Regional courses in international law

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STUDY MATERIALS
PART II

Codification Division of the United Nations Office of Legal Affairs

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STUDY MATERIALS
PART II

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STATE JURISDICTION AND IMMUNITIES
PROFESSOR MARIKO KAWANO

Bangkok, Thailand
13 November 2012

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No. 4

CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS

Adopted by the General Assembly of the United Nations on 13 February 1946

Official texts in English and in French. This Convention was registered ex officio by the Secretariat of the United Nations on 14 December 1946.

CONVENTION SUR LES PRIVILÈGES ET IMMUNITÉS DES NATIONS UNIES

Approuvée par l'Assemblée générale des Nations Unies le 13 février 1946

No. 4. CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS, ADOPTED BY THE GENERAL ASSEMBLY OF THE UNITED NATIONS ON 13 FEBRUARY 1946

Whereas Article 104 of the Charter of the United Nations provides that the Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes and

Whereas Article 105 of the Charter of the United Nations provides that the Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes and that representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.

Consequently the General Assembly by a Resolution adopted on the 13 February 1946, approved the following Convention and proposed it for accession by each Member of the United Nations.

Article I
Juridical Personality

Section 1. The United Nations shall possess juridical personality. It shall have the capacity:

(a) To contract;
(b) To acquire and dispose of immovable and movable property;
(c) To institute legal proceedings.

Article II
Property, Funds and Assets

Section 2. The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity shall extend to any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.

Section 3. The premises of the United Nations shall be inviolable. The property and assets of the United Nations, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action.

Section 4. The archives of the United Nations, and in general all documents belonging to it or held by it, shall be inviolable wherever located.

Section 5. Without being restricted by financial controls, regulations or moratoria of any kind,

(a) The United Nations may hold funds, gold or currency of any kind and operate accounts in any currency;
(b) The United Nations shall be free to transfer its funds, gold or currency from one country to another or within any country and to convert any currency held by it into any other currency.

Section 6. In exercising its rights under Section 5 above, the United Nations shall pay due regard to any representations made by the Government of any Member insofar as it is considered that effect can be given to such representations without detriment to the interests of the United Nations.

Section 7. The United Nations, its assets, income and other property shall be:

(a) Exempt from all direct taxes; it is understood, however, that the United Nations will not claim exemption from taxes which are, in fact, no more than charges for public utility services;

(b) Exempt from customs duties and prohibitions and restrictions on imports and exports in respect of articles imported or exported by the United Nations for its official use. It is understood, however, that articles imported under such exemption will not be sold in the country into which they were imported except under conditions agreed with the Government of that country;

1 Came into force (see page 263 of this volume) on 17 September 1946 as regards United Kingdom of Great Britain and Northern Ireland by the deposit of the instrument of accession.
(c) Exempt from customs duties and prohibitions and restrictions on imports and exports in respect of its publications.

Section 8. While the United Nations will not, as a general rule, claim exemption from excise duties and from taxes on the sale of movable and immovable property which form part of the price to be paid, nevertheless when the United Nations is making important purchases for official use of property on which such duties and taxes have been charged or are chargeable, Members will, whenever possible, make appropriate administrative arrangements for the remission or return of the amount of duty or tax.

Article III

Facilities in Respect of Communications

Section 9. The United Nations shall enjoy in the territory of each Member for its official communications treatment not less favourable than that accorded by the Government of that Member to any other Government including its diplomatic mission in the matter of priorities, rates and taxes on mails, cables, telegrams, radiograms, telephones, telephone and other communications; and press rates for information to the press and radio. No censorship shall be applied to the official correspondence and other official communications of the United Nations.

Section 10. The United Nations shall have the right to use codes and to despatch and receive its correspondence by courier or in bags, which shall have the same immunities and privileges as diplomatic couriers and bags.

Article IV

The Representatives of Members

Section 11. Representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations, shall, while exercising their functions and during the journey to and from the place of meeting, enjoy the following privileges and immunities:

(a) Immunity from personal arrest or detention and from seizure of their personal baggage, and, in respect of words spoken or written and all acts done by them in their capacity as representatives, immunity from legal process of every kind;

(b) Inviolability for all papers and documents;

(c) The right to use codes and to receive papers or correspondence by courier or in sealed bags;

(d) Exemption in respect of themselves and their spouses from immigration restrictions, aliens registration or national service obligations in the state they are visiting or through which they are passing in the exercise of their functions;

(e) The same facilities in respect of currency or exchange restrictions as are accorded to representatives of foreign governments on temporary official missions;

(f) The same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys, and also;

(g) Such other privileges, immunities and facilities not inconsistent with the foregoing as diplomatic envoys enjoy, except that they shall have no right to claim exemption from customs duties on goods imported (otherwise than as part of their personal baggage) or from excise duties or sales taxes.

Section 12. In order to secure, for the representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations, complete freedom of speech and independence in the discharge of their duties, the immunity from legal process in respect of words spoken or written and all acts done by them in discharging their duties shall continue to be accorded, notwithstanding that the persons concerned are no longer the representatives of Members.

Section 13. Where the incidence of any form of taxation depends upon residence, periods during which the representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations are present in a state for the discharge of their duties shall not be considered as periods of residence.

Section 14. Privileges and immunities are accorded to the representatives of Members not for the personal benefit of the individuals themselves, but in order to safeguard the independent exercise of their functions in connection with the United Nations. Consequently a Member not only has the right but is under a duty to waive the immunity of its representative in any case where in the opinion of the Member the immunity would impede the course of justice, and it can be waived without prejudice to the purpose for which the immunity is accorded.
SECTION 15. The provisions of Sections 11, 12 and 13 are not applicable as between a representative and the authorities of the state of which he is a national or of which he is or has been the representative.

SECTION 16. In this article the expression "representatives" shall be deemed to include all delegates, deputy delegates, advisers, technical experts and secretaries of delegations.

Article V

Officials

SECTION 17. The Secretary-General will specify the categories of officials to which the provisions of this Article and Article VII shall apply. He shall submit these categories to the General Assembly. Thereafter these categories shall be communicated to the Governments of all Members. The names of the officials included in these categories shall from time to time be made known to the Governments of Members.

SECTION 18. Officials of the United Nations shall:

(a) Be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity;

(b) Be exempt from taxation on the salaries and emoluments paid to them by the United Nations;

(c) Be immune from national service obligations;

(d) Be immune, together with their spouses and relatives dependent on them, from immigration restrictions and alien registration;

(e) Be accorded the same privileges in respect of exchange facilities as are accorded to the officials of comparable ranks forming part of diplomatic missions to the Government concerned;

(f) Be given, together with their spouses and relatives dependent on them, the same repatriation facilities in time of international crisis as diplomatic envoys;

(g) Have the right to import free of duty their furniture and effects at the time of first taking up their post in the country in question.

SECTION 19. In addition to the immunities and privileges specified in Section 18, the Secretary-General and all Assistant Secretaries-General shall be accorded in respect of themselves, their spouses and minor children, the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law.

SECTION 20. Privileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations. In the case of the Secretary-General, the Security Council shall have the right to waive immunity.

SECTION 21. The United Nations shall co-operate at all times with the appropriate authorities of Members to facilitate the proper administration of justice, secure the observance of police regulations and prevent the occurrence of any abuse in connection with the privileges, immunities and facilities mentioned in this Article.

Article VI

Experts on Missions for the United Nations

SECTION 22. Experts (other than officials coming within the scope of Article V) performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including the time spent on journeys in connection with their missions. In particular they shall be accorded:

(a) Immunity from personal arrest or detention and from seizure of their personal baggage;

(b) In respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations;

(c) Inviolability for all papers and documents;

(d) For the purpose of their communications with the United Nations, the right to use codes and to receive papers or correspondence by courier or in sealed bags;
(e) The same facilities in respect of currency or exchange restrictions as are accorded to representatives of foreign governments on temporary official missions;
(f) The same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys.

Section 23. Privileges and immunities are granted to experts in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any expert in any case where, in his opinion, the immunity would impede the course of justice and it can be waived without prejudice to the interests of the United Nations.

Article VII
United Nations Laissez-Passer

Section 24. The United Nations may issue United Nations laissez-passer to its officials. These laissez-passer shall be recognized and accepted as valid travel documents by the authorities of Members, taking into account the provisions of Section 25.

Section 25. Applications for visas (where required) from the holders of United Nations laissez-passer, when accompanied by a certificate that they are travelling on the business of the United Nations, shall be dealt with as speedily as possible. In addition, such persons shall be granted facilities for speedy travel.

Section 26. Similar facilities to those specified in Section 25 shall be accorded to experts and other persons who, though not the holders of United Nations laissez-passer, have a certificate that they are travelling on the business of the United Nations.

Section 27. The Secretary-General, Assistant Secretaries-General and Directors travelling on United Nations laissez-passer on the business of the United Nations shall be granted the same facilities as are accorded to diplomatic envoys.

Section 28. The provisions of this article may be applied to the comparable officials of specialized agencies if the agreements for relationship made under Article 65 of the Charter so provide.

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Article VIII
Settlements of Disputes

Section 29. The United Nations shall make provisions for appropriate modes of settlement of:

(a) Disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party;

(b) Disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General.

Section 30. All differences arising out of the interpretation or application of the present convention shall be referred to the International Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement. If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties.

Final Article

Section 31. This convention is submitted to every Member of the United Nations for accession.

Section 32. Accession shall be affected by deposit of an instrument with the Secretary-General of the United Nations and the convention shall come into force as regards each Member on the date of deposit of each instrument of accession.

Section 33. The Secretary-General shall inform all Members of the United Nations of the deposit of each accession.

Section 34. It is understood that, when an instrument of accession is deposited on behalf of any Member, the Member will be in a position under its own law to give effect to the terms of this convention.

Section 35. This convention shall continue in force as between the United Nations and every Member which has deposited an instrument of accession for so long as that Member remains a Member of the United
Nations, or until a revised general convention has been approved by the General Assembly and that Member has become a party to this revised convention.

Section 36. The Secretary-General may conclude with any Member or Members supplementary agreements adjusting the provisions of this convention so far as that Member or those Members are concerned. These supplementary agreements shall in each case be subject to the approval of the General Assembly.
United Nations Convention on Jurisdictional Immunities of States and Their Property, 2004
United Nations Convention on Jurisdictional Immunities of States and Their Property

The States Parties to the present Convention,

Considering that the jurisdictional immunities of States and their property are generally accepted as a principle of customary international law,

Having in mind the principles of international law embodied in the Charter of the United Nations,

Believing that an international convention on the jurisdictional immunities of States and their property would enhance the rule of law and legal certainty, particularly in dealings of States with natural or juridical persons, and would contribute to the codification and development of international law and the harmonization of practice in this area,

Taking into account developments in State practice with regard to the jurisdictional immunities of States and their property,

Affirming that the rules of customary international law continue to govern matters not regulated by the provisions of the present Convention,

Have agreed as follows:

PART I
INTRODUCTION

Article 1
Scope of the present Convention

The present Convention applies to the immunity of a State and its property from the jurisdiction of the courts of another State.

Article 2
Use of terms

1. For the purposes of the present Convention:

(a) "court" means any organ of a State, however named, entitled to exercise judicial functions;

(b) "State" means:

(i) the State and its various organs of government;

(ii) constituent units of a federal State or political subdivisions of the State, which are entitled to perform acts in the exercise of sovereign authority, and are acting in that capacity;

(iii) agencies or instrumentalities of the State or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State;

(iv) representatives of the State acting in that capacity;

(c) "commercial transaction" means:

(i) any commercial contract or transaction for the sale of goods or supply of services;

(ii) any contract for a loan or other transaction of a financial nature, including any obligation of guarantee or of indemnity in respect of any such loan or transaction;

(iii) any other contract or transaction of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.

2. In determining whether a contract or transaction is a "commercial transaction" under paragraph 1(c), reference should be made primarily to the nature of the contract or transaction, but its
purpose should also be taken into account if the parties to the contract or transaction have so agreed, or if, in the practice of the State of the forum, that purpose is relevant to determining the non-commercial character of the contract or transaction.

3. The provisions of paragraphs 1 and 2 regarding the use of terms in the present Convention are without prejudice to the use of those terms or to the meanings which may be given to them in other international instruments or in the internal law of any State.

Article 3
Privileges and immunities not affected by the present Convention

1. The present Convention is without prejudice to the privileges and immunities enjoyed by a State under international law in relation to the exercise of the functions of:
   (a) its diplomatic missions, consular posts, special missions, missions to international organizations or delegations to organs of international organizations or to international conferences; and
   (b) persons connected with them.

2. The present Convention is without prejudice to privileges and immunities accorded under international law to heads of State ratione persona.

3. The present Convention is without prejudice to the immunities enjoyed by a State under international law with respect to aircraft or space objects owned or operated by a State.

Article 4
Non-retroactivity of the present Convention

Without prejudice to the application of any rules set forth in the present Convention to which jurisdictional immunities of States and their property are subject under international law independently of the present Convention, the present Convention shall not apply to any question of jurisdictional immunities of States or their property arising in a proceeding instituted against a State before a court of another State prior to the entry into force of the present Convention for the States concerned.

PART II
GENERAL PRINCIPLES

Article 5
State immunity

A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present Convention.

Article 6
Modalities for giving effect to State immunity

1. A State shall give effect to State immunity under article 5 by refraining from exercising jurisdiction in a proceeding before its courts against another State and to that end shall ensure that its courts determine on their own initiative that the immunity of that other State under article 5 is respected.

2. A proceeding before a court of a State shall be considered to have been instituted against another State if that other State:
   (a) is named as a party to that proceeding; or
   (b) is not named as a party to the proceeding but the proceeding in effect seeks to affect the property, rights, interests or activities of that other State.

Article 7
Express consent to exercise of jurisdiction

1. A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State with regard to a matter or case if it has expressly consented to the exercise of jurisdiction by the court with regard to the matter or case:
   (a) by international agreement;
   (b) in a written contract; or
   (c) by a declaration before the court or by a written communication in a specific proceeding.

2. Agreement by a State for the application of the law of another State shall not be interpreted as consent to the exercise of jurisdiction by the courts of that other State.

Article 8
Effect of participation in a proceeding before a court

1. A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State if it has:
   (a) itself instituted the proceeding; or
   (b) intervened in the proceeding or taken any other step relating to the merits. However, if the State satisfies the court that it could not have acquired knowledge of facts on which a claim to immunity can be based until after it took such a step, it can claim immunity based on those facts, provided it does so at the earliest possible moment.

2. A State shall not be considered to have consented to the exercise of jurisdiction by a court of another State if it intervenes in a proceeding or takes any other step for the sole purpose of:
   (a) invoking immunity; or
   (b) asserting a right or interest in property at issue in the proceeding.

3. The appearance of a representative of a State before a court of another State as a witness shall not be interpreted as consent by the former State to the exercise of jurisdiction by the court.

4. Failure on the part of a State to enter an appearance in a proceeding before a court of another State shall not be interpreted as consent by the former State to the exercise of jurisdiction by the court.

