perpetrator and the issuance of a restraining order, and the court decision of 4 September 2003.

#### Request for interim measures of protection in accordance with article 5, paragraph 1 of the Optional Protocol

4.1 On 10 October 2003, with her initial submission, the author also urgently requested effective interim measures as may be necessary in accordance with article 5, paragraph 1, of the Optional Protocol to avoid possible irreparable damage to her person, i.e. to save her life, which she feels is threatened by her violent former partner.

4.2 On 20 October 2003 (with a corrigendum on 17 November 2003), a note verbale was sent to the State party for its urgent consideration, requesting the State party to provide immediate, appropriate and concrete, preventive interim measures of protection to the author, as may be necessary to avoid irreparable damage to her. The State party was informed that, as laid down in article 5, paragraph 2, of the Optional Protocol, this request did not imply a determination on admissibility or on the merits of the communication. The Committee invited the State party to provide information no later than 20 December 2003 of the type of measures it had taken to give effect to the Committee’s request under article 5, paragraph 1 of the Optional Protocol.

4.3 In her supplementary submission of 2 January 2004, the author states that, apart from being interrogated by the local police at the police station in her vicinity on the day before Christmas, she had not heard from any authority concerning the ways and means

through which they would provide her with immediate and effective protection in accordance with the Committee's request.

4.4 By submission of 20 April 2004, the State party informed the Committee that the Governmental Office for Equal Opportunities (hereinafter 'Office') established contact with the author in January 2004, in order to inquire about her situation. It turned out that at that time, the author had had no legal representative in the proceedings, and thus the Office retained a lawyer with professional experience and practice in cases of domestic violence for her.

4.5 The State party further informed the Committee that on 26 January 2004, the Office set up contact with the competent family- and child-care service at the Ferencváros local Government in order to halt the domestic violations against the author and her children. The State party stated that urgent measures were enforced for securing the safety and the personal development of the children.

4.6 On 9 February 2004 the Office sent a letter to the Notary of Ferencváros local Government containing a detailed description of the author's and her children's situation. The Office requested the Notary to convene a so-called "case-conference" with the aim of determining the further necessary measures for promoting effective protection of the author and her children. As at 20 April 2004, the Office had not had a reply to that letter.

4.7 On 13 July 2004, on behalf of the Working Group on Communications, a note verbale with a follow-up to the Committee's request of 20 October and 17 November 2003 was sent to the State party, conveying the Working Group's regret that the State party had furnished little information on the interim measures taken to avoid irreparable damage to the author. The Working Group requested that A.T. be immediately offered a safe place for her and her children to live and that the State party ensure that the author receive adequate financial assistance, if needed. The State party was invited to inform the Working Group as soon as possible of any concrete action taken in response to the request.

4.8 By its note of 27 August 2004, the State party repeated that it had established contact with the author, retained a lawyer for her in the civil proceedings and established contact with the competent Notary and child welfare services.

State party's submission on admissibility and merits

5.1 By its submission of 20 April 2004, the State party gives an explanation of the civil proceedings to which reference is made by the author, by stating that in May 2000 L.F. instituted trespass proceedings against the author because she had changed the door-lock of their common flat and prevented him access to his possessions. The Notary of Ferencváros local Government ordered the author to cease interfering with L.F.'s property rights. She applied to the Pest Central District Court (Pesti Központi Kerületi Bíróság) in order to set aside this decision and to establish her entitlement to use the flat. The District Court (Pesti Központi Kerületi Bíróság) dismissed the author's claims on grounds that L.F. was entitled to the use of his property and the author could have been expected to try to settle the dispute by lawful means, instead of the arbitrary conduct she

had resorted to. In a supplementary judgment of 13 September 2002 the District Court (Pesti Központi Kerületi Bíróság) established that the author was entitled to use the flat but it was not competent to establish that she was entitled to the exclusive use of the flat because she had not submitted a request to that effect. The judgment of 4 September 2003 of the Budapest Regional Court (Fővárosi Bíróság) confirmed the District Court (Pesti Központi Kerületi Bíróság)'s decision. The author submitted a petition for review by the Supreme Court on 8 December 2003 and these proceedings were thus still pending as at 20 April 2004, the date of the submission of the State party's observations.

5.2 On 2 May 2000 the author brought an action against L.F. before the Pest Central District Court (Pesti Központi Kerületi Bíróság) requesting separation of their common property. On 25 July 2000 the District Court (Pesti Központi Kerületi Bíróság) dismissed the author's request for interim measures on the use and possession of the common flat on grounds that the other set of proceedings (the "trespass" proceedings) were pending concerning that issue and that it was not competent to decide the question in the proceedings concerning the division of the property. The State party contends that the progress of the proceedings was considerably hindered by the author's lack of cooperation with her then counsel and failure to submit the requested documents. Furthermore, it turned out that the couple's ownership of the flat had not been registered and the civil proceedings were suspended in this connection.

5.3 The State party states that several sets of criminal proceedings were instituted against L.F. on charges of assault and battery. On 3 October 2001 the Pest Central District Court (Pesti Központi Kerületi Bíróság) convicted L.F. on one count of assault committed on 22 April 1999 and sentenced him to a fine of HUF 60000. The District Court (Pesti Központi Kerületi Bíróság) acquitted L.F. on another count of assault allegedly committed on 19 January 2000 for lack of sufficient evidence. The public prosecutor's office appealed but the case-file was lost on its way to the Budapest Regional Court (Fővárosi Bíróság). On 29 April 2003 the Budapest Regional Court (Fővárosi Bíróság) ordered a new trial. The proceedings were resumed before the Pest Central District Court (Pesti Központi Kerületi Bíróság) and were joined to another set of criminal proceedings pending against L.F. before the same court.

5.4 A proceeding was brought against L.F. on charges of an assault allegedly committed on 27 July 2001 causing bruises to the author's kidneys. Though the investigations were twice discontinued by the police (on 6 December 2001 and 4 December 2002) they were resumed by order of the public prosecutor's office. Witnesses and experts were heard and a bill of indictment was brought against L.F. on 27 August 2003 before the Pest Central District Court (Pesti Központi Kerületi Bíróság).

5.5 The State party states that the two sets of criminal proceedings (i.e. the criminal proceedings regarding the separate incidents of assault allegedly committed on 19 January 2000 and 21 July 2001) have been joined. The Pest Central District Court (Pesti Központi Kerületi Bíróság) has held hearings on 5 November 2003, 9 January and 13 February 2004, the next hearing is scheduled for 21 April 2004.

5.6 The State party maintains that although the author did not make effective use of the domestic remedies available to her and although some domestic proceedings are still pending, the State party does not wish to raise any preliminary objections as to the

admissibility of the communication. At the same time, the State party admits that these remedies were not capable of providing immediate protection to the author from ill-treatment by her former partner.

5.7 Having realized that the system of remedies against domestic violence is incomplete in Hungarian law and that the effectiveness of the existing procedures is not sufficient, the State party states that it has instituted a comprehensive action programme against domestic violence in 2003. On 16 April 2003 the Hungarian Parliament adopted a resolution on the national strategy for the prevention and effective treatment of violence within the family, setting forth a number of legislative and other actions to be taken in the field by the State party. These actions include: introducing a restraining order into legislation; ensuring that proceedings before the Courts or other authorities in domestic violence cases are given priority; reinforcing existing witness protection rules and introducing new rules aimed at ensuring adequate legal protection for the personal security of victims of violence within the family; elaborating clear protocols for the police, child care organs and social and medical institutions; extending and modernizing the network of shelters and setting up victim protection crisis centres; providing free legal aid in certain circumstances; working out a complex nationwide action programme to eliminate violence within the family that applies sanctions and protective measures; training of professionals; ensuring data collection on violence within the family; requesting the judiciary to organize training for judges and to find a way to ensure that cases relating to violence within the family are given priority. In the resolution, reference is made, among others, to the Convention on the Elimination of All Forms of Discrimination against Women, the concluding comments of the Committee on the combined fourth and fifth periodic report of Hungary adopted at its Exceptional Session in August 2002 and the Declaration on the Elimination of Violence against Women.

5.8 In a second resolution, the Parliament has also stated that prevention of violence within the family is a high priority in the national strategy of crime prevention and describes the tasks of various actors of the State and of the society. These include: prompt and effective intervention by the police and other investigating authorities; medical treatment of pathologically aggressive persons and application of protective measures for those who live in their environment; operation of 24-hour "SOS" lines; organization of rehabilitation programmes; organization of sport and leisure time activities for youths and children from violence-prone families; integration of non-violent conflict resolution techniques and family-life education into the public educational system; establishment and operation of crisis intervention houses as well as mother and child care centres and support for the accreditation of civil organizations by municipalities; and launching of a media campaign against violence within the family.

5.9 The State party further states that it has implemented various measures to eliminate domestic violence. These measures include registration of criminal proceedings (ROBOTZSARU) in a manner that will facilitate the identification of trends in offences related to violence within the family, as well as the collection of data, the expanded operation of family protection services by 1 July 2005, including units for ill-treated women without children in Budapest, which is to be followed by seven regional centres. The first shelter is planned to be set up in 2004. The Government has prepared a Draft Law that will enter into force on 1 July 2005, providing for a new protective remedy for victims of domestic violence, namely a temporary restraining order to be issued by the police and a restraining order to be issued by the Courts, accompanied by fines if intentionally disregarded, and has decided to improve the support services available to such victims.

5.10 Additionally, the State party states that special emphasis has been put on the handling of cases of domestic violence by the police. The State party observes that the efforts made in this field have already brought about significant results which were summed up by the National Headquarters of the Police in a Press Communication in December 2003. NGOs have also been involved in the elaboration of the governmental policy to combat domestic violence.

The author's comments on the State party's observations on admissibility and merits

6.1 By her submission of 23 June 2004, the author states that, in spite of promises, the only step that has been taken under the Decree/Decision of Parliament on the Prevention of, and Response to Domestic Violence is the entry into force of the new protocol of the police, who now respond to domestic violence cases, but still not in line with the Convention; batterers are not taken into custody, as this would be considered a violation of their human rights. Instead, according to the media, the police mostly mediate on the spot.

6.2 The author further states that the parliamentary debate on the draft law on restraining orders has been postponed until the autumn. Resistance to change is said to be strong and decision-makers allegedly still do not fully understand why they should interfere in what they consider to be the private affairs of families. The author suggests that a timely decision in her case may help decision-makers understand that the effective prevention of, and response to domestic violence are not only demands of victims and "radical" NGOs but also of the international human rights community.

6.3 The author reports that her situation has not changed and she still lives in constant fear as regards her former partner. From time to time L.F. has harassed her and threatened to move back into the apartment.

6.4 The author submits that the local child protection authority minutes of the official case conference of 9 May 2004 regarding her case state that it cannot put an end to her threatening situation using official measures. It recommends that she continue to ask for help from the police, ask for medical documentation of injuries, ask for help from her extended family and keep the authority informed. The child protection authority also

reportedly states that it would summon L.F. and give him a warning in case the battering continues.

6.5 As at 23 June 2004, according to the author the criminal proceeding against L.F. were still ongoing. A hearing scheduled for 21 April was postponed to 7 May and, as the judge was reportedly too busy to hear the case, the criminal proceedings were again postponed until 25 June 2004. The author believes that, whatever the outcome, the criminal proceedings have been so lengthy and her safety so severely neglected that she has not received the timely and effective protection and the remedy to which she is entitled under the Convention and General Recommendation No. 19 of the Committee.

6.6 The author refers to the civil proceedings, in particular to the petition for review by the Supreme Court that she considers to be an extraordinary remedy but submitted nonetheless. She states that, in response to the Committee's intervention, the State party covered the legal costs of supplementing her petition with additional arguments.

6.7 On 23 March 2004, the Supreme Court dismissed the petition, arguing, among other things, that the jurisprudence is established with regard to the legal issue raised in the petition.

6.8 The author refutes the State party's argument that she did not submit a request for the exclusive use of the apartment. The court of the second instance (Fővárosi Bíróság) ordered the court of the first instance (Pesti Központi Kerületi Bíróság) to re-try the case, namely because it had failed to decide on the merits of the request. She believes that it is clear from the context and from her court documents, including decisions, that she had requested sole possession of the apartment to avoid a continuation of the violence. However, she states that under the established law and jurisprudence in the State party, battered individuals have no right to the exclusive use of the jointly-owned/leased apartments, on grounds of domestic violence.

6.9 The author requests that the Committee declare her communication admissible without delay and decide on the merits that the rights under the Convention have been violated by the State party. She requests that the Committee recommend to the State party to urgently introduce effective laws and measures towards the prevention of, and effective response to domestic violence in her specific case and generally. The author furthermore seeks compensation for long years of suffering that have been directly related to the severe and serious violations of the Convention. The author believes that the most effective way would be to provide her with a safe home, where she could live in safety and peace with her children, without constant fear of her batterer's "lawful" return and/or substantial financial compensation.

6.10 By her submission of 30 June 2004, the author informs the Committee that the criminal proceeding against L.F. have been postponed until 1 October 2004 in order to hear the testimony of a policeman because the judge thinks that there is a slight discrepancy between two police reports.

6.11 By her submission of 19 October 2004, the author informs the Committee that the Pest Central District Court (Pesti Központi Kerületi Bíróság) convicted L.F. of two counts of causing grievous bodily harm to her and fined him for the equivalent of approximately 365US\$.

Supplementary observations of the State party

7.1 By note dated 27 August 2004, the State party argues that, although all tasks that the Decree/Decision of Parliament on the Prevention of, and Response to Domestic Violence prescribes have not yet been completely implemented, some positive steps, including new norms in the field of crime prevention and Act LXXX (2003) on the conditions under which legal assistance is given to those in need, have been taken. These documents are said to provide an opportunity to establish a national network of comprehensive legal and social support for future victims of domestic violence.

7.2 The State party confirms that the Draft Act on Restraining Orders that applies to cases of violence within the family has been postponed to the autumn session of Parliament.

7.3 The State party admits that the experience of the Office and the information it has shows that domestic violence cases as such do not enjoy high priority in court proceedings.

7.4 Based on the experience of the Office in the present case as well as in general, it is conceded that the legal and institutional system in Hungary is not ready yet to ensure the internationally expected, coordinated, comprehensive and effective protection and support for the victims of domestic violence.

**Issues and proceedings before the Committee  
Consideration of admissibility**

8.1 In accordance with rule 64 of its rules of procedure, the Committee shall decide whether the communication is admissible or inadmissible under the Optional Protocol to the Convention. Pursuant to rule 72, paragraph 4, of its rules of procedure, it shall do so before considering the merits of the communication.

8.2 The Committee has ascertained that the matter has not already been or is being examined under another procedure of international investigation or settlement.

8.3 With regard to article 4, paragraph 1 of the Optional Protocol, the Committee observes that the State party does not wish to raise any preliminary objections as to the admissibility of the communication and furthermore concedes that the currently existing remedies in Hungary have not been capable of providing immediate protection to the author from ill-treatment from L.F. The Committee agrees with this assessment and considers that it is not precluded by article 4, paragraph 1, from considering the communication.

8.4 The Committee, nevertheless, wishes to make some observations as to the State party's comment in its submission of 20 April 2004 that some domestic proceedings are still pending. In the civil matter of L.F.'s access to the family's apartment, according to the author's submission of 23 June 2004, the petition for review by the Supreme Court was dismissed on 23 March 2004. The civil matter on the distribution of the common property, on the other hand, has been suspended over the issue of registration for an

undisclosed period of time. The Committee considers, however, that the eventual outcome of this proceeding is not likely to bring effective relief vis-à-vis the current life-threatening violation of the Convention of which the author has complained. In addition, the Committee notes that two sets of criminal proceedings against L.F. on charges of assault and battery allegedly committed on 19 January 2000 and 21 July 2001 were joined and, according to the author, were decided on 1 October 2004 by convicting L.F. and imposing a fine equivalent to approximately 365 US\$. The Committee has not been informed as to whether the conviction and/or sentence may or will be appealed. Nonetheless, the Committee is of the view that such a delay of over three years from the dates of the incidents in question would amount to an unreasonably prolonged delay within the meaning of article 4, paragraph 1, of the Optional Protocol, particularly considering that the author has been at risk of irreparable harm and threats to her life during that period. Additionally, the Committee takes account of the fact that she had no possibility of obtaining temporary protection while criminal proceedings were in progress and that the defendant had at no time been detained.

8.5 As to the facts that are the subject of the communication, the Committee observes that the author points out that most of the incidents complained of took place prior to March 2001 when the Optional Protocol entered into force for Hungary. She argues, however, that the 10 incidents of severe physical violence that are medically documented and which are part of an allegedly larger number constitute elements of a clear continuum of regular domestic violence and that her life was still in danger, as documented by the battering which took place 27 July 2001 - that is after the Optional Protocol came into force for Hungary. The Committee is persuaded that it is competent *ratione temporis* to consider the communication in its entirety, because the facts that are the subject of the communication cover the alleged lack of protection/alleged culpable inaction on the part of the State party for the series of severe incidents of battering and threats of further violence that has uninterruptedly characterized the period beginning in 1998 to the present.

8.6 The Committee has no reason to find the communication inadmissible on any other grounds and thus finds the communication admissible.

### **Consideration of the merits**

9.1 The Committee has considered the present communication in light of all the information made available to it by the author and by the State party, as provided in article 7, paragraph 1, of the Optional Protocol.

9.2 The Committee recalls its general recommendation No. 19 on violence against women, which states that "...[T]he definition of discrimination includes gender-based violence" and that "[G]ender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence". Furthermore, the general recommendation addresses the question of whether States parties can be held accountable for the conduct of non-State actors in stating that "...discrimination under the Convention is not restricted to action by or on behalf of Governments ..." and "[U]nder general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due

diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation". Against this backdrop, the immediate issue facing the Committee is whether the author of the communication is the victim of a violation of articles 2 (a), (b) and (e), 5 (a) and 16 of the Convention because, as she alleges, for the past four years the State party has failed in its duty to provide her with effective protection from the serious risk to her physical integrity, physical and mental health, and life by her former common law husband.

9.3 With regard to article 2 (a), (b), and (e), the Committee notes that the State party has admitted that the remedies pursued by the author, were not capable of providing immediate protection to her against ill-treatment by her former partner and, furthermore, that legal and institutional arrangements in the State party are not yet ready to ensure the internationally expected, coordinated, comprehensive and effective protection and support for the victims of domestic violence. While appreciating the State party's efforts at instituting a comprehensive action programme against domestic violence and the legal and other measures envisaged, the Committee believes that these have yet to benefit the author and address her persistent situation of insecurity. The Committee further notes the State party's general assessment that domestic violence cases as such do not enjoy high priority in court proceedings. The Committee is of the opinion that the description provided of the proceedings resorted to in the present case, both the civil and criminal proceedings, coincides with this general assessment. Women's human rights to life and to physical and mental integrity cannot be superseded by other rights, including the right to property and the right to privacy. The Committee also takes note that the State party does not offer information as to the existence of alternative avenues that the author may have pursued that would have provided sufficient protection or security from the danger of continued violence. In this connection, the Committee recalls its concluding comments from August 2002 on the State party's combined fourth and fifth periodic report that states "... [T]he Committee is concerned about the prevalence of violence against women and girls, including domestic violence. It is particularly concerned that no specific legislation has been enacted to combat domestic violence and sexual harassment and that no protection or exclusion orders or shelters exist for the immediate protection of women victims of domestic violence". Bearing this in mind, the Committee concludes that the obligations of the State party that are set out in article 2 (a), (b) and (e) of the Convention extend to the prevention of, and protection from violence against women and, in the instant case, remain unfulfilled and constitute a violation of the author's human rights and fundamental freedoms, particularly her right to security of person.

9.4 The Committee addressed articles 5 and 16 together in its general recommendation No. 19 in dealing with family violence. In its general recommendation No. 21, the Committee stressed that "the provisions of General Recommendation 19 ... concerning violence against women have great significance for women's abilities to enjoy rights and freedoms on an equal basis with men". It has stated on many occasions that traditional attitudes by which women are regarded as subordinate to men contribute to violence against them. The Committee recognized those very attitudes when it considered the combined fourth and fifth periodic report of Hungary in 2002, and was concerned about the "persistence of entrenched traditional stereotypes regarding the role and responsibilities of women and men in the family...". In respect of the instant case before the Committee, the facts of the communication reveal aspects of the relationships

between the sexes and attitudes towards women that the Committee recognized *vis-à-vis* the country as a whole. For four years and continuing to the present day, the author has felt threatened by her former common law husband – the father of her two children. The author has been battered by the same man, i.e. her former common law husband. She has been unsuccessful, either through civil or criminal proceedings, to temporarily or permanently bar L.F. from the apartment where she and her children have continued to reside. The author could not have asked for a restraining or protection order since neither option currently exists in the State party. She has been unable to flee to a shelter because none are equipped to take her in together with her children, one of whom is fully disabled. None of these facts have been disputed by the State party and, considered together, they indicate that the rights of the author under articles 5 (a) and 16 of the Convention have been violated.

9.5 The Committee also notes that the lack of effective legal and other measures prevented the State party from dealing in a satisfactory manner with the Committee's request for interim measures.

9.6 Acting under article 7, paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, the Committee is of the view that the State party has failed to fulfill its obligations and has thereby violated the rights of the author under article 2 (a), (b) and (c) and article 5(a) in conjunction with article 16 of the Convention on the Elimination of All Forms of Discrimination against Women, and makes the following recommendations to the State party:

- I. concerning the author of the communication
  - i. take immediate and effective measures to guarantee the physical and mental integrity of A. T. and her family; and
  - ii. ensure that A. T. is given a safe home in which to live with her children, receives appropriate child support and legal assistance and that she receives reparation proportionate to the physical and mental harm undergone and to the gravity of the violations of her rights;
- II general
  - i. respect, protect, promote and fulfill women's human rights, including their right to be free from all forms of domestic violence, including intimidation and threats of violence;
  - ii assure victims of domestic violence the maximum protection of the law by acting with due diligence to prevent and respond to such violence against women;
  - iii take all necessary measures to ensure that the national strategy for the prevention and effective treatment of violence within the family is promptly implemented and evaluated;

iv take all necessary measures to provide regular training on the Convention on the Elimination of All Forms of Discrimination against Women and the Optional Protocol thereto to judges, lawyers and law enforcement officials;

v implement expeditiously and without delay the Committee's concluding comments of August 2002 on the combined fourth and fifth periodic report of Hungary in respect of violence against women and girls, in particular the Committee's recommendation that a specific law be introduced prohibiting domestic violence against women, which would provide for protection and exclusion orders as well as support services, including shelters;

vi investigate promptly, thoroughly, impartially and seriously all allegations of domestic violence and bring the offenders to justice in accordance with international standards;

vii provide victims of domestic violence with safe and prompt access to justice, including free legal aid where necessary, to ensure them available, effective and sufficient remedies and rehabilitation; and

viii provide offenders with rehabilitation programmes and programmes on non-violent conflict resolution methods.

9.7 In accordance with article 7 paragraph 4, of the Optional Protocol, the State party shall give due consideration to the views of the Committee, together with its recommendations, and shall submit to the Committee, within six months, a written response, including any information on any action taken in the light of the views and recommendations of the Committee. The State party is also requested to publish the Committee's views and recommendations and to have them translated into the Hungarian language and widely distributed in order to reach all relevant sectors of society.

**U.S. Court of Appeals, Second Circuit**

*Filartiga v. Peña Irala*

630 F.2d 876, 30 June 1980

630 F.2d 876  
(Cite as: 630 F.2d 876)



United States Court of Appeals,  
Second Circuit.

Dolly M. E. FILARTIGA and Joel Filartiga,  
Plaintiffs-Appellants,  
v.  
Americo Norberto PENA-IRALA, Defendant-  
Appellee.

**No. 191, Docket 79-6090.**

Argued Oct. 16, 1979.  
Decided June 30, 1980.

Citizens of the Republic of Paraguay, who had applied for permanent political asylum in the United States, brought action against one also a citizen of Paraguay, who was in United States on a visitor's visa, for wrongfully causing the death of their son allegedly by the use of torture. The United States District Court for the Eastern District of New York, Eugene H. Nickerson, J., dismissed the action for want of subject matter jurisdiction and appeal was taken. The Court of Appeals, Irving R. Kaufman, Circuit Judge, held that deliberate torture perpetrated under the color of official authority violates universally accepted norms of international law of human rights regardless of the nationality of the parties, and, thus, whenever an alleged torturer is found and served with process by an alien within the borders of the United States, the Alien Tort Statute provides federal jurisdiction.

Reversed.

West Headnotes

[\[1\] Federal Courts](#) <sup>↔</sup> **192.10**  
[170Bk192.10](#)

(Formerly 170Bk192)

Deliberate torture perpetrated under color of official authority violates universally accepted norms of international law of human rights, regardless of the nationality of the parties, and, thus, whenever an alleged torturer is found and served with process by an alien within the borders of the United States, the

Alien Tort Statute provides federal jurisdiction. [28 U.S.C.A. § 1350.](#)

[\[2\] International Law](#) <sup>↔</sup> **2**  
[221k2](#)

Law of nations may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing such law.

[\[3\] International Law](#) <sup>↔</sup> **1**  
[221k1](#)

Courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today. U.S.C.A.Const. Art. 2, § 2; Art. 6, cl. 2.

[\[4\] International Law](#) <sup>↔</sup> **1**  
[221k1](#)

Official torture is prohibited by the law of nations: the prohibition is clear and unambiguous and admits of no distinction between treatment of aliens and citizens.

[\[5\] Federal Courts](#) <sup>↔</sup> **76**  
[170Bk76](#)  
(Formerly 106k12(2))

Where in personam jurisdiction had been obtained over Paraguayan defendant, who was in United States on a visitor's visa, parties agreed that the acts alleged against defendant would violate Paraguayan law, and policies of the forum were consistent with the foreign law, state court jurisdiction would have been proper.

[\[6\] Federal Courts](#) <sup>↔</sup> **191**  
[170Bk191](#)

A case properly arises under the laws of the United States if grounded upon statutes enacted by Congress or upon the common law of the United States. [U.S.C.A.Const. Art. 3, § 1](#) et seq.

[\[7\] Federal Courts](#) <sup>↔</sup> **192.10**  
[170Bk192.10](#)  
(Formerly 170Bk192)

Enactment of Alien Tort Statute, providing that district courts have original jurisdiction of any civil action by an alien for a tort only, committed in

violation of the law of nations or a treaty of the United States, was authorized by Article III, of the Constitution dealing with jurisdiction of federal courts. [28 U.S.C.A. § 1350](#); [U.S.C.A.Const. Art. 3, § 1](#) et seq.

[\[8\] International Law](#) <sup>↔</sup> 2  
[221k2](#)

Law of nations forms a part of the laws of the United States, even in absence of congressional enactment. [U.S.C.A.Const. Art. 1, § 8, cl. 10](#).

[\[9\] Federal Courts](#) <sup>↔</sup> 192.10  
[170Bk192.10](#)

(Formerly 170Bk192)

Alien tort statute opens the federal courts for adjudication of rights already recognized by international law. [28 U.S.C.A. § 1350](#).

[\[10\] Federal Courts](#) <sup>↔</sup> 247  
[170Bk247](#)

Requirement of alien tort statute of alleging a "violation of the law of nations" requires more searching review of the merits at the jurisdictional threshold than does the more flexible "arising under" formulation. [28 U.S.C.A. § 1350](#).

[\[11\] Federal Courts](#) <sup>↔</sup> 192.10  
[170Bk192.10](#)

(Formerly 170Bk192)

It is only where the nations of world have demonstrated that the wrong is of mutual, and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes an international law violation within the meaning of the Alien Tort Statute. [28 U.S.C.A. § 1350](#).

[\[12\] Federal Courts](#) <sup>↔</sup> 192.10  
[170Bk192.10](#)

(Formerly 170Bk192)

Where federal court had subject matter jurisdiction over action by citizens of Paraguay, who applied for permanent political asylum in the United States, against a citizen of Paraguay who was in the United States on a visitor's visa, for wrongfully causing the death of their son, allegedly by the use of torture, such jurisdiction would not be affected by the court's subsequent decision to apply foreign law as a rule of

decision; its choice of law inquiry would be primarily concerned with fairness. [28 U.S.C.A. § 1350](#).

[\[13\] International Law](#) <sup>↔</sup> 1  
[221k1](#)

Foreign nation's renunciation of torture as a legitimate instrument of state policy, did not strip the tort of its character as an international law violation, if it in fact occurred under color of government authority.

[\[14\] International Law](#) <sup>↔</sup> 10.33  
[221k10.33](#)

Act of State Doctrine probably does not apply to acts of a foreign government official that are wholly unauthorized and expressly forbidden by the foreign sovereign.

\***877** Peter Weiss, New York City (Rhonda Copelon, John Corwin and Jose Antonio Lugo, Center for Constitutional Rights, New York City, and Michael Maggio, Goren & Maggio, Washington, D. C., of counsel), for plaintiffs- appellants.

Murry D. Brochin, Newark, N. J. (Lowenstein, Sandler, Brochin, Kohl, Fisher & Boylan, P. C., Newark, N. J., of counsel), for defendant-appellee.

Irving Gornstein, Atty., Dept. of Justice, Washington, D. C. (Drew S. Days, III, Asst. Atty. Gen., John E. Huerta, Deputy Asst. Atty. Gen., Roberts B. Owen, Legal Advisor, William T. Lake, Deputy Legal Advisor, Stefan A. Riesenfeld, Charles Runyon and Linda A. Baumann, Attys., Dept. of State, Washington, D. C.), for the U. S. as amicus curiae.

Donald L. Doernberg, New York City, and David S. Weissbrodt, Minneapolis, Minn., for Amnesty International-U. S. A., Intern. League for Human Rights, and the Lawyers' Committee for Intern. Human Rights as amici curiae.

Allan Abbot Tuttle, and Steven M. Schneebaum, Washington, D. C., for The Intern. Human Rights Law Group, The Council on Hemispheric Affairs and the Washington Office on Latin America as amici curiae.

Before FEINBERG, Chief Judge, KAUFMAN and KEARSE [\[FN\\*\]](#), Circuit Judges.

[FN\\*](#) The late Judge Smith was a member of the original panel in this case. After his unfortunate death, Judge Kearsse was designated to fill his place pursuant to Local Rule s 0.14(b).

IRVING R. KAUFMAN, Circuit Judge:

Upon ratification of the Constitution, the thirteen former colonies were fused into a single nation, one which, in its relations with foreign states, is bound both to observe and construe the accepted norms of international law, formerly known as the law of nations. Under the Articles of Confederation, the several states had interpreted and applied this body of doctrine as a \*878 part of their common law, but with the founding of the "more perfect Union" of 1789, the law of nations became preeminently a federal concern.