Article 9
Counterclaims

1. A State instituting a proceeding before a court of another State cannot invoke immunity from the jurisdiction of the court in respect of any counterclaim arising out of the same legal relationship or facts as the principal claim.

2. A State intervening to present a claim in a proceeding before a court of another State cannot invoke immunity from the jurisdiction of the court in respect of any counterclaim arising out of the same legal relationship or facts as the claim presented by the State.

3. A State making a counterclaim in a proceeding instituted against it before a court of another State cannot invoke immunity from the jurisdiction of the court in respect of the principal claim.

PART III
PROCEEDINGS IN WHICH STATE IMMUNITY CANNOT BE INVOKED
Article 10
Commercial transactions

1. If a State engages in a commercial transaction with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial transaction fall within the jurisdiction of a court of another State, the State cannot invoke immunity from that jurisdiction in a proceeding arising out of that commercial transaction.

2. Paragraph 1 does not apply:
(a) in the case of a commercial transaction between States; or
(b) if the parties to the commercial transaction have expressly agreed otherwise.

3. Where a State enterprise or other entity established by a State which has an independent legal personality and is capable of:
(a) suing or being sued; and
(b) acquiring, owning or possessing and disposing of property, including property which that State has authorized it to operate or manage,
is involved in a proceeding which relates to a commercial transaction in which that entity is engaged, the immunity from jurisdiction enjoyed by that State shall not be affected.

Article 11
Contracts of employment

1. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to a contract of employment between the State and an individual for work performed or to be performed, in whole or in part, in the territory of that other State.

2. Paragraph 1 does not apply if:
(a) the employee has been recruited to perform particular functions in the exercise of governmental authority;
(b) the employee is:
(i) a diplomatic agent, as defined in the Vienna Convention on Diplomatic Relations of 1961;
(ii) a consular officer, as defined in the Vienna Convention on Consular Relations of 1963;
(iii) a member of the diplomatic staff of a permanent mission to an international organization or of a special mission, or is recruited to represent a State at an international conference; or
(iv) any other person enjoying diplomatic immunity;
(c) the subject-matter of the proceeding is the recruitment, renewal of employment or reinstatement of an individual;
(d) the subject-matter of the proceeding is the dismissal or termination of employment of an individual and, as determined by the head of State, the head of Government or the Minister for Foreign Affairs of the employer State, such a proceeding would interfere with the security interests of that State;
(e) the employee is a national of the employer State at the time when the proceeding is instituted, unless this person has the permanent residence in the State of the forum; or
(f) the employer State and the employee have otherwise agreed in writing, subject to any considerations of public policy conferring on the courts of the State of the forum exclusive jurisdiction by reason of the subject-matter of the proceeding.

Article 12
Personal injuries and damage to property

Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission.

Article 13
Ownership, possession and use of property

Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to the determination of:
(a) any right or interest of the State in, or its possession or use of, or any obligation of the State arising out of its interest in, or its possession or use of, immovable property situated in the State of the forum;
(b) any right or interest of the State in movable or immovable property arising by way of succession, gift or bona vacantia; or
(c) any right or interest of the State in the administration of property, such as trust property, the estate of a bankrupt or the property of a company in the event of its winding up.

Article 14
Intellectual and industrial property

Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to:
(a) the determination of any right of the State in a patent, industrial design, trade name or business name, trademark, copyright or any other form of intellectual or industrial property which enjoys a measure of legal protection, even if provisional, in the State of the forum; or
(b) an alleged infringement by the State, in the territory of the State of the forum, of a right of the nature mentioned in subparagraph (a) which belongs to a third person and is protected in the State of the forum.

Article 15
Participation in companies or other collective bodies

1. A State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to its participation in a company or other collective body, whether incorporated or unincorporated, being a proceeding concerning the relationship between the State and the body or the other participants therein, provided that the body:
(a) has participants other than States or international organizations; and
(b) is incorporated or constituted under the law of the State of the forum or has its seat or principal place of business in that State.

2. A State can, however, invoke immunity from jurisdiction in such a proceeding if the States concerned have so agreed or if the parties to the dispute have so provided by an agreement in writing or if the instrument establishing or regulating the body in question contains provisions to that effect.
Article 16
Ships owned or operated by a State

1. Unless otherwise agreed between the States concerned, a State which owns or operates a ship cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to the operation of that ship if, at the time the cause of action arose, the ship was used for other than government non-commercial purposes.

2. Paragraph 1 does not apply to warships, or naval auxiliaries, nor does it apply to other vessels owned or operated by a State and used, for the time being, on government non-commercial service.

3. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to the carriage of cargo on board a ship owned or operated by that State if, at the time the cause of action arose, the ship was used for other than government non-commercial purposes.

4. Paragraph 3 does not apply to any cargo carried on board the ships referred to in paragraph 2, nor does it apply to any cargo owned by a State and used or intended for use exclusively for government non-commercial purposes.

5. States may plead all measures of defence, prescription and limitation of liability which are available to private ships and cargoes and their owners.

6. If in a proceeding there arises a question relating to the government and non-commercial character of a ship owned or operated by a State or cargo owned by a State and used or intended for use exclusively for government non-commercial purposes.

Article 17
Effect of an arbitration agreement

If a State enters into an agreement in writing with a foreign natural or juridical person to submit to arbitration differences relating to a commercial transaction, that State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to:

(a) the validity, interpretation or application of the arbitration agreement;

(b) the arbitration procedure; or

(c) the confirmation or the setting aside of the award,

unless the arbitration agreement otherwise provides.

PART IV
STATE IMMUNITY FROM MEASURES OF CONSTRAINT IN CONNECTION WITH PROCEEDINGS BEFORE A COURT

Article 18
State immunity from pre-judgment measures of constraint

No pre-judgment measures of constraint, such as attachment or arrest, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:

(a) the State has expressly consented to the taking of such measures as indicated:

(i) by international agreement;

(ii) by an arbitration agreement or in a written contract; or

(b) it has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes under article 19, subparagraph (c);

(c) the confirmation or the setting aside of the award,

unless the arbitration agreement otherwise provides.

Article 19
State immunity from post-judgment measures of constraint

No post-judgment measures of constraint, such as attachment, arrest or execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:

(a) the State has expressly consented to the taking of such measures as indicated:

(i) by international agreement;

(ii) by an arbitration agreement or in a written contract; or

(iii) by a declaration before the court or by a written communication after a dispute between the parties has arisen; or

(b) the State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding.

Article 20
Effect of consent to jurisdiction to measures of constraint

Where consent to the measures of constraint is required under articles 18 and 19, consent to the exercise of jurisdiction under article 7 shall not imply consent to the taking of measures of constraint.

Article 21
Specific categories of property

1. The following categories, in particular, of property of a State shall not be considered as property specifically in use or intended for use by the State for other than government non-commercial purposes under article 19, subparagraph (c):

(a) property, including any bank account, which is used or intended for use in the performance of the functions of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations or delegations to organs of international organizations or to international conferences;

(b) property of a military character or used or intended for use in the performance of military functions;

(c) property of the central bank or other monetary authority of the State;

(d) property forming part of the cultural heritage of the State or part of its archives and not placed or intended to be placed on sale;

(e) property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale.

2. Paragraph 1 is without prejudice to article 18 and article 19, subparagraphs (a) and (b).
PART V
MISCELLANEOUS PROVISIONS

Article 22
Service of process

1. Service of process by writ or other document instituting a proceeding against a State shall be effected:
   
   (a) in accordance with any applicable international convention binding on the State of the forum and the State concerned; or
   
   (b) in accordance with any special arrangement for service between the claimant and the State concerned, if not precluded by the law of the State of the forum; or
   
   (c) in the absence of such a convention or special arrangement:
      
      (i) by transmission through diplomatic channels to the Ministry of Foreign Affairs of the State concerned; or
      
      (ii) by any other means accepted by the State concerned, if not precluded by the law of the State of the forum.

2. Service of process referred to in paragraph 1 (c) (i) is deemed to have been effected by receipt of the documents by the Ministry of Foreign Affairs.

3. These documents shall be accompanied, if necessary, by a translation into the official language, or one of the official languages, of the State concerned.

4. Any State that enters an appearance on the merits in a proceeding instituted against it may not thereafter assert that service of process did not comply with the provisions of paragraphs 1 and 3.

Article 23
Default judgment

1. A default judgment shall not be rendered against a State unless the court has found that:

   (a) the requirements laid down in article 22, paragraphs 1 and 3, have been complied with;

   (b) a period of not less than four months has expired from the date on which the service of the writ or other document instituting a proceeding has been effected or deemed to have been effected in accordance with article 22, paragraphs 1 and 2; and

   (c) the present Convention does not preclude it from exercising jurisdiction.

2. A copy of any default judgment rendered against a State, accompanied if necessary by a translation into the official language or one of the official languages of the State concerned, shall be transmitted to it through one of the means specified in article 22, paragraph 1, and in accordance with the provisions of that paragraph.

3. The time-limit for applying to have a default judgment set aside shall not be less than four months and shall begin to run from the date on which the copy of the judgment is received or is deemed to have been received by the State concerned.

Article 24
Privileges and immunities during court proceedings

1. Any failure or refusal by a State to comply with an order of a court of another State enjoining it to perform or refrain from performing a specific act or to produce any document or disclose any other information for the purposes of a proceeding shall entail no consequences other than those which may result from such conduct in relation to the merits of the case. In particular, no fine or penalty shall be imposed on the State by reason of such failure or refusal.

2. A State shall not be required to provide any security, bond or deposit, however described, to guarantee the payment of judicial costs or expenses in any proceeding to which it is a respondent party before a court of another State.

PART VI
FINAL CLAUSES

Article 25
Annex

The annex to the present Convention forms an integral part of the Convention.

Article 26
Other international agreements

Nothing in the present Convention shall affect the rights and obligations of States Parties under existing international agreements which relate to matters dealt with in the present Convention as between the parties to those agreements.

Article 27
Settlement of disputes

1. States Parties shall endeavour to settle disputes concerning the interpretation or application of the present Convention through negotiation.

2. Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which cannot be settled through negotiation within six months shall, at the request of any of those States Parties, be submitted to arbitration. If, six months after the date of the request for arbitration, those States Parties are unable to agree on the organization of the arbitration, any of those States Parties may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court.

3. Each State Party may, at the time of signature, ratification, acceptance or approval of, or accession to, the present Convention, declare that it does not consider itself bound by paragraph 2. The other States Parties shall not be bound by paragraph 2 with respect to any State Party which has made such a declaration.

4. Any State Party that has made a declaration in accordance with paragraph 3 may at any time withdraw that declaration by notification to the Secretary-General of the United Nations.

Article 28
Signature


Article 29
Ratification, acceptance, approval or accession

1. The present Convention shall be subject to ratification, acceptance or approval.

2. The present Convention shall remain open for accession by any State.

3. The instruments of ratification, acceptance, approval or accession shall be deposited with the Secretary-General of the United Nations.
Article 30  
Entry into force

1. The present Convention shall enter into force on the thirtieth day following the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.

2. For each State ratifying, accepting, approving or acceding to the present Convention after the deposit of the thirtieth instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the thirtieth day after the deposit by such State of its instrument of ratification, acceptance, approval or accession.

Article 31  
Denunciation

1. Any State Party may denounce the present Convention by written notification to the Secretary-General of the United Nations.

2. Denunciation shall take effect one year following the date on which notification is received by the Secretary-General of the United Nations. The present Convention shall, however, continue to apply to any question of jurisdictional immunities of States or their property arising in a proceeding instituted against a State before a court of another State prior to the date on which the denunciation takes effect for any of the States concerned.

3. The denunciation shall not in any way affect the duty of any State Party to fulfil any obligation embodied in the present Convention to which it would be subject under international law independently of the present Convention.

Article 32  
Depositary and notifications

1. The Secretary-General of the United Nations is designated the depositary of the present Convention.

2. As depositary of the present Convention, the Secretary-General of the United Nations shall inform all States of the following:

(a) signatures of the present Convention and the deposit of instruments of ratification, acceptance, approval or accession of denunciation, in accordance with articles 29 and 31;

(b) the date on which the present Convention will enter into force, in accordance with article 30;

(c) any acts, notifications or communications relating to the present Convention.

Article 33  
Authentic texts

The Arabic, Chinese, English, French, Russian and Spanish texts of the present Convention are equally authentic.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Convention opened for signature at United Nations Headquarters in New York on 17 January 2005.

Annex to the Convention

Understandings with respect to certain provisions of the Convention

The present annex is for the purpose of setting out understandings relating to the provisions concerned.

With respect to article 10

The term “immunity” in article 10 is to be understood in the context of the present Convention as a whole.

Article 10, paragraph 3, does not prejudge the question of “piercing the corporate veil”, questions relating to a situation where a State entity has deliberately misrepresented its financial position or subsequently reduced its assets to avoid satisfying a claim, or other related issues.

With respect to article 11

The reference in article 11, paragraph 2 (d), to the “security interests” of the employer State is intended primarily to address matters of national security and the security of diplomatic missions and consular posts.

Under article 41 of the 1961 Vienna Convention on Diplomatic Relations and article 55 of the 1963 Vienna Convention on Consular Relations, all persons referred to in those articles have the duty to respect the laws and regulations, including labour laws, of the host country. At the same time, under article 38 of the 1961 Vienna Convention on Diplomatic Relations and article 71 of the 1963 Vienna Convention on Consular Relations, the receiving State has a duty to exercise its jurisdiction in such a manner as not to interfere unduly with the performance of the functions of the mission or the consular post.

With respect to articles 13 and 14

The expression “determination” is used to refer not only to the ascertainment or verification of the existence of the rights protected, but also to the evaluation or assessment of the substance, including content, scope and extent, of such rights.

With respect to article 17

The expression “commercial transaction” includes investment matters.

With respect to article 19

The expression “entity” in subparagraph (c) means the State as an independent legal personality, a constituent unit of a federal State, a subdivision of a State, an agency or instrumentality of a State or other entity, which enjoys independent legal personality.

The words “property that has a connection with the entity” in subparagraph (c) are to be understood as broader than ownership or possession.

Article 19 does not prejudge the question of “piercing the corporate veil”, questions relating to a situation where a State entity has deliberately misrepresented its financial position or subsequently reduced its assets to avoid satisfying a claim, or other related issues.
Permanent Court of International Justice

S.S. Lotus
(France v. Turkey)
Judgment of 7 September 1927

P.C.I.J., Series A, No. 10
PERMANENT COURT OF INTERNATIONAL JUSTICE.

[Translation.]

TWELFTH (ORDINARY) SESSION.

Before:

MM. HUBER, President,
LODER, Former President,
WEISS, Vice-President,

Lord FINLAY,
MM. NYHOLM,
MOORE,
de BUSTAMANTE,
ALTAMIRA,
ODA,
ANZILOTTO,
PESSÔA,
FEIŽI-DAĪM BEY, National Judge.

JUDGMENT No. 9.

THE CASE OF THE S.S. "LOTUS".

The Government of the French Republic, represented by M. Basdevant, Professor at the Faculty of Law of Paris,

versus

The Government of the Turkish Republic, represented by His Excellency Mahmout Essat Bey, Minister of Justice.