Implementing the constitutional mandate for national control over foreign relations, the First Congress established original district court jurisdiction over "all causes where an alien sues for a tort only (committed) in violation of the law of nations." Judiciary Act of 1789, ch. 20, s 9(b), 1 Stat. 73, 77 (1789), codified at [28 U.S.C. s 1350](#). Construing this rarely-invoked provision, we hold that deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties. Thus, whenever an alleged torturer is found and served with process by an alien within our borders, [s 1350](#) provides federal jurisdiction. Accordingly, we reverse the judgment of the district court dismissing the complaint for want of federal jurisdiction.

## I

The appellants, plaintiffs below, are citizens of the Republic of Paraguay. Dr. Joel Filartiga, a physician, describes himself as a longstanding opponent of the government of President Alfredo Stroessner, which has held power in Paraguay since 1954. His daughter, Dolly Filartiga, arrived in the United States in 1978 under a visitor's visa, and has since applied for permanent political asylum. The Filartigas brought this action in the Eastern District of New York against Americo Norberto Pena-Irala (Pena), also a citizen of Paraguay, for wrongfully causing the death of Dr. Filartiga's seventeen-year old son, Joelito. Because the district court dismissed the

action for want of subject matter jurisdiction, we must accept as true the allegations contained in the Filartigas' complaint and affidavits for purposes of this appeal.

The appellants contend that on March 29, 1976, Joelito Filartiga was kidnapped and tortured to death by Pena, who was then Inspector General of Police in Asuncion, Paraguay. Later that day, the police brought Dolly Filartiga to Pena's home where she was confronted with the body of her brother, which evidenced marks of severe torture. As she fled, horrified, from the house, Pena followed after her shouting, "Here you have what you have been looking for for so long and what you deserve. Now shut up." The Filartigas claim that Joelito was tortured and killed in retaliation for his father's political activities and beliefs.

Shortly thereafter, Dr. Filartiga commenced a criminal action in the Paraguayan courts against Pena and the police for the murder of his son. As a result, Dr. Filartiga's attorney was arrested and brought to police headquarters where, shackled to a wall, Pena threatened him with death. This attorney, it is alleged, has since been disbarred without just cause.

During the course of the Paraguayan criminal proceeding, which is apparently still pending after four years, another man, Hugo Duarte, confessed to the murder. Duarte, who was a member of the Pena household, [\[FN1\]](#) claimed that he had discovered his wife and Joelito in flagrante delicto, and that the crime was one of passion. The Filartigas have submitted a photograph of Joelito's corpse showing injuries they believe refute this claim. Dolly Filartiga, moreover, has stated that she will offer evidence of three independent autopsies demonstrating that her brother's death "was the result of professional methods of torture." Despite his confession, Duarte, we are told, has never been convicted or sentenced in connection with the crime.

[FN1.](#) Duarte is the son of Pena's companion, Juana Bautista Fernandez Villalba, who later accompanied Pena to the United States.

In July of 1978, Pena sold his house in Paraguay and entered the United States under a visitor's visa. He was accompanied by Juana Bautista Fernandez Villalba, who had lived with him in Paraguay. The couple remained in the United States beyond the term of their visas, and were living in \*879 Brooklyn, New

York, when Dolly Filartiga, who was then living in Washington, D. C., learned of their presence. Acting on information provided by Dolly the Immigration and Naturalization Service arrested Pena and his companion, both of whom were subsequently ordered deported on April 5, 1979 following a hearing. They had then resided in the United States for more than nine months.

Almost immediately, Dolly caused Pena to be served with a summons and civil complaint at the Brooklyn Navy Yard, where he was being held pending deportation. The complaint alleged that Pena had wrongfully caused Joelito's death by torture and sought compensatory and punitive damages of \$10,000,000. The Filartigas also sought to enjoin Pena's deportation to ensure his availability for testimony at trial.[\[FN2\]](#) The cause of action is stated as arising under "wrongful death statutes; the U. N. Charter; the Universal Declaration on Human Rights; the U. N. Declaration Against Torture; the American Declaration of the Rights and Duties of Man; and other pertinent declarations, documents and practices constituting the customary international law of human rights and the law of nations," as well as 28 U.S.C. s 1350, Article II, sec. 2 and the Supremacy Clause of the U. S. Constitution. Jurisdiction is claimed under the general federal question provision, [28 U.S.C. s 1331](#) and, principally on this appeal, under the Alien Tort Statute, [28 U.S.C. s 1350.](#)[\[FN3\]](#)

[FN2.](#) Several officials of the Immigration and Naturalization Service were named as defendants in connection with this portion of the action. Because Pena has now been deported, the federal defendants are no longer parties to this suit, and the claims against them are not before us on this appeal.

[FN3.](#) Jurisdiction was also invoked pursuant to [28 U.S.C. ss 1651, 2201 & 2202](#), presumably in connection with appellants' attempt to delay Pena's return to Paraguay.

Judge Nickerson stayed the order of deportation, and Pena immediately moved to dismiss the complaint on the grounds that subject matter jurisdiction was absent and for forum non conveniens. On the jurisdictional issue, there has been no suggestion that Pena claims diplomatic immunity from suit. The Filartigas submitted the affidavits of a number of

distinguished international legal scholars, who stated unanimously that the law of nations prohibits absolutely the use of torture as alleged in the complaint.[\[FN4\]](#) Pena, in support of his motion to dismiss on the ground of forum non conveniens, submitted the affidavit of his Paraguayan counsel, Jose Emilio Gorostiaga, who averred that Paraguayan law provides a full and adequate civil remedy for the wrong alleged.[\[FN5\]](#) Dr. Filartiga has not **\*880** commenced such an action, however, believing that further resort to the courts of his own country would be futile.

[FN4.](#) Richard Falk, the Albert G. Milbank Professor of International Law and Practice at Princeton University, and a former Vice President of the American Society of International Law, avers that, in his judgment, "it is now beyond reasonable doubt that torture of a person held in detention that results in severe harm or death is a violation of the law of nations." Thomas Franck, professor of international law at New York University and Director of the New York University Center for International Studies offers his opinion that torture has now been rejected by virtually all nations, although it was once commonly used to extract confessions. Richard Lillich, the Howard W. Smith Professor of Law at the University of Virginia School of Law, concludes, after a lengthy review of the authorities, that officially perpetrated torture is "a violation of international law (formerly called the law of nations)." Finally, Myres MacDougal, a former Sterling Professor of Law at the Yale Law School, and a past President of the American Society of International Law, states that torture is an offense against the law of nations, and that "it has long been recognized that such offenses vitally affect relations between states."

[FN5.](#) The Gorostiaga affidavit states that a father whose son has been wrongfully killed may in addition to commencing a criminal proceeding bring a civil action for damages against the person responsible. Accordingly, Mr. Filartiga has the right to commence a civil action against Mr. Duarte and Mr. Pena-Irala since he accuses them both of responsibility for his son's death. He

may commence such a civil action either simultaneously with the commencement of the criminal proceeding, during the time that the criminal proceeding lasts, or within a year after the criminal proceeding has terminated. In either event, however, the civil action may not proceed to judgment until the criminal proceeding has been disposed of. If the defendant is found not guilty because he was not the author of the case under investigation in the criminal proceeding, no civil action for indemnity for damages based upon the same deed investigated in the criminal proceeding, can prosper or succeed.

Judge Nickerson heard argument on the motion to dismiss on May 14, 1979, and on May 15 dismissed the complaint on jurisdictional grounds.<sup>[FN6]</sup> The district judge recognized the strength of appellants' argument that official torture violates an emerging norm of customary international law. Nonetheless, he felt constrained by dicta contained in two recent opinions of this Court, [Dreyfus v. von Finck](#), 534 F.2d 24 (2d Cir.), cert. denied, 429 U.S. 835, 97 S.Ct. 102, 50 L.Ed.2d 101 (1976); [IIT v. Vencap, Ltd.](#), 519 F.2d 1001 (2d Cir. 1975), to construe narrowly "the law of nations," as employed in [s 1350](#), as excluding that law which governs a state's treatment of its own citizens.

<sup>[FN6]</sup> The court below accordingly did not consider the motion to dismiss on forum non conveniens grounds, which is not before us on this appeal.

The district court continued the stay of deportation for forty-eight hours while appellants applied for further stays. These applications were denied by a panel of this Court on May 22, 1979, and by the Supreme Court two days later. Shortly thereafter, Pena and his companion returned to Paraguay.

## II

<sup>[1]</sup> Appellants rest their principal argument in support of federal jurisdiction upon the Alien Tort Statute, [28 U.S.C. s 1350](#), which provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." Since appellants do not contend that

their action arises directly under a treaty of the United States,<sup>[FN7]</sup> a threshold question on the jurisdictional issue is whether the conduct alleged violates the law of nations. In light of the universal condemnation of torture in numerous international agreements, and the renunciation of torture as an instrument of official policy by virtually all of the nations of the world (in principle if not in practice), we find that an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations.

<sup>[FN7]</sup> Appellants "associate themselves with" the argument of some of the amici curiae that their claim arises directly under a treaty of the United States, Brief for Appellants at 23 n.\*, but nonetheless primarily rely upon treaties and other international instruments as evidence of an emerging norm of customary international law, rather than independent sources of law.

<sup>[2]</sup> The Supreme Court has enumerated the appropriate sources of international law. The law of nations "may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law." [United States v. Smith](#), 18 U.S. (5 Wheat.) 153, 160-61, 5 L.Ed. 57 (1820); [Lopes v. Reederei Richard Schroder](#), 225 F.Supp. 292, 295 (E.D.Pa.1963). In [Smith](#), a statute proscribing "the crime of piracy (on the high seas) as defined by the law of nations," 3 Stat. 510(a) (1819), was held sufficiently determinate in meaning to afford the basis for a death sentence. The [Smith](#) Court discovered among the works of Lord Bacon, Grotius, Bochar and other commentators a genuine consensus that rendered the crime "sufficiently and constitutionally defined." [Smith, supra](#), 18 U.S. (5 Wheat.) at 162, 5 L.Ed. 57.

The [Paquete Habana](#), 175 U.S. 677, 20 S.Ct. 290, 44 L.Ed. 320 (1900), reaffirmed that

where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they \*881 treat. Such works are resorted to by judicial tribunals, not for the

speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

[Id. at 700, 20 S.Ct. at 299.](#) Modern international sources confirm the propriety of this approach.[\[FN8\]](#)

[FN8.](#) The Statute of the International Court of Justice, Arts. 38 & 59, June 26, 1945, 59 Stat. 1055, 1060 (1945) provides: Art. 38

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

(b) international custom, as evidence of a general practice accepted as law;

(c) the general principles of law recognized by civilized nations;

(d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

Art. 59

The decision of the Court has no binding force except between the parties and in respect of that particular case.

[\[3\]](#) Habana is particularly instructive for present purposes, for it held that the traditional prohibition against seizure of an enemy's coastal fishing vessels during wartime, a standard that began as one of comity only, had ripened over the preceding century into "a settled rule of international law" by "the general assent of civilized nations." [Id. at 694, 20 S.Ct. at 297](#); accord, [id. at 686, 20 S.Ct. at 297](#). Thus it is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today. See [Ware v. Hylton, 3 U.S. \(3 Dall.\) 198, 1 L.Ed. 568 \(1796\)](#) (distinguishing between "ancient" and "modern" law of nations).

The requirement that a rule command the "general assent of civilized nations" to become binding upon them all is a stringent one. Were this not so, the

courts of one nation might feel free to impose idiosyncratic legal rules upon others, in the name of applying international law. Thus, in [Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804 \(1964\)](#), the Court declined to pass on the validity of the Cuban government's expropriation of a foreign-owned corporation's assets, noting the sharply conflicting views on the issue propounded by the capital-exporting, capital-importing, socialist and capitalist nations. [Id. at 428-30, 84 S.Ct. at 940-41.](#)

The case at bar presents us with a situation diametrically opposed to the conflicted state of law that confronted the Sabbatino Court. Indeed, to paraphrase that Court's statement, [id. at 428, 84 S.Ct. at 940](#), there are few, if any, issues in international law today on which opinion seems to be so united as the limitations on a state's power to torture persons held in its custody.

The United Nations Charter (a treaty of the United States, see 59 Stat. 1033 (1945)) makes it clear that in this modern age a state's treatment of its own citizens is a matter of international concern. It provides:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations . . . the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinctions as to race, sex, language or religion.

[Id. Art. 55.](#) And further:

All members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.

[Id. Art. 56.](#)

While this broad mandate has been held not to be wholly self-executing, [Hitai v. Immigration and Naturalization Service, 343 F.2d 466, 468 \(2d Cir. 1965\)](#), this observation **\*882** alone does not end our inquiry.[\[FN9\]](#) For although there is no universal agreement as to the precise extent of the "human rights and fundamental freedoms" guaranteed to all by the Charter, there is at present no dissent from the view that the guaranties include, at a bare minimum, the right to be free from torture. This prohibition has become part of customary international law, as evidenced and defined by the Universal Declaration of Human Rights, General Assembly Resolution 217 (III)(A)

(Dec. 10, 1948) which states, in the plainest of terms, "no one shall be subjected to torture." [FN10] The General Assembly has declared that the Charter precepts embodied in this Universal Declaration "constitute basic principles of international law." G.A.Res. 2625 (XXV) (Oct. 24, 1970).

FN9. We observe that this Court has previously utilized the U.N. Charter and the Charter of the Organization of American States, another non-self-executing agreement, as evidence of binding principles of international law. United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974). In that case, our government's duty under international law to refrain from kidnapping a criminal defendant from within the borders of another nation, where formal extradition procedures existed, infringed the personal rights of the defendant, whose international law claims were thereupon remanded for a hearing in the district court.

FN10. Eighteen nations have incorporated the Universal Declaration into their own constitutions. 48 *Revue Internationale de Droit Penal* Nos. 3 & 4, at 211 (1977).

Particularly relevant is the Declaration on the Protection of All Persons from Being Subjected to Torture, General Assembly Resolution 3452, 30 U.N. GAOR Supp. (No. 34) 91, U.N.Doc. A/1034 (1975), which is set out in full in the margin.[FN11] The Declaration \*883 expressly prohibits any state from permitting the dastardly and totally inhuman act of torture. Torture, in turn, is defined as "any act by which severe pain and suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as . . . intimidating him or other persons." The Declaration goes on to provide that "(w)here it is proved that an act of torture or other cruel, inhuman or degrading treatment or punishment has been committed by or at the instigation of a public official, the victim shall be afforded redress and compensation, in accordance with national law." This Declaration, like the Declaration of Human Rights before it, was

adopted without dissent by the General Assembly. Nayar, "Human Rights: The United Nations and United States Foreign Policy," 19 *Harv.Int'l L.J.* 813, 816 n.18 (1978). Article 1

1. For the purpose of this Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent or incidental to lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners. 2. Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.

Article 2

Any act of torture or other cruel, inhuman or degrading treatment or punishment is an offense to human dignity and shall be condemned as a denial of the purposes of the Charter of the United Nations and as a violation of human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights.

Article 3

No state may permit or tolerate torture or other cruel, inhuman or degrading treatment or punishment. Exceptional circumstances such as a state of war or a threat of war, internal political instability or any other public emergency may not be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment.

Article 4

Each state shall, in accordance with the provisions of this Declaration, take effective measures to prevent torture and other cruel, inhuman or degrading treatment or punishment from being practiced within its jurisdiction. Article 5

The training of law enforcement personnel and of other public officials who may be responsible for persons deprived of their liberty shall ensure that full account is taken of the prohibition against torture and other cruel, inhuman or degrading treatment or

punishment. This prohibition shall also, where appropriate, be included in such general rules or instructions as are issued in regard to the duties and functions of anyone who may be involved in the custody or treatment of such persons.

#### Article 6

Each state shall keep under systematic review interrogation methods and practices as well as arrangements for the custody and treatment of persons deprived of their liberty in its territory, with a view to preventing any cases of torture or other cruel, inhuman or degrading treatment or punishment.

#### Article 7

Each state shall ensure that all acts of torture as defined in Article I are offenses under its criminal law. The same shall apply in regard to acts which constitute participation in, complicity in, incitement to or an attempt to commit torture.

#### Article 8

Any person who alleges he has been subjected to torture or other cruel, inhuman or degrading treatment or punishment by or at the instigation of a public official shall have the right to complain to, and to have his case impartially examined by, the competent authorities of the state concerned.

#### Article 9

Wherever there is reasonable ground to believe that an act of torture as defined in [Article I](#) has been committed, the competent authorities of the state concerned shall promptly proceed to an impartial investigation even if there has been no formal complaint.

#### Article 10

If an investigation under Article 8 or Article 9 establishes that an act of torture as defined in Article I appears to have been committed, criminal proceedings shall be instituted against the alleged offender or offenders in accordance with national law. If an allegation of other forms of cruel, inhuman or degrading treatment or punishment is considered to be well founded, the alleged offender or offenders shall be subject to criminal, disciplinary or other appropriate proceedings.

#### Article 11

Where it is proved that an act of torture or other cruel, inhuman or degrading treatment or punishment has been committed by or at the instigation of a public official, the victim shall be afforded redress and compensation,

in accordance with national law.

Article 12  
Any statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment may not be invoked as evidence against the person concerned or against any other person in any proceeding.

These U.N. declarations are significant because they specify with great precision the obligations of member nations under the Charter. Since their adoption, "(m)embers can no longer contend that they do not know what human rights they promised in the Charter to promote." Sohn, "A Short History of United Nations Documents on Human Rights," in *The United Nations and Human Rights, 18th Report of the Commission (Commission to Study the Organization of Peace ed. 1968)*. Moreover, a U.N. Declaration is, according to one authoritative definition, "a formal and solemn instrument, suitable for rare occasions when principles of great and lasting importance are being enunciated." 34 U.N. ESCOR, Supp. (No. 8) 15, U.N. Doc. E/cn.4/1/610 (1962) (memorandum of Office of Legal Affairs, U.N. Secretariat). Accordingly, it has been observed that the Universal Declaration of Human Rights "no longer fits into the dichotomy of 'binding treaty' against 'non-binding pronouncement,' but is rather an authoritative statement of the international community." E. Schwelb, *Human Rights and the International Community* 70 (1964). Thus, a Declaration creates an expectation of adherence, and "insofar as the expectation is gradually justified by State practice, a declaration may by custom become recognized as laying down rules binding upon the States." 34 U.N. ESCOR, supra. Indeed, several commentators have concluded that the Universal Declaration has become, in toto, a part of binding, customary international law. Nayar, supra, at 816-17; Waldlock, "Human Rights in Contemporary International Law and the Significance of the European Convention," *Int'l & Comp. L.Q., Supp. Publ. No. 11* at 15 (1965).

Turning to the act of torture, we have little difficulty discerning its universal renunciation in the modern usage and practice of nations. [Smith, supra, 18 U.S. \(5 Wheat.\) at 160-61, 5 L.Ed. 57](#). The international consensus surrounding torture has found expression in numerous international treaties and accords. E. g., American Convention on Human Rights, Art. 5, OAS \*884 Treaty Series No. 36 at 1, OAS Off. Rec. OEA/Ser 4 v/II 23, doc. 21, rev. 2 (English ed., 1975) ("No one shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment");

International Covenant on Civil and Political Rights, U.N. General Assembly Res. 2200 (XXI)A, U.N. Doc. A/6316 (Dec. 16, 1966) (identical language); European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 3, Council of Europe, European Treaty Series No. 5 (1968), 213 U.N.T.S. 211 (semble ). The substance of these international agreements is reflected in modern municipal i. e. national law as well. Although torture was once a routine concomitant of criminal interrogations in many nations, during the modern and hopefully more enlightened era it has been universally renounced. According to one survey, torture is prohibited, expressly or implicitly, by the constitutions of over fifty-five nations,[\[FN12\]](#) including both the United States [\[FN13\]](#) and Paraguay. [\[FN14\]](#) Our State Department reports a general recognition of this principle:

[FN12.](#) 48 *Revue Internationale de Droit Penal* Nos. 3 & 4 at 208 (1977).

[FN13.](#) U.S.Const., Amend. VIII ("cruel and unusual punishments" prohibited); id. Amend. XIV.

[FN14.](#) Constitution of Paraguay, Art. 45 (prohibiting torture and other cruel treatment).

There now exists an international consensus that recognizes basic human rights and obligations owed by all governments to their citizens . . . . There is no doubt that these rights are often violated; but virtually all governments acknowledge their validity.

Department of State, Country Reports on Human Rights for 1979, published as Joint Comm. Print, House Comm. on Foreign Affairs, and Senate Comm. on Foreign Relations, 96th Cong. 2d Sess. (Feb. 4, 1980), Introduction at 1. We have been directed to no assertion by any contemporary state of a right to torture its own or another nation's citizens. Indeed, United States diplomatic contacts confirm the universal abhorrence with which torture is viewed:

In exchanges between United States embassies and all foreign states with which the United States maintains relations, it has been the Department of State's general experience that no government has asserted a right to torture its own nationals. Where

reports of torture elicit some credence, a state usually responds by denial or, less frequently, by asserting that the conduct was unauthorized or constituted rough treatment short of torture.[\[FN15\]](#)

[FN15.](#) The fact that the prohibition of torture is often honored in the breach does not diminish its binding effect as a norm of international law. As one commentator has put it, "The best evidence for the existence of international law is that every actual State recognizes that it does exist and that it is itself under an obligation to observe it. States often violate international law, just as individuals often violate municipal law; but no more than individuals do States defend their violations by claiming that they are above the law." J. Brierly, *The Outlook for International Law* 4-5 (Oxford 1944).

Memorandum of the United States as Amicus Curiae at 16 n.34.

[\[4\]](#) Having examined the sources from which customary international law is derived the usage of nations, judicial opinions and the works of jurists [\[FN16\]](#) we conclude that official torture is now prohibited by the law of nations. The prohibition is clear and unambiguous, and admits of no distinction between treatment of aliens and citizens. Accordingly, we must conclude that the dictum in [Dreyfus v. von Finck, supra, 534 F.2d at 31](#), to the effect that "violations of international law do not occur when the aggrieved parties are nationals of the acting state," is clearly out of tune with the current usage and practice of international law. The treaties and accords cited above, as well as the express foreign policy \*885 of our own government,[\[FN17\]](#) all make it clear that international law confers fundamental rights upon all people vis-a-vis their own governments. While the ultimate scope of those rights will be a subject for continuing refinement and elaboration, we hold that the right to be free from torture is now among them. We therefore turn to the question whether the other requirements for jurisdiction are met.

[FN16.](#) See note 4, supra: see also Ireland v. United Kingdom, Judgment of Jan. 18, 1978 (European Court of Human Rights), summarized in (1978) Yearbook, European Convention on Human Rights 602 (Council

of Europe) (holding that Britain's subjection of prisoners to sleep deprivation, hooding, exposure to hissing noise, reduced diet and standing against a wall for hours was "inhuman and degrading," but not "torture" within meaning of European Convention on Human Rights).

[FN17](#). E. g., [22 U.S.C. s 2304\(a\)\(2\)](#) ("Except under circumstances specified in this section, no security assistance may be provided to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights."); [22 U.S.C. s 2151\(a\)](#) ("The Congress finds that fundamental political, economic, and technological changes have resulted in the interdependence of nations. The Congress declares that the individual liberties, economic prosperity, and security of the people of the United States are best sustained and enhanced in a community of nations which respect individual civil and economic rights and freedoms").

### III

Appellee submits that even if the tort alleged is a violation of modern international law, federal jurisdiction may not be exercised consistent with the dictates of Article III of the Constitution. The claim is without merit. Common law courts of general jurisdiction regularly adjudicate transitory tort claims between individuals over whom they exercise personal jurisdiction, wherever the tort occurred. Moreover, as part of an articulated scheme of federal control over external affairs, Congress provided, in the first Judiciary Act, s 9(b), 1 Stat. 73, 77 (1789), for federal jurisdiction over suits by aliens where principles of international law are in issue. The constitutional basis for the Alien Tort Statute is the law of nations, which has always been part of the federal common law.

[\[5\]](#) It is not extraordinary for a court to adjudicate a tort claim arising outside of its territorial jurisdiction. A state or nation has a legitimate interest in the orderly resolution of disputes among those within its borders, and where the *lex loci delicti commissi* is applied, it is an expression of comity to give effect to the laws of the state where the wrong occurred. Thus, Lord Mansfield in *Mostyn v. Fabrigas*, 1 Cowp. 161

(1774), quoted in [McKenna v. Fisk](#), 42 U.S. (1 How.) 241, 248, 11 L.Ed. 117 (1843) said:

(If A becomes indebted to B, or commits a tort upon his person or upon his personal property in Paris, an action in either case may be maintained against A in England, if he is there found . . . (A)s to transitory actions, there is not a colour of doubt but that any action which is transitory may be laid in any county in England, though the matter arises beyond the seas.

Mostyn came into our law as the original basis for state court jurisdiction over out-of-state torts, [McKenna v. Fisk](#), *supra*, 42 U.S. (1 How.) 241, 11 L.Ed. 117 (personal injury suits held transitory); [Dennick v. Railroad Co.](#), 103 U.S. 11, 26 L.Ed. 439 (1880) (wrongful death action held transitory), and it has not lost its force in suits to recover for a wrongful death occurring upon foreign soil, [Slater v. Mexican National Railroad Co.](#), 194 U.S. 120, 24 S.Ct. 581, 48 L.Ed. 900 (1904), as long as the conduct complained of was unlawful where performed. [Restatement \(Second\) of Foreign Relations Law of the United States s 19](#) (1965). Here, where in personam jurisdiction has been obtained over the defendant, the parties agree that the acts alleged would violate Paraguayan law, and the policies of the forum are consistent with the foreign law, [\[FN18\]](#) state court jurisdiction would be proper. Indeed, appellees conceded as much at oral argument.

[FN18](#). Conduct of the type alleged here would be actionable under [42 U.S.C. s 1983](#) or, undoubtedly, the Constitution, if performed by a government official.

[\[6\]\[7\]](#) Recalling that *Mostyn* was freshly decided at the time the Constitution was ratified, we proceed to consider whether the First Congress acted constitutionally in vesting jurisdiction over "foreign suits," [Slater](#), *supra*, 194 U.S. at 124, 24 S.Ct. at 582, alleging torts committed in violation of ~~\*886~~ the law of nations. A case properly "aris(es) under the . . . laws of the United States" for Article III purposes if grounded upon statutes enacted by Congress or upon the common law of the United States. See [Illinois v. City of Milwaukee](#), 406 U.S. 91, 99-100, 92 S.Ct. 1385, 1390-91, 31 L.Ed.2d 712 (1972); [Ivy Broadcasting Co., Inc. v. American Tel. & Tel. Co.](#), 391 F.2d 486, 492 (2d Cir. 1968). The law of nations forms an integral part of the common law, and a review of the history surrounding the adoption of the

Constitution demonstrates that it became a part of the common law of the United States upon the adoption of the Constitution. Therefore, the enactment of the Alien Tort Statute was authorized by Article III.

During the eighteenth century, it was taken for granted on both sides of the Atlantic that the law of nations forms a part of the common law. 1 Blackstone, Commentaries 263-64 (1st Ed. 1765-69); 4 id. at 67.<sup>[FN19]</sup> Under the Articles of Confederation, the Pennsylvania Court of Oyer and Terminer at Philadelphia, per McKean, Chief Justice, applied the law of nations to the criminal prosecution of the Chevalier de Longchamps for his assault upon the person of the French Consul-General to the United States, noting that "(t)his law, in its full extent, is a part of the law of this state . . . ." [Respublica v. DeLongchamps](#), 1 U.S. (1 Dall.) 113, 119, 1 L.Ed. 59 (1784). Thus, a leading commentator has written:

<sup>[FN19]</sup> As Lord Stowell said in *The Maria*, 165 Eng.Rep. 955, 958 (Adm.1807): "In the first place it is to be recollected, that this is a Court of the Law of Nations, though sitting here under the authority of the King of Great Britain. It belongs to other nations as well as to our own; and what foreigners have a right to demand from it, is the administration of the law of nations, simply, and exclusively of the introduction of principles borrowed from our own municipal jurisprudence, to which it is well known, they have at all times expressed no inconsiderable repugnance."

It is an ancient and a salutary feature of the Anglo-American legal tradition that the Law of Nations is a part of the law of the land to be ascertained and administered, like any other, in the appropriate case. This doctrine was originally conceived and formulated in England in response to the demands of an expanding commerce and under the influence of theories widely accepted in the late sixteenth, the seventeenth and the eighteenth centuries. It was brought to America in the colonial years as part of the legal heritage from England. It was well understood by men of legal learning in America in the eighteenth century when the United Colonies broke away from England to unite effectively, a little later, in the United States of America.

Dickenson, "The Law of Nations as Part of the National Law of the United States," 101 U.Pa.L.Rev. 26, 27 (1952).

Indeed, Dickenson goes on to demonstrate, *id.* at 34-41, that one of the principal defects of the Confederation that our Constitution was intended to remedy was the central government's inability to "cause infractions of treaties or of the law of nations, to be punished." 1 Farrand, Records of the Federal Convention 19 (Rev. ed. 1937) (Notes of James Madison). And, in Jefferson's words, the very purpose of the proposed Union was "(t)o make us one nation as to foreign concerns, and keep us distinct in domestic ones." Dickenson, *supra*, at 36 n. 28.

<sup>[8]</sup> As ratified, the judiciary article contained no express reference to cases arising under the law of nations. Indeed, the only express reference to that body of law is contained in [Article I, sec. 8, cl. 10](#), which grants to the Congress the power to "define and punish . . . offenses against the law of nations." Appellees seize upon this circumstance and advance the proposition that the law of nations forms a part of the laws of the United States only to the extent that Congress has acted to define it. This extravagant claim is amply refuted by the numerous decisions applying rules of international law uncodified in any act of Congress. *E. g.*, [Ware v. Hylton](#), 3 U.S. (3 Dall.) 198, 1 L.Ed. 568 (1796); *The Paquete Habana*, *supra*, 175 U.S. 677, 20 S.Ct. 290, 44 L.Ed. 320; <sup>\*887</sup>[Sabbatino](#), *supra*, 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964). A similar argument was offered to and rejected by the Supreme Court in [United States v. Smith](#), *supra*, 18 U.S. (5 Wheat.) 153, 158- 60, 5 L.Ed. 57 and we reject it today. As John Jay wrote in *The Federalist* No. 3, at 22 (1 Bourne ed. 1901), "Under the national government, treaties and articles of treaties, as well as the laws of nations, will always be expounded in one sense and executed in the same manner, whereas adjudications on the same points and questions in the thirteen states will not always accord or be consistent." Federal jurisdiction over cases involving international law is clear.

Thus, it was hardly a radical initiative for Chief Justice Marshall to state in *The Nereide*, 13 U.S. (9 Cranch) 388, 422, 3 L.Ed. 769 (1815), that in the absence of a congressional enactment,<sup>[FN20]</sup> United States courts are "bound by the law of nations, which is a part of the law of the land." These words were echoed in *The Paquete Habana*, *supra*, 175 U.S. at 700, 20 S.Ct. at 299: "(i)nternational law is part of our law, and must be ascertained and administered by the courts of

justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."