The Court,

composed as above,

having heard the observations and conclusions of the Parties,

delivers the following judgment:
JUDGMENT No. 9.—THE CASE OF THE S.S. “LOTUS” 5

By a special agreement signed at Geneva on October 12th, 1926, between the Governments of the French and Turkish Republics and filed with the Registry of the Court, in accordance with Article 40 of the Statute and Article 35 of the Rules of Court, on January 4th, 1927, by the diplomatic representatives at The Hague of the aforesaid Governments, the latter have submitted to the Permanent Court of International Justice the question of jurisdiction which has arisen between them following upon the collision which occurred on August 2nd, 1926, between the steamships Boz-Kourt and Lotus.

According to the special agreement, the Court has to decide the following questions:

“(1) Has Turkey, contrary to Article 15 of the Convention of Lausanne of July 24th, 1923, respecting conditions of residence and business and jurisdiction, acted in conflict with the principles of international law—and if so, what principles—by instituting, following the collision which occurred on August 2nd, 1926, on the high seas between the French steamer Lotus and the Turkish steamer Boz-Kourt and upon the arrival of the French steamer at Constantinople—as well as against the captain of the Turkish steamship—joint criminal proceedings in pursuance of Turkish law against M. Demons, officer of the watch on board the Lotus at the time of the collision, in consequence of the loss of the Boz-Kourt having involved the death of eight Turkish sailors and passengers?

“(2) Should the reply be in the affirmative, what pecuniary reparation is due to M. Demons, provided, according to the principles of international law, reparation should be made in similar cases?”

Giving effect to the proposals jointly made by the Parties to the special agreement in accordance with the terms of Article 32 of the Rules, the President, under Article 48 of the Statute and Articles 33 and 39 of the Rules, fixed the dates for the filing by each Party of a Case and Counter-Case as March 1st and May 24th, 1927, respectively; no time was fixed for the submission of replies, as the Parties had expressed the wish that there should not be any.

The Cases and Counter-Cases were duly filed with the Registry by the dates fixed and were communicated to those concerned as provided in Article 43 of the Statute.

In the course of hearings held on August 2nd, 3rd, 6th, and 8th-10th, 1927, the Court has heard the oral pleadings, reply and rejoinder submitted by the above-mentioned Agents for the Parties.

JUDGMENT No. 9.—THE CASE OF THE S.S. “LOTUS” 6

In support of their respective submissions, the Parties have placed before the Court, as annexes to the documents of the written proceedings, certain documents, a list of which is given in the annex.

In the course of the proceedings, the Parties have had occasion to define the points of view respectively adopted by them in relation to the questions referred to the Court. They have done so by formulating more or less developed conclusions summarizing their arguments. Thus the French Government, in its Case, asks for judgment to the effect that:

“Under the Convention respecting conditions of residence and business and jurisdiction signed at Lausanne on July 24th, 1923, and the principles of international law, jurisdiction to entertain criminal proceedings against the officer of the watch of a French ship, in connection with the collision which occurred on the high seas between that vessel and a Turkish ship, belongs exclusively to the French Courts;

“Consequently, the Turkish judicial authorities were wrong in prosecuting, imprisoning and convicting M. Demons, in connection with the collision which occurred on the high seas between the Lotus and the Boz-Kourt, and by so doing acted in a manner contrary to the above-mentioned Convention and to the principles of international law;

“Accordingly the Court is asked to fix the indemnity in reparation of the injury thus inflicted upon M. Demons at 6,000 Turkish pounds and to order this indemnity to be paid by the Government of the Turkish Republic to the Government of the French Republic.”

The Turkish Government, for its part, simply asks the Court in its Case to “give judgment in favour of the jurisdiction of the Turkish Courts”.

The French Government, however, has, in its Counter-Case, again formulated the conclusions, already set out in its Case, in a slightly modified form, introducing certain new points preceded by arguments which should be cited in full, seeing that they summarize in a brief and precise manner the point of view taken by the French Government; the new arguments and conclusions are as follows:

“Whereas the substitution of the jurisdiction of the Turkish Courts for that of the foreign consular courts in criminal proceedings taken against foreigners is the outcome of the consent given by the Powers to this substitution in the Conventions signed at Lausanne on July 24th, 1923;
JUDGMENT No. 9.—THE CASE OF THE S.S. "LOTUS"

"As this consent, far from having been given as regards criminal proceedings against foreigners for crimes or offences committed abroad, has been definitely refused by the Powers and by France in particular;

"As this refusal follows from the rejection of a Turkish amendment calculated to establish this jurisdiction and from the statements made in this connection;

"As, accordingly, the Convention of Lausanne of July 24th, 1923, construed in the light of these circumstances and intentions, does not allow the Turkish Courts to take cognizance of criminal proceedings directed against a French citizen for crimes or offences committed outside Turkey;

"Furthermore, whereas, according to international law as established by the practice of civilized nations, in their relations with each other, a State is not entitled, apart from express or implicit special agreements, to extend the criminal jurisdiction of its courts to include a crime or offence committed by a foreigner abroad solely in consequence of the fact that one of its nationals has been a victim of the crime or offence;

"Whereas acts performed on the high seas on board a merchant ship are, in principle and from the point of view of criminal proceedings, amenable only to the jurisdiction of the courts of the State whose flag the vessel flies;

"As that is a consequence of the principle of the freedom of the seas, and as States, attaching especial importance thereto, have rarely departed therefrom;

"As, according to existing law, the nationality of the victim is not a sufficient ground to override this rule, and seeing that this was held in the case of the Costa Rica Packet;

"Whereas there are special reasons why the application of this rule should be maintained in collision cases, which reasons are mainly connected with the fact that the culpable character of the act causing the collision must be considered in the light of purely national regulations which apply to the ship and the carrying out of which must be controlled by the national authorities;

"As the collision cannot, in order thus to establish the jurisdiction of the courts of the country to which it belongs, be localized in the vessel sunk, such a contention being contrary to the facts;

"As the claim to extend the jurisdiction of the courts of the country to which one vessel belongs, on the ground of the "connexion" (connexion) of offences, to proceedings against an officer of the other vessel concerned in the collision, when the two vessels are not of the same nationality, has no support in international law;

"Whereas a contrary decision recognizing the jurisdiction of the Turkish Courts to take cognizance of the criminal proceedings against the officer of the watch of the French ship involved in the collision would amount to introducing an innovation entirely at variance with firmly established precedent;

"Whereas the special agreement submits to the Court the question of an indemnity to be awarded to Monsieur Demons as a consequence of the decision given by it upon the first question;

"As any other consequences involved by this decision, not having been submitted to the Court, are ipso facto reserved;

"As the arrest, imprisonment and conviction of Monsieur Demons are the acts of authorities having no jurisdiction under international law, the principle of an indemnity entitling to the benefit of Monsieur Demons and chargeable to Turkey, cannot be disputed;

"As his imprisonment lasted for thirty-nine days, there having been delay in granting his release on bail contrary to the provisions of the Declaration regarding the administration of justice signed at Lausanne on July 24th, 1923;

"As his prosecution was followed by a conviction calculated to do Monsieur Demons at least moral damage;

"As the Turkish authorities, immediately before his conviction, and when he had undergone detention about equal to one half of the period to which he was going to be sentenced, made his release conditional upon bail in 6,000 Turkish pounds;

"Asks for judgment, whether the Government of the Turkish Republic be present or absent, to the effect:

"That, under the rules of international law and the Convention respecting conditions of residence and business and jurisdiction signed at Lausanne on July 24th, 1923, jurisdiction to entertain criminal proceedings against the officer of the watch of a French ship, in connection with the collision which occurred on the high seas between that ship and a Turkish ship, belongs exclusively to the French Courts;

"That, consequently, the Turkish judicial authorities were wrong in prosecuting, imprisoning and convicting Monsieur Demons, in connection with the collision which occurred on the high seas between the Lotus and the Bos-Kourt, and by so doing acted in a manner contrary to the principles of international law and to the above-mentioned Convention;

"Accordingly, the Court is asked to fix the indemnity in reparation of the injury thus inflicted on Monsieur Demons at 6,000 Turkish pounds and to order this indemnity to be paid by the Government of the Turkish Republic to the Government of the French Republic within one month from the date of judgment, without prejudice to the repayment of the bail deposited by Monsieur Demons.

"The Court is also asked to place on record that any other consequences which the decision given might have, not having been submitted to the Court, are ipso facto reserved."

The Turkish Government, in its Counter-Case, confines itself to repeating the conclusion of its Case, preceding it, however, by
a short statement of its argument, which statement it will be well to reproduce, since it corresponds to the arguments preceding the conclusions of the French Counter-Case:

"1.—Article 15 of the Convention of Lausanne respecting conditions of residence and business and jurisdiction refers simply and solely, as regards the jurisdiction of the Turkish Courts, to the principles of international law, subject only to the provisions of Article 16. Article 15 cannot be read as supporting any reservation whatever or any construction giving it another meaning. Consequently, Turkey, when exercising jurisdiction in any case concerning foreigners, need, under this article, only take care not to act in a manner contrary to the principles of international law.

"2.—Article 6 of the Turkish Penal Code, which is taken word for word from the Italian Penal Code, is not, as regards the case, contrary to the principles of international law.

"3.—Vessels on the high seas form part of the territory of the nation whose flag they fly, and in the case under consideration, the place where the offence was committed being the S.S. Boz-Kourt flying the Turkish flag, Turkey’s jurisdiction in the proceedings taken is as clear as if the case had occurred on her territory—as is borne out by analogous cases.

"4.—The Boz-Kourt—Lotus case being a case involving “connected” offences (délits connexes), the Code of criminal procedure for trial—which is borrowed from France—lays down that the French officer should be prosecuted jointly with and at the same time as the Turkish officer; this, moreover, is confirmed by the doctrines and legislation of all countries. Turkey, therefore, is entitled from this standpoint also to claim jurisdiction.

"5.—Even if the question be considered solely from the point of view of the collision, as no principle of international criminal law exists which would debar Turkey from exercising the jurisdiction which she clearly possesses to entertain an action for damages, that country has jurisdiction to institute criminal proceedings.

"6.—As Turkey is exercising jurisdiction of a fundamental character, and as States are not, according to the principles of international law, under an obligation to pay indemnities in such cases, it is clear that the question of the payment of the indemnity claimed in the French Case does not arise for the Turkish Government, since that Government has jurisdiction to prosecute the French citizen Demons who, as the result of a collision, has been guilty of manslaughter.

"The Court is asked for judgment in favour of the jurisdiction of the Turkish Courts."

During the oral proceedings, the Agent of the French Government confined himself to referring to the conclusions submitted in the Counter-Case, simply reiterating his request that the Court should place on record the reservations made therein as regards any consequences of the judgment not submitted to the Court’s decision; these reservations are now duly recorded.

For his part, the Agent for the Turkish Government abstained both in his original speech and in his rejoinder from submitting any conclusion. The one he formulated in the documents filed by him in the written proceedings must therefore be regarded as having been maintained unaltered.

THE FACTS.

According to the statements submitted to the Court by the Parties’ Agents in their Cases and in their oral pleadings, the facts in which the affair originated are agreed to be as follows:

On August 2nd, 1926, just before midnight, a collision occurred between the French mail steamer Lotus, proceeding to Constantinople, and the Turkish collier Boz-Kourt, between five and six nautical miles to the north of Cape Sigri (Mitylene). The Boz-Kourt, which was cut in two, sank, and eight Turkish nationals who were on board perished. After having done everything possible to succour the shipwrecked persons, of whom ten were able to be saved, the Lotus continued on its course to Constantinople, where it arrived on August 3rd.

At the time of the collision, the officer of the watch on board the Lotus was Monsieur Demons, a French citizen, lieutenant in the merchant service and first officer of the ship, whilst the movements of the Boz-Kourt were directed by its captain, Hassan Bey, who was one of those saved from the wreck.

As early as August 3rd the Turkish police proceeded to hold an enquiry into the collision on board the Lotus; and on the following day, August 4th, the captain of the Lotus handed in his master’s report at the French Consulate-General, transmitting a copy to the harbour master.

On August 5th, Lieutenant Demons was requested by the Turkish authorities to go ashore to give evidence. The examination, the length of which incidentally resulted in delaying the departure of
The French Government having, on the 6th of the same month, given "its full consent to the proposed solution", the two Governments appointed their plenipotentiaries with a view to the drawing up of the special agreement to be submitted to the Court; this special agreement was signed at Geneva on October 12th, 1926, as stated above, and the ratifications were deposited on December 27th, 1926.

THE LAW.

I.

Before approaching the consideration of the principles of international law contrary to which Turkey is alleged to have acted—thereby infringing the terms of Article 15 of the Convention of Lausanne of July 24th, 1923, respecting conditions of residence and business and jurisdiction—it is necessary to define, in the light of the written and oral proceedings, the position resulting from the special agreement. For, the Court having obtained cognizance of the present case by notification of a special agreement concluded between the Parties in the case, it is rather to the terms of this agreement than to the submissions of the Parties that the Court must have recourse in establishing the precise points which it has to decide. In this respect the following observations should be made:

1.—The collision which occurred on August 2nd, 1926, between the S.S. Lotus, flying the French flag, and the S.S. Boz-Kourt, flying the Turkish flag, took place on the high seas: the territorial jurisdiction of any State other than France and Turkey therefore does not enter into account.

2.—The violation, if any, of the principles of international law would have consisted in the taking of criminal proceedings against Lieutenant Demons. It is not therefore a question relating to any particular step in these proceedings—such as his being put to trial, his arrest, his detention pending trial or the judgment given by the Criminal Court of Stamboul—but of the very fact of the Turkish Courts exercising criminal jurisdiction. That is why the arguments put forward by the Parties in both phases of
the proceedings relate exclusively to the question whether Turkey has or has not, according to the principles of international law, jurisdiction to prosecute in this case.

The Parties agree that the Court has not to consider whether the prosecution was in conformity with Turkish law; it need not therefore consider whether, apart from the actual question of jurisdiction, the provisions of Turkish law cited by Turkish authorities were really applicable in this case, or whether the manner in which the proceedings against Lieutenant Demons were conducted might constitute a denial of justice, and accordingly, a violation of international law. The discussions have borne exclusively upon the question whether criminal jurisdiction does or does not exist in this case.

3.—The prosecution was instituted because the loss of the Boz-Kout involved the death of eight Turkish sailors and passengers. It is clear, in the first place, that this result of the collision constitutes a factor essential for the institution of the criminal proceedings in question; secondly, it follows from the statements of the two Parties that no criminal intention has been imputed to either of the officers responsible for navigating the two vessels; it is therefore a case of prosecution for involuntary manslaughter. The French Government maintains that breaches of navigation regulations fall exclusively within the jurisdiction of the State under whose flag the vessel sails; but it does not argue that a collision between two vessels cannot also bring into operation the sanctions which apply to criminal law in cases of manslaughter. The precedents cited by it and relating to collision cases all assume the possibility of criminal proceedings with a view to the infliction of such sanctions, the dispute being confined to the question of jurisdiction—concurrenct or exclusive—which another State might claim in this respect. As has already been observed, the Court has not to consider the lawfulness of the prosecution under Turkish law; questions of criminal law relating to the justification of the prosecution and consequently to the existence of a nexus causalis between the actions of Lieutenant Demons and the loss of eight Turkish nationals are not relevant to the issue so far as the Court is concerned. Moreover, the exact conditions in which these persons perished do not appear from the documents submitted to the Court; nevertheless, there is no doubt that their death may be regarded as the direct outcome of the collision, and the French Government has not contended that this relation of cause and effect cannot exist.