[FN20](#). The plainest evidence that international law has an existence in the federal courts independent of acts of Congress is the long-standing rule of construction first enunciated by Chief Justice Marshall: "an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains . . . ." *The Charming Betsy*, [6 U.S. \(2 Cranch\), 34, 67, 2 L.Ed. 208 \(1804\)](#), quoted in [Lauritzen v. Larsen, 345 U.S. 571, 578, 73 S.Ct. 921, 926, 97 L.Ed. 1254 \(1953\)](#).

[\[9\]](#) The *Filartigas* urge that [28 U.S.C. s 1350](#) be treated as an exercise of Congress's power to define offenses against the law of nations. While such a reading is possible, see [Lincoln Mills v. Textile Workers, 353 U.S. 488, 77 S.Ct. 912, 1 L.Ed.2d 972 \(1957\)](#) (jurisdictional statute authorizes judicial explication of federal common law), we believe it is sufficient here to construe the Alien Tort Statute, not as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights already recognized by international law. The statute nonetheless does inform our analysis of Article III, for we recognize that questions of jurisdiction "must be considered part of an organic growth part of an evolutionary process," and that the history of the judiciary article gives meaning to its pithy phrases. [Romero v. International Terminal Operating Co., 358 U.S. 354, 360, 79 S.Ct. 468, 473, 3 L.Ed.2d 368 \(1959\)](#). The Framers' overarching concern that control over international affairs be vested in the new national government to safeguard the standing of the United States among the nations of the world therefore reinforces the result we reach today.

[\[10\]](#) Although the Alien Tort Statute has rarely been the basis for jurisdiction during its long history,[\[FN21\]](#) in light of the foregoing discussion, there can be little doubt that this action is properly brought in federal court.[\[FN22\]](#) This is undeniably an action by an alien, for a tort only, committed in violation of the law of nations. The paucity of suits successfully maintained under the section is readily attributable to the statute's requirement of alleging a "violation of the law of nations" (emphasis supplied) at the jurisdictional threshold. Courts have,

accordingly, engaged in a more searching preliminary review of the merits than is required, for example, under the more flexible "arising under" formulation. \*888 Compare [O'Reilly de Camara v. Brooke, 209 U.S. 45, 52, 28 S.Ct. 439, 441, 52 L.Ed. 676 \(1907\)](#) (question of Alien Tort Statute jurisdiction disposed of "on the merits") (Holmes, J.), with [Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 \(1946\)](#) (general federal question jurisdiction not defeated by the possibility that the averments in the complaint may fail to state a cause of action). Thus, the narrowing construction that the Alien Tort Statute has previously received reflects the fact that earlier cases did not involve such well-established, universally recognized norms of international law that are here at issue.

[FN21](#). [Section 1350](#) afforded the basis for jurisdiction over a child custody suit between aliens in [Adra v. Clift, 195 F.Supp. 857 \(D.Md.1961\)](#), with a falsified passport supplying the requisite international law violation. In [Bolchos v. Darrell, 3 Fed.Cas. 810 \(D.S.C.1795\)](#), the Alien Tort Statute provided an alternative basis of jurisdiction over a suit to determine title to slaves on board an enemy vessel taken on the high seas.

[FN22](#). We recognize that our reasoning might also sustain jurisdiction under the general federal question provision, [28 U.S.C. s 1331](#). We prefer, however, to rest our decision upon the Alien Tort Statute, in light of that provision's close coincidence with the jurisdictional facts presented in this case. See [Romero v. International Terminal Operating Co., 358 U.S. 354, 79 S.Ct. 468, 3 L.Ed.2d 368 \(1959\)](#).

[\[11\]](#) For example, the statute does not confer jurisdiction over an action by a Luxembourgish international investment trust's suit for fraud, conversion and corporate waste. [IIT v. Vencap, 519 F.2d 1001, 1015 \(1975\)](#). In *IIT*, Judge Friendly astutely noted that the mere fact that every nation's municipal law may prohibit theft does not incorporate "the Eighth Commandment, 'Thou Shalt not steal' . . . (into) the law of nations." It is only where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern, by means of express international accords, that a wrong generally

recognized becomes an international law violation within the meaning of the statute. Other recent [s 1350](#) cases are similarly distinguishable.[\[FN23\]](#)

[FN23. Dreyfus v. von Finck, 534 F.2d 24 \(2d Cir.\)](#), cert. denied, [429 U.S. 835, 97 S.Ct. 102, 50 L.Ed.2d 101 \(1976\)](#), concerned a forced sale of property, and thus sought to invoke international law in an area in which no consensus view existed. See [Sabbatino, supra, 376 U.S. at 428, 84 S.Ct. at 940](#). Similarly, [Benjamins v. British European Airways, 572 F.2d 913 \(2d Cir. 1978\)](#), cert. denied, [439 U.S. 1114, 99 S.Ct. 1016, 59 L.Ed.2d 72 \(1979\)](#), held only that an air disaster, even if caused by "wilful" negligence, does not constitute a law of nations violation. [Id. at 916](#). In [Khedivial Line, S. A. E. v. Seafarers' International Union, 278 F.2d 49 \(2d Cir. 1960\)](#), we found that the "right" to free access to the ports of a foreign nation was at best a rule of comity, and not a binding rule of international law.

The cases from other circuits are distinguishable in like manner. The court in [Huynh Thi Anh v. Levi, 586 F.2d 625 \(6th Cir. 1978\)](#), was unable to discern from the traditional sources of the law of nations "a universal or generally accepted substantive rule or principle" governing child custody, [id. at 629](#), and therefore held jurisdiction to be lacking. Cf. [Nguyen Da Yen v. Kissinger, 528 F.2d 1194, 1201 n.13 \(9th Cir. 1975\)](#) ("the illegal seizure, removal and detention of an alien against his will in a foreign country would appear to be a tort . . . and it may well be a tort in violation of the 'law of nations' ") ([s 1350](#) question not reached due to inadequate briefing). Finally, the district court in [Lopes v. Reederei Richard Schroder, 225 F.Supp. 292 \(E.D.Pa.1963\)](#) simply found that the doctrine of seaworthiness, upon which the plaintiff relied, was a uniquely American concept, and therefore not a part of the law of nations.

IIT adopted a dictum from [Lopes v. Reederei Richard Schroder, 225 F.Supp. 292 \(E.D.Pa.1963\)](#) to the effect that "a violation of the law of nations arises only when there has been 'a violation by one or more individuals of those standards, rules or customs (a) affecting the relationship between states or between

an individual and a foreign state and (b) used by those states for their common good and/or in dealings inter se.' " [IIT, supra, 519 F.2d at 1015](#), quoting [Lopes, supra, 225 F.Supp. at 297](#). We have no quarrel with this formulation so long as it be understood that the courts are not to prejudge the scope of the issues that the nations of the world may deem important to their interrelationships, and thus to their common good. As one commentator has noted:

the sphere of domestic jurisdiction is not an irreducible sphere of rights which are somehow inherent, natural, or fundamental. It does not create an impenetrable barrier to the development of international law. Matters of domestic jurisdiction are not those which are unregulated by international law, but those which are left by international law for regulation by States. There are, therefore, no matters which are domestic by their 'nature.' All are susceptible of international legal regulation and may become the subjects of new rules of customary law of treaty obligations.

\***889** Preuss, "Article 2, Paragraph 7 of the Charter of the United Nations and Matters of Domestic Jurisdiction," Hague Receuil (Extract, 149) at 8, reprinted in H. Briggs, *The Law of Nations* 24 (1952). Here, the nations have made it their business, both through international accords and unilateral action,[\[FN24\]](#) to be concerned with domestic human rights violations of this magnitude. The case before us therefore falls within the Lopes/IIT rule.

[FN24.](#) As President Carter stated in his address to the United Nations on March 17, 1977: All the signatories of the United Nations Charter have pledged themselves to observe and to respect basic human rights. Thus, no member of the United Nations can claim that mistreatment of the citizens is solely its own business. Equally, no member can avoid its responsibilities to review and to speak when torture or unwarranted deprivation occurs in any part of the world. Reprinted in 78 Department of State Bull. 322 (1977); see note 17, supra.

Since federal jurisdiction may properly be exercised over the Filartigas' claim, the action must be remanded for further proceedings. Appellee Pena, however, advances several additional points that lie beyond the scope of our holding on jurisdiction. Both to emphasize the boundaries of our holding, and to

clarify some of the issues reserved for the district court on remand, we will address these contentions briefly.

#### IV

[12] Pena argues that the customary law of nations, as reflected in treaties and declarations that are not self-executing, should not be applied as rules of decision in this case. In doing so, he confuses the question of federal jurisdiction under the Alien Tort Statute, which requires consideration of the law of nations, with the issue of the choice of law to be applied, which will be addressed at a later stage in the proceedings. The two issues are distinct. Our holding on subject matter jurisdiction decides only whether Congress intended to confer judicial power, and whether it is authorized to do so by Article III. The choice of law inquiry is a much broader one, primarily concerned with fairness, see [Home Insurance Co. v. Dick](#), 281 U.S. 397, 50 S.Ct. 338, 74 L.Ed. 926 (1930); consequently, it looks to wholly different considerations. See [Lauritzen v. Larsen](#), 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254 (1954). Should the district court decide that the Lauritzen analysis requires it to apply Paraguayan law, our courts will not have occasion to consider what law would govern a suit under the Alien Tort Statute where the challenged conduct is actionable under the law of the forum and the law of nations, but not the law of the jurisdiction in which the tort occurred. [FN25]

[FN25]. In taking that broad range of factors into account, the district court may well decide that fairness requires it to apply Paraguayan law to the instant case. See [Slater v. Mexican National Railway Co.](#), 194 U.S. 120, 24 S.Ct. 581, 48 L.Ed. 900 (1904). Such a decision would not retroactively oust the federal court of subject matter jurisdiction, even though plaintiff's cause of action would no longer properly be "created" by a law of the United States. See [American Well Works Co. v. Layne & Bowler Co.](#), 241 U.S. 257, 260, 36 S.Ct. 585, 586, 60 L.Ed. 987 (1916) (Holmes, J.). Once federal jurisdiction is established by a colorable claim under federal law at a preliminary stage of the proceeding, subsequent dismissal of that claim (here, the claim under the general international proscription of torture) does not deprive the court of jurisdiction previously established.

See [Hagans v. Lavine](#), 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974); [Romero v. International Terminal Operating Co.](#), 358 U.S. 354, 79 S.Ct. 468, 3 L.Ed.2d 368 (1959); [Bell v. Hood](#), 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946). Cf. [Huynh Thi Ahn](#), *supra*, 586 F.2d at 633 (choice of municipal law ousts s 1350 jurisdiction when no international norms exist).

[13][14] Pena also argues that "(i)f the conduct complained of is alleged to be the act of the Paraguayan government, the suit is barred by the Act of State doctrine." This argument was not advanced below, and is therefore not before us on this appeal. We note in passing, however, that we doubt whether action by a state official in violation of the Constitution and laws of the Republic of Paraguay, and wholly unratified by that nation's government, could properly be characterized as an act of state. See \*890 [Banco Nacional de Cuba v. Sabbatino](#), *supra*, 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804; [Underhill v. Hernandez](#), 168 U.S. 250, 18 S.Ct. 83, 42 L.Ed. 456 (1897). Paraguay's renunciation of torture as a legitimate instrument of state policy, however, does not strip the tort of its character as an international law violation, if it in fact occurred under color of government authority. See Declaration on the Protection of All Persons from Being Subjected to Torture, *supra* note 11; cf. *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908) (state official subject to suit for constitutional violations despite immunity of state).

Finally, we have already stated that we do not reach the critical question of forum non conveniens, since it was not considered below. In closing, however, we note that the foreign relations implications of this and other issues the district court will be required to adjudicate on remand underscores the wisdom of the First Congress in vesting jurisdiction over such claims in the federal district courts through the Alien Tort Statute. Questions of this nature are fraught with implications for the nation as a whole, and therefore should not be left to the potentially varying adjudications of the courts of the fifty states.

In the twentieth century the international community has come to recognize the common danger posed by the flagrant disregard of basic human rights and particularly the right to be free of torture. Spurred first by the Great War, and then the Second, civilized nations have banded together to prescribe acceptable norms of international behavior. From the ashes of

the Second World War arose the United Nations Organization, amid hopes that an era of peace and cooperation had at last begun. Though many of these aspirations have remained elusive goals, that circumstance cannot diminish the true progress that has been made. In the modern age, humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest. Among the rights universally proclaimed by all nations, as we have noted, is the right to be free of physical torture. Indeed, for purposes of civil liability, the torturer has become like the pirate and slave trader before him hostis humani generis, an enemy of all mankind. Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.

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**Inter-American Court of Human Rights**

***Velásquez Rodríguez Case***

Judgment of 29 July 1988, Series C No.4, paras. 149-158 & 159-188

authorization. In some cases, Government agents carried out the detentions openly and without any pretense or disguise; in others, government agents had cleared the areas where the kidnappings were to take place and, on at least one occasion, when government agents stopped the kidnappers they were allowed to continue freely on their way after showing their identification (testimony of Miguel Angel Pavón Salazar, Ramón Custodio López and Florencio Caballero);

iii. The kidnappers blindfolded the victims, took them to secret, unofficial detention centers and moved them from one center to another. They interrogated the victims and subjected them to cruel and humiliating treatment and torture. Some were ultimately murdered and their bodies were buried in clandestine cemeteries (testimony of Miguel Angel Pavón Salazar, Ramón Custodio López, Florencio Caballero, René Velásquez Díaz, Inés Consuelo Murillo and José Gonzalo Flores Trejo);

iv. When queried by relatives, lawyers and persons or entities interested in the protection of human rights, or by judges charged with executing writs of habeas corpus, the authorities systematically denied any knowledge of the detentions or the whereabouts or fate of the victims. That attitude was seen even in the cases of persons who later reappeared in the hands of the same authorities who had systematically denied holding them or knowing their fate (testimony of Inés Consuelo Murillo, José Gonzalo Flores Trejo, Efraín Díaz Arrivillaga, Florencio Caballero, Virgilio Carías, Milton Jiménez Puerto, René Velásquez Díaz, Zenaida Velásquez, César Augusto Murillo and press clippings);

v. Military and police officials as well as those from the Executive and Judicial Branches either denied the disappearances or were incapable of preventing or investigating them, punishing those responsible, or helping those interested discover the whereabouts and fate of the victims or the location of their remains. The investigative committees created by the Government and the Armed Forces did not produce any results. The judicial proceedings brought were processed slowly with a clear lack of interest and some were ultimately dismissed (testimony of Inés Consuelo Murillo, José Gonzalo Flores Trejo, Efraín Díaz Arrivillaga, Florencio Caballero, Virgilio Carías, Milton Jiménez Puerto, René Velásquez Díaz, Zenaida Velásquez, César Augusto Murillo and press clippings);

e. On September 12, 1981, between 4:30 and 5:00 p.m., several heavily-armed men in civilian clothes driving a white Ford without license plates kidnapped Manfredo Velásquez from a parking lot in downtown Tegucigalpa. Today, nearly seven years later, he remains disappeared, which creates a reasonable presumption that he is dead (testimony of Miguel Angel Pavón Salazar, Ramón Custodio López, Zenaida Velásquez, Florencio Caballero, Leopoldo Aguilar Villalobos and press clippings).

f. Persons connected with the Armed Forces or under its direction carried out that kidnapping (testimony of Ramón Custodio López, Zenaida Velásquez, Florencio Caballero, Leopoldo Aguilar Villalobos and press clippings).

## INTER-AMERICAN COURT OF HUMAN RIGHTS

### VELASQUEZ RODRIGUEZ CASE

#### JUDGMENT OF JULY 29, 1988

In the Velásquez Rodríguez case,

The Inter-American Court of Human Rights, (.....)delivers the following judgment pursuant to Article 44 (1) of its Rules of Procedure (hereinafter "the Rules of Procedure") in the instant case submitted by the Inter-American Commission on Human Rights against the State of Honduras.

147. The Court now turns to the relevant facts that it finds to have been proven. They are as follows:

a. During the period 1981 to 1984, 100 to 150 persons disappeared in the Republic of Honduras, and many were never heard from again (testimony of Miguel Angel Pavón Salazar, Ramón Custodio López, Efraín Díaz Arrivillaga, Florencio Caballero and press clippings).

b. Those disappearances followed a similar pattern, beginning with the kidnapping of the victims by force, often in broad daylight and in public places, by armed men in civilian clothes and disguises, who acted with apparent impunity and who used vehicles without any official identification, with tinted windows and with false license plates or no plates (testimony of Miguel Angel Pavón Salazar, Ramón Custodio López, Efraín Díaz Arrivillaga, Florencio Caballero and press clippings).

c. It was public and notorious knowledge in Honduras that the kidnappings were carried out by military personnel or the police, or persons acting under their orders (testimony of Miguel Angel Pavón Salazar, Ramón Custodio López, Efraín Díaz Arrivillaga, Florencio Caballero and press clippings).

d. The disappearances were carried out in a systematic manner, regarding which the Court considers the following circumstances particularly relevant:

i. The victims were usually persons whom Honduran officials considered dangerous to State security (testimony of Miguel Angel Pavón Salazar, Ramón Custodio López, Efraín Díaz Arrivillaga, Florencio Caballero, Virgilio Carías, Milton Jiménez Puerto, René Velásquez Díaz, Inés Consuelo Murillo, José Gonzalo Flores Trejo, Zenaida Velásquez, César Augusto Murillo and press clippings). In addition, the victims had usually been under surveillance for long periods of time (testimony of Ramón Custodio López and Florencio Caballero);

ii. The arms employed were reserved for the official use of the military and police, and the vehicles used had tinted glass, which requires special official

g. The kidnapping and disappearance of Manfredo Velásquez falls within the systematic practice of disappearances referred to by the facts deemed proved in paragraphs a-d. To wit:

- i. Manfredo Velásquez was a student who was involved in activities the authorities considered "dangerous" to national security (testimony of Miguel Angel Pavón Salazar, Ramón Custodio López and Zenaida Velásquez).
- ii. The kidnapping of Manfredo Velásquez was carried out in broad daylight by men in civilian clothes who used a vehicle without license plates.
- iii. In the case of Manfredo Velásquez, there were the same type of denials by his captors and the Armed Forces, the same omissions of the latter and of the Government in investigating and revealing his whereabouts, and the same ineffectiveness of the courts where three writs of habeas corpus and two criminal complaints were brought (testimony of Miguel Angel Pavón Salazar, Ramón Custodio López, Zenaida Velásquez, press clippings and documentary evidence).
- h. There is no evidence in the record that Manfredo Velásquez had disappeared in order to join subversive groups, other than a letter from the Mayor of Langue, which contained rumors to that effect. The letter itself shows that the Government associated him with activities it considered a threat to national security. However, the Government did not corroborate the view expressed in the letter with any other evidence. Nor is there any evidence that he was kidnapped by common criminals or other persons unrelated to the practice of disappearances existing at that time.

148. Based upon the above, the Court finds that the following facts have been proven in this proceeding: (1) a practice of disappearances carried out or tolerated by Honduran officials existed between 1981 and 1984; (2) Manfredo Velásquez disappeared at the hands of or with the acquiescence of those officials within the framework of that practice; and (3) the Government of Honduras failed to guarantee the human rights affected by that practice.

## X

149. Disappearances are not new in the history of human rights violations. However, their systematic and repeated nature and their use not only for causing certain individuals to disappear, either briefly or permanently, but also as a means of creating a general state of anguish, insecurity and fear, is a recent phenomenon. Although this practice exists virtually worldwide, it has occurred with exceptional intensity in Latin American in the last few years.

150. The phenomenon of disappearances is a complex form of human rights violation that must be understood and confronted in an integral fashion.

151. The establishment of a Working Group on Enforced or Involuntary Disappearances of the United Nations Commission on Human Rights, by Resolution 20 (XXXXVI) of February 29, 1980, is a clear demonstration of general censure and repudiation of the practice of disappearances, which had already

received world attention at the UN General Assembly (Resolution 33/173 of December 20, 1978), the Economic and Social Council (Resolution 1979/38 of May 10, 1979) and the Subcommission for the Prevention of Discrimination and Protection of Minorities (Resolution 5B (XXXII) of September 5, 1979). The reports of the rapporteurs or special envoys of the Commission on Human Rights show concern that the practice of disappearances be stopped, the victims reappear and that those responsible be punished.

152. Within the inter-American system, the General Assembly of the Organization of American States (OAS) and the Commission have repeatedly referred to the practice of disappearances and have urged that disappearances be investigated and that the practice be stopped (AG/RES. 443 (IX-0/79) of October 31, 1979; AG/RES.510 (X-0/80) of November 27, 1980; AG/RES. 618 (XII-0/82) of November 20, 1982; AG/RES. 666 (XIII-0/83) of November 18, 1983; AG/RES. 742 (XIV-0/84) of November 17, 1984 and AG/RES. 890 (XVII-0/87) of November 14, 1987; Inter-American Commission on Human Rights: Annual Report 1978, pp. 24-27; Annual Report, 1980-1981, pp. 113-114; Annual Report, 1982-1983, pp. 46-67; Annual Report, 1985-1986, pp. 37-40; Annual Report, 1986-1987, pp. 277-284 and in many of its Country Reports, such as OEA/Ser. L/V/II.49, doc. 19, 1980 (Argentina); OEA/Ser. L/V/II.66, doc. 17, 1985 (Chile) and OEA/Ser. L/V/II.66, doc. 16, 1985 (Guatemala)).

153. International practice and doctrine have often categorized disappearances as a crime against humanity, although there is no treaty in force which is applicable to the States Parties to the Convention and which uses this terminology (Inter-American Yearbook on Human Rights, 1985, pp. 368, 686 and 1102). The General Assembly of the OAS has resolved that it "is an affront to the conscience of the hemisphere and constitutes a crime against humanity" (AG/RES. 666, *supra*) and that "this practice is cruel and inhuman, mocks the rule of law, and undermines those norms which guarantee protection against arbitrary detention and the right to personal security and safety" (AG/RES. 742, *supra*).

154. Without question, the State has the right and duty to guarantee its security. It is also indisputable that all societies suffer some deficiencies in their legal orders. However, regardless of the seriousness of certain actions and the culpability of the perpetrators of certain crimes, the power of the State is not unlimited, nor may the State resort to any means to attain its ends. The State is subject to law and morality. Disrespect for human dignity cannot serve as the basis for any State action.

155. The forced disappearance of human beings is a multiple and continuous violation of many rights under the Convention that the States Parties are obligated to respect and guarantee. The kidnapping of a person is an arbitrary deprivation of liberty, an infringement of a detainee's right to be taken without delay before a judge and to invoke the appropriate procedures to review the legality of the arrest, all in violation of Article 7 of the Convention which recognizes the right to personal liberty by providing that:

1. Every person has the right to personal liberty and security.
2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.
3. No one shall be subject to arbitrary arrest or imprisonment.
4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.
5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a

reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.

6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.

156. Moreover, prolonged isolation and deprivation of communication are in themselves cruel and inhuman treatment, harmful to the psychological and moral integrity of the person and a violation of the right of any detainee to respect for his inherent dignity as a human being. Such treatment, therefore, violates Article 5 of the Convention, which recognizes the right to the integrity of the person by providing that:

1. Every person has the right to have his physical, mental, and moral integrity respected.
2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

In addition, investigations into the practice of disappearances and the testimony of victims who have regained their liberty show that those who are disappeared are often subjected to merciless treatment, including all types of indignities, torture and other cruel, inhuman and degrading treatment, in violation of the right to physical integrity recognized in Article 5 of the Convention.

157. The practice of disappearances often involves secret execution without trial, followed by concealment of the body to eliminate any material evidence of the crime and to ensure the impunity of those responsible. This is a flagrant violation of the right to life, recognized in Article 4 of the Convention, the first clause of which reads as follows:

1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

158. The practice of disappearances, in addition to directly violating many provisions of the Convention, such as those noted above, constitutes a radical breach of the treaty in that it shows a crass abandonment of the values which emanate from the concept of human dignity and of the most basic principles of the inter-American system and the Convention. The existence of this practice, moreover, evinces a disregard of the duty to organize the State in such a manner as to guarantee the rights recognized in the Convention, as set out below.

159. The Commission has asked the Court to find that Honduras has violated the rights guaranteed to Manfredo Velásquez by Articles 4, 5 and 7 of the Convention. The Government has denied the charges and seeks to be absolved.

160. This requires the Court to examine the conditions under which a particular act, which violates one of the rights recognized by the Convention, can be imputed to a State Party thereby establishing its international responsibility.

161. Article 1 (1) of the Convention provides:

#### **Article 1. Obligation to Respect Rights**

1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

162. This article specifies the obligation assumed by the States Parties in relation to each of the rights protected. Each claim alleging that one of those rights has been infringed necessarily implies that Article 1 (1) of the Convention has also been violated.

163. The Commission did not specifically allege the violation of Article 1 (1) of the Convention, but that does not preclude the Court from applying it. The precept contained therein constitutes the generic basis of the protection of the rights recognized by the Convention and would be applicable, in any case, by virtue of a general principle of law, *iusa novit curia*, on which international jurisprudence has repeatedly relied and under which a court has the power and the duty to apply the juridical provisions relevant to a proceeding, even when the parties do not expressly invoke them ("*Lotus*", Judgment No. 9, 1927, P.C.I.J., Series A No. 10, p. 31 and Eur. Court H.R., **Handyside Case**, Judgment of 7 December 1976, Series A No. 24, para. 41).

164. Article 1 (1) is essential in determining whether a violation of the human rights recognized by the Convention can be imputed to a State Party. In effect, that article charges the States Parties with the fundamental duty to respect and guarantee the rights recognized in the Convention. Any impairment of those rights which can be attributed under the rules of international law to the action or omission of any public authority constitutes an act imputable to the State, which assumes responsibility in the terms provided by the Convention.

165. The first obligation assumed by the States Parties under Article 1 (1) is "to respect the rights and freedoms" recognized by the Convention. The exercise of public authority has certain limits which derive from the fact that human rights are inherent attributes of human dignity and are, therefore, superior to the power of the State. On another occasion, this court stated:

The protection of human rights, particularly the civil and political rights set forth in the Convention, is in effect based on the affirmation of the existence of certain inviolable attributes of the individual that cannot be legitimately restricted through the exercise of governmental power. There are individual domains that are beyond the reach of the

State or to which the State has but limited access. Thus, the protection of human rights must necessarily comprise the concept of the restriction of the exercise of state power (The Word "Laws" in Article 30 of the American Convention on Human Rights, Advisory Opinion OC-6/86 of May 9, 1986. Series A No. 6, para 21).

166. The second obligation of the States Parties is to "ensure" the free and full exercise of the rights recognized by the Convention to every person subject to its jurisdiction. This obligation implies the duty of States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of judicially ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.

167. The obligation to ensure the free and full exercise of human rights is not fulfilled by the existence of a legal system designed to make it possible to comply with this obligation --it also requires the government to conduct itself so as to effectively ensure the free and full exercise of human rights.

168. The obligation of the States is, thus, much more direct than that contained in Article 2, which reads:

#### Article 2. Domestic Legal Effects

Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

169. According to Article 1 (1), any exercise of public power that violates the rights recognized by the Convention is illegal. Whenever a State organ, official or public entity violates one of those rights, this constitutes a failure of the duty to respect the rights and freedoms set forth in the Convention.

170. This conclusion is independent of whether the organ or official has contravened provisions of internal law or overstepped the limits of his authority: under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law.

171. This principle suits perfectly the nature of the Convention, which is violated whenever public power is used to infringe the rights recognized therein. If acts of public power that exceed the State's authority or are illegal under its own laws were not considered to compromise that State's obligations under the treaty, the system of protection provided for in the Convention would be illusory.

172. Thus, in principle, any violation of rights recognized by the Convention carried out by an act of public authority or by persons who use their position of authority is imputable to the State. However, this does not define all the circumstances in which a State is obligated to prevent, investigate and punish human rights violations, nor all the cases in which the State might be found responsible for an infringement of those rights. An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been

identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.

173. Violations of the Convention cannot be founded upon rules that take psychological factors into account in establishing individual culpability. For the purposes of analysis, the intent or motivation of the agent who has violated the rights recognized by the Convention is irrelevant --the violation can be established even if the identity of the individual perpetrator is unknown. What is decisive is whether a violation of the rights recognized by the Convention has occurred with the support or the acquiescence of the government, or whether the State has allowed the act to take place without taking measures to prevent it or to punish those responsible. Thus, the Court's task is to determine whether the violation is the result of a State's failure to fulfill its duty to respect and guarantee those rights, as required by Article 1 (1) of the Convention.

174. The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.

175. This duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages. It is not possible to make a detailed list of all such measures, since they vary with the law and the conditions of each State Party. Of course, while the State is obligated to prevent human rights abuses, the existence of a particular violation does not, in itself, prove the failure to take preventive measures. On the other hand, subjecting a person to official, repressive bodies that practice torture and assassination with impunity is itself a breach of the duty to prevent violations of the rights to life and physical integrity of the person, even if that particular person is not tortured or assassinated, or if those facts cannot be proven in a concrete case.

176. The State is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction. The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention.

177. In certain circumstances, it may be difficult to investigate acts that violate an individual's rights. The duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result. Nevertheless, it must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government. This is true regardless of what agent is eventually found responsible for the violation. Where the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane.

178. In the instant case, the evidence shows a complete inability of the procedures of the State of Honduras, which were theoretically adequate, to carry out an investigation into the disappearance of Manfredo Velásquez, and of the fulfillment of its duties to pay compensation and punish those responsible, as set out in Article 1 (1) of the Convention.

179 As the Court has verified above, the failure of the judicial system to act upon the writs brought before various tribunals in the instant case has been proven. Not one writ of habeas corpus was processed. No judge has access to the places where Manfredo Velásquez might have been detained. The criminal complaint was dismissed.

180 Nor did the organs of the Executive Branch carry out a serious investigation to establish the fate of Manfredo Velásquez. There was no investigation of public allegations of a practice of disappearances nor a determination of whether Manfredo Velásquez had been a victim of that practice. The Commission's requests for information were ignored to the point that the Commission had to presume, under Article 42 of its Regulations, that the allegations were true. The offer of an investigation in accord with Resolution 30/83 of the Commission resulted in an investigation by the Armed Forces, the same body accused of direct responsibility for the disappearances. This raises grave questions regarding the seriousness of the investigation. The Government often resorted to asking relatives of the victims to present conclusive proof of their allegations even though those allegations, because they involved crimes against the person, should have been investigated on the Government's own initiative in fulfillment of the State's duty to ensure public order. This is especially true when the allegations refer to a practice carried out within the Armed Forces, which, because of its nature, is not subject to private investigations. No proceeding was initiated to establish responsibility for the disappearance of Manfredo Velásquez and apply punishment under internal law. All of the above leads to the conclusion that the Honduran authorities did not take effective action to ensure respect for human rights within the jurisdiction of that State as required by Article 1 (1) of the Convention.

181. The duty to investigate facts of this type continues as long as there is uncertainty about the fate of the person who has disappeared. Even in the hypothetical case that those individually responsible for crimes of this type cannot be legally punished under certain circumstances, the State is obligated to use the means at its disposal to inform the relatives of the fate of the victims and, if they have been killed, the location of their remains.

182. The Court is convinced, and has so found, that the disappearance of Manfredo Velásquez was carried out by agents who acted under cover of public authority. However, even had that fact not been proven, the failure of the State apparatus to act, which is clearly proven, is a failure on the part of Honduras to fulfill the duties it assumed under Article 1 (1) of the Convention, which obligated it to ensure Manfredo Velásquez the free and full exercise of his human rights.

183. The Court notes that the legal order of Honduras does not authorize such acts and that internal law defines them as crimes. The Court also recognizes that not all levels of the Government of Honduras were necessarily aware of those acts, nor is there any evidence that such acts were the result of official orders. Nevertheless, those circumstances are irrelevant for the purposes of establishing whether Honduras is responsible under international law for the violations of human rights perpetrated within the practice of disappearances.

184. According to the principle of the continuity of the State in international law, responsibility exists both independently of changes of government over a period of time and continuously from the time of the act that creates responsibility to the time when the act is declared illegal. The foregoing is also valid in the area of human rights although, from an ethical or political point of view, the attitude of the new government may be much more respectful of those rights than that of the government in power when the violations occurred.

185. The Court, therefore, concludes that the facts found in this proceeding show that the State of Honduras is responsible for the involuntary disappearance of Angel Manfredo Velásquez Rodríguez. Thus, Honduras has violated Articles 7, 5 and 4 of the Convention.

186. As a result of the disappearance, Manfredo Velásquez was the victim of an arbitrary detention, which deprived him of his physical liberty without legal cause and without a determination of the lawfulness of his detention by a judge or competent tribunal. Those acts directly violate the right to personal liberty recognized by Article 7 of the Convention (supra 155) and are a violation imputable to Honduras of the duties to respect and ensure that right under Article 1 (1).

187. The disappearance of Manfredo Velásquez violates the right to personal integrity recognized by Article 5 of the Convention (supra 156). First, the mere subtraction of an individual to prolonged isolation and deprivation of communication is in itself cruel and inhuman treatment which harms the psychological and moral integrity of the person, and violates the right of every detainee under Article 5 (1) and 5 (2) to treatment respectful of his dignity. Second, although it has not been directly shown that Manfredo Velásquez was physically tortured, his kidnapping and imprisonment by governmental authorities, who have been shown to subject detainees to indignities, cruelty and torture, constitute a failure of Honduras to fulfill the duty imposed by Article 1 (1) to ensure the rights under Article 5 (1) and 5 (2) of the Convention. The guarantee of physical integrity and the right of detainees to treatment respectful of their human dignity require States Parties to take reasonable steps to prevent situations which are truly harmful to the rights protected.

188. The above reasoning is applicable to the right to life recognized by Article 4 of the Convention (supra 157). The context in which the disappearance of Manfredo Velásquez occurred and the lack of knowledge seven years later about his fate create a reasonable presumption that he was killed. Even if there is a minimal margin of doubt in this respect, it must be presumed that his fate was decided by authorities who systematically executed detainees without trial and concealed their bodies in order to avoid punishment. This, together with the failure to investigate, is a violation by Honduras of a legal duty under Article 1 (1) of the Convention to ensure the rights recognized by Article 4 (1). That duty is to ensure every person subject to its jurisdiction the inviolability of the right to life and the right not to have one's life taken arbitrarily. These rights imply an obligation on the part of States Parties to take reasonable steps to prevent situations that could result in the violation of that right.

(.....)

194. **THEREFORE,**

**THE COURT:**

Unanimously

1. Rejects the preliminary objection interposed by the Government of Honduras alleging the inadmissibility of the case for the failure to exhaust domestic legal remedies.

Unanimously

2. Declares that Honduras has violated, in the case of Angel Manfredo Velásquez Rodríguez, its obligations to respect and to ensure the right to personal liberty set forth in Article 7 of the Convention, read in conjunction with Article 1 (1) thereof.

Unanimously

3. Declares that Honduras has violated, in the case of Angel Manfredo Velásquez Rodríguez, its obligations to respect and to ensure the right to humane treatment set forth in Article 5 of the Convention, read in conjunction with Article 1 (1) thereof.

Unanimously

4. Declares that Honduras has violated, in the case of Angel Manfredo Velásquez Rodríguez, its obligation to ensure the right to life set forth in Article 4 of the Convention, read in conjunction with Article 1 (1) thereof.

Unanimously

5. Decides that Honduras is hereby required to pay fair compensation to the next-of-kin of the victim.

By six votes to one

6. Decides that the form and amount of such compensation, failing agreement between Honduras and the Commission within six months of the date of this judgment, shall be settled by the Court and, for that purpose, retains jurisdiction of the case.  
Judge Rodolfo E. Piza E. dissenting.

Unanimously

7. Decides that the agreement on the form and amount of the compensation shall be approved by the Court.

Unanimously

8. Does not find it necessary to render a decision concerning costs.

Done in Spanish and in English, the Spanish text being authentic, at the seat of the Court in San José, Costa Rica, this twenty-ninth day of July, 1988.



**Certiorari to the Court of Criminal Appeals of Texas**

*Medellín v. Texas*

No.06-984, 25 March 2008

## Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

## SUPREME COURT OF THE UNITED STATES

## Syllabus

## MEDELLIN v. TEXAS

## CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 06–984. Argued October 10, 2007—Decided March 25, 2008

In the *Case Concerning Avena and Other Mexican Nationals (Mex. v. U. S.)*, 2004 I. C. J. 12 (*Avena*), the International Court of Justice (ICJ) held that the United States had violated Article 36(1)(b) of the Vienna Convention on Consular Relations (Vienna Convention or Convention) by failing to inform 51 named Mexican nationals, including petitioner Medellín, of their Vienna Convention rights. The ICJ found that those named individuals were entitled to review and reconsideration of their U. S. state-court convictions and sentences regardless of their failure to comply with generally applicable state rules governing challenges to criminal convictions. In *Sanchez-Llamas v. Oregon*, 548 U. S. 331—issued after *Avena* but involving individuals who were not named in the *Avena* judgment—this Court held, contrary to the ICJ’s determination, that the Convention did not preclude the application of state default rules. The President then issued a memorandum (President’s Memorandum or Memorandum) stating that the United States would “discharge its international obligations” under *Avena* “by having State courts give effect to the decision.”

Relying on *Avena* and the President’s Memorandum, Medellín filed a second Texas state-court habeas application challenging his state capital murder conviction and death sentence on the ground that he had not been informed of his Vienna Convention rights. The Texas Court of Criminal Appeals dismissed Medellín’s application as an abuse of the writ, concluding that neither *Avena* nor the President’s Memorandum was binding federal law that could displace the State’s limitations on filing successive habeas applications.

*Held:* Neither *Avena* nor the President’s Memorandum constitutes directly enforceable federal law that pre-empts state limitations on the filing of successive habeas petitions. Pp. 8–37.

1. The *Avena* judgment is not directly enforceable as domestic law in state court. Pp. 8–27.

(a) While a treaty may constitute an international commitment, it is not binding domestic law unless Congress has enacted statutes implementing it or the treaty itself conveys an intention that it be “self-executing” and is ratified on that basis. See, e.g., *Foster v. Neilson*, 2 Pet. 253, 314. The *Avena* judgment creates an international law obligation on the part of the United States, but it is not automatically binding domestic law because none of the relevant treaty sources—the Optional Protocol, the U. N. Charter, or the ICJ Statute—creates binding federal law in the absence of implementing legislation, and no such legislation has been enacted.

The most natural reading of the Optional Protocol is that it is a bare grant of jurisdiction. The Protocol says nothing about the effect of an ICJ decision, does not commit signatories to comply therewith, and is silent as to any enforcement mechanism. The obligation to comply with ICJ judgments is derived from Article 94 of the U. N. Charter, which provides that “[e]ach . . . Member . . . undertakes to comply with the [ICJ’s] decision . . . in any case to which it is a party.” The phrase “undertakes to comply” is simply a commitment by member states to take future action through their political branches. That language does not indicate that the Senate, in ratifying the Optional Protocol, intended to vest ICJ decisions with immediate legal effect in domestic courts.

This reading is confirmed by Article 94(2)—the enforcement provision—which provides the sole remedy for noncompliance: referral to the U. N. Security Council by an aggrieved state. The provision of an express diplomatic rather than judicial remedy is itself evidence that ICJ judgments were not meant to be enforceable in domestic courts. See *Sanchez-Llamas*, 548 U. S., at 347. Even this “quintessentially international remedy[.]” *id.*, at 355, is not absolute. It requires a Security Council resolution, and the President and Senate were undoubtedly aware that the United States retained the unqualified right to exercise its veto of any such resolution. Medellín’s construction would eliminate the option of noncompliance contemplated by Article 94(2), undermining the ability of the political branches to determine whether and how to comply with an ICJ judgment.

The ICJ Statute, by limiting disputes to those involving nations, not individuals, and by specifying that ICJ decisions have no binding force except between those nations, provides further evidence that the *Avena* judgment does not automatically constitute federal law enforceable in U. S. courts. Medellín, an individual, cannot be considered a party to the *Avena* decision. Finally, the United States’ interpretation of a treaty “is entitled to great weight.” *Sumitomo Shoji*

## Syllabus

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## Syllabus

*America, Inc. v. Avagliano*, 457 U. S., at 184–185, and the Executive Branch has unfailingly adhered to its view that the relevant treaties do not create domestically enforceable federal law. Pp. 8–17.

(b) The foregoing interpretive approach—parsing a treaty’s text to determine if it is self-executing—is hardly novel. This Court has long looked to the language of a treaty to determine whether the President who negotiated it and the Senate that ratified it intended for the treaty to automatically create domestically enforceable federal law. See, e.g., *Foster, supra*. Pp. 18–20.

(c) The Court’s conclusion that *Avena* does not by itself constitute binding federal law is confirmed by the “postratification understanding” of signatory countries. See *Zicherman v. Korean Air Lines Co.*, 516 U. S. 217, 226. There are currently 47 nations that are parties to the Optional Protocol and 171 nations that are parties to the Vienna Convention. Yet neither Medellín nor his *amici* have identified a single nation that treats ICJ judgments as binding in domestic courts. The lack of any basis for supposing that any other country would treat ICJ judgments as directly enforceable as a matter of their domestic law strongly suggests that the treaty should not be so viewed in our courts. See *Sanchez-Llamas*, 548 U. S., at 343–344, and n. 3.

The Court’s conclusion is further supported by general principles of interpretation. Given that the forum state’s procedural rules govern a treaty’s implementation absent a clear and express statement to the contrary, see e.g., *id.*, at 351, one would expect the ratifying parties to the relevant treaties to have clearly stated any intent to give ICJ judgments such effect. There is no statement in the Optional Protocol, the U. N. Charter, or the ICJ Statute that supports this notion. Moreover, the consequences of Medellín’s argument give pause: neither Texas nor this Court may look behind an ICJ decision and quarrel with its reasoning or result, despite this Court’s holding in *Sanchez-Llamas* that “[n]othing in the [ICJ’s] structure or purpose . . . suggests that its interpretations were intended to be conclusive on our courts.” *id.*, at 354. Pp. 20–24.

(d) The Court’s holding does not call into question the ordinary enforcement of foreign judgments. An agreement to abide by the result of an international adjudication can be a treaty obligation like any other, so long as the agreement is consistent with the Constitution. In addition, Congress is up to the task of implementing non-self-executing treaties, even those involving complex commercial disputes. Medellín contends that domestic courts generally give effect to foreign judgments, but the judgment Medellín asks us to enforce is hardly typical: It would enjoin the operation of state law and force the State to take action to “review and reconsider[r]” his case. Foreign

## Syllabus

judgments awarding injunctive relief against private parties, let alone sovereign States, “are not generally entitled to enforcement.” Restatement (Third) of Foreign Relations Law of the United States §481, Comment b, p. 595 (1986). Pp. 24–27.

2. The President’s Memorandum does not independently require the States to provide review and reconsideration of the claims of the 51 Mexican nationals named in *Avena* without regard to state procedural default rules. Pp. 27–37.

(a) The President seeks to vindicate plainly compelling interests in ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law. But those interests do not allow the Court to set aside first principles. The President’s authority to act, as with the exercise of any governmental power, “must stem either from an act of Congress or from the Constitution itself.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579, 585.

Justice Jackson’s familiar tripartite scheme provides the accepted framework for evaluating executive action in this area. First, “[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.” *Youngstown*, 343 U. S., at 635 (Jackson, J., concurring). Second, “[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.” *Id.*, at 637. In such a circumstance, Presidential authority can derive support from “congressional inertia, indifference or quiescence.” *Ibid.* Finally, “[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb,” and the Court can sustain his actions “only by disabling the Congress from acting upon the subject.” *Id.*, at 637–638. Pp. 28–29.

(b) The United States marshals two principal arguments in favor of the President’s authority to establish binding rules of decision that preempt contrary state law. The United States argues that the relevant treaties give the President the authority to implement the *Avena* judgment and that Congress has acquiesced in the exercise of such authority. The United States also relies upon an “independent” international dispute-resolution power. We find these arguments, as well as Medellín’s additional argument that the President’s Memorandum is a valid exercise of his “Take Care” power, unpersuasive. Pp. 29–37.

(i) The United States maintains that the President’s Memo-

## Syllabus

randum is implicitly authorized by the Optional Protocol and the U. N. Charter. But the responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress, not the Executive. *Foster*, 2 Pet., at 315. It is a fundamental constitutional principle that “[t]he power to make the necessary laws is in Congress; the power to execute in the President.” *Hamdan v. Rumsfeld*, 548 U. S. 557, 591. A non-self-executing treaty, by definition, is one that was ratified with the understanding that it is not to have domestic effect of its own force. That understanding precludes the assertion that Congress has implicitly authorized the President—acting on his own—to achieve precisely the same result. Accordingly, the President’s Memorandum does not fall within the first category of the *Youngstown* framework. Indeed, because the non-self-executing character of the relevant treaties not only refutes the notion that the ratifying parties vested the President with the authority to unilaterally make treaty obligations binding on domestic courts, but also implicitly prohibits him from doing so, the President’s assertion of authority is within *Youngstown*’s third category, not the first or even the second.

The United States maintains that congressional acquiescence requires that the President’s Memorandum be given effect as domestic law. But such acquiescence is pertinent when the President’s action falls within the second *Youngstown* category, not the third. In any event, congressional acquiescence does not exist here. Congress’ failure to act following the President’s resolution of prior ICJ controversies does not demonstrate acquiescence because in none of those prior controversies did the President assert the authority to transform an international obligation into domestic law and thereby displace state law. The United States’ reliance on the President’s “related” statutory responsibilities and on his “established role” in litigating foreign policy concerns is also misplaced. The President’s statutory authorization to represent the United States before the U. N., the ICJ, and the U. N. Security Council speaks to his *international* responsibilities, not to any unilateral authority to create domestic law.

The combination of a non-self-executing treaty and the lack of implementing legislation does not preclude the President from acting to comply with an international treaty obligation by other means, so long as those means are consistent with the Constitution. But the President may not rely upon a non-self-executing treaty to establish binding rules of decision that pre-empt contrary state law. Pp. 30–35.

(ii) The United States also claims that—independent of the United States’ treaty obligations—the Memorandum is a valid exercise of the President’s foreign affairs authority to resolve claims dis-

## Syllabus

putes. See, e.g., *American Ins. Assn. v. Garamendi*, 539 U. S. 396, 415. This Court’s claims-settlement cases involve a narrow set of circumstances: the making of executive agreements to settle civil claims between American citizens and foreign governments or foreign nationals. They are based on the view that “a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned,” can “raise a presumption that the [action] had been [taken] in pursuance of its consent.” *Dames & Moore v. Regan*, 453 U. S. 654, 668. But “[p]ast practice does not, by itself, create power.” *Ibid.* The President’s Memorandum—a directive issued to state courts that would compel those courts to reopen final criminal judgments and set aside neutrally applicable state laws—is not supported by a “particularly longstanding practice.” The Executive’s limited authority to settle international claims disputes pursuant to an executive agreement cannot stretch so far. Pp. 35–37.

(iii) Medellin’s argument that the President’s Memorandum is a valid exercise of his power to “Take Care” that the laws be faithfully executed, U. S. Const., Art. II, §3, fails because the ICJ’s decision in *Avena* is not domestic law. P. 37.

223 S. W. 3d 315, affirmed.

ROBERTS, C. J., delivered the opinion of the Court, in which SCALIA, KENNEDY, THOMAS, and ALITO, J.J., joined. STEVENS, J., filed an opinion concurring in the judgment. BREYER, J., filed a dissenting opinion, in which SOUTER and GINSBURG, J.J., joined.

**Inter-American Court of Human Rights**

*Barrios Altos Case (Chumbipuna Aguirre et al. v. Peru)*

Judgment of 14 March 2001, Series C, No. 75, paras. 37-49

**INTER-AMERICAN COURT OF HUMAN RIGHTS**  
**BARRIOS ALTOS CASE**  
**(CHUMBIPUMA AGUIRRE ET AL. VERSUS PERU)**

**JUDGMENT OF MARCH 14, 2001**

In the Barrios Altos case, the Inter-American Court of Human Rights (hereinafter “the Court” or the “Inter-American Court”), in accordance with Articles 29, 55 and 57 of the Rules of Procedure of the Court (hereinafter “the Rules of Procedure”), delivers this judgment.

(. . . . .)  
\* \* \*

*The considerations of the Court*

37. Article 52(2) of the Rules of Procedure establishes that:

If the respondent informs the Court of its acquiescence in the claims of the party that has brought the case, the Court shall decide, after hearing the opinions of the latter and the representatives of the victims or their next of kin, whether such acquiescence and its juridical effects are acceptable. In that event, the Court shall determine the appropriate reparations and indemnities.

38. Based on the statements of the parties at the public hearing of March 14, 2001, and in view of the acquiescence to the facts and the recognition of international responsibility by Peru, the Court considers that the dispute between the State and the Commission has ceased with regard to the facts that gave rise to the instant case.<sup>1</sup>

39. Consequently, the Court considers that the facts referred to in paragraph 2 of this judgment have been admitted. The Court also considers that, as the State has expressly recognized, it incurred international responsibility for violating Article 4 (Right to Life) of the American Convention with regard to Placentina Marcela Chumbipuma Aguirre, Luis Alberto Diaz Astovilca, Octavio Benigno Huamanyauri Nolasco, Luis Antonio León Borja, Filomeno León León, Máximo León León, Lucio Quispe Huanaco, Tito Ricardo Ramírez Alberto, Teobaldo Ríos Lira, Manuel Isaías Ríos Pérez, Javier Manuel Ríos Rojas, Alejandro Rosales Alejandro, Nelly María Rubina Arquínigo, Odar Mender Sifuentes Nuñez and Benedicta Yanque Churo, and for violating Article 5 (Right to Humane Treatment) with

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<sup>1</sup> *Cfr. Trujillo Ortega case.* Judgment of January 26, 2000. Series C No. 64, para. 40; *El Caracazo case.* Judgment of November 11, 1999. Series C No. 58, para. 41; *Benavides Cervillos case.* Judgment of June 19, 1998. Series C No. 38, para. 42; *Carrido and Baigorria case.* Judgment of February 2, 1996. Series C No. 26, para. 27; *El Amparo case.* Judgment of January 18, 1995. Series C No. 19, para. 20; and *Alcobaete et al. case.* Judgment of December 4, 1991. Series C No. 11, para. 23.

regard to *Natividad Condorcahuana Chicaña*, Felipe León León, Tomás Livias Ortega and Alfonso Rodas Alvítez. In addition, the State is responsible for violating Article 8 (Right to a Fair Trial) and Article 25 (Judicial Protection) of the American Convention as a result of the promulgation and application of Amnesty Laws No. 26479 and No. 26492. Finally, the State is responsible for failing to comply with Article 1(1) (Obligation to Respect Rights) and Article 2 (Domestic Legal Effects) of the American Convention on Human Rights as a result of the promulgation and application of Amnesty Laws No. 26479 and No. 26492 and the violation of the articles of the Convention mentioned above.

40. The Court recognizes that Peru’s acquiescence makes a positive contribution to this proceeding and to the exercise of the principles that inspire the American Convention on Human Rights.

**VII**  
**THE INCOMPATIBILITY OF AMNESTY LAWS**  
**WITH THE CONVENTION**

41. This Court considers that all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.

42. The Court, in accordance with the arguments put forward by the Commission and not contested by the State, considers that the amnesty laws adopted by Peru prevented the victims’ next of kin and the surviving victims in this case from being heard by a judge, as established in Article 8(1) of the Convention; they violated the right to judicial protection embodied in Article 25 of the Convention; they prevented the investigation, capture, prosecution and conviction of those responsible for the events that occurred in Barrios Altos, thus failing to comply with Article 1(1) of the Convention, and they obstructed clarification of the facts of this case. Finally, the adoption of self-amnesty laws that are incompatible with the Convention meant that Peru failed to comply with the obligation to adapt internal legislation that is embodied in Article 2 of the Convention.

43. The Court considers that it should be emphasized that, in the light of the general obligations established in Articles 1(1) and 2 of the American Convention, the States Parties are obliged to take all measures to ensure that no one is deprived of judicial protection and the exercise of the right to a simple and effective recourse, in the terms of Articles 8 and 25 of the Convention. Consequently, States Parties to the Convention which adopt laws that have the opposite effect, such as self-amnesty laws, violate Articles 8 and 25, in relation to Articles 1(1) and 2 of the Convention. Self-amnesty laws lead to the defenselessness of victims and perpetuate impunity; therefore, they are manifestly incompatible with the aims and spirit of the Convention. This type of law precludes the identification of the individuals who are responsible for human rights violations, because it obstructs the investigation and access to justice and prevents the victims and their next of kin from knowing the truth and receiving the corresponding reparation.

49. Therefore, this matter has been resolved, since it has been indicated (*supra* para. 39) that Peru violated Articles 8 and 25 of the Convention, with regard to judicial guarantees and judicial protection.  
(.....)

**X**

51. Therefore,

**THE COURT,  
DECIDES:**

unanimously,

1. To admit the State's recognition of international responsibility.
2. To find, in accordance with the terms of the State's recognition of international responsibility, that it violated:
  - a) the right to life embodied in Article 4 of the American Convention on Human Rights, with regard to Placentina Marcela Chumbipuma Aguirre, Luis Alberto Díaz Astovilca, Octavio Benigno Huamanyauri Nolasco, Luis Antonio León Borja, Filomeno León León, Máximo León León, Lucio Quispe Huanaco, Tito Ricardo Ramírez Alberto, Teobaldo Ríos Lira, Manuel Isaias Ríos Pérez, Javier Manuel Ríos Rojas, Alejandro Rosales Alejandro, Nelly María Rubina Arquiño, Odar Mender Sifuentes Nuñez and Benedicta Yanque Churo;
  - b) the right to humane treatment embodied in Article 5 of the American Convention on Human Rights, with regard to Natividad Condorcahuana Chicaña, Felipe León León, Tomás Livias Ortega and Alfonso Rodas Alvítez; and
  - c) the right to a fair trial and judicial protection embodied in Articles 8 and 25 of the American Convention on Human Rights, with regard to the next of kin of Placentina Marcela Chumbipuma Aguirre, Luis Alberto Díaz Astovilca, Octavio Benigno Huamanyauri Nolasco, Luis Antonio León Borja, Filomeno León León, Máximo León León, Lucio Quispe Huanaco, Tito Ricardo Ramírez Alberto, Teobaldo Ríos Lira, Manuel Isaias Ríos Pérez, Javier Manuel Ríos Rojas, Alejandro Rosales Alejandro, Nelly María Rubina Arquiño, Odar Mender Sifuentes Nuñez, Benedicta Yanque Churo, and with regard to Natividad Condorcahuana Chicaña, Felipe León León, Tomás Livias Ortega and Alfonso Rodas Alvítez, as a result of the promulgation and application of Amnesty Laws No. 26479 and No. 26492.
3. To find, in accordance with the terms of the State's recognition of international responsibility, that the State failed to comply with Articles 1(1) and 2 of the American Convention on Human Rights as a result of the promulgation and application of Amnesty Laws No. 26479 and No. 26492 and the violation of the articles of the Convention mentioned in operative paragraph 2 of this judgment.

44. Owing to the manifest incompatibility of self-amnesty laws and the American Convention on Human Rights, the said laws lack legal effect and may not continue to obstruct the investigation of the grounds on which this case is based or the identification and punishment of those responsible, nor can they have the same or a similar impact with regard to other cases that have occurred in Peru, where the rights established in the American Convention have been violated.

**VIII  
RIGHT TO THE TRUTH AND JUDICIAL GUARANTEES  
IN THE RULE OF LAW**

*The Commission's arguments*

45. The Commission alleged that the right to truth is founded in Articles 8 and 25 of the Convention, insofar as they are both "instrumental" in the judicial establishment of the facts and circumstances that surrounded the violation of a fundamental right. It also indicated that this right has its roots in Article 13(1) of the Convention, because that article recognizes the right to seek and receive information. With regard to that article, the Commission added that the State has the positive obligation to guarantee essential information to preserve the rights of the victims, to ensure transparency in public administration and the protection of human rights.

*The State's arguments*

46. The State did not contest the Commission's arguments in this respect and indicated that its human rights strategy was based on "recognizing responsibilities, but, above all, proposing integrated procedures for attending to the victims based on three fundamental elements: the right to truth, the right to justice and the right to obtain fair reparation".

\* \* \*

*The considerations of the Court*

47. In this case, it is evident that the surviving victims, their next of kin and the next of kin of the victims who died were prevented from knowing the truth about the events that occurred in Barrios Altos.

48. Despite this, in the circumstances of the instant case, the right to the truth is subsumed in the right of the victim or his next of kin to obtain clarification of the events that violated human rights and the corresponding responsibilities from the competent organs of the State, through the investigation and prosecution that are established in Articles 8 and 25 of the Convention.<sup>2</sup>

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<sup>2</sup> *Cfr. Bámaca Velásquez case*. Judgment of November 25, 2000. Series C No. 70, para. 201.

4. To find that Amnesty Laws No. 26479 and No. 26492 are incompatible with the American Convention on Human Rights and, consequently, lack legal effect.
5. To find that the State of Peru should investigate the facts to determine the identity of those responsible for the human rights violations referred to in this judgment, and also publish the results of this investigation and punish those responsible.
6. To order that reparations shall be established by mutual agreement between the defendant State, the Inter-American Commission and the victims, their next of kin or their duly accredited legal representatives, within three months of the notification of this judgment.
7. To reserve the authority to review and approve the agreement mentioned in the previous operative paragraph and, should no agreement be reached, to continue the reparations procedure.

Judge Cançado Trindade and Judge García Ramírez informed the Court of their Concurring Opinions, which accompany this judgment.

Done at San Jose, Costa Rica, on March 14, 2001, in the Spanish and English languages, the Spanish text being authentic.

**International Court of Justice**

***The Legal Consequences of the Construction of a Wall in Occupied  
Palestine Territory, Advisory Opinion***

*I.C.J. Reports 2004*, pp. 189-194, paras. 130-137

COUR INTERNATIONALE DE JUSTICE  
RECUEIL DES ARRÊTS,  
AVIS CONSULTATIFS ET ORDONNANCES  
CONSÉQUENCES JURIDIQUES  
DE L'ÉDIFICATION D'UN MUR  
DANS LE TERRITOIRE PALESTINIEN OCCUPÉ

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

CONSÉQUENCES JURIDIQUES  
DE L'ÉDIFICATION D'UN MUR  
DANS LE TERRITOIRE PALESTINIEN OCCUPÉ

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

*Jurisdiction of the Court to give the advisory opinion requested.*  
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*Events leading to the adoption of General Assembly resolution ES-10/14 requesting the advisory opinion.*

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\* \*

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9 JULY 2004

ADVISORY OPINION

of opinion — Nullus in modum capere potest de sua injuria propria — Opinion to be given to the General Assembly, not to a specific State or entity.

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\* \*

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Description of the wall.

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\* \*

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Applicable provisions of international humanitarian law and human rights instruments relevant to the present case — Destruction and requisition of properties — Restrictions on freedom of movement of inhabitants of the Occupied Palestinian Territory — Impediments to the exercise by those concerned of the right to work, to health, to education and to an adequate standard of living — Demographic changes in the Occupied Palestinian Territory — Provisions of international humanitarian law enabling account to be taken of military exigencies — Clauses in human rights instruments qualifying rights guaranteed or providing for derogation — Construction of the wall and its associated régime cannot be justified by military exigencies or by the requirements of national security or public order — Breach by Israel of various of its obligations under

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Construction of the wall and its associated régime are contrary to international law.

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Legal consequences of the violation by Israel of its obligations.

Israel's international responsibility — Israel obliged to comply with the international obligations it has breached by the construction of the wall — Israel obliged to put an end to the violation of its international obligations — Obligation to cease forthwith the works of construction of the wall, to dismantle it forthwith and to repeal or render ineffective forthwith the legislative and regulatory acts relating to its construction, save where relevant for compliance by Israel with its obligation to make reparation for the damage caused — Israel obliged to make reparation for the damage caused to all natural or legal persons affected by construction of the wall.

Legal consequences for States other than Israel — Erga omnes character of certain obligations violated by Israel — Obligation for all States not to recognize the illegal situation resulting from construction of the wall and not to render aid or assistance in maintaining the situation created by such construction — Obligation for all States, while respecting the Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end — Obligation for all States parties to the Fourth Geneva Convention, while respecting the Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention — Need for the United Nations, and especially the General Assembly and the Security Council, to consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and its associated régime, taking due account of the Advisory Opinion.

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Construction of the wall must be placed in a more general context — Obligation of Israel and Palestine scrupulously to observe international humanitarian law — Implementation in good faith of all relevant Security Council resolutions, in particular resolutions 242 (1967) and 338 (1973) — "Roadmap" — Need for efforts to be encouraged with a view to achieving as soon as possible, on the basis of international law, a negotiated solution to the outstanding problems and the establishment of a Palestinian State, with peace and security for all in the region.

## ADVISORY OPINION

*Present:* President SHI; *Vice-President* RANJEVA; *Judges* GUILLAUME, KOROMA, VERESHCHETIN, HIGGINS, PARRA-ARANGUREN, KOOUUMANS, REZEK, AL-KHASAWNEH, BUERGENTHAL, ELARABY, OWADA, SIMMA, TOMKA; *Registrar* COUVREUR.