4.—Lieutenant Demons and the captain of the Turkish steamship were prosecuted jointly and simultaneously. In regard to the conception of "connexity" of offences (connexité), the Turkish Agent in the submissions of his Counter-Case has referred to the Turkish Code of criminal procedure for trial, the provisions of which are said to have been taken from the corresponding French Code. Now in French law, amongst other factors, coincidence of time and place may give rise to "connexity" (connexité). In this case, therefore, the Court interprets this conception as meaning that the proceedings against the captain of the Turkish vessel in regard to which the jurisdiction of the Turkish Courts is not disputed, and the proceedings against Lieutenant Demons, have been regarded by the Turkish authorities, from the point of view of the investigation of the case, as one and the same prosecution, since the collision of the two steamers constitutes a complex of facts the consideration of which should, from the standpoint of Turkish criminal law, be entrusted to the same court.

5.—The prosecution was instituted in pursuance of Turkish legislation. The special agreement does not indicate what clause or clauses of that legislation apply. No document has been submitted to the Court indicating on what article of the Turkish Penal Code the prosecution was based; the French Government however declares that the Criminal Court claimed jurisdiction under Article 6 of the Turkish Penal Code, and far from denying this statement, Turkey, in the submissions of her Counter-Case, contends that that article is in conformity with the principles of international law. It does not appear from the proceedings whether the prosecution was instituted solely on the basis of that article.

Article 6 of the Turkish Penal Code, Law No. 765 of March 1st, 1926 (Official Gazette No. 320 of March 13th, 1926), runs as follows:

[Translation.]

"Any foreigner who, apart from the cases contemplated by Article 4, commits an offence abroad to the prejudice of Turkey or of a Turkish subject, for which offence Turkish law prescribes a penalty involving loss of freedom for a
minimum period of not less than one year, shall be punished in accordance with the Turkish Penal Code provided that he is arrested in Turkey. The penalty shall however be reduced by one third and instead of the death penalty, twenty years of penal servitude shall be awarded.

"Nevertheless, in such cases, the prosecution will only be instituted at the request of the Minister of Justice or on the complaint of the injured Party.

"If the offence committed injures another foreigner, the guilty person shall be punished at the request of the Minister of Justice, in accordance with the provisions set out in the first paragraph of this article, provided however that:

"(1) the article in question is one for which Turkish law prescribes a penalty involving loss of freedom for a minimum period of three years;

"(2) there is no extradition treaty or that extradition has not been accepted either by the government of the locality where the guilty person has committed the offence or by the government of his own country."

Even if the Court must hold that the Turkish authorities had seen fit to base the prosecution of Lieutenant Demons upon the above-mentioned Article 6, the question submitted to the Court is not whether that article is compatible with the principles of international law; it is more general. The Court is asked to state whether or not the principles of international law prevent Turkey from instituting criminal proceedings against Lieutenant Demons under Turkish law. Neither the conformity of Article 6 in itself with the principles of international law nor the application of that article by the Turkish authorities constitutes the point at issue; it is the very fact of the institution of proceedings which is held by France to be contrary to those principles. Thus the French Government at once protested against his arrest, quite independently of the question as to what clause of her legislation was relied upon by Turkey to justify it. The arguments put forward by the French Government in the course of the proceedings and based on the principles which, in its contention, should govern navigation on the high seas, show that it would dispute Turkey's jurisdiction to prosecute Lieutenant Demons, even if that prosecution were based on a clause of the Turkish Penal Code other than Article 6, assuming for instance that the offence in question should be regarded, by reason of its consequences, to have been actually committed on Turkish territory.

II.

Having determined the position resulting from the terms of the special agreement, the Court must now ascertain which were the principles of international law that the prosecution of Lieutenant Demons could conceivably be said to contravene.

It is Article 15 of the Convention of Lausanne of July 24th, 1923, respecting conditions of residence and business and jurisdiction, which refers the contracting Parties to the principles of international law as regards the delimitation of their respective jurisdiction.

This clause is as follows:

"Subject to the provisions of Article 16, all questions of jurisdiction shall, as between Turkey and the other contracting Powers, be decided in accordance with the principles of international law."

The French Government maintains that the meaning of the expression "principles of international law" in this article should be sought in the light of the evolution of the Convention. Thus it states that during the preparatory work, the Turkish Government, by means of an amendment to the relevant article of a draft for the Convention, sought to extend its jurisdiction to crimes committed in the territory of a third State, provided that, under Turkish law, such crimes were within the jurisdiction of Turkish Courts. This amendment, in regard to which the representatives of France and Italy made reservations, was definitely rejected by the British representative; and the question having been subsequently referred to the Drafting Committee, the latter confined itself in its version of the draft to a declaration to the effect that questions of jurisdiction should be decided in accordance with the principles of international law. The French Government deduces from these facts that the prosecution of Demons is contrary to the intention which guided the preparation of the Convention of Lausanne.

The Court must recall in this connection what it has said in some of its preceding judgments and opinions, namely, that there is no occasion to have regard to preparatory work if the text of a convention is sufficiently clear in itself. Now the Court considers that the words "principles of international law", as ordinarily used, can only mean international law as it is applied between all nations belonging to the community of States. This interpretation
is borne out by the context of the article itself which says that the principles of international law are to determine questions of jurisdiction—not only criminal but also civil—between the contracting Parties, subject only to the exception provided for in Article 16. Again, the preamble of the Convention says that the High Contracting Parties are desirous of effecting a settlement in accordance “with modern international law”, and Article 28 of the Treaty of Peace of Lausanne, to which the Convention in question is annexed, decrees the complete abolition of the Capitulations “in every respect”. In these circumstances it is impossible—except in pursuance of a definite stipulation—to construe the expression “principles of international law” otherwise than as meaning the principles which are in force between all independent nations and which therefore apply equally to all the contracting Parties.

Moreover, the records of the preparation of the Convention respecting conditions of residence and business and jurisdiction would not furnish anything calculated to overrule the construction indicated by the actual terms of Article 15. It is true that the representatives of France, Great Britain and Italy rejected the Turkish amendment already mentioned. But only the British delegate—and this conformably to British municipal law which maintains the territorial principle in regard to criminal jurisdiction—stated the reasons for his opposition to the Turkish amendment; the reasons for the French and Italian reservations and for the omission from the draft prepared by the Drafting Committee of any definition of the scope of the criminal jurisdiction in respect of foreigners, are unknown and might have been unconnected with the arguments now advanced by France.

It should be added to these observations that the original draft of the relevant article, which limited Turkish jurisdiction to crimes committed in Turkey itself, was also discarded by the Drafting Committee; this circumstance might with equal justification give the impression that the intention of the framers of the Convention was not to limit this jurisdiction in any way.

The two opposing proposals designed to determine definitely the area of application of Turkish criminal law having thus been discarded, the wording ultimately adopted by common consent for Article 15 can only refer to the principles of general international law relating to jurisdiction.

The Court, having to consider whether there are any rules of international law which may have been violated by the prosecution in pursuance of Turkish law of Lieutenant Demos, is confronted in the first place by a question of principle which, in the written and oral arguments of the two Parties, has proved to be a fundamental one. The French Government contends that the Turkish Courts, in order to have jurisdiction, should be able to point to some title to jurisdiction recognized by international law in favour of Turkey. On the other hand, the Turkish Government takes the view that Article 15 allows Turkey jurisdiction whenever such jurisdiction does not come into conflict with a principle of international law.

III.

The latter view seems to be in conformity with the special agreement itself, No. 1 of which asks the Court to say whether Turkey has acted contrary to the principles of international law and, if so, what principles. According to the special agreement, therefore, it is not a question of stating principles which would permit Turkey to take criminal proceedings, but of formulating the principles, if any, which might have been violated by such proceedings.

This way of stating the question is also dictated by the very nature and existing conditions of international law.

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.

Now the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory
except by virtue of a permissive rule derived from international custom or from a convention.

It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.

This discretion left to States by international law explains the great variety of rules which they have been able to adopt without objections or complaints on the part of other States; it is in order to remedy the difficulties resulting from such variety that efforts have been made for many years past, both in Europe and America, to prepare conventions the effect of which would be precisely to limit the discretion at present left to States in this respect by international law, thus making good the existing lacunae in respect of jurisdiction or removing the conflicting jurisdictions arising from the diversity of the principles adopted by the various States.

In these circumstances, all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty.

It follows from the foregoing that the contention of the French Government to the effect that Turkey must in each case be able to cite a rule of international law authorizing her to exercise jurisdiction, is opposed to the generally accepted international law to which Article 15 of the Convention of Lausanne refers. Having regard to the terms of Article 15 and to the construction which the Court has just placed upon it, this contention would apply in regard to civil as well as to criminal cases, and would be applicable on conditions of absolute reciprocity as between Turkey and the other contracting Parties; in practice, it would therefore in many cases result in paralyzing the action of the courts, owing to the impossibility of citing a universally accepted rule on which to support the exercise of their jurisdiction.

Nevertheless, it has to be seen whether the foregoing considerations really apply as regards criminal jurisdiction, or whether this jurisdiction is governed by a different principle: this might be the outcome of the close connection which for a long time existed between the conception of supreme criminal jurisdiction and that of a State, and also by the especial importance of criminal jurisdiction from the point of view of the individual.

Though it is true that in all systems of law the principle of the territorial character of criminal law is fundamental, it is equally true that all or nearly all these systems of law extend their action to offences committed outside the territory of the State which adopts them, and they do so in ways which vary from State to State. The territoriality of criminal law, therefore, is not an absolute principle of international law and by no means coincides with territorial sovereignty.

This situation may be considered from two different standpoints corresponding to the points of view respectively taken up by the Parties. According to one of these standpoints, the principle of freedom, in virtue of which each State may regulate its legislation at its discretion, provided that in so doing it does not come in conflict with a restriction imposed by international law, would also apply as regards law governing the scope of jurisdiction in criminal cases. According to the other standpoint, the exclusively territorial character of law relating to this domain constitutes a principle which, except as otherwise expressly provided, would, ipso facto, prevent States from extending the criminal jurisdiction of their courts beyond their frontiers; the exceptions in question, which include for instance extraterritorial jurisdiction over nationals and over crimes directed against public safety, would therefore rest on special permissive rules forming part of international law.
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Adopting, for the purposes of the argument, the standpoint of the latter of these two systems, it must be recognized that, in the absence of a treaty provision, its correctness depends upon whether there is a custom having the force of law establishing it. The same is true as regards the applicability of this system—assuming it to have been recognized as sound—in the particular case. It follows that, even from this point of view, before ascertaining whether there may be a rule of international law expressly allowing Turkey to prosecute a foreigner for an offence committed by him outside Turkey, it is necessary to begin by establishing both that the system is well-founded and that it is applicable in the particular case. Now, in order to establish the first of these points, one must, as has just been seen, prove the existence of a principle of international law restricting the discretion of States as regards criminal legislation.

Consequently, whichever of the two systems described above be adopted, the same result will be arrived at in this particular case: the necessity of ascertaining whether or not under international law there is a principle which would have prohibited Turkey, in the circumstances of the case before the Court, from prosecuting Lieutenant Demons. And moreover, on either hypothesis, this must be ascertained by examining precedents offering a close analogy to the case under consideration; for it is only from precedents of this nature that the existence of a general principle applicable to the particular case may appear. For if it were found, for example, that, according to the practice of States, the jurisdiction of the State whose flag was flown was not established by international law as exclusive with regard to collision cases on the high seas, it would not be necessary to ascertain whether there were a more general restriction; since, as regards that restriction—supposing that it existed—the fact that it had been established that there was no prohibition in respect of collision on the high seas would be tantamount to a special permissive rule.

The Court therefore must, in any event, ascertain whether or not there exists a rule of international law limiting the freedom of States to extend the criminal jurisdiction of their courts to a situation uniting the circumstances of the present case.

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IV.

The Court will now proceed to ascertain whether general international law, to which Article 15 of the Convention of Lausanne refers, contains a rule prohibiting Turkey from prosecuting Lieutenant Demons.

For this purpose, it will in the first place examine the value of the arguments advanced by the French Government, without however omitting to take into account other possible aspects of the problem, which might show the existence of a restrictive rule applicable in this case.

The arguments advanced by the French Government, other than those considered above, are, in substance, the three following:

(1) International law does not allow a State to take proceedings with regard to offences committed by foreigners abroad, simply by reason of the nationality of the victim; and such is the situation in the present case because the offence must be regarded as having been committed on board the French vessel.

(2) International law recognizes the exclusive jurisdiction of the State whose flag is flown as regards everything which occurs on board a ship on the high seas.

(3) Lastly, this principle is especially applicable in a collision case.

* * *

As regards the first argument, the Court feels obliged in the first place to recall that its examination is strictly confined to the specific situation in the present case, for it is only in regard to this situation that its decision is asked for.

As has already been observed, the characteristic features of the situation of fact are as follows: there has been a collision on the high seas between two vessels flying different flags, on one of which was one of the persons alleged to be guilty of the offence, whilst the victims were on board the other.

This being so, the Court does not think it necessary to consider the contention that a State cannot punish offences committed abroad by a foreigner simply by reason of the nationality of the
victim. For this contention only relates to the case where the nationality of the victim is the only criterion on which the criminal jurisdiction of the State is based. Even if that argument were correct generally speaking—and in regard to this the Court reserves its opinion—it could only be used in the present case if international law forbade Turkey to take into consideration the fact that the offence produced its effects on the Turkish vessel and consequently in a place assimilated to Turkish territory in which the application of Turkish criminal law cannot be challenged, even in regard to offences committed there by foreigners. But no such rule of international law exists. No argument has come to the knowledge of the Court from which it could be deduced that States recognize themselves to be under an obligation towards each other only to have regard to the place where the author of the offence happens to be at the time of the offence. On the contrary, it is certain that the courts of many countries, even of countries which have given their criminal legislation a strictly territorial character, interpret criminal law in the sense that offences, the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offence, and more especially its effects, have taken place there. French courts have, in regard to a variety of situations, given decisions sanctioning this way of interpreting the territorial principle. Again, the Court does not know of any cases in which governments have protested against the fact that the criminal law of some country contained a rule to this effect or that the courts of a country construed their criminal law in this sense. Consequently, once it is admitted that the effects of the offence were produced on the Turkish vessel, it becomes impossible to hold that there is a rule of international law which prohibits Turkey from prosecuting Lieutenant Demons because of the fact that the author of the offence was on board the French ship. Since, as has already been observed, the special agreement does not deal with the provision of Turkish law under which the prosecution was instituted, but only with the question whether the prosecution should be regarded as contrary to the principles of international law, there is no reason preventing the Court from confining itself to observing that, in this case, a prosecution may also be justified from the point of view of the so-called territorial principle.