On the legal consequences of the construction of a wall in the Occupied Palestinian Territory,

THE COURT,

composed as above,

gives the following *Advisory Opinion*:

1. The question on which the advisory opinion of the Court has been requested is set forth in resolution ES-10/14 adopted by the General Assembly of the United Nations (hereinafter the "General Assembly") on 8 December 2003 at its Tenth Emergency Special Session. By a letter dated 8 December 2003 and received in the Registry by facsimile on 10 December 2003, the original of which reached the Registry subsequently, the Secretary-General of the United Nations officially communicated to the Court the decision taken by the General Assembly to submit the question for an advisory opinion. Certified true copies of the English and French versions of resolution ES-10/14 were enclosed with the letter. The resolution reads as follows:

"The General Assembly,

Reaffirming its resolution ES-10/13 of 21 October 2003,

Guided by the principles of the Charter of the United Nations,

Aware of the established principle of international law on the inadmissibility of the acquisition of territory by force,

Aware also that developing friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples is among the purposes and principles of the Charter of the United Nations,

Recalling relevant General Assembly resolutions, including resolution 181 (II) of 29 November 1947, which partitioned mandated Palestine into two States, one Arab and one Jewish,

Recalling also the resolutions of the tenth emergency special session of the General Assembly,

Recalling further relevant Security Council resolutions, including resolutions 242 (1967) of 22 November 1967, 338 (1973) of 22 October 1973, 267 (1969) of 3 July 1969, 298 (1971) of 25 September 1971, 446 (1979) of 22 March 1979, 452 (1979) of 20 July 1979, 465 (1980) of 1 March 1980, 476 (1980) of 30 June 1980, 478 (1980) of 20 August 1980, 904 (1994) of 18 March 1994, 1073 (1996) of 28 September 1996, 1397 (2002) of 12 March 2002 and 1515 (2003) of 19 November 2003,

Reaffirming the applicability of the Fourth Geneva Convention<sup>1</sup> as well as Additional Protocol I to the Geneva Conventions<sup>2</sup> to the Occupied Palestinian Territory, including East Jerusalem,

Recalling the Regulations annexed to the Hague Convention Respecting the Laws and Customs of War on Land of 1907<sup>3</sup>,

Welcoming the convening of the Conference of High Contracting Parties to the Fourth Geneva Convention on measures to enforce the Convention in the Occupied Palestinian Territory, including Jerusalem, at Geneva on 15 July 1999,

Expressing its support for the declaration adopted by the reconvened Conference of High Contracting Parties at Geneva on 5 December 2001,

Recalling in particular relevant United Nations resolutions affirming that Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, are illegal and an obstacle to peace and to economic and social development as well as those demanding the complete cessation of settlement activities,

Recalling relevant United Nations resolutions affirming that actions taken by Israel, the occupying Power, to change the status and demographic composition of Occupied East Jerusalem have no legal validity and are null and void,

Noting the agreements reached between the Government of Israel and the Palestine Liberation Organization in the context of the Middle East peace process,

Gravely concerned at the commencement and continuation of construction by Israel, the occupying Power, of a wall in the Occupied Palestinian Territory, including in and around East Jerusalem, which is in departure from the Armistice Line of 1949 (Green Line) and which has involved the confiscation and destruction of Palestinian land and resources, the disruption of the lives of thousands of protected civilians and the de facto annexation of large areas of territory, and undermining the unanimous opposition by the international community to the construction of that wall,

Gravely concerned also at the even more devastating impact of the projected parts of the wall on the Palestinian civilian population and on the prospects for solving the Palestinian-Israeli conflict and establishing peace in the region,

Welcoming the report of 8 September 2003 of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in the Palestinian territories occupied by Israel since 1967<sup>4</sup>, in particular the section regarding the wall,

<sup>1</sup> United Nations, *Treaty Series*, Vol. 75, No. 973.

<sup>2</sup> *Ibid.*, Vol. 1125, No. 17512.

<sup>3</sup> See Carnegie Endowment for International Peace, *The Hague Conventions and Declarations of 1899 and 1907* (New York, Oxford University Press, 1915).

<sup>4</sup> E/CN.4/2004/6.

*Affirming* the necessity of ending the conflict on the basis of the two-State solution of Israel and Palestine living side by side in peace and security based on the Armistice Line of 1949, in accordance with relevant Security Council and General Assembly resolutions,

*Having received with appreciation* the report of the Secretary-General, submitted in accordance with resolution ES-10/13<sup>5</sup>,

*Bearing in mind* that the passage of time further compounds the difficulties on the ground, as Israel, the occupying Power, continues to refuse to comply with international law vis-à-vis its construction of the above-mentioned wall, with all its detrimental implications and consequences,

*Decides*, in accordance with Article 96 of the Charter of the United Nations, to request the International Court of Justice, pursuant to Article 65 of the Statute of the Court, to urgently render an advisory opinion on the following question:

What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?

<sup>5</sup> A/ES-10/248.”

Also enclosed with the letter were the certified English and French texts of the report of the Secretary-General dated 24 November 2003, prepared pursuant to General Assembly resolution ES-10/13 (A/ES-10/248), to which resolution ES-10/14 makes reference.

2. By letters dated 10 December 2003, the Registrar notified the request for an advisory opinion to all States entitled to appear before the Court, in accordance with Article 66, paragraph 1, of the Statute.

3. By a letter dated 11 December 2003, the Government of Israel informed the Court of its position on the request for an advisory opinion and on the procedure to be followed.

4. By an Order of 19 December 2003, the Court decided that the United Nations and its Member States were likely, in accordance with Article 66, paragraph 2, of the Statute, to be able to furnish information on all aspects raised by the question submitted to the Court for an advisory opinion and fixed 30 January 2004 as the time-limit within which written statements might be submitted to it on the question in accordance with Article 66, paragraph 4, of the Statute. By the same Order, the Court further decided that, in the light of resolution ES-10/14 and the report of the Secretary-General transmitted with the request, and taking into account the fact that the General Assembly had granted Palestine a special status of observer and that the latter was co-sponsor of the draft resolution requesting the advisory opinion, Palestine might also submit a written statement on the question within the above time-limit.

5. By the aforesaid Order, the Court also decided, in accordance with

Article 105, paragraph 4, of the Rules of Court, to hold public hearings during which oral statements and comments might be presented to it by the United Nations and its Member States, regardless of whether or not they had submitted written statements, and fixed 23 February 2004 as the date for the opening of the said hearings. By the same Order, the Court decided that, for the reasons set out above (see paragraph 4), Palestine might also take part in the hearings.

Lastly, it invited the United Nations and its Member States, as well as Palestine, to inform the Registry, by 13 February 2004 at the latest, if they were intending to take part in the above-mentioned hearings. By letters of 19 December 2004, the Registrar informed them of the Court's decisions and transmitted to them a copy of the Order.

6. Ruling on requests submitted subsequently by the League of Arab States and the Organization of the Islamic Conference, the Court decided, in accordance with Article 66 of its Statute, that those two international organizations were likely to be able to furnish information on the question submitted to the Court, and that consequently they might for that purpose submit written statements within the time-limit fixed by the Court in its Order of 19 December 2003 and take part in the hearings.

7. Pursuant to Article 65, paragraph 2, of the Statute, the Secretary-General of the United Nations communicated to the Court a dossier of documents likely to throw light upon the question.

8. By a reasoned Order of 30 January 2004 regarding its composition in the case, the Court decided that the matters brought to its attention by the Government of Israel in a letter of 31 December 2003, and in a confidential letter of 15 January 2004 addressed to the President pursuant to Article 34, paragraph 2, of the Rules of Court, were not such as to preclude Judge Elaraby from sitting in the case.

9. Within the time-limit fixed by the Court for that purpose, written statements were filed by, in order of their receipt: Guinea, Saudi Arabia, League of Arab States, Egypt, Cameroon, Russian Federation, Australia, Palestine, United Nations, Jordan, Kuwait, Lebanon, Canada, Syria, Switzerland, Israel, Yemen, United States of America, Morocco, Indonesia, Organization of the Islamic Conference, France, Italy, Sudan, South Africa, Germany, Japan, Norway, United Kingdom, Pakistan, Czech Republic, Greece, Ireland on its own behalf, Ireland on behalf of the European Union, Cyprus, Brazil, Namibia, Malta, Malaysia, Netherlands, Cuba, Sweden, Spain, Belgium, Palau, Federated States of Micronesia, Marshall Islands, Senegal, Democratic People's Republic of Korea. Upon receipt of those statements, the Registrar transmitted copies thereof to the United Nations and its Member States, to Palestine, to the League of Arab States and to the Organization of the Islamic Conference.

10. Various communications were addressed to these latter by the Registry, concerning in particular the measures taken for the organization of the oral proceedings. By communications of 20 February 2004, the Registry transmitted a detailed timetable of the hearings to those of the latter who, within the time-limit fixed for that purpose by the Court, had expressed their intention of taking part in the aforementioned proceedings.

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

12. In the course of hearings held from 23 to 25 February 2004, the Court heard oral statements, in the following order, by:

- for Palestine:* H.E. Mr. Nasser Al-Kidwa, Ambassador, Permanent Observer of Palestine to the United Nations,  
 Ms Stephanie Koury, Member, Negotiations Support Unit, Counsel,  
 Mr. James Crawford, S.C., Whewell Professor of International Law, University of Cambridge, Member of the Institute of International Law, Counsel and Advocate,  
 Mr. Georges Abi-Saab, Professor of International Law, Graduate Institute of International Studies, Geneva, Member of the Institute of International Law, Counsel and Advocate,  
 Mr. Vaughan Lowe, Chichele Professor of International Law, University of Oxford, Counsel and Advocate,  
 Mr. Jean Salmon, Professor Emeritus of International Law, Université libre de Bruxelles, Member of the Institute of International Law, Counsel and Advocate;
- for the Republic of South Africa:* H.E. Mr. Aziz Pahad, Deputy Minister for Foreign Affairs, Head of Delegation,  
 Judge M. R. W. Madlanga, S.C.;
- for the People's Democratic Republic of Algeria:* Mr. Ahmed Laraba, Professor of International Law;
- for the Kingdom of Saudi Arabia:* H.E. Mr. Fawzi A. Shobokshi, Ambassador and Permanent Representative of the Kingdom of Saudi Arabia to the United Nations in New York, Head of Delegation;
- for the People's Republic of Bangladesh:* H.E. Mr. Liaquat Ali Choudhury, Ambassador of the People's Republic of Bangladesh to the Kingdom of the Netherlands;
- for Belize:* Mr. Jean-Marc Sorel, Professor at the University of Paris I (Panthéon-Sorbonne);
- for the Republic of Cuba:* H.E. Mr. Abelardo Moreno Fernández, Deputy Minister for Foreign Affairs;
- for the Republic of Indonesia:* H.E. Mr. Mohammad Jusuf, Ambassador of the Republic of Indonesia to the Kingdom of the Netherlands, Head of Delegation;
- for the Hashemite Kingdom of Jordan:* H.R.H. Ambassador Zeid Ra'ad Zeid Al-Husseini, Permanent Representative of the Hashemite Kingdom of Jordan to the United Nations, New York, Head of Delegation,  
 Sir Arthur Watts, K.C.M.G., Q.C., Senior Legal

Adviser to the Government of the Hashemite Kingdom of Jordan;

- for the Republic of Madagascar:* H.E. Mr. Alfred Rambeloson, Permanent Representative of Madagascar to the Office of the United Nations at Geneva and to the Specialized Agencies, Head of Delegation;
- for Malaysia:* H.E. Datuk Seri Syed Hamid Albar, Foreign Minister of Malaysia, Head of Delegation;
- for the Republic of Senegal:* H.E. Mr. Saliou Cissé, Ambassador of the Republic of Senegal to the Kingdom of the Netherlands, Head of Delegation;
- for the Republic of the Sudan:* H.E. Mr. Abuelgasim A. Idris, Ambassador of the Republic of the Sudan to the Kingdom of the Netherlands;
- for the League of Arab States:* Mr. Michael Bothe, Professor of Law, Head of the Legal Team;
- for the Organization of the Islamic Conference:* H.E. Mr. Abdelouahed Belkeziz, Secretary General of the Organization of the Islamic Conference,  
 Ms Monique Chemillier-Gendreau, Professor of Public Law, University of Paris VII-Denis Diderot, as Counsel.

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13. When seized of a request for an advisory opinion, the Court must first consider whether it has jurisdiction to give the opinion requested and whether, should the answer be in the affirmative, there is any reason why it should decline to exercise any such jurisdiction (see *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 232, para. 10).

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14. The Court will thus first address the question whether it possesses jurisdiction to give the advisory opinion requested by the General Assembly on 8 December 2003. The competence of the Court in this regard is based on Article 65, paragraph 1, of its Statute, according to which the Court "may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request". The Court has already had occasion to indicate that:

"It is . . . a precondition of the Court's competence that the advisory opinion be requested by an organ duly authorized to seek it under the Charter, that it be requested on a legal question, and that, except in the case of the General Assembly or the Security Council, that question should be one arising within the scope of the activities of the requesting organ." (*Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982*, pp. 333-334, para. 21.)

15. It is for the Court to satisfy itself that the request for an advisory opinion comes from an organ or agency having competence to make it. In the present instance, the Court notes that the General Assembly, which seeks the advisory opinion, is authorized to do so by Article 96, paragraph 1, of the Charter, which provides: "The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question."

16. Although the above-mentioned provision states that the General Assembly may seek an advisory opinion "on any legal question", the Court has sometimes in the past given certain indications as to the relationship between the question the subject of a request for an advisory opinion and the activities of the General Assembly (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, I.C.J. Reports 1950*, p. 70; *Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996 (I)*, pp. 232 and 233, paras. 11 and 12).

17. The Court will so proceed in the present case. The Court would observe that Article 10 of the Charter has conferred upon the General Assembly a competence relating to "any questions or any matters" within the scope of the Charter, and that Article 11, paragraph 2, has specifically provided it with competence on "questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations . . ." and to make recommendations under certain conditions fixed by those Articles. As will be explained below, the question of the construction of the wall in the Occupied Palestinian Territory was brought before the General Assembly by a number of Member States in the context of the Tenth Emergency Special Session of the Assembly, convened to deal with what the Assembly, in its resolution ES-10/2 of 25 April 1997, considered to constitute a threat to international peace and security.

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18. Before further examining the problems of jurisdiction that have been raised in the present proceedings, the Court considers it necessary to describe the events that led to the adoption of resolution ES-10/14, by which the General Assembly requested an advisory opinion on the legal consequences of the construction of the wall in the Occupied Palestinian Territory.

19. The Tenth Emergency Special Session of the General Assembly, at which that resolution was adopted, was first convened following the rejection by the Security Council, on 7 March and 21 March 1997, as a result of negative votes by a permanent member, of two draft resolutions concerning certain Israeli settlements in the Occupied Palestinian Territory (see, respectively, S/1997/199 and S/1997/241, and S/1997/241 and S/1997/241). By a letter of 31 March 1997, the Chairman of the Arab Group then requested "that an emergency special session of the General Assembly be convened pursuant to resolution 377 A (V) entitled 'Uniting

for Peace' " with a view to discussing "Illegal Israeli actions in occupied East Jerusalem and the rest of the Occupied Palestinian Territory" (letter dated 31 March 1997 from the Permanent Representative of Qatar to the United Nations addressed to the Secretary-General, A/ES-10/1, 22 April 1997, Annex). The majority of Members of the United Nations having concurred in this request, the first meeting of the Tenth Emergency Special Session of the General Assembly took place on 24 April 1997 (see A/ES-10/1, 22 April 1997). Resolution ES-10/2 was adopted the following day; the General Assembly thereby expressed its conviction that:

"the repeated violation by Israel, the occupying Power, of international law and its failure to comply with relevant Security Council and General Assembly resolutions and the agreements reached between the parties undermine the Middle East peace process and constitute a threat to international peace and security",

and condemned the "illegal Israeli actions" in occupied East Jerusalem and the rest of the Occupied Palestinian Territory, in particular the construction of settlements in that territory. The Tenth Emergency Special Session was then adjourned temporarily and has since been reconvened 11 times (on 15 July 1997, 13 November 1997, 17 March 1998, 5 February 1999, 18 October 2000, 20 December 2001, 7 May 2002, 5 August 2002, 19 September 2003, 20 October 2003 and 8 December 2003).

20. By a letter dated 9 October 2003, the Chairman of the Arab Group, on behalf of the States Members of the League of Arab States, requested an immediate meeting of the Security Council to consider the "grave and ongoing Israeli violations of international law, including international humanitarian law, and to take the necessary measures in this regard" (letter of 9 October 2003 from the Permanent Representative of the Syrian Arab Republic to the United Nations to the President of the Security Council, S/2003/973, 9 October 2003). This letter was accompanied by a draft resolution for consideration by the Council, which condemned as illegal the construction by Israel of a wall in the Occupied Palestinian Territory departing from the Armistice Line of 1949. The Security Council held its 4841st and 4842nd meetings on 14 October 2003 to consider the item entitled "The situation in the Middle East, including the Palestine question". It then had before it another draft resolution proposed on the same day by Guinea, Malaysia, Pakistan and the Syrian Arab Republic, which also condemned the construction of the wall. This latter draft resolution was put to a vote after an open debate and was not adopted owing to the negative vote of a permanent member of the Council (S/1997.4841 and S/1997.4842).

On 15 October 2003, the Chairman of the Arab Group, on behalf of

the States Members of the League of Arab States, requested the resumption of the Tenth Emergency Special Session of the General Assembly to consider the item of “Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory” (A/ES-10/242); this request was supported by the Non-Aligned Movement (A/ES-10/243) and the Organization of the Islamic Conference Group at the United Nations (A/ES-10/244). The Tenth Emergency Special Session resumed its work on 20 October 2003.

21. On 27 October 2003, the General Assembly adopted resolution ES-10/13, by which it demanded that

“Israel stop and reverse the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, which is in departure of the Armistice Line of 1949 and is in contradiction to relevant provisions of international law” (para. 1).

In paragraph 3, the Assembly requested the Secretary-General

“to report on compliance with the . . . resolution periodically, with the first report on compliance with paragraph 1 [of that resolution] to be submitted within one month . . .”.

The Tenth Emergency Special Session was temporarily adjourned and, on 24 November 2003, the report of the Secretary-General prepared pursuant to General Assembly resolution ES-10/13 (hereinafter the “report of the Secretary-General”) was issued (A/ES-10/248).

22. Meanwhile, on 19 November 2003, the Security Council adopted resolution 1515 (2003), by which it “*Endorse[d]* the Quartet Performance-based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict”. The Quartet consists of representatives of the United States of America, the European Union, the Russian Federation and the United Nations. That resolution

“*Call[ed]* on the parties to fulfil their obligations under the Roadmap in cooperation with the Quartet and to achieve the vision of two States living side by side in peace and security.”

Neither the “Roadmap” nor resolution 1515 (2003) contained any specific provision concerning the construction of the wall, which was not discussed by the Security Council in this context.

23. Nineteen days later, on 8 December 2003, the Tenth Emergency Special Session of the General Assembly resumed its work, following a new request by the Chairman of the Arab Group, on behalf of the States Members of the League of Arab States, and pursuant to resolution ES-10/13 (letter dated 1 December 2003 to the President of the General Assembly from the Chargé d’affaires a.i. of the Permanent Mission

of Kuwait to the United Nations, A/ES-10/249, 2 December 2003). It was during the meeting convened on that day that resolution ES-10/14 requesting the present advisory opinion was adopted.

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24. Having thus recalled the sequence of events that led to the adoption of resolution ES-10/14, the Court will now turn to the questions of jurisdiction that have been raised in the present proceedings. First, Israel has alleged that, given the active engagement of the Security Council with the situation in the Middle East, including the Palestinian question, the General Assembly acted *ultra vires* under the Charter when it requested an advisory opinion on the legal consequences of the construction of the wall in the Occupied Palestinian Territory.

25. The Court has already indicated that the subject of the present request for an advisory opinion falls within the competence of the General Assembly under the Charter (see paragraphs 15-17 above). However, Article 12, paragraph 1, of the Charter provides that:

“While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.”

A request for an advisory opinion is not in itself a “recommendation” by the General Assembly “with regard to [a] dispute or situation”. It has however been argued in this case that the adoption by the General Assembly of resolution ES-10/14 was *ultra vires* as not in accordance with Article 12. The Court thus considers that it is appropriate for it to examine the significance of that Article, having regard to the relevant texts and the practice of the United Nations.

26. Under Article 24 of the Charter the Security Council has “primary responsibility for the maintenance of international peace and security”. In that regard it can impose on States “an explicit obligation of compliance if for example it issues an order or command . . . under Chapter VII” and can, to that end, “require enforcement by coercive action” (*Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 163). However, the Court would emphasize that Article 24 refers to a primary, but not necessarily exclusive, competence. The General Assembly does have the power, *inter alia*, under Article 14 of the Charter, to “recommend measures for the peaceful adjustment” of various situations (*ibid.*).

“[T]he only limitation which Article 14 imposes on the General

Assembly is the restriction found in Article 12, namely, that the Assembly should not recommend measures while the Security Council is dealing with the same matter unless the Council requests it to do so." (*I.C.J. Reports 1962*, p. 163.)

27. As regards the practice of the United Nations, both the General Assembly and the Security Council initially interpreted and applied Article 12 to the effect that the Assembly could not make a recommendation on a question concerning the maintenance of international peace and security while the matter remained on the Council's agenda. Thus the Assembly during its fourth session refused to recommend certain measures on the question of Indonesia, on the ground, *inter alia*, that the Council remained seized of the matter (*Official Records of the General Assembly, Fourth Session, Ad Hoc Political Committee, Summary Records of Meetings, 27 September-7 December 1949*, 56th Meeting, 3 December 1949, p. 339, para. 118). As for the Council, on a number of occasions it deleted items from its agenda in order to enable the Assembly to deliberate on them (for example, in respect of the Spanish question (*Official Records of the Security Council, First Year: Second Series, No. 21*, 79th Meeting, 4 November 1946, p. 498), in connection with incidents on the Greek border (*Official Records of the Security Council, Second Year, No. 89*, 202nd Meeting, 15 September 1947, pp. 2404-2405) and in regard to the Island of Taiwan (Formosa) (*Official Records of the Security Council, Fifth Year, No. 48*, 506th Meeting, 29 September 1950, p. 5)). In the case of the Republic of Korea, the Council decided on 31 January 1951 to remove the relevant item from the list of matters of which it was seized in order to enable the Assembly to deliberate on the matter (*Official Records of the Security Council, Sixth Year, S/PV.531*, 531st Meeting, 31 January 1951, pp. 11-12, para. 57).

However, this interpretation of Article 12 has evolved subsequently. Thus the General Assembly deemed itself entitled in 1961 to adopt recommendations in the matter of the Congo (resolutions 1955 (XV) and 1600 (XVI)) and in 1963 in respect of the Portuguese colonies (resolution 1913 (XVIII)) while those cases still appeared on the Council's agenda, without the Council having adopted any recent resolution concerning them. In response to a question posed by Peru during the twenty-third session of the General Assembly, the Legal Counsel of the United Nations confirmed that the Assembly interpreted the words "is exercising the functions" in Article 12 of the Charter as meaning "is exercising the functions at this moment" (General Assembly, Twenty-third Session, Third Committee, 1637th meeting, A/C.3/SR.1637, para. 9). Indeed, the Court notes that there has been an increasing tendency over time for the General Assembly and the Security Council to deal in parallel with the same matter concerning the maintenance of international peace and security (see, for example, the matters involving Cyprus, South Africa, Angola, Southern Rhodesia and more recently Bosnia and Herzegovina and

Somalia). It is often the case that, while the Security Council has tended to focus on the aspects of such matters related to international peace and security, the General Assembly has taken a broader view, considering also their humanitarian, social and economic aspects.

28. The Court considers that the accepted practice of the General Assembly, as it has evolved, is consistent with Article 12, paragraph 1, of the Charter.

The Court is accordingly of the view that the General Assembly, in adopting resolution ES-10/14, seeking an advisory opinion from the Court, did not contravene the provisions of Article 12, paragraph 1, of the Charter. The Court concludes that by submitting that request the General Assembly did not exceed its competence.

29. It has however been contended before the Court that the present request for an advisory opinion did not fulfil the essential conditions set by resolution 377 A (V), under which the Tenth Emergency Special Session was convened and has continued to act. In this regard, it has been said, first, that "The Security Council was never seized of a draft resolution proposing that the Council itself should request an advisory opinion from the Court on the matters now in contention", and, that specific issue having thus never been brought before the Council, the General Assembly could not rely on any inaction by the Council to make such a request. Secondly, it has been claimed that, in adopting resolution 1515 (2003), which endorsed the "Roadmap", before the adoption by the General Assembly of resolution ES-10/14, the Security Council continued to exercise its responsibility for the maintenance of international peace and security and that, as a result, the General Assembly was not entitled to act in its place. The validity of the procedure followed by the Tenth Emergency Special Session, especially the Session's "rolling character" and the fact that its meeting was convened to deliberate on the request for the advisory opinion at the same time as the General Assembly was meeting in regular session, has also been questioned.

30. The Court would recall that resolution 377 A (V) states that:

"if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures . . . ."

The procedure provided for by that resolution is premised on two conditions, namely that the Council has failed to exercise its primary responsibility for the maintenance of international peace and security as a result of a negative vote of one or more permanent members, and that the situa-

tion is one in which there appears to be a threat to the peace, breach of the peace, or act of aggression. The Court must accordingly ascertain whether these conditions were fulfilled as regards the convening of the Tenth Emergency Special Session of the General Assembly, in particular at the time when the Assembly decided to request an advisory opinion from the Court.

31. In the light of the sequence of events described in paragraphs 18 to 23 above, the Court observes that, at the time when the Tenth Emergency Special Session was convened in 1997, the Council had been unable to take a decision on the case of certain Israeli settlements in the Occupied Palestinian Territory, due to negative votes of a permanent member; and that, as indicated in resolution ES-10/2 (see paragraph 19 above), there existed a threat to international peace and security.

The Court further notes that, on 20 October 2003, the Tenth Emergency Special Session of the General Assembly was reconvened on the same basis as in 1997 (see the statements by the representatives of Palestine and Israel, A/ES-10/PV.21, pp. 2 and 5), after the rejection by the Security Council, on 14 October 2003, again as a result of the negative vote of a permanent member, of a draft resolution concerning the construction by Israel of the wall in the Occupied Palestinian Territory. The Court considers that the Security Council again failed to act as contemplated in resolution 377 A (V). It does not appear to the Court that the situation in this regard changed between 20 October 2003 and 8 December 2003, since the Council neither discussed the construction of the wall nor adopted any resolution in that connection. Thus, the Court is of the view that, up to 8 December 2003, the Council had not reconsidered the negative vote of 14 October 2003. It follows that, during that period, the Tenth Emergency Special Session was duly reconvened and could properly be seized, under resolution 377 A (V), of the matter now before the Court.

32. The Court would also emphasize that, in the course of this Emergency Special Session, the General Assembly could adopt any resolution falling within the subject-matter for which the Session had been convened, and otherwise within its powers, including a resolution seeking the Court's opinion. It is irrelevant in that regard that no proposal had been made to the Security Council to request such an opinion.

33. Turning now to alleged further procedural irregularities of the Tenth Emergency Special Session, the Court does not consider that the "rolling" character of that Session, namely the fact of its having been convened in April 1997 and reconvened 11 times since then, has any relevance with regard to the validity of the request by the General Assembly. The Court observes in that regard that the Seventh Emergency Special Session of the General Assembly, having been convened on 22 July 1980, was subsequently reconvened four times (on 20 April 1982, 25 June 1982, 16 August 1982 and 24 September 1982), and that the validity of

resolutions or decisions of the Assembly adopted under such circumstances was never disputed. Nor has the validity of any previous resolutions adopted during the Tenth Emergency Special Session been challenged.

34. The Court also notes the contention by Israel that it was improper to reconvene the Tenth Emergency Special Session at a time when the regular session of the General Assembly was in progress. The Court considers that, while it may not have been originally contemplated that it would be appropriate for the General Assembly to hold simultaneous emergency and regular sessions, no rule of the Organization has been identified which would be thereby violated, so as to render invalid the resolution adopting the present request for an advisory opinion.

35. Finally, the Tenth Emergency Special Session appears to have been convened in accordance with Rule 9 (b) of the Rules of Procedure of the General Assembly, and the relevant meetings have been convened in pursuance of the applicable rules. As the Court stated in its Advisory Opinion of 21 June 1971 concerning the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, a

"resolution of a properly constituted organ of the United Nations which is passed in accordance with that organ's rules of procedure, and is declared by its President to have been so passed, must be presumed to have been validly adopted" (*I.C.J. Reports 1971*, p. 22, para. 20).

In view of the foregoing, the Court cannot see any reason why that presumption is to be rebutted in the present case.

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36. The Court now turns to a further issue related to jurisdiction in the present proceedings, namely the contention that the request for an advisory opinion by the General Assembly is not on a "legal question" within the meaning of Article 96, paragraph 1, of the Charter and Article 65, paragraph 1, of the Statute of the Court. It has been contended in this regard that, for a question to constitute a "legal question" for the purposes of these two provisions, it must be reasonably specific, since otherwise it would not be amenable to a response by the Court. With regard to the request made in the present advisory proceedings, it has been argued that it is not possible to determine with reasonable certainty the legal meaning of the question asked of the Court for two reasons.

First, it has been argued that the question regarding the "legal consequences" of the construction of the wall only allows for two possible interpretations, each of which would lead to a course of action that is

precluded for the Court. The question asked could first be interpreted as a request for the Court to find that the construction of the wall is illegal, and then to give its opinion on the legal consequences of that illegality. In this case, it has been contended, the Court should decline to respond to the question asked for a variety of reasons, some of which pertain to jurisdiction and others rather to the issue of propriety. As regards jurisdiction, it is said that, if the General Assembly had wished to obtain the view of the Court on the highly complex and sensitive question of the legality of the construction of the wall, it should have expressly sought an opinion to that effect (cf. *Exchange of Greek and Turkish Populations, Advisory Opinion, 1925, P.C.I.J., Series B, No. 10*, p. 17). A second possible interpretation of the request, it is said, is that the Court should assume that the construction of the wall is illegal, and then give its opinion on the legal consequences of that assumed illegality. It has been contended that the Court should also decline to respond to the question on this hypothesis, since the request would then be based on a questionable assumption and since, in any event, it would be impossible to rule on the legal consequences of illegality without specifying the nature of that illegality.

Secondly, it has been contended that the question asked of the Court is not of a "legal" character because of its imprecision and abstract nature. In particular, it has been argued in this regard that the question fails to specify whether the Court is being asked to address legal consequences for "the General Assembly or some other organ of the United Nations", "Member States of the United Nations", "Israel", "Palestine" or "some combination of the above, or some different entity".

37. As regards the alleged lack of clarity of the terms of the General Assembly's request and its effect on the "legal nature" of the question referred to the Court, the Court observes that this question is directed to the legal consequences arising from a given factual situation considering the rules and principles of international law, including the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (hereinafter the "Fourth Geneva Convention") and relevant Security Council and General Assembly resolutions. The question submitted by the General Assembly has thus, to use the Court's phrase in its Advisory Opinion on *Western Sahara*, "been framed in terms of law and raise[s] problems of international law"; it is by its very nature susceptible of a reply based on law; indeed it is scarcely susceptible of a reply otherwise than on the basis of law. In the view of the Court, it is indeed a question of a legal character (see *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 18, para. 15).