Nevertheless, even if the Court had to consider whether Article 6 of the Turkish Penal Code was compatible with international law, and if it held that the nationality of the victim did not in all circumstances constitute a sufficient basis for the exercise of criminal jurisdiction by the State of which the victim was a national, the Court would arrive at the same conclusion for the reasons just set out. For even were Article 6 to be held incompatible with the principles of international law, since the prosecution might have been based on another provision of Turkish law which would not have been contrary to any principle of international law, it follows that it would be impossible to deduce from the mere fact that Article 6 was not in conformity with those principles, that the prosecution itself was contrary to them. The fact that the judicial authorities may have committed an error in their choice of the legal provision applicable to the particular case and compatible with international law only concerns municipal law and can only affect international law in so far as a treaty provision enters into account, or the possibility of a denial of justice arises.

It has been sought to argue that the offence of manslaughter cannot be localized at the spot where the mortal effect is felt; for the effect is not intentional and it cannot be said that there is, in the mind of the delinquent, any culpable intent directed towards the territory where the mortal effect is produced. In reply to this argument it might be observed that the effect is a factor of outstanding importance in offences such as manslaughter, which are punished precisely in consideration of their effects rather than of the subjective intention of the delinquent. But the Court does not feel called upon to consider this question, which is one of interpretation of Turkish criminal law. It will suffice to observe that no argument has been put forward and nothing has been found from which it would follow that international law has established a rule imposing on States this reading of the conception of the offence of manslaughter.

* * *

The second argument put forward by the French Government is the principle that the State whose flag is flown has exclusive jurisdiction over everything which occurs on board a merchant ship on the high seas.
It is certainly true that—apart from certain special cases which are defined by international law—vessels on the high seas are subject to no authority except that of the State whose flag they fly. In virtue of the principle of the freedom of the seas, that is to say, the absence of any territorial sovereignty upon the high seas, no State may exercise any kind of jurisdiction over foreign vessels upon them. Thus, if a war vessel, happening to be at the spot where a collision occurs between a vessel flying its flag and a foreign vessel, were to send on board the latter an officer to make investigations or to take evidence, such an act would undoubtedly be contrary to international law.

But it by no means follows that a State can never in its own territory exercise jurisdiction over acts which have occurred on board a foreign ship on the high seas. A corollary of the principle of the freedom of the seas is that a ship on the high seas is assimilated to the territory of the State the flag of which it flies, for, just as in its own territory, that State exercises its authority upon it, and no other State may do so. All that can be said is that by virtue of the principle of the freedom of the seas, a ship is placed in the same position as national territory; but there is nothing to support the claim according to which the rights of the State under whose flag the vessel sails may go farther than the rights which it exercises within its territory properly so called. It follows that what occurs on board a vessel on the high seas must be regarded as if it occurred on the territory of the State whose flag the ship flies. If, therefore, a guilty act committed on the high seas produces its effects on a vessel flying another flag or in foreign territory, the same principles must be applied as if the territories of two different States were concerned, and the conclusion must therefore be drawn that there is no rule of international law prohibiting the State to which the ship on which the effects of the offence have taken place belongs, from regarding the offence as having been committed in its territory and prosecuting, accordingly, the delinquent.

This conclusion could only be overcome if it were shown that there was a rule of customary international law which, going further than the principle stated above, established the exclusive jurisdiction of the State whose flag was flown. The French Government has endeavoured to prove the existence of such a rule, having recourse for this purpose to the teachings of publicists, to decisions of municipal and international tribunals, and especially to conventions which, whilst creating exceptions to the principle of the freedom of the seas by permitting the war and police vessels of a State to exercise a more or less extensive control over the merchant vessels of another State, reserve jurisdiction to the courts of the country whose flag is flown by the vessel proceeded against.

In the Court's opinion, the existence of such a rule has not been conclusively proved.

In the first place, as regards teachings of publicists, and apart from the question as to what their value may be from the point of view of establishing the existence of a rule of customary law, it is no doubt true that all or nearly all writers teach that ships on the high seas are subject exclusively to the jurisdiction of the State whose flag they fly. But the important point is the significance attached by them to this principle; now it does not appear that in general, writers bestow upon this principle a scope differing from or wider than that explained above and which is equivalent to saying that the jurisdiction of a State over vessels on the high seas is the same in extent as its jurisdiction in its own territory. On the other hand, there is no lack of writers who, upon a close study of the special question whether a State can prosecute for offences committed on board a foreign ship on the high seas, definitely come to the conclusion that such offences must be regarded as if they had been committed in the territory of the State whose flag the ship flies, and that consequently the general rules of each legal system in regard to offences committed abroad are applicable.

In regard to precedents, it should first be observed that, leaving aside the collision cases which will be alluded to later, none of them relates to offences affecting two ships flying the flags of two different countries, and that consequently they are not of much importance in the case before the Court. The case of the Costa Rica Packet is no exception, for the prauw on which the alleged depredations took place was adrift without flag or crew, and this circumstance certainly influenced, perhaps decisively, the conclusion arrived at by the arbitrator.

On the other hand, there is no lack of cases in which a State has claimed a right to prosecute for an offence, committed on board a foreign ship, which it regarded as punishable under its legislation. Thus Great Britain refused the request of the United
States for the extradition of John Anderson, a British seaman who had committed homicide on board an American vessel, stating that she did not dispute the jurisdiction of the United States but that she was entitled to exercise hers concurrently. This case, to which others might be added, is relevant in spite of Anderson's British nationality, in order to show that the principle of the exclusive jurisdiction of the country whose flag the vessel flies is not universally accepted.

The cases in which the exclusive jurisdiction of the State whose flag was flown has been recognized would seem rather to have been cases in which the foreign State was interested only by reason of the nationality of the victim, and in which, according to the legislation of that State itself or the practice of its courts, that ground was not regarded as sufficient to authorize prosecution for an offence committed abroad by a foreigner.

Finally, as regards conventions expressly reserving jurisdiction exclusively to the State whose flag is flown, it is not absolutely certain that this stipulation is to be regarded as expressing a general principle of law rather than as corresponding to the extraordinary jurisdiction which these conventions confer on the state-owned ships of a particular country in respect of ships of another country on the high seas. Apart from that, it should be observed that these conventions relate to matters of a particular kind, closely connected with the policing of the seas, such as the slave trade, damage to submarine cables, fisheries, etc., and not to common-law offences. Above all it should be pointed out that the offences contemplated by the conventions in question only concern a single ship; it is impossible therefore to make any deduction from them in regard to matters which concern two ships and consequently the jurisdiction of two different States.

The Court therefore has arrived at the conclusion that the second argument put forward by the French Government does not, any more than the first, establish the existence of a rule of international law prohibiting Turkey from prosecuting Lieutenant Demons.

* * *

It only remains to examine the third argument advanced by the French Government and to ascertain whether a rule specially applying to collision cases has grown up, according to which criminal proceedings regarding such cases come exclusively within the jurisdiction of the State whose flag is flown.

In this connection, the Agent for the French Government has drawn the Court’s attention to the fact that questions of jurisdiction in collision cases, which frequently arise before civil courts, are but rarely encountered in the practice of criminal courts. He deduces from this that, in practice, prosecutions only occur before the courts of the State whose flag is flown and that that circumstance is proof of a tacit consent on the part of States and, consequently, shows what positive international law is in collision cases.

In the Court’s opinion, this conclusion is not warranted. Even if the rarity of the judicial decisions to be found among the reported cases were sufficient to prove in point of fact the circumstance alleged by the Agent for the French Government, it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom. The alleged fact does not allow one to infer that States have been conscious of having such a duty; on the other hand, as will presently be seen, there are other circumstances calculated to show that the contrary is true.

So far as the Court is aware there are no decisions of international tribunals in this matter; but some decisions of municipal courts have been cited. Without pausing to consider the value to be attributed to the judgments of municipal courts in connection with the establishment of the existence of a rule of international law, it will suffice to observe that the decisions quoted sometimes support one view and sometimes the other. Whilst the French Government have been able to cite the Ortigia—Oncle-Joseph case before the Court of Aix and the Franconia—Strathclyde case before the British Court for Crown Cases Reserved, as being in favour of the exclusive jurisdiction of the State whose flag is flown, on the other hand the Ortigia—Oncle-Joseph case before the Italian Courts and the Ekbhata—West-Hinder case before the Belgian Courts have been cited in support of the opposing contention.

Lengthy discussions have taken place between the Parties as to the importance of each of these decisions as regards the details
State whilst its effects are produced in another State, has been abandoned in more recent English decisions (R. v. Nillins, 1884, 53 L. J. 157; R. v. Godfrey, L. R. 1923, x K. B. 24). This development of English case-law tends to support the view that international law leaves States a free hand in this respect.

In support of the theory in accordance with which criminal jurisdiction in collision cases would exclusively belong to the State of the flag flown by the ship, it has been contended that it is a question of the observance of the national regulations of each merchant marine and that effective punishment does not consist so much in the infliction of some months' imprisonment upon the captain as in the cancellation of his certificate as master, that is to say, in depriving him of the command of his ship.

In regard to this, the Court must observe that in the present case a prosecution was instituted for an offence at criminal law and not for a breach of discipline. Neither the necessity of taking administrative regulations into account (even ignoring the circumstance that it is a question of uniform regulations adopted by States as a result of an international conference) nor the impossibility of applying certain disciplinary penalties can prevent the application of criminal law and of penal measures of repression.

The conclusion at which the Court has therefore arrived is that there is no rule of international law in regard to collision cases to the effect that criminal proceedings are exclusively within the jurisdiction of the State whose flag is flown.

This conclusion moreover is easily explained if the manner in which the collision brings the jurisdiction of two different countries into play be considered.

The offence for which Lieutenant Demons appears to have been prosecuted was an act—of negligence or imprudence—having its origin on board the Lotus, whilst its effects made themselves felt on board the Bos-Kourt. These two elements are, legally, entirely inseparable, so much so that their separation renders the offence non-existent. Neither the exclusive jurisdiction of either State, nor the limitations of the jurisdiction of each to the occurrences which took place on the respective ships would appear calculated to satisfy the requirements of justice and effectively to protect the interests of the two States. It is only natural that each should be able to exercise jurisdiction and to do so in respect
of the incident as a whole. It is therefore a case of concurrent jurisdiction.

* * *

The Court, having arrived at the conclusion that the arguments advanced by the French Government either are irrelevant to the issue or do not establish the existence of a principle of international law precluding Turkey from instituting the prosecution which was in fact brought against Lieutenant Demons, observes that in the fulfilment of its task of itself ascertaining what the international law is, it has not confined itself to a consideration of the arguments put forward, but has included in its researches all precedents, teachings and facts to which it had access and which might possibly have revealed the existence of one of the principles of international law contemplated in the special agreement. The result of these researches has not been to establish the existence of any such principle. It must therefore be held that there is no principle of international law, within the meaning of Article 15 of the Convention of Lausanne of July 24th, 1923, which precludes the institution of the criminal proceedings under consideration. Consequently, Turkey, by instituting, in virtue of the discretion which international law leaves to every sovereign State, the criminal proceedings in question, has not, in the absence of such principles, acted in a manner contrary to the principles of international law within the meaning of the special agreement.

In the last place the Court observes that there is no need for it to consider the question whether the fact that the prosecution of Lieutenant Demons was "joint" (connexa) with that of the captain of the Boz-Kourt would be calculated to justify an extension of Turkish jurisdiction. This question would only have arisen if the Court had arrived at the conclusion that there was a rule of international law prohibiting Turkey from prosecuting Lieutenant Demons; for only in that case would it have been necessary to ask whether that rule might be overridden by the fact of the "connexion" (connexité) of the offences.

V.

Having thus answered the first question submitted by the special agreement in the negative, the Court need not consider the second question, regarding the pecuniary reparation which might have been due to Lieutenant Demons.

For these reasons,

The Court,

having heard both Parties,
gives, by the President's casting vote—the votes being equally divided—, judgment to the effect

(1) that, following the collision which occurred on August 2nd, 1926, on the high seas between the French steamship Lotus and the Turkish steamship Boz-Kourt, and upon the arrival of the French ship at Stamboul, and in consequence of the loss of the Boz-Kourt having involved the death of eight Turkish nationals, Turkey, by instituting criminal proceedings in pursuance of Turkish law against Lieutenant Demons, officer of the watch on board the Lotus at the time of the collision, has not acted in conflict with the principles of international law, contrary to Article 15 of the Convention of Lausanne of July 24th, 1923, respecting conditions of residence and business and jurisdiction;

(2) that, consequently, there is no occasion to give judgment on the question of the pecuniary reparation which might have been due to Lieutenant Demons if Turkey, by prosecuting him as above stated, had acted in a manner contrary to the principles of international law.

This judgment having been drawn up in French in accordance with the terms of Article 39, paragraph 1, second sentence, of the Statute of the Court, an English translation is attached thereto.
JUDGMENT No. 9.—THE CASE OF THE S.S. “LOTUS” 33

Done at the Peace Palace, The Hague, this seventh day of September, nineteen hundred and twenty-seven, in three copies, one of which is to be placed in the archives of the Court, and the others to be transmitted to the Agents of the respective Parties.

(Signed) MAX HUBER,
President.

(Signed) Å. HAMMARSKJÖLD,
Registrar.

MM. Loder, former President, Weiss, Vice-President, and Lord Finlay, MM. Nyholm and Altamira, Judges, declaring that they are unable to concur in the judgment delivered by the Court and availing themselves of the right conferred on them by Article 57 of the Statute, have delivered the separate opinions which follow hereafter.

Mr. Moore, dissenting from the judgment of the Court only on the ground of the connection of the criminal proceedings in the case with Article 6 of the Turkish Penal Code, also delivered a separate opinion.

(Initialled) M. H.

(Initialled) Å. H.
International Court of Justice

Arrest Warrant of 11 April 2000
(Democratic Republic of the Congo v. Belgium)
Judgment, Merits

_I.C.J. Reports 2002_
CASE CONCERNING THE ARREST WARRANT OF 11 APRIL 2000
(DEMOCRATIC REPUBLIC OF THE CONGO v. BELGIUM)

JUDGMENT OF 14 FEBRUARY 2002
INTERNATIONAL COURT OF JUSTICE

YEAR 2002

14 February 2002

CASE CONCERNING THE ARREST WARRANT
OF 11 APRIL 2000

(DEMOCRATIC REPUBLIC OF THE CONGO v. BELGIUM)

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

* * *

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

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

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

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

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

* * *

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

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

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

* * *

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

JUDGMENT

Present: President GUILLEAUME; Vice-President SHI; Judges ODA, RANIEVA, HERCEGNI, FLEISCHHAUER, KOROMA, VERESCHCHIN, HIGGINS, PARBA-ARANGUREN, KOOMANS, REZEK, AL-KHASAWNEH, BEUGERNAU; Judges ad hoc BULA-BULA, VAN DEN WYNGAERT; Registrar COUVREUR.

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

between

the Democratic Republic of the Congo,
ARREST WARRANT (JUDGMENT) 5

represented by

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

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

and

the Kingdom of Belgium,

represented by

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

Mr. Eric David, Professor of Public International Law, Université libre de Bruxelles, Mr. Daniel Bethlehem, Barrister, Bar of England and Wales, Fellow of Clare Hall and Deputy Director of the Lauterpacht Research Centre for International Law, University of Cambridge,
as Counsel and Advocates;
H.E. Baron Olivier Gills de Pélichy, Permanent Representative of the Kingdom of Belgium to the Organization for the Prohibition of Chemical Weapons, responsible for relations with the International Court of Justice,
Mr. Claude Debrulle, Director-General, Criminal Legislation and Human Rights, Ministry of Justice,
Mr. Pierre Morlet, Advocate-General, Brussels Cour d’Appel,
Mr. Wouter Detavernier, Deputy Counsellor, Directorate-General Legal Matters, Ministry of Foreign Affairs,
Mr. Rodney Neufeld, Research Associate, Lauterpacht Research Centre for International Law, University of Cambridge, Mr. Tom Vanderhaeghe, Assistant at the Université libre de Bruxelles.

THE COURT,

composed as above,
after deliberation,

delivers the following Judgment:

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

In that Application the Congo contended that Belgium had violated the “principle that a State may not exercise its authority on the territory of another State”, “the principle of sovereign equality among all Members of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations”, as well as “the diplomatic immunity of the Minister for Foreign Affairs of a sovereign State, as recognized by the jurisprudence of the Court and following from Article 41, paragraph 2, of the Vienna Convention of 13 April 1961 on Diplomatic Relations”.

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

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

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

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

By Order of 8 December 2000 the Court, on the one hand, rejected Belgium’s request that the case be removed from the List and, on the other, held that the circumstances, as they then presented themselves to the Court, were not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures. In the same Order, the Court also held that “it [was] desirable that the issues before the Court should be determined as soon as possible” and that “it [was] therefore appropriate to ensure that a decision on the Congo’s Application be reached with all expedition”.

5. By Order of 13 December 2000, the President of the Court, taking account of the agreement of the Parties as expressed at a meeting held with their Agents on 8 December 2000, fixed time-limits for the filing of a Memorial by the Congo and of a Counter-Memorial by Belgium, addressing both issues of jurisdiction and admissibility and the merits. By Orders of 14 March 2001 and 2 April 2001, these time-limits, taking account of the reasons given by the Congo and the agreement of the Parties, were successively extended. The Memorial of the Congo was filed on 16 May 2001 within the time-limit thus finally prescribed.

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

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

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

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

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

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

* *

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

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

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

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

“In light of the facts and arguments set out above, the Government of the Democratic Republic of the Congo requests the Court to adjudge and declare that:

1. by issuing and internationally circulating the arrest warrant of 11 April 2000 against Mr. Abdou aye Yerodia Ndombasi, Belgium committed a violation in regard to the DRC of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers;

2. a formal finding by the Court of the unlawfulness of that act constitutes an appropriate form of satisfaction, providing reparation for the consequent moral injury to the DRC;

3. the violations of international law underlying the issue and international circulation of the arrest warrant of 11 April 2000 preclude any State, including Belgium, from executing it;

4. Belgium shall be required to recall and cancel the arrest warrant of 11 April 2000 and to inform the foreign authorities to whom the warrant was circulated that, following the Court’s Judgment, Belgium renounces its request for their co-operation in executing the unlawful warrant.”

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

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

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

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

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

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

1. by issuing and internationally circulating the arrest warrant of 11 April 2000 against Mr. Abdou aye Yerodia Ndombasi, Belgium committed a violation in regard to the DRC of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers; in so doing, it violated the principle of sovereign equality among States;

2. a formal finding by the Court of the unlawfulness of that act constitutes an appropriate form of satisfaction, providing reparation for the consequent moral injury to the Democratic Republic of the Congo;

3. the violations of international law underlying the issue and international circulation of the arrest warrant of 11 April 2000 preclude any State, including Belgium, from executing it;

4. Belgium shall be required to recall and cancel the arrest warrant of 11 April 2000 and to inform the foreign authorities to whom the war-
rant was circulated that Belgium renounces its request for their cooperation in executing the unlawful warrant.”

On behalf of the Government of Belgium,

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

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

* * *

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

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

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

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

Article 7 of the Belgian Law provides that “The Belgian courts shall have jurisdiction in respect of the offences provided for in the present Law, wheresoever they may have been committed”. In the present case, according to Belgium, the complaints that initiated the proceedings as a result of which the arrest warrant was issued emanated from 12 individuals all resident in Belgium, five of whom were of Belgian nationality. It is not contested by Belgium, however, that the alleged acts to which

the arrest warrant relates were committed outside Belgian territory, that Mr. Yerodia was not a Belgian national at the time of those acts, and that Mr. Yerodia was not in Belgian territory at the time that the arrest warrant was issued and circulated. That no Belgian nationals were victims of the violence that was said to have resulted from Mr. Yerodia’s alleged offences was also uncontroverted.

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

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

17. On 17 October 2000, the Congo filed in the Registry an Application instituting the present proceedings (see paragraph 1 above), in which the Court was requested “to declare that the Kingdom of Belgium shall annul the international arrest warrant issued on 11 April 2000”. The Congo relied in its Application on two separate legal grounds. First, it claimed that “[t]he universal jurisdiction that the Belgian State attributes to itself under Article 7 of the Law in question” constituted a

“[v]iolation of the principle that a State may not exercise its authority on the territory of another State and of the principle of sovereign equality among all Members of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations”.

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

18. On the same day that it filed its Application instituting proceedings, the Congo submitted a request to the Court for the indication of a provisional measure under Article 41 of the Statute of the Court. During the hearings devoted to consideration of that request, the Court was informed that in November 2000 a ministerial reshuffle had taken place in the Congo, following which Mr. Yerodia had ceased to hold office as Minister for Foreign Affairs and had been entrusted with the portfolio of Minister of Education. Belgium accordingly claimed that the Congo’s Application had become moot and asked the Court, as has already been
recalled, to remove the case from the List. By Order of 8 December 2000, the Court rejected both Belgium’s submissions to that effect and also the Congo’s request for the indication of provisional measures (see paragraph 4 above).

19. From mid-April 2001, with the formation of a new Government in the Congo, Mr. Yerodia ceased to hold the post of Minister of Education. He no longer holds any ministerial office today.

20. On 12 September 2001, the Belgian National Central Bureau of Interpol requested the Interpol General Secretariat to issue a Red Notice in respect of Mr. Yerodia. Such notices concern individuals whose arrest is requested with a view to extradition. On 19 October 2001, at the public sittings held to hear the oral arguments of the Parties in the case, Belgium informed the Court that Interpol had responded on 27 September 2001 with a request for additional information, and that no Red Notice had yet been circulated.

21. Although the Application of the Congo originally advanced two separate legal grounds (see paragraph 17 above), the submissions of the Congo in its Memorial and the final submissions which it presented at the end of the oral proceedings refer only to a violation “in regard to the . . . Congo of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers” (see paragraphs 11 and 12 above).

22. In their written pleadings, and in oral argument, the Parties addressed issues of jurisdiction and admissibility as well as the merits (see paragraphs 5 and 6 above). In this connection, Belgium raised certain objections which the Court will begin by addressing.

23. The first objection presented by Belgium reads as follows:

“That, in the light of the fact that Mr. Yerodia Ndombasi is no longer either Minister for Foreign Affairs of the [Congo] or a minister occupying any other position in the . . . Government [of the Congo], there is no longer a ‘legal dispute’ between the Parties within the meaning of this term in the Optional Clause Declarations of the Parties and that the Court accordingly lacks jurisdiction in this case.”

24. Belgium does not deny that such a legal dispute existed between the Parties at the time when the Congo filed its Application instituting proceedings, and that the Court was properly seised by that Application. However, it contends that the question is not whether a legal dispute existed at that time, but whether a legal dispute exists at the present time. Belgium refers in this respect inter alia to the Northern Cameroons case, in which the Court found that it “may pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication an actual conflict of legal interests between the parties” (I.C.J. Reports 1963, pp. 33-34), as well as to the Nuclear Tests cases (Australia v. France) (New Zealand v. France), in which the Court stated the following: “The Court, as a court of law, is called upon to resolve existing disputes between States . . . The dispute brought before it must therefore continue to exist at the time when the Court makes its decision” (I.C.J. Reports 1974, pp. 270-271, para. 55; p. 476, para. 58). Belgium argues that the position of Mr. Yerodia as Minister for Foreign Affairs was central to the Congo’s Application instituting proceedings, and emphasizes that there has now been a change of circumstances at the very heart of the case, in view of the fact that Mr. Yerodia was relieved of his position as Minister for Foreign Affairs in November 2000 and that, since 15 April 2001, he has occupied no position in the Government of the Congo (see paragraphs 18 and 19 above). According to Belgium, while there may still be a difference of opinion between the Parties on the scope and content of international law governing the immunities of a Minister for Foreign Affairs, that difference of opinion has now become a matter of abstract, rather than of practical, concern. The result, in Belgium’s view, is that the case has become an attempt by the Congo to “seek[] an advisory opinion from the Court” and no longer a “concrete case” involving an “actual controversy” between the Parties, and that the Court accordingly lacks jurisdiction in the case.

25. The Congo rejects this objection of Belgium. It contends that there is indeed a legal dispute between the Parties, in that the Congo claims that the arrest warrant was issued in violation of the immunity of its Minister for Foreign Affairs, that that warrant was unlawful ab initio, and that this legal defect persists despite the subsequent changes in the position occupied by the individual concerned, while Belgium maintains that the issue and circulation of the arrest warrant were not contrary to international law. The Congo adds that the termination of Mr. Yerodia’s official duties in no way operated to efface the wrongful act and the injury that flowed from it, for which the Congo continues to seek redress.

26. The Court recalls that, according to its settled jurisprudence, its jurisdiction must be determined at the time that the act instituting proceedings was filed. Thus, if the Court has jurisdiction on the date the case is referred to it, it continues to do so regardless of subsequent events. Such events might lead to a finding that an application has subsequently
become moot and to a decision not to proceed to judgment on the merits, but they cannot deprive the Court of jurisdiction (see Notteboom, Preliminary Objection, Judgment, I.C.J. Reports 1953, p. 122; Right of Passage over Indian Territory, Preliminary Objections, Judgment, I.C.J. Reports 1957, p. 142; Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998, pp. 23-24, para. 38; and Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 129, para. 37).

27. Article 36, paragraph 2, of the Statute of the Court provides:

“The States parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

(a) the interpretation of a treaty;
(b) any question of international law;
(c) the existence of any fact which, if established, would constitute a breach of an international obligation;
(d) the nature or extent of the reparation to be made for the breach of an international obligation.”

On 17 October 2000, the date that the Congo’s Application instituting these proceedings was filed, each of the Parties was bound by a declaration of acceptance of compulsory jurisdiction, filed in accordance with the above provision: Belgium by a declaration of 17 June 1958 and the Congo by a declaration of 8 February 1989. Those declarations contained no reservation applicable to the present case.

Moreover, it is not contested by the Parties that at the material time there was a legal dispute between them concerning the international lawfulness of the arrest warrant of 11 April 2000 and the consequences to be drawn if the warrant was unlawful. Such a dispute was clearly a legal dispute within the meaning of the Court’s jurisprudence, namely “a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons” in which “the claim of one party is positively opposed by the other” (Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 17, para. 22; and Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998, pp. 122-123, para. 21).

28. The Court accordingly concludes that at the time that it was seized of the case it had jurisdiction to deal with it, and that it still has such jurisdiction. Belgium’s first objection must therefore be rejected.

* *

29. The second objection presented by Belgium is the following:

“That in the light of the fact that Mr. Yerodia Ndombasi is no longer either Minister for Foreign Affairs of the [Congo] or a minister occupying any other position in the . . . Government [of the Congo], the case is now without object and the Court should accordingly decline to proceed to judgment on the merits of the case.”

30. Belgium also relies in support of this objection on the Northern Cameroons case, in which the Court considered that it would not be a proper discharge of its duties to proceed further in a case in which any judgment that the Court might pronounce would be “without object” (I.C.J. Reports 1963, p. 38), and on the Nuclear Tests cases, in which the Court saw “no reason to allow the continuance of proceedings which it knows are bound to be fruitless” (I.C.J. Reports 1974, p. 271, para. 58; p. 477, para. 61). Belgium maintains that the declarations requested by the Congo in its first and second submissions would clearly fall within the principles enunciated by the Court in those cases, since a judgment of the Court on the merits in this case could only be directed towards the clarification of the law in this area for the future, or be designed to reinforce the position of one or other Party. It relies in support of this argument on the fact that the Congo does not allege any material injury and is not seeking compensatory damages. It adds that the issue and transmission of the arrest warrant were not predicated on the ministerial status of the person concerned, that he is no longer a minister, and that the case is accordingly now devoid of object.

31. The Congo contests this argument of Belgium, and emphasizes that the aim of the Congo — to have the disputed arrest warrant annulled and to obtain redress for the moral injury suffered — remains unachieved at the point in time when the Court is called upon to decide the dispute. According to the Congo, in order for the case to have become devoid of object during the proceedings, the cause of the violation of the right would have had to disappear, and the redress sought would have to have been obtained.

* *

32. The Court has already affirmed on a number of occasions that events occurring subsequent to the filing of an application may render the application without object such that the Court is not called upon to give a decision thereon (see Questions of Interpretation and Application of the 1971 Mont-

However, it considers that this is not such a case. The change which has occurred in the situation of Mr. Yerodia has not in fact put an end to the dispute between the Parties and has not deprived the Application of its object. The Congo argues that the arrest warrant issued by the Belgian judicial authorities against Mr. Yerodia was and remains unlawful. It asks the Court to hold that the warrant is unlawful, thus providing redress for the moral injury which the warrant allegedly caused to it. The Congo also continues to seek the cancellation of the warrant. For its part, Belgium contends that it did not act in violation of international law and it disputes the Congo’s submissions. In the view of the Court, it follows from the foregoing that the Application of the Congo is not now without object and that accordingly the case is not moot. Belgium’s second objection must accordingly be rejected.

* * *

33. The third Belgian objection is put as follows:

“That the case as it now stands is materially different to that set out in the [Congo]’s Application instituting proceedings and that the Court accordingly lacks jurisdiction in the case and/or that the application is inadmissible.”

34. According to Belgium, it would be contrary to legal security and the sound administration of justice for an applicant State to continue proceedings in circumstances in which the factual dimension on which the Application was based has changed fundamentally, since the respondent State would in those circumstances be uncertain, until the very last moment, of the substance of the claims against it. Belgium argues that the prejudice suffered by the respondent State in this situation is analogous to the situation in which an applicant State formulates new claims during the course of the proceedings. It refers to the jurisprudence of the Court holding inadmissible new claims formulated during the course of the proceedings which, had they been entertained, would have transformed the subject of the dispute originally brought before it under the terms of the Application (see Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998, pp. 447-448, para. 29). In the circumstances, Belgium contends that, if the Congo wishes to maintain its claims, it should be required to initiate proceedings afresh or, at the very least, apply to the Court for permission to amend its initial Application.