38. The Court would point out that lack of clarity in the drafting of a question does not deprive the Court of jurisdiction. Rather, such uncer-

tainty will require clarification in interpretation, and such necessary clarifications of interpretation have frequently been given by the Court.

In the past, both the Permanent Court and the present Court have observed in some cases that the wording of a request for an advisory opinion did not accurately state the question on which the Court's opinion was being sought (*Interpretation of the Greco-Turkish Agreement of 1 December 1926 (Final Protocol, Article IV), Advisory Opinion, 1928, P.C.I.J., Series B, No. 16 (I)*, pp. 14-16), or did not correspond to the "true legal question" under consideration (*Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, pp. 87-89, paras. 34-36). The Court noted in one case that "the question put to the Court is, on the face of it, at once infelicitously expressed and vague" (*Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982*, p. 348, para. 46).

Consequently, the Court has often been required to broaden, interpret and even reformulate the questions put (see the three Opinions cited above; see also *Jaworzina, Advisory Opinion, 1923, P.C.I.J., Series B, No. 8; Admissibility of Hearings of Petitioners by the Committee on South West Africa, Advisory Opinion, I.C.J. Reports 1956*, p. 25; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, pp. 157-162).

In the present instance, the Court will only have to do what it has often done in the past, namely "identify the existing principles and rules, interpret them and apply them . . . , thus offering a reply to the question posed based on law" (*Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996 (I)*, p. 234, para. 13).

39. In the present instance, if the General Assembly requests the Court to state the "legal consequences" arising from the construction of the wall, the use of these terms necessarily encompasses an assessment of whether that construction is or is not in breach of certain rules and principles of international law. Thus, the Court is first called upon to determine whether such rules and principles have been and are still being breached by the construction of the wall along the planned route.

40. The Court does not consider that what is contended to be the abstract nature of the question posed to it raises an issue of jurisdiction. Even when the matter was raised as an issue of propriety rather than one of jurisdiction, in the case concerning the *Legality of the Threat or Use of Nuclear Weapons*, the Court took the position that to contend that it should not deal with a question couched in abstract terms is "a mere affirmation devoid of any justification" and that "the Court may give an advisory opinion on any legal question, abstract or otherwise" (*I.C.J. Reports 1996 (I)*, p. 236, para. 15, referring to *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948, I.C.J. Reports 1947-1948*, p. 61; *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1954*, p. 51; and *Legal Con-*

*sequesters for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion*, I.C.J. Reports 1971, p. 27, para. 40). In any event, the Court considers that the question posed to it in relation to the legal consequences of the construction of the wall is not an abstract one, and moreover that it would be for the Court to determine for whom any such consequences arise.

41. Furthermore, the Court cannot accept the view, which has also been advanced in the present proceedings, that it has no jurisdiction because of the "political" character of the question posed. As is clear from its long-standing jurisprudence on this point, the Court considers that the fact that a legal question also has political aspects,

"as, in the nature of things, is the case with so many questions which arise in international life, does not suffice to deprive it of its character as a 'legal question' and to 'deprive the Court of a competence expressly conferred on it by its Statute' (*Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion*, I.C.J. Reports 1973, p. 172, para. 14). Whatever its political aspects, the Court cannot refuse to admit the legal character of a question which invites it to discharge an essentially judicial task, namely, an assessment of the legality of the possible conduct of States with regard to the obligations imposed upon them by international law (cf. *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, *Advisory Opinion*, 1948, I.C.J. Reports 1947-1948, pp. 61-62; *Competence of the General Assembly for the Admission of a State to the United Nations*, *Advisory Opinion*, I.C.J. Reports 1950, pp. 6-7; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, *Advisory Opinion*, I.C.J. Reports 1962, p. 155)." (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996 (I), p. 234, para. 13.)

In its Opinion concerning the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, the Court indeed emphasized that, "in situations in which political considerations are prominent it may be particularly necessary for an international organization to obtain an advisory opinion from the Court as to the legal principles applicable with respect to the matter under debate . . ." (*I.C.J. Reports 1980*, p. 87, para. 33).

Moreover, the Court has affirmed in its Opinion on the *Legality of the Threat or Use of Nuclear Weapons* that

"the political nature of the motives which may be said to have inspired the request and the political implications that the opinion given might have are of no relevance in the establishment of its jurisdiction to give such an opinion" (*I.C.J. Reports 1996 (I)*, p. 234, para. 13).

The Court is of the view that there is no element in the present proceedings which could lead it to conclude otherwise.

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42. The Court accordingly has jurisdiction to give the advisory opinion requested by resolution ES-10/14 of the General Assembly.

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43. It has been contended in the present proceedings, however, that the Court should decline to exercise its jurisdiction because of the presence of specific aspects of the General Assembly's request that would render the exercise of the Court's jurisdiction improper and inconsistent with the Court's judicial function.

44. The Court has recalled many times in the past that Article 65, paragraph 1, of its Statute, which provides that "The Court may give an advisory opinion . . ." (emphasis added), should be interpreted to mean that the Court has a discretionary power to decline to give an advisory opinion even if the conditions of jurisdiction are met (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996 (I), pp. 234-235, para. 14). The Court however is mindful of the fact that its answer to a request for an advisory opinion "represents its participation in the activities of the Organization, and, in principle, should not be refused" (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion*, I.C.J. Reports 1950, p. 71; see also, for example, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion*, I.C.J. Reports 1999 (I), pp. 78-79, para. 29.) Given its responsibilities as the "principal judicial organ of the United Nations" (Article 92 of the Charter), the Court should in principle not decline to give an advisory opinion. In accordance with its consistent jurisprudence, only "compelling reasons" should lead the Court to refuse its opinion (*Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, *Advisory Opinion*, I.C.J. Reports 1962, p. 155; see also, for example, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion*, I.C.J. Reports 1999 (I), pp. 78-79, para. 29.)

The present Court has never, in the exercise of this discretionary power, declined to respond to a request for an advisory opinion. Its decision not to give the advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* requested by the World Health Organization was based on the Court's lack of jurisdiction, and not on considerations of judicial propriety (see *I.C.J. Reports 1996 (I)*, p. 235, para. 14). Only on one occasion did the Court's predecessor, the Permanent Court of International Justice, take the view that it should

not reply to a question put to it (*Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5*), but this was due to

“the very particular circumstances of the case, among which were that the question directly concerned an already existing dispute, one of the States parties to which was neither a party to the Statute of the Permanent Court nor a Member of the League of Nations, objected to the proceedings, and refused to take part in any way” (*Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996 (I)*, pp. 235-236, para. 14).

45. These considerations do not release the Court from the duty to satisfy itself, each time it is seized of a request for an opinion, as to the propriety of the exercise of its judicial function, by reference to the criterion of “compelling reasons” as cited above. The Court will accordingly examine in detail and in the light of its jurisprudence each of the arguments presented to it in this regard.

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46. The first such argument is to the effect that the Court should not exercise its jurisdiction in the present case because the request concerns a contentious matter between Israel and Palestine, in respect of which Israel has not consented to the exercise of that jurisdiction. According to this view, the subject-matter of the question posed by the General Assembly “is an integral part of the wider Israeli-Palestinian dispute concerning questions of terrorism, security, borders, settlements, Jerusalem and other related matters”. Israel has emphasized that it has never consented to the settlement of this wider dispute by the Court or by any other means of compulsory adjudication; on the contrary, it contends that the parties repeatedly agreed that these issues are to be settled by negotiation, with the possibility of an agreement that recourse could be had to arbitration. It is accordingly contended that the Court should decline to give the present Opinion, on the basis *inter alia* of the precedent of the decision of the Permanent Court of International Justice on the *Status of Eastern Carelia*.

47. The Court observes that the lack of consent to the Court’s contentious jurisdiction by interested States has no bearing on the Court’s jurisdiction to give an advisory opinion. In an Advisory Opinion of 1950, the Court explained that:

“The consent of States, parties to a dispute, is the basis of the Court’s jurisdiction in contentious cases. The situation is different in regard to advisory proceedings even where the Request for an Opinion relates to a legal question actually pending between States. The Court’s reply is only of an advisory character: as such, it has no binding force. It follows that no State, whether a Member of the

United Nations or not, can prevent the giving of an Advisory Opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take. The Court’s Opinion is given not to the States, but to the organ which is entitled to request it; the reply of the Court, itself an ‘organ of the United Nations’, represents its participation in the activities of the Organization, and, in principle, should not be refused.” (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71; see also *Western Sahara, I.C.J. Reports 1975*, p. 24, para. 31.)

It followed from this that, in those proceedings, the Court did not refuse to respond to the request for an advisory opinion on the ground that, in the particular circumstances, it lacked jurisdiction. The Court did however examine the opposition of certain interested States to the request by the General Assembly in the context of issues of judicial propriety. Commenting on its 1950 decision, the Court explained in its Advisory Opinion on *Western Sahara* that it had “Thus . . . recognized that lack of consent might constitute a ground for declining to give the opinion requested if, in the circumstances of a given case, considerations of judicial propriety should oblige the Court to refuse an opinion.” The Court continued:

“In certain circumstances . . . the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court’s judicial character. An instance of this would be when the circumstances disclose that to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent.” (*Western Sahara, I.C.J. Reports 1975*, p. 25, paras. 32-33.)

In applying that principle to the request concerning *Western Sahara*, the Court found that a legal controversy did indeed exist, but one which had arisen during the proceedings of the General Assembly and in relation to matters with which the Assembly was dealing. It had not arisen independently in bilateral relations (*ibid.*, p. 25, para. 34).

48. As regards the request for an advisory opinion now before it, the Court acknowledges that Israel and Palestine have expressed radically divergent views on the legal consequences of Israel’s construction of the wall, on which the Court has been asked to pronounce. However, as the Court has itself noted, “Differences of views . . . on legal issues have existed in practically every advisory proceeding” (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion, I.C.J. Reports 1971*, p. 24, para. 34).

49. Furthermore, the Court does not consider that the subject-matter

of the General Assembly's request can be regarded as only a bilateral matter between Israel and Palestine. Given the powers and responsibilities of the United Nations in questions relating to international peace and security, it is the Court's view that the construction of the wall must be deemed to be directly of concern to the United Nations. The responsibility of the United Nations in this matter also has its origin in the Mandate and the Partition Resolution concerning Palestine (see paragraphs 70 and 71 below). This responsibility has been described by the General Assembly as "a permanent responsibility towards the question of Palestine until the question is resolved in all its aspects in a satisfactory manner in accordance with international legitimacy" (General Assembly resolution 57/107 of 3 December 2002). Within the institutional framework of the Organization, this responsibility has been manifested by the adoption of many Security Council and General Assembly resolutions, and by the creation of several subsidiary bodies specifically established to assist in the realization of the inalienable rights of the Palestinian people.

50. The object of the request before the Court is to obtain from the Court an opinion which the General Assembly deems of assistance to it for the proper exercise of its functions. The opinion is requested on a question which is of particularly acute concern to the United Nations, and one which is located in a much broader frame of reference than a bilateral dispute. In the circumstances, the Court does not consider that to give an opinion would have the effect of circumventing the principle of consent to judicial settlement, and the Court accordingly cannot, in the exercise of its discretion, decline to give an opinion on that ground.

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51. The Court now turns to another argument raised in the present proceedings in support of the view that it should decline to exercise its jurisdiction. Some participants have argued that an advisory opinion from the Court on the legality of the wall and the legal consequences of its construction could impede a political, negotiated solution to the Israeli-Palestinian conflict. More particularly, it has been contended that such an opinion could undermine the scheme of the "Roadmap" (see paragraph 22 above), which requires Israel and Palestine to comply with certain obligations in various phases referred to therein. The requested opinion, it has been alleged, could complicate the negotiations envisaged in the "Roadmap", and the Court should therefore exercise its discretion and decline to reply to the question put.

This is a submission of a kind which the Court has already had to consider several times in the past. For instance, in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court stated:

"It has . . . 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." (*I.C.J. Reports 1996 (I)*, p. 237, para. 17; see also *Western Sahara, I.C.J. Reports 1975*, p. 37, para. 73.)

52. One participant in the present proceedings has indicated that the Court, if it were to give a response to the request, should in any event do so keeping in mind

"two key aspects of the peace process: the fundamental principle that permanent status issues must be resolved through negotiations; and the need during the interim period for the parties to fulfil their security responsibilities so that the peace process can succeed".

53. The Court is conscious that the "Roadmap", which was endorsed by the Security Council in resolution 1515 (2003) (see paragraph 22 above), constitutes a negotiating framework for the resolution of the Israeli-Palestinian conflict. It is not clear, however, what influence the Court's opinion might have on those negotiations: participants in the present proceedings have expressed differing views in this regard. The Court cannot regard this factor as a compelling reason to decline to exercise its jurisdiction.

54. It was also put to the Court by certain participants that the question of the construction of the wall was only one aspect of the Israeli-Palestinian conflict, which could not be properly addressed in the present proceedings. The Court does not however consider this a reason for it to decline to reply to the question asked. The Court is indeed aware that the question of the wall is part of a greater whole, and it would take this circumstance carefully into account in any opinion it might give. At the same time, the question that the General Assembly has chosen to ask of the Court is confined to the legal consequences of the construction of the wall, and the Court would only examine other issues to the extent that they might be necessary to its consideration of the question put to it.

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55. Several participants in the proceedings have raised the further

argument that the Court should decline to exercise its jurisdiction because it does not have at its disposal the requisite facts and evidence to enable it to reach its conclusions. In particular, Israel has contended, referring to the Advisory Opinion on the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, that the Court could not give an opinion on issues which raise questions of fact that cannot be elucidated without hearing all parties to the conflict. According to Israel, if the Court decided to give the requested opinion, it would be forced to speculate about essential facts and make assumptions about arguments of law. More specifically, Israel has argued that the Court could not rule on the legal consequences of the construction of the wall without enquiring, first, into the nature and scope of the security threat to which the wall is intended to respond and the effectiveness of that response, and, second, into the impact of the construction for the Palestinians. This task, which would already be difficult in a contentious case, would be further complicated in an advisory proceeding, particularly since Israel alone possesses much of the necessary information and has stated that it chooses not to address the merits. Israel has concluded that the Court, confronted with factual issues impossible to clarify in the present proceedings, should use its discretion and decline to comply with the request for an advisory opinion.

56. The Court observes that the question whether the evidence available to it is sufficient to give an advisory opinion must be decided in each particular instance. In its Opinion concerning the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (I.C.J. Reports 1950, p. 72)* and again in its Opinion on the *Western Sahara*, the Court made it clear that what is decisive in these circumstances is

“whether the Court has before it sufficient information and evidence to enable it to arrive at a judicial conclusion upon any disputed questions of fact the determination of which is necessary for it to give an opinion in conditions compatible with its judicial character”  
(*Western Sahara, I.C.J. Reports 1975*, pp. 28-29, para. 46).

Thus, for instance, in the proceedings concerning the *Status of Eastern Carelia*, the Permanent Court of International Justice decided to decline to give an Opinion *inter alia* because the question put “raised a question of fact which could not be elucidated without hearing both parties” (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, I.C.J. Reports 1950*, p. 72; see *Status of Eastern Carelia, P.C.I.J., Series B, No. 5*, p. 28). On the other hand, in the *Western Sahara* Opinion, the Court observed that it had been provided with very extensive documentary evidence of the relevant facts (*I.C.J. Reports 1975*, p. 29, para. 47).

57. In the present instance, the Court has at its disposal the report of the Secretary-General, as well as a voluminous dossier submitted by him to the Court, comprising not only detailed information on the route of

the wall but also on its humanitarian and socio-economic impact on the Palestinian population. The dossier includes several reports based on on-site visits by special rapporteurs and competent organs of the United Nations. The Secretary-General has further submitted to the Court a written statement updating his report, which supplemented the information contained therein. Moreover, numerous other participants have submitted to the Court written statements which contain information relevant to a response to the question put by the General Assembly. The Court notes in particular that Israel's Written Statement, although limited to issues of jurisdiction and judicial propriety, contained observations on other matters, including Israel's concerns in terms of security, and was accompanied by corresponding annexes; many other documents issued by the Israeli Government on those matters are in the public domain.

58. The Court finds that it has before it sufficient information and evidence to enable it to give the advisory opinion requested by the General Assembly. Moreover, the circumstance that others may evaluate and interpret these facts in a subjective or political manner can be no argument for a court of law to abdicate its judicial task. There is therefore in the present case no lack of information such as to constitute a compelling reason for the Court to decline to give the requested opinion.

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59. In their written statements, some participants have also put forward the argument that the Court should decline to give the requested opinion on the legal consequences of the construction of the wall because such opinion would lack any useful purpose. They have argued that the advisory opinions of the Court are to be seen as a means to enable an organ or agency in need of legal clarification for its future action to obtain that clarification. In the present instance, the argument continues, the General Assembly would not need an opinion of the Court because it has already declared the construction of the wall to be illegal and has already determined the legal consequences by demanding that Israel stop and reverse its construction, and further, because the General Assembly has never made it clear how it intended to use the opinion.

60. As is clear from the Court's jurisprudence, advisory opinions have the purpose of furnishing to the requesting organs the elements of law necessary for them in their action. In its Opinion concerning *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the Court observed: “The object of this request for an Opinion is to guide the United Nations in respect of its own action.” (*I.C.J. Reports 1951*, p. 19.) Likewise, in its Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South*

*West Africa*) notwithstanding Security Council Resolution 276 (1970), the Court noted: "The request is put forward by a United Nations organ with reference to its own decisions and it seeks legal advice from the Court on the consequences and implications of these decisions." (*J.C.J. Reports 1971*, p. 24, para. 32.) The Court found on another occasion that the advisory opinion it was to give would "furnish the General Assembly with elements of a legal character relevant to its further treatment of the decolonization of Western Sahara" (*Western Sahara, J.C.J. Reports 1975*, p. 37, para. 72).

61. With regard to the argument that the General Assembly has not made it clear what use it would make of an advisory opinion on the wall, the Court would recall, as equally relevant in the present proceedings, what it stated in its Opinion on the *Legality of the Threat or Use of Nuclear Weapons*:

"Certain States have observed that the General Assembly has not explained to the Court for what precise purposes it seeks the advisory opinion. Nevertheless, it is not for the Court itself to purport to decide whether or not an advisory opinion is needed by the Assembly for the performance of its functions. The General Assembly has the right to decide for itself on the usefulness of an opinion in the light of its own needs." (*J.C.J. Reports 1996 (I)*, p. 237, para. 16.)

62. It follows that the Court cannot decline to answer the question posed based on the ground that its opinion would lack any useful purpose. The Court cannot substitute its assessment of the usefulness of the opinion requested for that of the organ that seeks such opinion, namely the General Assembly. Furthermore, and in any event, the Court considers that the General Assembly has not yet determined all the possible consequences of its own resolution. The Court's task would be to determine in a comprehensive manner the legal consequences of the construction of the wall, while the General Assembly — and the Security Council — may then draw conclusions from the Court's findings.

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63. Lastly, the Court will turn to another argument advanced with regard to the propriety of its giving an advisory opinion in the present proceedings. Israel has contended that Palestine, given its responsibility for acts of violence against Israel and its population which the wall is aimed at addressing, cannot seek from the Court a remedy for a situation resulting from its own wrongdoing. In this context, Israel has invoked the maxim *nullus commodum capere potest de sua injuria propria*, which it considers to be as relevant in advisory proceedings as it is in contentious cases. Therefore, Israel concludes, good faith and the principle of "clean hands" provide a compelling reason that should lead the Court to refuse the General Assembly's request.

64. The Court does not consider this argument to be pertinent. As was emphasized earlier, it was the General Assembly which requested the advisory opinion, and the opinion is to be given to the General Assembly, and not to a specific State or entity.

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65. In the light of the foregoing, the Court concludes not only that it has jurisdiction to give an opinion on the question put to it by the General Assembly (see paragraph 42 above), but also that there is no compelling reason for it to use its discretionary power not to give that opinion.

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66. The Court will now address the question put to it by the General Assembly in resolution ES-10/14. The Court recalls that the question is as follows:

"What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?"

67. As explained in paragraph 82 below, the "wall" in question is a complex construction, so that that term cannot be understood in a limited physical sense. However, the other terms used, either by Israel ("fence") or by the Secretary-General ("barrier"), are no more accurate if understood in the physical sense. In this Opinion, the Court has therefore chosen to use the terminology employed by the General Assembly.

The Court notes furthermore that the request of the General Assembly concerns the legal consequences of the wall being built "in the Occupied Palestinian Territory, including in and around East Jerusalem". As also explained below (see paragraphs 79-84 below), some parts of the complex are being built, or are planned to be built, on the territory of Israel itself; the Court does not consider that it is called upon to examine the legal consequences arising from the construction of those parts of the wall.

68. The question put by the General Assembly concerns the legal consequences of the construction of the wall in the Occupied Palestinian Territory. However, in order to indicate those consequences to the General Assembly the Court must first determine whether or not the construction of that wall breaches international law (see paragraph 39 above). It will

therefore make this determination before dealing with the consequences of the construction.

69. To do so, the Court will first make a brief analysis of the status of the territory concerned, and will then describe the works already constructed or in course of construction in that territory. It will then indicate the applicable law before seeking to establish whether that law has been breached.

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70. Palestine was part of the Ottoman Empire. At the end of the First World War, a class "A" Mandate for Palestine was entrusted to Great Britain by the League of Nations, pursuant to paragraph 4 of Article 22 of the Covenant, which provided that:

"Certain communities, formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone."

The Court recalls that in its Advisory Opinion on the *International Status of South West Africa*, speaking of mandates in general, it observed that "The Mandate was created, in the interest of the inhabitants of the territory, and of humanity in general, as an international institution with an international object — a sacred trust of civilization." (*I.C.J. Reports 1950*, p. 132.) The Court also held in this regard that "two principles were considered to be of paramount importance: the principle of non-annexation and the principle that the well-being and development of . . . peoples [not yet able to govern themselves] formed] 'a sacred trust of civilization'" (*ibid.*, p. 131).

The territorial boundaries of the Mandate for Palestine were laid down by various instruments, in particular on the eastern border by a British memorandum of 16 September 1922 and an Anglo-Transjordanian Treaty of 20 February 1928.

71. In 1947 the United Kingdom announced its intention to complete evacuation of the mandated territory by 1 August 1948, subsequently advancing that date to 15 May 1948. In the meantime, the General Assembly had on 29 November 1947 adopted resolution 181 (II) on the future government of Palestine, which "*Recommends* to the United Kingdom . . . and to all other Members of the United Nations the adoption and implementation . . . of the Plan of Partition" of the territory, as set forth in the resolution, between two independent States, one Arab, the other Jewish, as well as the creation of a special international régime for the City of Jerusalem. The Arab population of Palestine and the Arab States rejected this plan, contending that it was unbalanced; on 14 May

1948, Israel proclaimed its independence on the strength of the General Assembly resolution; armed conflict then broke out between Israel and a number of Arab States and the Plan of Partition was not implemented.

72. By resolution 62 (1948) of 16 November 1948, the Security Council decided that "an armistice shall be established in all sectors of Palestine" and called upon the parties directly involved in the conflict to seek agreement to this end. In conformity with this decision, general armistice agreements were concluded in 1949 between Israel and the neighbouring States through mediation by the United Nations. In particular, one such agreement was signed in Rhodes on 3 April 1949 between Israel and Jordan. Articles V and VI of that Agreement fixed the armistice demarcation line between Israeli and Arab forces (often later called the "Green Line" owing to the colour used for it on maps; hereinafter the "Green Line"). Article III, paragraph 2, provided that "No element of the . . . military or para-military forces of either Party . . . shall advance beyond or pass over for any purpose whatsoever the Armistice Demarcation Lines . . ." It was agreed in Article VI, paragraph 8, that these provisions would not be "interpreted as prejudicing, in any sense, an ultimate political settlement between the Parties". It was also stated that "the Armistice Demarcation Lines defined in articles V and VI of [the] Agreement [were] agreed upon by the Parties without prejudice to future territorial settlements or boundary lines or to claims of either Party relating thereto". The Demarcation Line was subject to such rectification as might be agreed upon by the parties.

73. In the 1967 armed conflict, Israeli forces occupied all the territories which had constituted Palestine under British Mandate (including those known as the West Bank, lying to the east of the Green Line).

74. On 22 November 1967, the Security Council unanimously adopted resolution 242 (1967), which emphasized the inadmissibility of acquisition of territory by war and called for the "Withdrawal of Israel armed forces from territories occupied in the recent conflict", and "Termination of all claims or states of belligerency".

75. From 1967 onwards, Israel took a number of measures in these territories aimed at changing the status of the City of Jerusalem. The Security Council, after recalling on a number of occasions "the principle that acquisition of territory by military conquest is inadmissible", condemned those measures and, by resolution 298 (1971) of 25 September 1971, confirmed in the clearest possible terms that:

"all legislative and administrative actions taken by Israel to change the status of the City of Jerusalem, including expropriation of land and properties, transfer of populations and legislation aimed at the incorporation of the occupied section, are totally invalid and cannot change that status".

Later, following the adoption by Israel on 30 July 1980 of the Basic Law making Jerusalem the “complete and united” capital of Israel, the Security Council, by resolution 478 (1980) of 20 August 1980, stated that the enactment of that Law constituted a violation of international law and that “all legislative and administrative measures and actions taken by Israel, the occupying Power, which have altered or purport to alter the character and status of the Holy City of Jerusalem . . . are null and void”. It further decided “not to recognize the ‘basic law’ and such other actions by Israel that, as a result of this law, seek to alter the character and status of Jerusalem”.

76. Subsequently, a peace treaty was signed on 26 October 1994 between Israel and Jordan. That treaty fixed the boundary between the two States “with reference to the boundary definition under the Mandate as is shown in Annex I (a) . . . without prejudice to the status of any territories that came under Israeli military government control in 1967” (Article 3, paragraphs 1 and 2). Annex I provided the corresponding maps and added that, with regard to the “territory that came under Israeli military government control in 1967”, the line indicated “is the administrative boundary” with Jordan.

77. Lastly, a number of agreements have been signed since 1993 between Israel and the Palestine Liberation Organization imposing various obligations on each party. Those agreements *inter alia* required Israel to transfer to Palestinian authorities certain powers and responsibilities exercised in the Occupied Palestinian Territory by its military authorities and civil administration. Such transfers have taken place, but, as a result of subsequent events, they remained partial and limited.

78. The Court would observe that, under customary international law as reflected (see paragraph 89 below) in Article 42 of the Regulations Respecting the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 18 October 1907 (hereinafter “the Hague Regulations of 1907”), territory is considered occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised.

The territories situated between the Green Line (see paragraph 72 above) and the former eastern boundary of Palestine under the Mandate were occupied by Israel in 1967 during the armed conflict between Israel and Jordan. Under customary international law, these were therefore occupied territories in which Israel had the status of occupying Power. Subsequent events in these territories, as described in paragraphs 75 to 77 above, have done nothing to alter this situation. All these territories (including East Jerusalem) remain occupied territories and Israel has continued to have the status of occupying Power.

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79. It is essentially in these territories that Israel has constructed or plans to construct the works described in the report of the Secretary-General. The Court will now describe those works, basing itself on that report. For developments subsequent to the publication of that report, the Court will refer to complementary information contained in the Written Statement of the United Nations, which was intended by the Secretary-General to supplement his report (hereinafter “Written Statement of the Secretary-General”).

80. The report of the Secretary-General states that “The Government of Israel has since 1996 considered plans to halt infiltration into Israel from the central and northern West Bank . . .” (para. 4). According to that report, a plan of this type was approved for the first time by the Israeli Cabinet in July 2001. Then, on 14 April 2002, the Cabinet adopted a decision for the construction of works, forming what Israel describes as a “security fence”, 80 kilometres in length, in three areas of the West Bank.

The project was taken a stage further when, on 23 June 2002, the Israeli Cabinet approved the first phase of the construction of a “continuous fence” in the West Bank (including East Jerusalem). On 14 August 2002, it adopted the line of that “fence” for the work in Phase A, with a view to the construction of a complex 123 kilometres long in the northern West Bank, running from the Salem checkpoint (north of Jenin) to the settlement at Elkana. Phase B of the work was approved in December 2002. It entailed a stretch of some 40 kilometres running east from the Salem checkpoint towards Beth Shean along the northern part of the Green Line as far as the Jordan Valley. Furthermore, on 1 October 2003, the Israeli Cabinet approved a full route, which, according to the report of the Secretary-General, “will form one continuous line stretching 720 kilometres along the West Bank”. A map showing completed and planned sections was posted on the Israeli Ministry of Defence website on 23 October 2003. According to the particulars provided on that map, a continuous section (Phase C) encompassing a number of large settlements will link the north-western end of the “security fence” built around Jerusalem with the southern point of Phase A construction at Elkana. According to the same map, the “security fence” will run for 115 kilometres from the Har Gilo settlement near Jerusalem to the Carmel settlement south-east of Hebron (Phase D). According to Ministry of Defence documents, work in this sector is due for completion in 2005. Lastly, there are references in the case file to Israel’s planned construction of a “security fence” following the Jordan Valley along the mountain range to the west.

81. According to the Written Statement of the Secretary-General, the first part of these works (Phase A), which ultimately extends for a distance of 150 kilometres, was declared completed on 31 July 2003. It is reported that approximately 56,000 Palestinians would be encompassed in enclaves. During this phase, two sections totalling 19.5 kilometres

were built around Jerusalem. In November 2003 construction of a new section was begun along the Green Line to the west of the Nazlat Issa-Baqa al-Sharqiya enclave, which in January 2004 was close to completion at the time when the Secretary-General submitted his Written Statement.

According to the Written Statement of the Secretary-General, the works carried out under Phase B were still in progress in January 2004. Thus an initial section of this stretch, which runs near or on the Green Line to the village of al-Mutilla, was almost complete in January 2004. Two additional sections diverge at this point. Construction started in early January 2004 on one section that runs due east as far as the Jordanian border. Construction of the second section, which is planned to run from the Green Line to the village of Taysir, has barely begun. The United Nations has, however, been informed that this second section might not be built.

The Written Statement of the Secretary-General further states that Phase C of the work, which runs from the terminus of Phase A, near the Elkana settlement, to the village of Nu'man, south-east of Jerusalem, began in December 2003. This section is divided into three stages. In Stage C1, between *inter alia* the villages of Rantis and Budrus, approximately 4 kilometres out of a planned total of 40 kilometres have been constructed. Stage C2, which will surround the so-called "Ariel Salient" by cutting 22 kilometres into the West Bank, will incorporate 52,000 Israeli settlers. Stage C3 is to involve the construction of two "depth barriers"; one of these is to run north-south, roughly parallel with the section of Stage C1 currently under construction between Rantis and Budrus, whilst the other runs east-west along a ridge said to be part of the route of Highway 45, a motorway under construction. If construction of the two barriers were completed, two enclaves would be formed, encompassing 72,000 Palestinians in 24 communities.

Further construction also started in late November 2003 along the south-eastern part of the municipal boundary of Jerusalem, following a route that, according to the Written Statement of the Secretary-General, cuts off the suburban village of El-Ezariya from Jerusalem and splits the neighbouring Abu Dis in two.

As at 25 January 2004, according to the Written Statement of the Secretary-General, some 190 kilometres of construction had been completed, covering Phase A and the greater part of Phase B. Further construction in Phase C had begun in certain areas of the central West Bank and in Jerusalem. Phase D, planned for the southern part of the West Bank, had not yet begun.

The Israeli Government has explained that the routes and timetable as described above are subject to modification. In February 2004, for example, an 8-kilometre section near the town of Baqa al-Sharqiya was

demolished, and the planned length of the wall appears to have been slightly reduced.

82. According to the description in the report and the Written Statement of the Secretary-General, the works planned or completed have resulted or will result in a complex consisting essentially of:

- (1) a fence with electronic sensors;
- (2) a ditch (up to 4 metres deep);
- (3) a two-lane asphalt patrol road;
- (4) a trace road (a strip of sand smoothed to detect footprints) running parallel to the fence;
- (5) a stack of six coils of barbed wire marking the perimeter of the complex.

The complex has a width of 50 to 70 metres, increasing to as much as 100 metres in some places. "Depth barriers" may be added to these works.

The approximately 180 kilometres of the complex completed or under construction as of the time when the Secretary-General submitted his report included some 8.5 kilometres of concrete wall. These are generally found where Palestinian population centres are close to or abut Israel (such as near Qatliya and Tulkarm or in parts of Jerusalem).

83. According to the report of the Secretary-General, in its northernmost part, the wall as completed or under construction barely deviates from the Green Line. It nevertheless lies within occupied territories for most of its course. The works deviate more than 7.5 kilometres from the Green Line in certain places to encompass settlements, while encircling Palestinian population areas. A stretch of 1 to 2 kilometres west of Tulkarm appears to run on the Israeli side of the Green Line. Elsewhere, on the other hand, the planned route would deviate eastward by up to 22 kilometres. In the case of Jerusalem, the existing works and the planned route lie well beyond the Green Line and even in some cases beyond the eastern municipal boundary of Jerusalem as fixed by Israel.

84. On the basis of that route, approximately 975 square kilometres (or 16.6 per cent of the West Bank) would, according to the report of the Secretary-General, lie between the Green Line and the wall. This area is stated to be home to 237,000 Palestinians. If the full wall were completed as planned, another 160,000 Palestinians would live in almost completely encircled communities, described as enclaves in the report. As a result of the planned route, nearly 320,000 Israeli settlers (of whom 178,000 in East Jerusalem) would be living in the area between the Green Line and the wall.

85. Lastly, it should be noted that the construction of the wall has been accompanied by the creation of a new administrative régime. Thus in October 2003 the Israeli Defence Forces issued Orders establishing the

part of the West Bank lying between the Green Line and the wall as a "Closed Area". Residents of this area may no longer remain in it, nor may non-residents enter it, unless holding a permit or identity card issued by the Israeli authorities. According to the report of the Secretary-General, most residents have received permits for a limited period. Israeli citizens, Israeli permanent residents and those eligible to immigrate to Israel in accordance with the Law of Return may remain in, or move freely to, from and within the Closed Area without a permit. Access to and exit from the Closed Area can only be made through access gates, which are opened infrequently and for short periods.

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86. The Court will now determine the rules and principles of international law which are relevant in assessing the legality of the measures taken by Israel. Such rules and principles can be found in the United Nations Charter and certain other treaties, in customary international law and in the relevant resolutions adopted pursuant to the Charter by the General Assembly and the Security Council. However, doubts have been expressed by Israel as to the applicability in the Occupied Palestinian Territory of certain rules of international humanitarian law and human rights instruments. The Court will now consider these various questions.

87. The Court first recalls that, pursuant to Article 2, paragraph 4, of the United Nations Charter:

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

On 24 October 1970, the General Assembly adopted resolution 2625 (XXV), entitled "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States" (hereinafter "resolution 2625 (XXV)"), in which it emphasized that "No territorial acquisition resulting from the threat or use of force shall be recognized as legal." As the Court stated in its Judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, the principles as to the use of force incorporated in the Charter reflect customary international law (see *I.C.J. Reports 1986*, pp. 98-101, paras. 187-190); the same is true of its corollary entailing the illegality of territorial acquisition resulting from the threat or use of force.

88. The Court also notes that the principle of self-determination of peoples has been enshrined in the United Nations Charter and reaffirmed by the General Assembly in resolution 2625 (XXV) cited above, pursuant

to which "Every State has the duty to refrain from any forcible action which deprives peoples referred to [in that resolution] . . . of their right to self-determination." Article 1 common to the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights reaffirms the right of all peoples to self-determination, and lays upon the States parties the obligation to promote the realization of that right and to respect it, in conformity with the provisions of the United Nations Charter.

The Court would recall that in 1971 it emphasized that current developments in "international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all [such territories]". The Court went on to state that "These developments leave little doubt that the ultimate objective of the sacred trust" referred to in Article 22, paragraph 1, of the Covenant of the League of Nations "was the self-determination . . . of the peoples concerned" (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion, I.C.J. Reports 1971*, p. 31, paras. 52-53). The Court has referred to this principle on a number of occasions in its jurisprudence (*ibid.*; see also *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 68, para. 162). The Court indeed made it clear that the right of peoples to self-determination is today a right *erga omnes* (see *East Timor (Portugal v. Australia)*, *Judgment, I.C.J. Reports 1995*, p. 102, para. 29).

89. As regards international humanitarian law, the Court would first note that Israel is a party to the Fourth Hague Convention of 1907, to which the Hague Regulations are annexed. The Court observes that, in the words of the Convention, those Regulations were prepared "to revise the general laws and customs of war" existing at that time. Since then, however, the International Military Tribunal of Nuremberg has found that the "rules laid down in the Convention were recognised by all civilised nations, and were regarded as being declaratory of the laws and customs of war" (Judgment of the International Military Tribunal of Nuremberg, 30 September and 1 October 1946, p. 65). The Court itself reached the same conclusion when examining the rights and duties of belligerents in their conduct of military operations (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, 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 depositary — in a position to decide whether" "the request [dated 14 June 1989] from the Palestine Liberation Movement in the name of the 'State of Palestine' to accede" *inter alia* to the Fourth Geneva Convention "can be considered as an instrument of accession".

92. Moreover, for the purpose of determining the scope of application of the Fourth Geneva Convention, it should be recalled that under common Article 2 of the four Conventions of 12 August 1949:

"In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof."

93. After the occupation of the West Bank in 1967, the Israeli authorities issued an order No. 3 stating in its Article 35 that:

"the Military Court . . . must apply the provisions of the Geneva Convention dated 12 August 1949 relative to the Protection of

Civilian Persons in Time of War with respect to judicial procedures. In case of conflict between this Order and the said Convention, the Convention shall prevail."

Subsequently, the Israeli authorities have indicated on a number of occasions that in fact they generally apply the humanitarian provisions of the Fourth Geneva Convention within the occupied territories. However, according to Israel's position as briefly recalled in paragraph 90 above, that Convention is not applicable *de jure* within those territories because, under Article 2, paragraph 2, it applies only in the case of occupation of territories falling under the sovereignty of a High Contracting Party involved in an armed conflict. Israel explains that Jordan was admittedly a party to the Fourth Geneva Convention in 1967, and that an armed conflict broke out at that time between Israel and Jordan, but it goes on to observe that the territories occupied by Israel subsequent to that conflict had not previously fallen under Jordanian sovereignty. It infers from this that that Convention is not applicable *de jure* in those territories. According however to the great majority of other participants in the proceedings, the Fourth Geneva Convention is applicable to those territories pursuant to Article 2, paragraph 1, whether or not Jordan had any rights in respect thereof prior to 1967.

94. The Court would recall that, according to customary international law as expressed in Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. Article 32 provides that:

"Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31 . . . leaves the meaning ambiguous or obscure; or . . . leads to a result which is manifestly obscure or unreasonable." (See *Oil Platforms (Islamic Republic of Iran v. United States of America)*, *Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 812, para. 23; see, similarly, *Kasikili/Sedudu Island (Botswana/Namibia)*, *Judgment, I.C.J. Reports 1999 (II)*, p. 1059, para. 18, and *Sovereignty over Pulau Ligitan and Pulau 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 satis-

fied, the Convention applies, in particular, in any territory occupied in the course of the conflict by one of the contracting parties.

The object of the second paragraph of Article 2 is not to restrict the scope of application of the Convention, as defined by the first paragraph, by excluding therefrom territories not falling under the sovereignty of one of the contracting parties. It is directed simply to making it clear that, even if occupation effected during the conflict met no armed resistance, the Convention is still applicable.

This interpretation reflects the intention of the drafters of the Fourth Geneva Convention to protect civilians who find themselves, in whatever way, in the hands of the occupying Power. Whilst the drafters of the Hague Regulations of 1907 were as much concerned with protecting the rights of a State whose territory is occupied, as with protecting the inhabitants of that territory, the drafters of the Fourth Geneva Convention sought to guarantee the protection of civilians in time of war, regardless of the status of the occupied territories, as is shown by Article 47 of the Convention.

That interpretation is confirmed by the Convention's *travaux préparatoires*. The Conference of Government Experts convened by the International Committee of the Red Cross (hereinafter, "ICRC") in the aftermath of the Second World War for the purpose of preparing the new Geneva Conventions recommended that these conventions be applicable to any armed conflict "whether [it] is or is not recognized as a state of war by the parties" and "in cases of occupation of territories in the absence of any state of war" (*Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims, Geneva, 14-26 April 1947*, p. 8). The drafters of the second paragraph of Article 2 thus had no intention, when they inserted that paragraph into the Convention, of restricting the latter's scope of application. They were merely seeking to provide for cases of occupation without combat, such as the occupation of Bohemia and Moravia by Germany in 1939.

96. The Court would moreover note that the States parties to the Fourth Geneva Convention approved that interpretation at their Conference on 15 July 1999. They issued a statement in which they "reaffirmed the applicability of the Fourth Geneva Convention to the Occupied Palestinian Territory, including East Jerusalem". Subsequently, on 5 December 2001, the High Contracting Parties, referring in particular to Article 1 of the Fourth Geneva Convention of 1949, once again reaffirmed the "applicability of the Fourth Geneva Convention to the Occupied Palestinian Territory, including East Jerusalem". They further reminded the Contracting Parties participating in the Conference, the parties to the conflict, and the State of Israel as occupying Power, of their respective obligations.

97. Moreover, the Court would observe that the ICRC, whose special position with respect to execution of the Fourth Geneva Convention must be "recognized and respected at all times" by the parties pursuant

to Article 142 of the Convention, has also expressed its opinion on the interpretation to be given to the Convention. In a declaration of 5 December 2001, it recalled that "the ICRC has always affirmed the *de jure* applicability of the Fourth Geneva Convention to the territories occupied since 1967 by the State of Israel, including East Jerusalem".

98. The Court notes that the General Assembly has, in many of its resolutions, taken a position to the same effect. Thus on 10 December 2001 and 9 December 2003, in resolutions 56/60 and 58/97, it reaffirmed

"that the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, is applicable to the Occupied Palestinian Territory, including East Jerusalem, and other Arab territories occupied by Israel since 1967".

99. The Security Council, for its part, had already on 14 June 1967 taken the view in resolution 237 (1967) that "all the obligations of the Geneva Convention relative to the Treatment of Prisoners of War . . . should be complied with by the parties involved in the conflict". Subsequently, on 15 September 1969, the Security Council, in resolution 271 (1969), called upon "Israel scrupulously to observe the provisions of the Geneva Conventions and international law governing military occupation".

Ten years later, the Security Council examined "the policy and practices of Israel in establishing settlements in the Palestinian and other Arab territories occupied since 1967". In resolution 446 (1979) of 22 March 1979, the Security Council considered that those settlements had "no legal validity" and affirmed "*once more* that the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, is applicable to the Arab territories occupied by Israel since 1967, including Jerusalem". It called "*once more upon* Israel, as the occupying Power, to abide scrupulously" by that Convention.

On 20 December 1990, the Security Council, in resolution 681 (1990), urged "the Government of Israel to accept the *de jure* applicability of the Fourth Geneva Convention . . . to all the territories occupied by Israel since 1967 and to abide scrupulously by the provisions of the Convention". It further called upon "the high contracting parties to the said Fourth Geneva Convention to ensure respect by Israel, the occupying Power, for its obligations under the Convention in accordance with article 1 thereof".

Lastly, in resolutions 799 (1992) of 18 December 1992 and 904 (1994) of 18 March 1994, the Security Council reaffirmed its position concerning the applicability of the Fourth Geneva Convention in the occupied territories.

100. The Court would note finally that the Supreme Court of Israel, in a judgment dated 30 May 2004, also found that:

"The military operations of the [Israeli Defence Forces] in Rafah,

to the extent they affect civilians, are governed by Hague Convention IV Respecting the Laws and Customs of War on Land 1907... and the Geneva Convention relative to the Protection of Civilian Persons in Time of War 1949.”

101. In view of the foregoing, the Court considers that the Fourth Geneva Convention is applicable in any occupied territory in the event of an armed conflict arising between two or more High Contracting Parties. Israel and Jordan were parties to that Convention when the 1967 armed conflict broke out. The Court accordingly finds that that Convention is applicable in the Palestinian territories which before the conflict lay to the east of the Green Line and which, during that conflict, were occupied by Israel, there being no need for any enquiry into the precise prior status of those territories.

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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.

103. On 3 October 1991 Israel ratified both the International Covenant on Economic, Social and Cultural Rights of 19 December 1966 and the International Covenant on Civil and Political Rights of the same date, as well as the United Nations Convention on the Rights of the Child of 20 November 1989. It is a party to these three instruments.

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. 52/79, *López Burgos v. Uruguay*; case No. 56/79, *Lilian Celiberti de Casariego v. Uruguay*). It decided to the same effect in the case of the confiscation of a passport by a Uruguayan consulate in Germany (case No. 106/81, *Montero v. Uruguay*).

The *travaux préparatoires* of the Covenant confirm the Committee's interpretation of Article 2 of that instrument. These show that, in adopting the wording chosen, the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory. They only intended to prevent persons residing abroad from asserting, vis-à-vis their State of origin, rights that do not fall within the competence of that State, but of that of the State of residence (see the discussion of the preliminary draft in the Commission on Human Rights, E/CN.4/SR.194, para. 46; and United Nations, *Official Records of the General Assembly, Tenth Session, Annexes, A/2929, Part II, Chap. V, para. 4* (1955)).

110. The Court takes note in this connection of the position taken by Israel, in relation to the applicability of the Covenant, in its communications to the Human Rights Committee, and of the view of the Committee.

In 1998, Israel stated that, when preparing its report to the Committee, it had had to face the question "whether individuals resident in the occupied territories were indeed subject to Israel's jurisdiction" for purposes of the application of the Covenant (CCPR/C/SR.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/CO/78/ISR, para. 11).

111. In conclusion, the Court considers that the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.

112. The International Covenant on Economic, Social and Cultural Rights contains no provision on its scope of application. This may be explicable by the fact that this Covenant guarantees rights which are essentially territorial. However, it is not to be excluded that it applies both to territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction. Thus Article 14 makes provision for transitional measures in the case of any State which "at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge".

It is not without relevance to recall in this regard the position taken by Israel in its reports to the Committee on Economic, Social and Cultural Rights. In its initial report to the Committee of 4 December 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.12/1/Add.90, paras. 15 and 31).

For the reasons explained in paragraph 106 above, the Court cannot accept Israel's view. It would also observe that the territories occupied by Israel have for over 37 years been subject to its territorial jurisdiction as the occupying Power. In the exercise of the powers available to it on this basis, Israel is bound by the provisions of the International Covenant on Economic, Social and Cultural Rights. Furthermore, it is under an obligation not to raise any obstacle to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities.

113. As regards the Convention on the Rights of the Child of 20 November 1989, that instrument contains an Article 2 according to which "States Parties shall respect and ensure the rights set forth in the . . . Convention to each child within their jurisdiction . . .". That Convention is therefore applicable within the Occupied Palestinian Territory.

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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.

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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

settlements" illegally established on the Occupied Palestinian Territory. It was further contended that the wall aimed at "reducing and parcelling out the territorial sphere over which the Palestinian people are entitled to exercise their right of self-determination".

116. For its part, Israel has argued that the wall's sole purpose is to enable it effectively to combat terrorist attacks launched from the West Bank. Furthermore, Israel has repeatedly stated that the Barrier is a temporary measure (see report of the Secretary-General, para. 29). It did so *inter alia* through its Permanent Representative to the United Nations at the Security Council meeting of 14 October 2003, emphasizing that "[t]he fence] does not annex territories to the State of Israel", and that Israel is "ready and able, at tremendous cost, to adjust or dismantle a fence if so required as part of a political settlement" (S/PV.4841, p. 10). Israel's Permanent Representative restated this view before the General Assembly on 20 October and 8 December 2003. On this latter occasion, he added:

"As soon as the terror ends, the fence will no longer be necessary. The fence is not a border and has no political significance. It does not change the legal status of the territory in any way." (A/ES-10/PV.23, p. 6.)

117. The Court would recall that both the General Assembly and the Security Council have referred, with regard to Palestine, to the customary rule of "the inadmissibility of the acquisition of territory by war" (see paragraphs 74 and 87 above). Thus in resolution 242 (1967) of 22 November 1967, the Security Council, after recalling this rule, affirmed that:

"the fulfilment of Charter principles requires the establishment of a just and lasting peace in the Middle East which should include the application of both the following principles:

- (i) Withdrawal of Israel armed forces from territories occupied in the recent conflict;
- (ii) Termination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force".

It is on this same basis that the Council has several times condemned the measures taken by Israel to change the status of Jerusalem (see paragraph 75 above).

118. As regards the principle of the right of peoples to self-determination, the Court observes that the existence of a "Palestinian people" is no

longer in issue. Such existence has moreover been recognized by Israel in the exchange of letters of 9 September 1993 between Mr. Yasser Arafat, President of the Palestine Liberation Organization (PLO) and Mr. Yitzhak Rabin, Israeli Prime Minister. In that correspondence, the President of the PLO recognized “the right of the State of Israel to exist in peace and security” and made various other commitments. In reply, the Israeli Prime Minister informed him that, in the light of those commitments, “the Government of Israel has decided to recognize the PLO as the representative of the Palestinian people”. The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip of 28 September 1995 also refers a number of times to the Palestinian people and its “legitimate rights” (Preamble, paras. 4, 7, 8; Article II, para. 2; Article III, paras. 1 and 3; Article XXII, para. 2). The Court considers that those rights include the right to self-determination, as the General Assembly has moreover recognized on a number of occasions (see, for example, resolution 58/163 of 22 December 2003).

119. The Court notes that the route of the wall as fixed by the Israeli Government includes within the “Closed Area” (see paragraph 85 above) some 80 per cent of the settlers living in the Occupied Palestinian Territory. Moreover, it is apparent from an examination of the map mentioned in paragraph 80 above that the wall’s sinuous route has been traced in such a way as to include within that area the great majority of the Israeli settlements in the occupied Palestinian Territory (including East Jerusalem).

120. As regards these settlements, the Court notes that Article 49, paragraph 6, of the Fourth Geneva Convention provides: “The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.” That provision prohibits not only deportations or forced transfers of population such as those carried out during the Second World War, but also any measures taken by an occupying Power in order to organize or encourage transfers of parts of its own population into the occupied territory.

In this respect, the information provided to the Court shows that, since 1977, Israel has conducted a policy and developed practices involving the establishment of settlements in the Occupied Palestinian Territory, contrary to the terms of Article 49, paragraph 6, just cited.

The Security Council has thus taken the view that such policy and practices “have no legal validity”. It has also called upon “Israel, as the occupying Power, to abide scrupulously” by the Fourth Geneva Convention and:

“to rescind its previous measures and to desist from taking any action which would result in changing the legal status and geographical nature and materially affecting the demographic composition of the Arab territories occupied since 1967, including Jerusalem

and, in particular, not to transfer parts of its own civilian population into the occupied Arab territories” (resolution 446 (1979) of 22 March 1979).

The Council reaffirmed its position in resolutions 452 (1979) of 20 July 1979 and 465 (1980) of 1 March 1980. Indeed, in the latter case it described “Israel’s policy and practices of settling parts of its population and new immigrants in [the occupied] territories” as a “flagrant violation” of the Fourth Geneva Convention.

The Court concludes that the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law.

121. Whilst the Court notes the assurance given by Israel that the construction of the wall does not amount to annexation and that the wall is of a temporary nature (see paragraph 116 above), it nevertheless cannot remain indifferent to certain fears expressed to it that the route of the wall will prejudice the future frontier between Israel and Palestine, and the fear that Israel may integrate the settlements and their means of access. The Court considers that the construction of the wall and its associated régime create a “fait accompli” on the ground that could well become permanent, in which case, and notwithstanding the formal characterization of the wall by Israel, it would be tantamount to *de facto* annexation.

122. The Court recalls moreover that, according to the report of the Secretary-General, the planned route would incorporate in the area between the Green Line and the wall more than 16 per cent of the territory of the West Bank. Around 80 per cent of the settlers living in the Occupied Palestinian Territory, that is 320,000 individuals, would reside in that area, as well as 237,000 Palestinians. Moreover, as a result of the construction of the wall, around 160,000 other Palestinians would reside in almost completely encircled communities (see paragraphs 84, 85 and 119 above).

In other terms, the route chosen for the wall gives expression *in loco* to the illegal measures taken by Israel with regard to Jerusalem and the settlements, as deplored by the Security Council (see paragraphs 75 and 120 above). There is also a risk of further alterations to the demographic composition of the Occupied Palestinian Territory resulting from the construction of the wall inasmuch as it is contributing, as will be further explained in paragraph 133 below, to the departure of Palestinian populations from certain areas. That construction, along with measures taken previously, thus severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel’s obligation to respect that right.

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123. The construction of the wall also raises a number of issues in rela-

tion to the relevant provisions of international humanitarian law and of human rights instruments.

124. With regard to the Hague Regulations of 1907, the Court would recall that these deal, in Section II, with hostilities and in particular with "means of injuring the enemy, sieges, and bombardments". Section III deals with military authority in occupied territories. Only Section III is currently applicable in the West Bank and Article 23 (*g*) of the Regulations, in Section II, is thus not pertinent.

Section III of the Hague Regulations includes Articles 43, 46 and 52, which are applicable in the Occupied Palestinian Territory. Article 43 imposes a duty on the occupant to "take all measures within his power to restore, and, as far as possible, to insure public order and life, respecting the laws in force in the country". Article 46 adds that private property must be "respected" and that it cannot "be confiscated". Lastly, Article 52 authorizes, within certain limits, requisitions in kind and services for the needs of the army of occupation.

125. A distinction is also made in the Fourth Geneva Convention between provisions applying during military operations leading to occupation and those that remain applicable throughout the entire period of occupation. It thus states in Article 6:

"The present Convention shall apply from the outset of any conflict or occupation mentioned in Article 2.

In the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations.

In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143.

Protected persons whose release, repatriation or re-establishment may take place after such dates shall meanwhile continue to benefit by the present Convention."

Since the military operations leading to the occupation of the West Bank in 1967 ended a long time ago, only those Articles of the Fourth Geneva Convention referred to in Article 6, paragraph 3, remain applicable in that occupied territory.

126. These provisions include Articles 47, 49, 52, 53 and 59 of the Fourth Geneva Convention. According to Article 47:

"Protected persons who are in occupied territory shall not be

deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory."

Article 49 reads as follows:

"Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.

Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.

The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated.

The Protecting Power shall be informed of any transfers and evacuations as soon as they have taken place.

The Occupying Power shall not detain protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand.

The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies."

According to Article 52:

"No contract, agreement or regulation shall impair the right of any worker, whether voluntary or not and wherever he may be, to apply to the representatives of the Protecting Power in order to request the said Power's intervention.

All measures aiming at creating unemployment or at restricting the opportunities offered to workers in an occupied territory, in order to induce them to work for the Occupying Power, are prohibited."

Article 53 provides that:

“Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or co-operative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.”

Lastly, according to Article 59:

“If the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf of the said population, and shall facilitate them by all the means at its disposal.

Such schemes, which may be undertaken either by States or by impartial humanitarian organizations such as the International Committee of the Red Cross, shall consist, in particular, of the provision of consignments of foodstuffs, medical supplies and clothing.

All Contracting Parties shall permit the free passage of these consignments and shall guarantee their protection.

A Power granting free passage to consignments on their way to territory occupied by an adverse Party to the conflict shall, however, have the right to search the consignments, to regulate their passage according to prescribed times and routes, and to be reasonably satisfied through the Protecting Power that these consignments are to be used for the relief of the needy population and are not to be used for the benefit of the Occupying Power.”

127. The International Covenant on Civil and Political Rights also contains several relevant provisions. Before further examining these, the Court will observe that Article 4 of the Covenant allows for derogation to be made, under various conditions, to certain provisions of that instrument. Israel made use of its right of derogation under this Article by addressing the following communication to the Secretary-General of the United Nations on 3 October 1991:

“Since its establishment, the State of Israel has been the victim of continuous threats and attacks on its very existence as well as on the life and property of its citizens.

These have taken the form of threats of war, of actual armed attacks, and campaigns of terrorism resulting in the murder of and injury to human beings.

In view of the above, the State of Emergency which was proclaimed in May 1948 has remained in force ever since. This situation constitutes a public emergency within the meaning of article 4 (1) of the Covenant.

The Government of Israel has therefore found it necessary, in accordance with the said article 4, to take measures to the extent strictly required by the exigencies of the situation, for the defence of

the State and for the protection of life and property, including the exercise of powers of arrest and detention.

In so far as any of these measures are inconsistent with article 9 of the Covenant, Israel thereby derogates from its obligations under that provision.”

The Court notes that the derogation so notified concerns only Article 9 of the International Covenant on Civil and Political Rights, which deals with the right to liberty and security of person and lays down the rules applicable in cases of arrest or detention. The other Articles of the Covenant therefore remain applicable not only on Israeli territory, but also on the Occupied Palestinian Territory.

128. Among these mention must be made of Article 17, paragraph 1 of which reads as follows: “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.”

Mention must also be made of Article 12, paragraph 1, which provides: “Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.”

129. In addition to the general guarantees of freedom of movement under Article 12 of the International Covenant on Civil and Political Rights, account must also be taken of specific guarantees of access to the Christian, Jewish and Islamic Holy Places. The status of the Christian Holy Places in the Ottoman Empire dates far back in time, the latest provisions relating thereto having been incorporated into Article 62 of the Treaty of Berlin of 13 July 1878. The Mandate for Palestine given to the British Government on 24 July 1922 included an Article 13, under which:

“All responsibility in connection with the Holy Places and religious buildings or sites in Palestine, including that of preserving existing rights and of securing free access to the Holy Places, religious buildings and sites and the free exercise of worship, while ensuring the requirements of public order and decorum, is assumed by the Mandatory . . .”

Article 13 further stated: “nothing in this mandate shall be construed as conferring . . . authority to interfere with the fabric or the management of purely Moslem sacred shrines, the immunities of which are guaranteed”.

In the aftermath of the Second World War, the General Assembly, in adopting resolution 181 (II) on the future government of Palestine, devoted an entire chapter of the Plan of Partition to the Holy Places, religious buildings and sites. Article 2 of this Chapter provided, in so far as the Holy Places were concerned:

“the liberty of access, visit and transit shall be guaranteed, in conformity with existing rights, to all residents and citizens [of the Arab

State, of the Jewish State] and of the City of Jerusalem, as well as to aliens, without distinction as to nationality, subject to requirements of national security, public order and decorum”.

Subsequently, in the aftermath of the armed conflict of 1948, the 1949 General Armistice Agreement between Jordan and Israel provided in Article VIII for the establishment of a special committee for “the formulation of agreed plans and arrangements for such matters as either Party may submit to it” for the purpose of enlarging the scope of the Agreement and of effecting improvement in its application. Such matters, on which an agreement of principle had already been concluded, included “free access to the Holy Places”.

This commitment concerned mainly the Holy Places located to the east of the Green Line. However, some Holy Places were located west of that Line. This was the case of the Room of the Last Supper and the Tomb of David, on Mount Zion. In signing the General Armistice Agreement, Israel thus undertook, as did Jordan, to guarantee freedom of access to the Holy Places. The Court considers that this undertaking by Israel has remained valid for the Holy Places which came under its control in 1967. This undertaking has further been confirmed by Article 9, paragraph 1, of the 1994 Peace Treaty between Israel and Jordan, by virtue of which, in more general terms, “Each party will provide freedom of access to places of religious and historical significance.”

130. As regards the International Covenant on Economic, Social and Cultural Rights, that instrument includes a number of relevant provisions, namely: the right to work (Arts. 6 and 7); protection and assistance accorded to the family and to children and young persons (Art. 10); the right to an adequate standard of living, including adequate food, clothing and housing, and the right “to be free from hunger” (Art. 11); the right to health (Art. 12); the right to education (Arts. 13 and 14).

131. Lastly, the United Nations Convention on the Rights of the Child of 20 November 1989 includes similar provisions in Articles 16, 24, 27 and 28.

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132. From the information submitted to the Court, particularly the report of the Secretary-General, it appears that the construction of the wall has led to the destruction or requisition of properties under conditions which contravene the requirements of Articles 46 and 52 of the Hague Regulations of 1907 and of Article 53 of the Fourth Geneva Convention.

133. That construction, the establishment of a closed area between the Green Line and the wall itself and the creation of enclaves have moreover imposed substantial restrictions on the freedom of movement of the inhabitants of the Occupied Palestinian Territory (with the exception of

Israeli citizens and those assimilated thereto). Such restrictions are most marked in urban areas, such as the Qalqilya enclave or the City of Jerusalem and its suburbs. They are aggravated by the fact that the access gates are few in number in certain sectors and opening hours appear to be restricted and unpredictably applied. For example, according to the Special Rapporteur of the Commission on Human Rights on the situation of human rights in the Palestinian territories occupied by Israel since 1967, “Qalqilya, a city with a population of 40,000, is completely surrounded by the Wall and residents can only enter and leave through a single military checkpoint open from 7 a.m. to 7 p.m.” (Report of the Special Rapporteur of the Commission on Human Rights, John Dugard, on the situation of human rights in the Palestinian territories occupied by Israel since 1967, submitted in accordance with Commission resolution 1993/2 A and entitled “Question of the Violation of Human Rights in the Occupied Arab Territories, including Palestine”, E/CN.4/2004/6, 8 September 2003, para. 9.)

There have also been serious repercussions for agricultural production, as is attested by a number of sources. According to the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories

“an estimated 100,000 dunums [approximately 10,000 hectares] of the West Bank’s most fertile agricultural land, confiscated by the Israeli Occupation Forces, have been destroyed during the first phase of the wall construction, which involves the disappearance of vast amounts of property, notably private agricultural land and olive trees, wells, citrus groves and hothouses upon which tens of thousands of Palestinians rely for their survival” (Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories, A/58/311, 22 August 2003, para. 26).