35. In response, the Congo denies that there has been a substantial amendment of the terms of its Application, and insists that it has presented no new claim, whether of substance or of form, that would have transformed the subject-matter of the dispute. The Congo maintains that it has done nothing through the various stages in the proceedings but “condense and refine” its claims, as do most States that appear before the Court, and that it is simply making use of the right of parties to amend their submissions until the end of the oral proceedings.

* *

36. The Court notes that, in accordance with settled jurisprudence, it “cannot, in principle, allow a dispute brought before it by application to be transformed by amendments in the submissions into another dispute which is different in character” (Société commerciale de Belgique, Judgment, 1939, P.C.I.J., Series A/B, No. 78, p. 173; v. Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 427, para. 80; see also Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992, pp. 264-267, in particular paras. 69 and 70). However, the Court considers that in the present case the facts underlying the Application have not changed in a way that produced such a transformation in the dispute brought before it. The question submitted to the Court for decision remains whether the issue and circulation of the arrest warrant by the Belgian judicial authorities against a person who was at that time the Minister for Foreign Affairs of the Congo were contrary to international law. The Congo’s final submissions arise “directly out of the question which is the subject-matter of that Application” (Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Merits, Judgment, I.C.J. Reports 1974, p. 203, para. 72; see also Temple of Preah Vihear, Merits, Judgment, I.C.J. Reports 1962, p. 36).

In these circumstances, the Court considers that Belgium cannot validly maintain that the dispute brought before the Court was transformed in a way that affected its ability to prepare its defence, or that the requirements of the sound administration of justice were infringed. Belgium’s third objection must accordingly be rejected.

* *

37. The fourth Belgian objection reads as follows:

“That, in the light of the new circumstances concerning Mr. Yerodia Ndombasi, the case has assumed the character of an action of diplomatic protection but one in which the individual being pro-
tected has failed to exhaust local remedies, and that the Court accordingly lacks jurisdiction in the case and/or that the application is inadmissible."

38. In this respect, Belgium accepts that, when the case was first instituted, the Congo had a direct legal interest in the matter, and was asserting a claim in its own name in respect of the alleged violation by Belgium of the immunity of the Congo’s Foreign Minister. However, according to Belgium, the case was radically transformed after: the Application was filed, namely on 15 April 2001, when Mr. Yerodia ceased to be a member of the Congolese Government. Belgium maintains that two of the requests made of the Court in the Congo’s final submissions in practice now concern the legal effect of an arrest warrant issued against a private citizen of the Congo, and that these issues fall within the remit of an action of diplomatic protection. It adds that the individual concerned has not exhausted all available remedies under Belgian law, a necessary condition before the Congo can espouse the cause of one of its nationals in international proceedings.

39. The Congo, on the other hand, denies that this is an action for diplomatic protection. It maintains that it is bringing these proceedings in the name of the Congolese State, on account of the violation of the immunity of its Minister for Foreign Affairs. The Congo further denies the availability of remedies under Belgian law. It points out in this regard that it is only when the Crown Prosecutor has become seized of the case file and makes submissions to the Chambre du conseil that the accused can defend himself before the Chambre and seek to have the charge dismissed.

* *

40. The Court notes that the Congo has never sought to invoke before it Mr. Yerodia’s personal rights. It considers that, despite the change in professional situation of Mr. Yerodia, the character of the dispute submitted to the Court by means of the Application has not changed: the dispute still concerns the lawfulness of the arrest warrant issued on 11 April 2000 against a person who was at the time Minister for Foreign Affairs of the Congo, and the question whether the rights of the Congo have or have not been violated by that warrant. As the Congo is not acting in the context of protection of one of its nationals, Belgium cannot rely upon the rules relating to the exhaustion of local remedies.

In any event, the Court recalls that an objection based on non-exhaustion of local remedies relates to the admissibility of the application (see Interhandel, Preliminary Objections, Judgment, I.C.J. Reports 1959, p. 26; Elettronica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports 1989, p. 42, para. 49). Under settled jurisprudence, the critical date for determining the admissibility of an application is the date on which it is filed

(see Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom). Preliminary Objections, Judgment, I.C.J. Reports 1998, pp. 25-26, paras. 43-44; and Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998, pp. 130-131, paras. 42-43). Belgium accepts that, on the date on which the Congo filed the Application instituting proceedings, the Congo had a direct legal interest in the matter, and was asserting a claim in its own name. Belgium’s fourth objection must accordingly be rejected.

* *

41. As a subsidiary argument, Belgium further contends that “[i]n the event that the Court decides that it does have jurisdiction in this case and that the application is admissible, . . . the non ultra petita rule operates to limit the jurisdiction of the Court to those issues that are the subject of the [Congo’s] final submissions”. Belgium points out that, while the Congo initially advanced a twofold argument, based, on the one hand, on the Belgian judge’s lack of jurisdiction, and, on the other, on the immunity from jurisdiction enjoyed by its Minister for Foreign Affairs, the Congo no longer claims in its final submissions that Belgium wrongly conferred upon itself universal jurisdiction in absentia. According to Belgium, the Congo now confines itself to arguing that the arrest warrant of 11 April 2000 was unlawful because it violated the immunity from jurisdiction of its Minister for Foreign Affairs, and that the Court consequently cannot rule on the issue of universal jurisdiction in any decision it renders on the merits of the case.

42. The Congo, for its part, states that its interest in bringing these proceedings is to obtain a finding by the Court that it has been the victim of an internationally wrongful act, the question whether this case involves the “exercise of an excessive universal jurisdiction” being in this connection only a secondary consideration. The Congo asserts that any consideration by the Court of the issues of international law raised by universal jurisdiction would be undertaken not at the request of the Congo but, rather, by virtue of the defence strategy adopted by Belgium, which appears to maintain that the exercise of such jurisdiction can “represent a valid counterweight to the observance of immunities”.

* *

43. The Court would recall the well-established principle that “it is the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions” (Asylum, Judgment, I.C.J. Reports 1950,
p. 402). While the Court is thus not entitled to decide upon questions not asked of it, the *non ultra petita* rule nonetheless cannot preclude the Court from addressing certain legal points in its reasoning. Thus in the present case the Court may not rule, in the operative part of its Judgment, on the question whether the disputed arrest warrant, issued by the Belgian investigating judge in exercise of his purported universal jurisdiction, complied in that regard with the rules and principles of international law governing the jurisdiction of national courts. This does not mean, however, that the Court may not deal with certain aspects of that question in the reasoning of its Judgment, should it deem this necessary or desirable.

* * *

44. The Court concludes from the foregoing that it has jurisdiction to entertain the Congo’s Application, that the Application is not without object and that accordingly the case is not moot and that the Application is admissible. Thus, the Court now turns to the merits of the case.

* * *

45. As indicated above (see paragraphs 41 to 43 above), in its Application instituting these proceedings, the Congo originally challenged the legality of the arrest warrant of 11 April 2000 on two separate grounds: on the one hand, Belgium’s claim to exercise a universal jurisdiction and, on the other, the alleged violation of the immunities of the Minister for Foreign Affairs of the Congo then in office. However, in its submissions in its Memorial, and in its final submissions at the close of the oral proceedings, the Congo invokes only the latter ground.

46. As a matter of logic, the second ground should be addressed only once there has been a determination in respect of the first, since it is only where a State has jurisdiction under international law in relation to a particular matter that there can be any question of immunities in regard to the exercise of that jurisdiction. However, in the present case, and in view of the final form of the Congo’s submissions, the Court will address first the question whether, assuming that it had jurisdiction under international law to issue and circulate the arrest warrant of 11 April 2000, Belgium in so doing violated the immunities of the then Minister for Foreign Affairs of the Congo.

* * *

47. The Congo maintains that, during his or her term of office, a Minister for Foreign Affairs of a sovereign State is entitled to inviolability and to immunity from criminal process being “absolute or complete”, that is to say, they are subject to no exception. Accordingly, the Congo contends that no criminal prosecution may be brought against a Minister for Foreign Affairs in a foreign court as long as he or she remains in office, and that any finding of criminal responsibility by a domestic court in a foreign country, or any act of investigation undertaken with a view to bringing him or her to court, would contravene the principle of immunity from jurisdiction. According to the Congo, the basis of such criminal immunity is purely functional, and immunity is accorded under customary international law simply in order to enable the foreign State representative enjoying such immunity to perform his or her functions freely and without let or hindrance. The Congo adds that the immunity thus accorded to Ministers for Foreign Affairs when in office covers all their acts, including any committed before they took office, and that it is irrelevant whether the acts done whilst in office may be characterized or not as “official acts”.

48. The Congo states further that it does not deny the existence of a principle of international criminal law, deriving from the decisions of the Nuremberg and Tokyo international military tribunals, that the accused’s official capacity at the time of the acts cannot, before any court, whether domestic or international, constitute a “ground of exemption from his criminal responsibility or a ground for mitigation of sentence”. The Congo then stresses that the fact that an immunity might bar prosecution before a specific court or over a specific period does not mean that the same prosecution cannot be brought, if appropriate, before another court which is not bound by that immunity, or at another time when the immunity need no longer be taken into account. It concludes that immunity does not mean impunity.

49. Belgium maintains for its part that, while Ministers for Foreign Affairs in office generally enjoy an immunity from jurisdiction before the courts of a foreign State, such immunity applies only to acts carried out in the course of their official functions, and cannot protect such persons in respect of private acts or when they are acting otherwise than in the performance of their official functions.

50. Belgium further states that, in the circumstances of the present case, Mr. Yerodia enjoyed no immunity at the time when he is alleged to have committed the acts of which he is accused, and that there is no evidence that he was then acting in any official capacity. It observes that the arrest warrant was issued against Mr. Yerodia personally.

* *

51. The Court would observe at the outset that in international law it is firmly established that, as also diplomatic and consular agents, certain
holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal. For the purposes of the present case, it is only the immunity from criminal jurisdiction and the inviolability of an incumbent Minister for Foreign Affairs that fall for the Court to consider.

52. A certain number of treaty instruments were cited by the Parties in this regard. These included, first, the Vienna Convention on Diplomatic Relations of 18 April 1961, which states in its preambles that the purpose of diplomatic privileges and immunities is “to ensure the efficient performance of the functions of diplomatic missions as representing States”. It provides in Article 32 that only the sending State may waive such immunity. On these points, the Vienna Convention on Diplomatic Relations, to which both the Congo and Belgium are parties, reflects customary international law. The same applies to the corresponding provisions of the Vienna Convention on Consular Relations of 24 April 1963, to which the Congo and Belgium are also parties.

The Congo and Belgium further cite the New York Convention on Special Missions of 8 December 1969, to which they are not, however, parties. They recall that under Article 21, paragraph 2, of that Convention:

“The Head of the Government, the Minister for Foreign Affairs and other persons of high rank, when they take part in a special mission of the sending State, shall enjoy in the receiving State or in a third State, in addition to what is granted by the present Convention, the facilities, privileges and immunities accorded by international law.”

These conventions provide useful guidance on certain aspects of the question of immunities. They do not, however, contain any provision specifically defining the immunities enjoyed by Ministers for Foreign Affairs. It is consequently on the basis of customary international law that the Court must decide the questions relating to the immunities of such Ministers raised in the present case.

53. In customary international law, the immunities accorded to Ministers for Foreign Affairs are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States. In order to determine the extent of these immunities, the Court must therefore first consider the nature of the functions exercised by a Minister for Foreign Affairs. He or she is in charge of his or her Government's diplomatic activities and generally acts as its representative in international negotiations and intergovernmental meetings. Ambassadors and other diplomatic agents carry out their duties under his or her authority. His or her acts may bind the State represented, and there is a presumption that a Minister for Foreign Affairs, simply by virtue of that office, has full powers to act on behalf of the State (see, for example, Article 7, paragraph 2 (a), of the 1969 Vienna Convention on the Law of Treaties). In the performance of these functions, he or she is frequently required to travel internationally, and thus must be in a position freely to do so whenever the need should arise. He or she must also be in constant communication with the Government, and with its diplomatic missions around the world, and be capable at any time of communicating with representatives of other States. The Court further observes that a Minister for Foreign Affairs, responsible for the conduct of his or her State’s relations with all other States, occupies a position such that, like the Head of State or the Head of Government, he or she is recognized under international law as representative of the State solely by virtue of his or her office. He or she does not have to present letters of credence: to the contrary, it is generally the Minister who determines the authority to be conferred upon diplomatic agents and countersigns their letters of credence. Finally, it is to the Minister for Foreign Affairs that chargés d’affaires are accredited.

54. The Court accordingly concludes that the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties.

55. In this respect, no distinction can be drawn between acts performed by a Minister for Foreign Affairs in an “official” capacity, and those claimed to have been performed in a “private” capacity, or, for that matter, between acts performed before the person concerned assumed office as Minister for Foreign Affairs and acts committed during the period of office. Thus, if a Minister for Foreign Affairs is arrested in another State on a criminal charge, he or she is clearly thereby prevented from exercising the functions of his or her office. The consequences of such impediment to the exercise of those official functions are equally serious, regardless of whether the Minister for Foreign Affairs was, at the time of arrest, present in the territory of the arresting State on an “official” visit or a “private” visit, regardless of whether the arrest relates to acts allegedly performed before the person became the Minister for Foreign Affairs or to acts performed while in office, and regardless of whether the arrest relates to alleged acts performed in an “official” capacity or a “private” capacity. Furthermore, even the mere risk that, by travelling to or transiting another State a Minister for Foreign Affairs might be exposing himself or herself to legal proceedings could deter the Minister from travelling internationally when required to do so for the purposes of the performance of his or her official functions.

* * *
56. The Court will now address Belgium’s argument that immunities accorded to incumbent Ministers for Foreign Affairs can in no case protect them where they are suspected of having committed war crimes or crimes against humanity. In support of this position, Belgium refers in its Counter-Memorial to various legal instruments creating international criminal tribunals, to examples from national legislation, and to the jurisprudence of national and international courts.

Belgium begins by pointing out that certain provisions of the instruments creating international criminal tribunals state expressly that the official capacity of a person shall not be a bar to the exercise by such tribunals of their jurisdiction.

Belgium also places emphasis on certain decisions of national courts, and in particular on the judgments rendered on 24 March 1999 by the House of Lords in the United Kingdom and on 13 March 2001 by the Court of Cassation in France in the *Pinochet* and *Quadafi* cases respectively, in which it contends that an exception to the immunity rule was accepted in the case of serious crimes under international law. Thus, according to Belgium, the *Pinochet* decision recognizes an exception to the immunity rule when Lord Millett stated that “[i]nternational law cannot be supposed to have established a crime having the character of a jus cogens and at the same time to have provided an immunity which is co-extensive with the obligation it seeks to impose”, or when Lord Phillips of Worth Matravers said that “no established rule of international law requires state immunity ratione materiae to be accorded in respect of prosecution for an international crime”. As to the French Court of Cassation, Belgium contends that, in holding that, “under international law as it currently stands, the crime alleged [acts of terrorism], irrespective of its gravity, does not come within the exceptions to the principle of immunity from jurisdiction for incumbent foreign Heads of State”, the Court explicitly recognized the existence of such exceptions.