Further, the Special Rapporteur on the situation of human rights in the Palestinian territories occupied by Israel since 1967 states that “Much of the Palestinian land on the Israeli side of the Wall consists of fertile agricultural land and some of the most important water wells in the region” and adds that “Many fruit and olive trees had been destroyed in the course of building the barrier” (E/CN.4/2004/6, 8 September 2003, para. 9). The Special Rapporteur on the Right to Food of the United Nations Commission on Human Rights states that construction of the wall “cuts off Palestinians from their agricultural lands, wells and means of subsistence” (Report by the Special Rapporteur of the United Nations Commission on Human Rights, Jean Ziegler, “The Right to Food”, Addendum, Mission to the Occupied Palestinian Territories, E/CN.4/2004/10/Add.2, 31 October 2003, para. 49). In a recent survey conducted by the World Food Programme, it is stated that the situation has aggra-

vated food insecurity in the region, which reportedly numbers 25,000 new beneficiaries of food aid (report of the Secretary-General, para. 25).

It has further led to increasing difficulties for the population concerned regarding access to health services, educational establishments and primary sources of water. This is also attested by a number of different information sources. Thus the report of the Secretary-General states generally that "According to the Palestinian Central Bureau of Statistics, so far the Barrier has separated 30 localities from health services, 22 from schools, 8 from primary water sources and 3 from electricity networks." (Report of the Secretary-General, para. 23.) The Special Rapporteur of the United Nations Commission on Human Rights on the situation of human rights in the Palestinian territories occupied by Israel since 1967 states that "Palestinians between the Wall and Green Line will effectively be cut off from their land and workplaces, schools, health clinics and other social services." (E/CN.4/2004/6, 8 September 2003, para. 9.) In relation specifically to water resources, the Special Rapporteur on the Right to Food of the United Nations Commission on Human Rights observes that "By constructing the fence Israel will also effectively annex most of the western aquifer system (which provides 51 per cent of the West Bank's water resources)." (E/CN.4/2004/10/Add.2, 31 October 2003, para. 51.) Similarly, in regard to access to health services, it has been stated that, as a result of the enclosure of Qalqiliya, a United Nations hospital in that town has recorded a 40 per cent decrease in its caseload (report of the Secretary-General, para. 24).

At Qalqiliya, according to reports furnished to the United Nations, some 600 shops or businesses have shut down, and 6,000 to 8,000 people have already left the region (E/CN.4/2004/6, 8 September 2003, para. 10; E/CN.4/2004/10/Add.2, 31 October 2003, para. 51). The Special Rapporteur on the Right to Food of the United Nations Commission on Human Rights has also observed that "With the fence/wall cutting communities off from their land and water without other means of subsistence, many of the Palestinians living in these areas will be forced to leave." (E/CN.4/2004/10/Add.2, 31 October 2003, para. 51.) In this respect also the construction of the wall would effectively deprive a significant number of Palestinians of the "freedom to choose [their] residence". In addition, however, in the view of the Court, since a significant number of Palestinians have already been compelled by the construction of the wall and its associated régime to depart from certain areas, a process that will continue as more of the wall is built, that construction, coupled with the establishment of the Israeli settlements mentioned in paragraph 120 above, is tending to alter the demographic composition of the Occupied Palestinian Territory.

134. To sum up, the Court is of the opinion that the construction of the wall and its associated régime impede the liberty of movement of the inhabitants of the Occupied Palestinian Territory (with the exception

of Israeli citizens and those assimilated thereto) as guaranteed under Article 12, paragraph 1, of the International Covenant on Civil and Political Rights. They also impede the exercise by the persons concerned of the right to work, to health, to education and to an adequate standard of living as proclaimed in the International Covenant on Economic, Social and Cultural Rights and in the United Nations Convention on the Rights of the Child. Lastly, the construction of the wall and its associated régime, by contributing to the demographic changes referred to in paragraphs 122 and 133 above, contravene Article 49, paragraph 6, of the Fourth Geneva Convention and the Security Council resolutions cited in paragraph 120 above.

135. The Court would observe, however, that the applicable international humanitarian law contains provisions enabling account to be taken of military exigencies in certain circumstances.

Neither Article 46 of the Hague Regulations of 1907 nor Article 47 of the Fourth Geneva Convention contain any qualifying provision of this type. With regard to forcible transfers of population and deportations, which are prohibited under Article 49, paragraph 1, of the Convention, paragraph 2 of that Article provides for an exception in those cases in which "the security of the population or imperative military reasons so demand". This exception however does not apply to paragraph 6 of that Article, which prohibits the occupying Power from deporting or transferring parts of its own civilian population into the territories it occupies. As to Article 53 concerning the destruction of personal property, it provides for an exception "where such destruction is rendered absolutely necessary by military operations".

The Court considers that the military exigencies contemplated by these texts may be invoked in occupied territories even after the general close of the military operations that led to their occupation. However, on the material before it, the Court is not convinced that the destructions carried out contrary to the prohibition in Article 53 of the Fourth Geneva Convention were rendered absolutely necessary by military operations.

136. The Court would further observe that some human rights conventions, and in particular the International Covenant on Civil and Political Rights, contain provisions which States parties may invoke in order to derogate, under various conditions, from certain of their conventional obligations. In this respect, the Court would however recall that the communication notified by Israel to the Secretary-General of the United Nations under Article 4 of the International Covenant on Civil and Political Rights concerns only Article 9 of the Covenant, relating to the right to freedom and security of person (see paragraph 127 above); Israel is accordingly bound to respect all the other provisions of that instrument.

The Court would note, moreover, that certain provisions of human rights conventions contain clauses qualifying the rights covered by those provisions. There is no clause of this kind in Article 17 of the Interna-

tional Covenant on Civil and Political Rights. On the other hand, Article 12, paragraph 3, of that instrument provides that restrictions on liberty of movement as guaranteed under that Article

“shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant”.

As for the International Covenant on Economic, Social and Cultural Rights, Article 4 thereof contains a general provision as follows:

“The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.”

The Court would observe that the restrictions provided for under Article 12, paragraph 3, of the International Covenant on Civil and Political Rights are, by the very terms of that provision, exceptions to the right of freedom of movement contained in paragraph 1. In addition, it is not sufficient that such restrictions be directed to the ends authorized; they must also be necessary for the attainment of those ends. As the Human Rights Committee put it, they “must conform to the principle of proportionality” and “must be the least intrusive instrument amongst those which might achieve the desired result” (CCPR/C/21/Rev.1/Add.9, General Comment No. 27, para. 14). On the basis of the information available to it, the Court finds that these conditions are not met in the present instance.

The Court would further observe that the restrictions on the enjoyment by the Palestinians living in the territory occupied by Israel of their economic, social and cultural rights, resulting from Israel’s construction of the wall, fail to meet a condition laid down by Article 4 of the International Covenant on Economic, Social and Cultural Rights, that is to say that their implementation must be “solely for the purpose of promoting the general welfare in a democratic society”.

137. To sum up, the Court, from the material available to it, is not convinced that the specific course Israel has chosen for the wall was necessary to attain its security objectives. The wall, along the route chosen, and its associated régime gravely infringe a number of rights of Palestinians residing in the territory occupied by Israel, and the infringements resulting from that route cannot be justified by military exigencies or by the requirements of national security or public order. The construction of such a wall accordingly constitutes breaches by Israel of various

of its obligations under the applicable international humanitarian law and human rights instruments.

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138. The Court has thus concluded that the construction of the wall constitutes action not in conformity with various international legal obligations incumbent upon Israel. However, Annex I to the report of the Secretary-General states that, according to Israel: “the construction of the Barrier is consistent with Article 51 of the Charter of the United Nations, its inherent right to self-defence and Security Council resolutions 1368 (2001) and 1373 (2001)”. More specifically, Israel’s Permanent Representative to the United Nations asserted in the General Assembly on 20 October 2003 that “the fence is a measure wholly consistent with the right of States to self-defence enshrined in Article 51 of the Charter”; the Security Council resolutions referred to, he continued, “have clearly recognized the right of States to use force in self-defence against terrorist attacks”, and therefore surely recognize the right to use non-forcible measures to that end (A/ES-10/PV.21, p. 6).

139. Under the terms of Article 51 of the Charter of the United Nations:

“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”

Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State.

The Court also notes that Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory. The situation is thus different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (2001), and therefore Israel could not in any event invoke those resolutions in support of its claim to be exercising a right of self-defence.

Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case.

140. The Court has, however, considered whether Israel could rely on a state of necessity which would preclude the wrongfulness of the construction of the wall. In this regard the Court is bound to note that some of the conventions at issue in the present instance include qualifying clauses of the rights guaranteed or provisions for derogation (see para-

graphs 135 and 136 above). Since those treaties already address considerations of this kind within their own provisions, it might be asked whether a state of necessity as recognized in customary international law could be invoked with regard to those treaties as a ground for precluding the wrongfulness of the measures or decisions being challenged. However, the Court will not need to consider that question. As the Court observed in the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, “the state of necessity is a ground recognized by customary international law” that “can only be accepted on an exceptional basis”; it “can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met” (*I.C.J. Reports 1997*, p. 40, para. 51). One of those conditions was stated by the Court in terms used by the International Law Commission, in a text which in its present form requires that the act being challenged be “the only way for the State to safeguard an essential interest against a grave and imminent peril” (Article 25 of the International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts; see also former Article 33 of the Draft Articles on the International Responsibility of States, with slightly different wording in the English text). In the light of the material before it, the Court is not convinced that the construction of the wall along the route chosen was the only means to safeguard the interests of Israel against the peril which it has invoked as justification for that construction.

141. The fact remains that Israel has to face numerous indiscriminate and deadly acts of violence against its civilian population. It has the right, and indeed the duty, to respond in order to protect the life of its citizens. The measures taken are bound nonetheless to remain in conformity with applicable international law.

142. In conclusion, the Court considers that Israel cannot rely on a right of self-defence or on a state of necessity in order to preclude the wrongfulness of the construction of the wall resulting from the considerations mentioned in paragraphs 122 and 137 above. The Court accordingly finds that the construction of the wall, and its associated régime, are contrary to international law.

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143. The Court having concluded that, by the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, and by adopting its associated régime, Israel has violated various international obligations incumbent upon it (see paragraphs 114-137 above), it must now, in order to reply to the question posed by the General Assembly, examine the consequences of those violations.

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144. In their written and oral observations, many participants in the proceedings before the Court contended that Israel’s action in illegally constructing this wall has legal consequences not only for Israel itself, but also for other States and for the United Nations; in its Written Statement, Israel, for its part, presented no arguments regarding the possible legal consequences of the construction of the wall.

145. As regards the legal consequences for Israel, it was contended that Israel has, first, a legal obligation to bring the illegal situation to an end by ceasing forthwith the construction of the wall in the Occupied Palestinian Territory, and to give appropriate assurances and guarantees of non-repetition.

It was argued that, secondly, Israel is under a legal obligation to make reparation for the damage arising from its unlawful conduct. It was submitted that such reparation should first of all take the form of restitution, namely demolition of those portions of the wall constructed in the Occupied Palestinian Territory and annulment of the legal acts associated with its construction and the restoration of property requisitioned or expropriated for that purpose; reparation should also include appropriate compensation for individuals whose homes or agricultural holdings have been destroyed.

It was further contended that Israel is under a continuing duty to comply with all of the international obligations violated by it as a result of the construction of the wall in the Occupied Palestinian Territory and of the associated régime. It was also argued that, under the terms of the Fourth Geneva Convention, Israel is under an obligation to search for and bring before its courts persons alleged to have committed, or to have ordered to be committed, grave breaches of international humanitarian law flowing from the planning, construction and use of the wall.

146. As regards the legal consequences for States other than Israel, it was contended before the Court that all States are under an obligation not to recognize the illegal situation arising from the construction of the wall, not to render aid or assistance in maintaining that situation and to co-operate with a view to putting an end to the alleged violations and to ensuring that reparation will be made therefor.

Certain participants in the proceedings further contended that the States parties to the Fourth Geneva Convention are obliged to take measures to ensure compliance with the Convention and that, inasmuch as the construction and maintenance of the wall in the Occupied Palestinian Territory constitutes grave breaches of that Convention, the States parties to that Convention are under an obligation to prosecute or extradite the authors of such breaches. It was further observed that

“the United Nations Security Council should consider flagrant and systematic violation of international law norm[s] and principles by

Israel, particularly . . . international humanitarian law, and take all necessary measures to put an end [to] these violations",

and that the Security Council and the General Assembly must take due account of the advisory opinion to be given by the Court.

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147. Since the Court has concluded that the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated régime, are contrary to various of Israel's international obligations, it follows that the responsibility of that State is engaged under international law.

148. The Court will now examine the legal consequences resulting from the violations of international law by Israel by distinguishing between, on the one hand, those arising for Israel and, on the other, those arising for other States and, where appropriate, for the United Nations. The Court will begin by examining the legal consequences of those violations for Israel.

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149. The Court notes that Israel is first obliged to comply with the international obligations it has breached by the construction of the wall in the Occupied Palestinian Territory (see paragraphs 114-137 above). Consequently, Israel is bound to comply with its obligation to respect the right of the Palestinian people to self-determination and its obligations under international humanitarian law and international human rights law. Furthermore, it must ensure freedom of access to the Holy Places that came under its control following the 1967 War (see paragraph 129 above).

150. The Court observes that Israel also has an obligation to put an end to the violation of its international obligations flowing from the construction of the wall in the Occupied Palestinian Territory. The obligation of a State responsible for an internationally wrongful act to put an end to that act is well established in general international law, and the Court has on a number of occasions confirmed the existence of that obligation (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits*, *Judgment*, I.C.J. Reports 1986, p. 149; *United States Diplomatic and Consular Staff in Tehran*, *Judgment*, I.C.J. Reports 1980, p. 44, para. 95; *Haya de la Torre*, *Judgment*, I.C.J. Reports 1951, p. 82).

151. Israel accordingly has the obligation to cease forthwith the works of construction of the wall being built by it in the Occupied Palestinian Territory, including in and around East Jerusalem. Moreover, in view of the Court's finding (see paragraph 143 above) that Israel's violations of

its international obligations stem from the construction of the wall and from its associated régime, cessation of those violations entails the dismantling forthwith of those parts of that structure situated within the Occupied Palestinian Territory, including in and around East Jerusalem. All legislative and regulatory acts adopted with a view to its construction, and to the establishment of its associated régime, must forthwith be repealed or rendered ineffective, except in so far as such acts, by providing for compensation or other forms of reparation for the Palestinian population, may continue to be relevant for compliance by Israel with the obligations referred to in paragraph 153 below.

152. Moreover, given that the construction of the wall in the Occupied Palestinian Territory has, *inter alia*, entailed the requisition and destruction of homes, businesses and agricultural holdings, the Court finds further that Israel has the obligation to make reparation for the damage caused to all the natural or legal persons concerned. The Court would recall that the essential forms of reparation in customary law were laid down by the Permanent Court of International Justice in the following terms:

"The essential principle contained in the actual notion of an illegal act — a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals — is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it — such are the principles which should serve to determine the amount of compensation due for an act contrary to international law." (*Factory at Chorzów*, *Merits*, *Judgment No. 13*, 1928, P.C.I.J., Series A, No. 17, p. 47.)

153. Israel is accordingly under an obligation to return the land, orchards, olive groves and other immovable property seized from any natural or legal person for purposes of construction of the wall in the Occupied Palestinian Territory. In the event that such restitution should prove to be materially impossible, Israel has an obligation to compensate the persons in question for the damage suffered. The Court considers that Israel also has an obligation to compensate, in accordance with the applicable rules of international law, all natural or legal persons having suffered any form of material damage as a result of the wall's construction.

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154. The Court will now consider the legal consequences of the internationally wrongful acts flowing from Israel's construction of the wall as regards other States.

155. The Court would observe that the obligations violated by Israel include certain obligations *erga omnes*. As the Court indicated in the *Barcelona Traction* case, such obligations are by their very nature "the concern of all States" and, "In view of the importance of the rights involved, all States can be held to have a legal interest in their protection" (*Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970*, p. 32, para. 33). The obligations *erga omnes* violated by Israel are the obligation to respect the right of the Palestinian people to self-determination, and certain of its obligations under international humanitarian law.

156. As regards the first of these, the Court has already observed (paragraph 88 above) that in the *East Timor* case, it described as "irreproachable" the assertion that "the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character" (*I.C.J. Reports 1995*, p. 102, para. 29). The Court would also recall that under the terms of General Assembly resolution 2625 (XXV), already mentioned above (see paragraph 88),

"Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle . . ."

157. With regard to international humanitarian law, the Court recalls that in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* it stated that "a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of humanity' . . .", that they are "to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law" (*I.C.J. Reports 1996 (I)*, p. 257, para. 79). In the Court's view, these rules incorporate obligations which are essentially of an *erga omnes* character.

158. The Court would also emphasize that Article 1 of the Fourth Geneva Convention, a provision common to the four Geneva Conventions, provides that "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances." It follows from that provision that every State party to that Convention, whether or

not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with.

159. Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end. In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.

160. Finally, the Court is of the view that the United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime, taking due account of the present Advisory Opinion.

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161. The Court, being concerned to lend its support to the purposes and principles laid down in the United Nations Charter, in particular the maintenance of international peace and security and the peaceful settlement of disputes, would emphasize the urgent necessity for the United Nations as a whole to redouble its efforts to bring the Israeli-Palestinian conflict, which continues to pose a threat to international peace and security, to a speedy conclusion, thereby establishing a just and lasting peace in the region.

162. The Court has reached the conclusion that the construction of the wall by Israel in the Occupied Palestinian Territory is contrary to international law and has stated the legal consequences that are to be drawn from that illegality. The Court considers itself bound to add that this construction must be placed in a more general context. Since 1947, the year when General Assembly resolution 181 (II) was adopted and the Mandate for Palestine was terminated, there has been a succession of armed conflicts, acts of indiscriminate violence and repressive measures on the former mandated territory. The Court would emphasize that both Israel and Palestine are under an obligation scrupulously to observe the rules of international humanitarian law, one of the paramount purposes of which is to protect civilian life. Illegal actions and unilateral decisions have been taken on all sides, whereas, in the Court's view, this tragic

situation can be brought to an end only through implementation in good faith of all relevant Security Council resolutions, in particular resolutions 242 (1967) and 338 (1973). The “Roadmap” approved by Security Council resolution 1515 (2003) represents the most recent of efforts to initiate negotiations to this end. The Court considers that it has a duty to draw the attention of the General Assembly, to which the present Opinion is addressed, to the need for these efforts to be encouraged with a view to achieving as soon as possible, on the basis of international law, a negotiated solution to the outstanding problems and the establishment of a Palestinian State, existing side by side with Israel and its other neighbours, with peace and security for all in the region.

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163. For these reasons,

THE COURT,

(1) Unanimously,

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

(2) By fourteen votes to one,

*Decides* to comply with the request for an advisory opinion;

IN FAVOUR: *President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka;*  
AGAINST: *Judge Buergenthal;*

(3) *Replies* in the following manner to the question put by the General Assembly:

A. By fourteen votes to one,

The construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated régime, are contrary to international law;

IN FAVOUR: *President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka;*  
AGAINST: *Judge Buergenthal;*

B. By fourteen votes to one,

Israel is under an obligation to terminate its breaches of international law; it is under an obligation to cease forthwith the works of construction of the wall being built in the Occupied Palestinian Territory, including in and around East Jerusalem, to dismantle forthwith the structure therein situated, and to repeal or render ineffective forthwith

all legislative and regulatory acts relating thereto, in accordance with paragraph 151 of this Opinion;

IN FAVOUR: *President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka;*  
AGAINST: *Judge Buergenthal;*

C. By fourteen votes to one,

Israel is under an obligation to make reparation for all damage caused by the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem;

IN FAVOUR: *President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka;*  
AGAINST: *Judge Buergenthal;*

D. By thirteen votes to two,

All States are under an obligation not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction; all States parties to the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 have in addition the obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention;

IN FAVOUR: *President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka;*  
AGAINST: *Judges Kooijmans, Buergenthal;*

E. By fourteen votes to one,

The United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime, taking due account of the present Advisory Opinion.

IN FAVOUR: *President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka;*  
AGAINST: *Judge Buergenthal.*

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this ninth day of July, two thousand and

four, in two copies, one of which will be placed in the archives of the Court and the other transmitted to the Secretary-General of the United Nations.

*(Signed)* SHI Jiuyong,  
President.

*(Signed)* Philippe COUVREUR,  
Registrar.

Judges KOROMA, HIGGINS, KOUMANS and AL-KHASAWNEH append separate opinions to the Advisory Opinion of the Court; Judge BUERGENTHAL appends a declaration to the Advisory Opinion of the Court; Judges ELARABY and OWADA append separate opinions to the Advisory Opinion of the Court.

*(Initialed)* J.Y.S.  
*(Initialed)* Ph.C.

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**Amnesty International**

***Report of an Amnesty International Mission to Argentina***

6- 15 November 1976 (excerpts)

PREFACE

In Argentina, on 24 March 1976, the government of María Estela Martínez de Perón was overthrown by a military coup. To many observers the event seemed hopeful; possibly the military would provide a solution to the country's formidable problems: the continual outbreaks of terrorism, the alarming effects of spiralling inflation, the ubiquity of political imprisonment and the numerous mysterious abductions. The new President, General Jorge Rafael Videla, issued a series of statements. He pledged himself to restore respect for human rights; he would also eliminate terrorism and "monopolize" the use of violence.

Following the coup, all violence increased. For the first three months after 24 March, twice as many political murders were reported as in the three months before. The number of arrests and abductions mounted; so too did the number of allegations of torture and the incidence of deaths in custody.

In November 1976, on account of this serious situation, a delegation was sent to Argentina by Amnesty International. The delegates were Lord Avebury, a member of the British House of Lords and of the Human Rights Parliamentary Commission, Father Robert Drinan, a member of the House of Representatives of the United States Congress and Patricia Feeney, a British member of the International Secretariat of Amnesty International. The intention of the delegates was to discuss the following subjects with members of the government: the number and identity of political prisoners; the allegations of torture; the alleged complicity of the police and military in illegal and violent abductions; the status and security of Latin American refugees; the nature and effects of the legislation enacted since the coup.

The members of the mission were unfortunately unable to arrange an interview with President Videla. They did, however, have lengthy discussions with a number of high-ranking officials:

- The Under-Secretary of Foreign Affairs: Capitan de Navio Don Gualter Allara;
- The Under-Secretary of Justice: Dr Laureano Alavarez Estrada;
- For the Chancellor: Consejero Juan Carlos Arlia
- Licenciado Rodolfo Fischer
- For the Minister of the Interior: Licenciado Francisco Muro;
- Señor Eduardo Andujar
- For the Minister of Justice: Señor Ricardo Flouret;
- Señor Luis Riggi;

While grateful for having been granted these interviews, the Amnesty delegates could not help regretting some other decisions taken

by the government regarding their visit. At least 20 plainclothes policemen, ostensibly assigned to protect the delegates, followed them wherever they went, and questioned, intimidated and even detained a number of people whom they met. The intention to intimidate was apparent from the outset: these policemen first arrived in the delegates' hotel at midnight on 8 November and claimed to be offering official assistance, even though neither the British nor the American Embassy had been given notice of this arrangement and neither Lord Avebury nor Father Drinan, in their meeting earlier that day with members of the Argentine government, had been told anything about it. The policemen, moreover, were consistently reluctant to give proof of their identity.

At times the number of plainclothes policemen purporting to protect the members of the mission was so great that it seriously limited their freedom of inquiry. During an official visit to two refugee hostels the delegates were accompanied by four Ford Falcons containing 16 armed men; their proximity did little to reassure the refugees or encourage communication.

The most serious harassment occurred in Cordoba where several people who met the delegates were openly threatened by plainclothes policemen. Two women were actually detained, without their families being told. One woman was held for 24 hours; the other for two weeks.

The attitude of the government to the Amnesty mission was also apparent from the nature of the reports issued by the official news-agency, TELAM. These reports described fictitious incidents and carried gross misrepresentations of statements made by the delegates, who felt obliged to issue a formal statement to correct the inaccuracies.

The following report on the condition of human rights in Argentina is based partly on information gathered during the mission from members of the government and from private individuals. But it also uses much evidence from material received by Amnesty International since the coup d'etat. This material includes not only government statements and newspaper reports, but numerous testimonies from prisoners and the relatives of missing persons. The testimonies referred to in this report have either been previously published or else concern people no longer living in Argentina.

Martin Ennals  
Secretary General  
Amnesty International

though in many cases they eventually discover that the disappeared person is dead.

The neglect of human rights in Argentina is all the more alarming in that it has no foreseeable end. According to provisions in the Constitution, the State of Siege may be declared only for a specified period of time; but no limit has ever been fixed by the present or the previous government. The citizens of Argentina therefore face an indefinite period without constitutional guarantees; prisoners in preventive detention face indefinite incarceration. There is no limit to the duration of the military government, no limit to the period a prisoner may be held incommunicado and no limit to the time that may elapse before he is brought to trial.

The current legislation in Argentina, together with the latitude allowed to various security forces, has then quite definitely led to gross violations of basic human rights. According to the government, the draconian legislation has been necessary to "restore full legal and social order" and to implement the required program of "national reorganization". A government official explained to the Amnesty International delegation:

"Systematic subversion and terrorism have cost the lives of many police and military and have compromised the security of the Argentine people. These activities have been repudiated by all citizens. If anybody violates human rights in Argentina, murdering, torturing and bombing, it is undoubtedly the terrorists. These people use violence for its own sake or to create chaos and destruction. We understand that the state has a right to defend itself, using whatever force is necessary."

It is true that any impartial observer must condemn the outrages committed by left-wing extremist groups: they have detonated bombs in barracks and police stations, have kidnapped and assassinated members of the military and business executives. However, it does not seem to Amnesty International that terrorist violence may be held to justify the extreme, and extensive, measures taken since the coup by the government. Firstly, it is doubtful whether these measures are in fact entirely defensive, no more than what is necessary to contain guerrilla violence. The military itself admits that this violence has been greatly reduced\* - yet abductions, torture and executions apparently committed by the security forces continue unabated. In 1976, left-wing extremists were allegedly responsible for some 400-500 deaths; the security forces and parapolice groups for over 1,000. Secondly, even if these measures were justifiable as a counter-response to extremist provocation, the undeniable fact would remain that they also strike at innocent citizens. Given the present legislation, no one can rely on legal protection, and in view of the practice of the security forces, no one is safe from abduction

\* Speech of General Menendez in Famailia in the Province of Tucuman to celebrate the "Day of the Flag" (20 June 1976): "Subversion is generally in retreat and on the way to collapse."

CONCLUSION

In view of the current turmoil in Argentina, a report concerned with human rights must conclude by asking two basic questions. First, to what extent are human rights respected and defended by the government and to what extent are they violated? Secondly, to what extent are the violations explicable or necessary? On both of these questions, the assertions of the government are not supported by the facts available to Amnesty International.

After the coup in March 1976, General Videla stated that the military government had come to power "not to trample on liberty but to consolidate it, not to twist justice but to impose it". But legislation passed since the coup has progressively eroded the individual's liberty and numerous members of the security forces have trampled on that which remains. Justice has been perverted twice - by the imposition of laws which contravene the Constitution, and by the reluctance of the security forces to acknowledge any laws at all.

The state of martial law which is currently in force deprives all the citizens in Argentina of the most fundamental civil and political rights, their constitutional guarantees. What it means in practice is that merely on suspicion of subversion, a citizen may be arrested or abducted, held for a long period incommunicado, tortured and perhaps even put to death. He has no legal safeguards against these measures, and, if it happens that he is released, no hope of legal redress.

Fundamental constitutional guarantees have been suspended since the coup, including the important Right of Opinion, which is now - unconstitutionally - at the discretion of the Executive Power. Military tribunals have been set up for all crimes pertaining to subversion; sweeping powers of arrest and detention have been conferred on the police. Furthermore, many of the decrees of the military junta free the police and the armed forces from any legal liability in the event of persons innocent of any subversive involvement or intention being detained, injured or killed.

The official suspension and unofficial neglect of fundamental legal rights has had alarming results. Since the coup, the number of political prisoners has increased - and more than three-quarters of these persons are detained at the disposal of the Executive Power: they have never been charged, have never been tried, and may be held indefinitely. Although, according to the Constitution, such prisoners are not supposed to be punished, they are held in punitive conditions. There is evidence that many have been maltreated during transfers and that the majority of them have been tortured as a matter of routine. Frequently, torture has been inflicted on people who have not been officially arrested but merely unofficially abducted. The number of abductions has increased since the coup. Friends and relatives find it all but impossible to ascertain the whereabouts of disappeared persons,

and torture. Amnesty International believes there is overwhelming evidence that many innocent citizens have been imprisoned without trial, have been tortured and have been killed. The actions taken against subversives have therefore been self-defeating: in order to restore security, an atmosphere of terror has been established; in order to counter illegal violence, legal safeguards have been removed and violent illegalities condoned.

RECOMMENDATIONS ARISING OUT OF A MISSION TO ARGENTINA  
ON BEHALF OF AMNESTY INTERNATIONAL FROM 6 - 15 NOVEMBER 1976  
SUBMITTED TO THE ARGENTINIAN GOVERNMENT IN FEBRUARY 1977

1. In view of the severe criticisms contained in this report, we recommend that the Argentinian government invite the United Nations to send a mission to investigate the situation of human rights in Argentina at an early opportunity.
2. Given the present anxiety about the whereabouts and security of the detainees, we recommend that the government immediately publish a full list of all its prisoners.
3. In view of the many allegations regarding poor conditions and maltreatment of prisoners, we recommend that the Argentinian authorities enforce Article 18 of the Argentinian Constitution and the United Nations Standard Minimum Rules for the Treatment of Prisoners.
4. Given the large number of politically motivated deaths by armed groups, Amnesty International urges that all those responsible be sought out and brought to trial.
5. In view of the widespread use of torture, Amnesty International refers the Argentinian government to the Resolution adopted by the General Assembly of the United Nations 3452 (XXX) on 9 December 1975 and urges the Argentinian government to implement the recommendations contained therein.
6. Given the uncertainty of relatives of missing persons about their fate, we recommend that a list of all politically motivated deaths and registered disappearances be immediately published. Amnesty International urges that the authorities immediately investigate the disappearance of the persons listed in Appendix 6.
7. In view of the large number of assaults and attacks on Latin American refugees during 1976, we urge the Argentinian government to take immediate steps to ensure their full protection. We further recommend that the Argentinian government withdraw the Geographical Limitation contained in Article 1B(1)(a) of the United Nations 1951 Convention on the Status of Refugees and do all in its power to assist the United Nations High Commission for Refugees in the peaceful resettlement of refugees.
8. Considering that no citizen should be indefinitely deprived of his constitutional rights, we urge the Argentinian government to announce a time limit for the State of Siege.