57. The Congo, for its part, states that, under international law as it currently stands, there is no basis for asserting that there is any exception to the principle of absolute immunity from criminal process of an incumbent Minister for Foreign Affairs where he or she is accused of having committed crimes under international law.

In support of this contention, the Congo refers to State practice, giving particular consideration in this regard to the *Pinochet* and *Quadafi* cases, and concluding that such practice does not correspond to that which Belgium claims but, on the contrary, confirms the absolute nature of the immunity from criminal process of Heads of State and Ministers for Foreign Affairs. Thus, in the *Pinochet* case, the Congo cites Lord Browne-Wilkinson’s statement that “[t]his immunity enjoyed by a head of state in power and an ambassador in post is a complete immunity attached to the person of the head of state or ambassador and rendering him immune from all actions or prosecutions . . . .”. According to the Congo, the French Court of Cassation adopted the same position in its *Quadafi* judgment, in affirming that “international customary law bars the prosecution of incumbent Heads of State, in the absence of any contrary international provision binding on the parties concerned, before the criminal courts of a foreign State”.

As regards the instruments creating international criminal tribunals and the latter’s jurisprudence, these, in the Congo’s view, concern only those tribunals, and no inference can be drawn from them in regard to criminal proceedings before national courts against persons enjoying immunity under international law.

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58. The Court has carefully examined State practice, including national legislation and those few decisions of national higher courts, such as the House of Lords or the French Court of Cassation. It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.

The Court has also examined the rules concerning the immunity or criminal responsibility of persons having an official capacity contained in the legal instruments creating international criminal tribunals, and which are specifically applicable to the latter (see *Charter* of the International Military Tribunal of Nuremberg, Art. 7; *Charter* of the International Military Tribunal of Tokyo, Art. 6; *Statute* of the International Criminal Tribunal for the former Yugoslavia, Art. 7, para. 2; *Statute* of the International Criminal Tribunal for Rwanda, Art. 6, para. 2; *Statute* of the International Criminal Court, Art. 27). It finds that these rules likewise do not enable it to conclude that any such an exception exists in customary international law in regard to national courts.

Finally, none of the decisions of the Nuremberg and Tokyo international military tribunals, or of the International Criminal Tribunal for the former Yugoslavia, cited by Belgium deal with the question of the immunities of incumbent Ministers for Foreign Affairs before national courts where they are accused of having committed war crimes or crimes against humanity. The Court accordingly notes that those decisions are in no way at variance with the findings it has reached above.

In view of the foregoing, the Court accordingly cannot accept Belgium’s argument in this regard.

59. It should further be noted that the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction. Thus,
although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs. These remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions.

60. The Court emphasizes, however, that the immunity from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy impunity in respect of any crimes they might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.

61. Accordingly, the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances.

First, such persons enjoy no criminal immunity under international law in their own countries, and may thus be tried by those countries' courts in accordance with the relevant rules of domestic law.

Secondly, they will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity.

Thirdly, after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.

Fourthly, an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention. The latter’s Statute expressly provides, in Article 27, paragraph 2, that “immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person”.

* * *

62. Given the conclusions it has reached above concerning the nature and scope of the rules governing the immunity from criminal jurisdiction enjoyed by incumbent Ministers for Foreign Affairs, the Court must now consider whether in the present case the issue of the arrest warrant of 11 April 2000 and its international circulation violated those rules. The Court recalls in this regard that the Congo requests it, in its first final submission, to adjudge and declare that:

“[B]y issuing and internationally circulating the arrest warrant of 11 April 2000 against Mr. Abduray feu Ndombasi, Belgium committed a violation in regard to the Democratic Republic of the Congo of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers; in so doing, it violated the principle of sovereign equality among States.”

63. In support of this submission, the Congo maintains that the arrest warrant of 11 April 2000 as such represents a “coercive legal act” which violates the Congo’s immunity and sovereign rights, inasmuch as it seeks to “subject to an organ of domestic criminal jurisdiction a member of a foreign government who is in principle beyond its reach” and is fully enforceable without special formality in Belgium.

The Congo considers that the mere issuance of the warrant thus constituted a coercive measure taken against the person of Mr. Yerodia, even if it was not executed.

64. As regards the international circulation of the said arrest warrant, this, in the Congo’s view, not only involved further violations of the rules referred to above, but also aggravated the moral injury which it suffered as a result of the opprobrium “thus cast upon one of the most prominent members of its Government”. The Congo further argues that such circulation was a fundamental infringement of its sovereign rights in that it significantly restricted the full and free exercise, by its Minister for Foreign Affairs, of the international negotiation and representation functions entrusted to him by the Congo’s former President. In the Congo’s view, Belgium “[t]hus manifests an intention to have the individual concerned arrested at the place where he is to be found, with a view to procuring his extradition”. The Congo emphasizes moreover that it is necessary to avoid any confusion between the arguments concerning the legal effect of the arrest warrant abroad and the question of any responsibility of the foreign authorities giving effect to it. It points out in this regard that no State has acted on the arrest warrant, and that accordingly
“no further consideration need be given to the specific responsibility which a State executing it might incur, or to the way in which that responsibility should be related” to that of the Belgian State. The Congo observes that, in such circumstances, “there [would be] a direct causal relationship between the arrest warrant issued in Belgium and any act of enforcement carried out elsewhere”.

65. Belgium rejects the Congo’s argument on the ground that “the character of the arrest warrant of 11 April 2000 is such that it has neither infringed the sovereignty of, nor created any obligation for, the [Congo]”. With regard to the legal effects under Belgian law of the arrest warrant of 11 April 2000, Belgium contends that the clear purpose of the warrant was to procure that, if found in Belgium, Mr. Yerodia would be detained by the relevant Belgian authorities with a view to his prosecution for war crimes and crimes against humanity. According to Belgium, the Belgian investigating judge did, however, draw an explicit distinction in the warrant between, on the one hand, immunity from jurisdiction and, on the other hand, immunity from enforcement as regards representatives of foreign States who visit Belgium on the basis of an official invitation, making it clear that such persons would be immune from enforcement of an arrest warrant in Belgium. Belgium further contends that, in its effect, the disputed arrest warrant is national in character, since it requires the arrest of Mr. Yerodia if he is found in Belgium but it does not have this effect outside Belgium.

66. In respect of the legal effects of the arrest warrant outside Belgium, Belgium maintains that the warrant does not create any obligation for the authorities of any other State to arrest Mr. Yerodia in the absence of some further step by Belgium completing or validating the arrest warrant (such as a request for the provisional detention of Mr. Yerodia), or the issuing of an arrest warrant by the appropriate authorities in the State concerned following a request to do so, or the issuing of an Interpol Red Notice. Accordingly, outside Belgium, while the purpose of the warrant was admittedly “to establish a legal basis for the arrest of Mr. Yerodia... and his subsequent extradition to Belgium”, the warrant had no legal effect unless it was validated or completed by some prior act “requiring the arrest of Mr. Yerodia by the relevant authorities in a third State”. Belgium further argues that “[i]f a State had executed the arrest warrant, it might infringe Mr. [Yerodia’s] criminal immunity”, but that “the Party directly responsible for that infringement would have been that State and not Belgium”.

67. The Court will first recall that the “international arrest warrant in absentia”, issued on 11 April 2000 by an investigating judge of the Brussels Tribunal de première instance, is directed against Mr. Yerodia, stating that he is “currently Minister for Foreign Affairs of the Democratic Republic of the Congo, having his business address at the Ministry of Foreign Affairs in Kinshasa”. The warrant states that Mr. Yerodia is charged with being “the perpetrator or co-perpetrator” of:

— Crimes under international law constituting grave breaches causing harm by act or omission to persons and property protected by the Conventions signed at Geneva on 12 August 1949 and by Additional Protocols I and II to those Conventions (Article 1, paragraph 3, of the Law of 16 June 1993, as amended by the Law of 10 February 1999 concerning the punishment of serious violations of international humanitarian law)

— Crimes against humanity (Article 1, paragraph 2, of the Law of 16 June 1993, as amended by the Law of 10 February 1999 concerning the punishment of serious violations of international humanitarian law).

The warrant refers to “various speeches inciting racial hatred” and to “particularly virulent remarks” allegedly made by Mr. Yerodia during “public addresses reported by the media” on 4 August and 27 August 1998. It adds:

“These speeches allegedly had the effect of inciting the population to attack Tutsi residents of Kinshasa: there were dragnet searches, manhunts (the Tutsi enemy) and Lynchings.

The speeches inciting racial hatred thus are said to have resulted in several hundred deaths, the internment of Tutsis, summary executions, arbitrary arrests and unfair trials.”

68. The warrant further states that “the position of Minister for Foreign Affairs currently held by the accused does not entail immunity from jurisdiction and enforcement”. The investigating judge does, however, observe in the warrant that “the rule concerning the absence of immunity under humanitarian law would appear... to require some qualification in respect of immunity from enforcement” and explains as follows:

“Pursuant to the general principle of fairness in judicial proceedings, immunity from enforcement must, in our view, be accorded to all State representatives welcomed as such onto the territory of Belgium (on ‘official visits’). Welcoming such foreign dignitaries as official representatives of sovereign States involves not only relations between individuals but also relations between States. This implies that such welcome includes an undertaking by the host State and its various components to refrain from taking any coercive measures against its guest and the invitation cannot become a pretext for ensnaring the individual concerned in what would then have to be labelled a trap. In the contrary case, failure to respect this
undertaking could give rise to the host State’s international responsibility.”

69. The arrest warrant concludes with the following order:

“We instruct and order all bailiffs and agents of public authority who may be so required to execute this arrest warrant and to conduct the accused to the detention centre in Forest;

We order the warden of the prison to receive the accused and to keep him (her) in custody in the detention centre pursuant to this arrest warrant;

We require all those exercising public authority to whom this warrant shall be shown to lend all assistance in executing it.”

70. The Court notes that the issuance, as such, of the disputed arrest warrant represents an act by the Belgian judicial authorities intended to enable the arrest on Belgian territory of an incumbent Minister for Foreign Affairs on charges of war crimes and crimes against humanity. The fact that the warrant is enforceable is clearly apparent from the order given to “all bailiffs and agents of public authority . . . to execute this arrest warrant” (see paragraph 69 above) and from the assertion in the warrant that “the position of Minister for Foreign Affairs currently held by the accused does not entail immunity from jurisdiction and enforcement”. The Court notes that the warrant did admittedly make an exception for the case of an official visit by Mr. Yerodia to Belgium, and that Mr. Yerodia never suffered arrest in Belgium. The Court is bound, however, to find that, given the nature and purpose of the warrant, its mere issue violated the immunity which Mr. Yerodia enjoyed as the Congo’s incumbent Minister for Foreign Affairs. The Court accordingly concludes that the issue of the warrant constituted a violation of an obligation of Belgium towards the Congo, in that it failed to respect the immunity of the incumbent Minister for Foreign Affairs of the Congo and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law.

* * *

72. The Court will now address the issue of the remedies sought by the Congo on account of Belgium’s violation of the above-mentioned rules of international law. In its second, third and fourth submissions, the Congo requests the Court to adjudge and declare that:

“A formal finding by the Court of the unlawfulness of [the issue and international circulation of the arrest warrant] constitutes an appropriate form of satisfaction, providing reparation for the consequent moral injury to the Democratic Republic of the Congo;

The violations of international law underlying the issue and international circulation of the arrest warrant of 1 April 2000 preclude any State, including Belgium, from executing it;

Belgium shall be required to recall and cancel the arrest warrant of 11 April 2000 and to inform the foreign authorities to whom the warrant was circulated that Belgium renounces its request for their co-operation in executing the unlawful warrant.”

73. In support of those submissions, the Congo asserts that the termination of the official duties of Mr. Yerodia in no way operated to efface the wrongful act and the injury flowing from it, which continue to exist. It argues that the warrant is unlawful ab initio, that “[i]t is fundamentally flawed” and that it cannot therefore have any legal effect today. It points
out that the purpose of its request is reparation for the injury caused, requiring the restoration of the situation which would in all probability have existed if the said act had not been committed. It states that, inasmuch as the wrongful act consisted in an illegal act, only the “withdrawal” and “cancellation” of the latter can provide appropriate reparation.

The Congo further emphasizes that in no way is it asking the Court itself to withdraw or cancel the warrant, nor to determine the means whereby Belgium is to comply with its decision. It explains that the withdrawal and cancellation of the warrant, by the means that Belgium deems most suitable, “are not means of enforcement of the judgment of the Court but the requested measure of legal reparation/RESTITUTION it self”. The Congo maintains that the Court is consequently only being requested to declare that Belgium, by way of reparation for the injury to the rights of the Congo, be required to withdraw and cancel this warrant by the means of its choice.

74. Belgium for its part maintains that a finding by the Court that the immunity enjoyed by Mr. Yerodia as Minister for Foreign Affairs had been violated would in no way entail an obligation to cancel the arrest warrant. It points out that the arrest warrant is still operative and that “there is no suggestion that it presently infringes the immunity of the Congo’s Minister for Foreign Affairs”. Belgium considers that what the Congo is in reality asking of the Court in its third and fourth final submissions is that the Court should direct Belgium as to the method by which it should give effect to a judgment of the Court finding that the warrant had infringed the immunity of the Congo’s Minister for Foreign Affairs.

75. The Court has already concluded (see paragraphs 70 and 71) that the issue and circulation of the arrest warrant of 11 April 2000 by the Belgian authorities failed to respect the immunity of the incumbent Minister for Foreign Affairs of the Congo and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by Mr. Yerodia under international law. Those acts engaged Belgium’s international responsibility. The Court considers that the findings so reached by it constitute a form of satisfaction which will make good the moral injury complained of by the Congo.

76. However, as the Permanent Court of International Justice stated in its Judgment of 13 September 1928 in the case concerning the Factory at Chorzów:

“[t]he essential principle contained in the actual notion of an illegal act — a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals — is that reparation must, as far as possible, wipe out all the conse-

quences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed” (P.C.I.J., Series A. No. 17, p. 47).

In the present case, “the situation which would, in all probability, have existed if [the illegal act] had not been committed” cannot be re-established merely by a finding by the Court that the arrest warrant was unlawful under international law. The warrant is still extant, and remains unlawful, notwithstanding the fact that Mr. Yerodia has ceased to be Minister for Foreign Affairs. The Court accordingly considers that Belgium must, by means of its own choosing, cancel the warrant in question and so inform the authorities to whom it was circulated.

77. The Court sees no need for any further remedy: in particular, the Court cannot, in a judgment ruling on a dispute between the Congo and Belgium, indicate what that judgment’s implications might be for third States, and the Court cannot therefore accept the Congo’s submissions on this point.

* * *

78. For these reasons,

THE COURT,

(I) (A) By fifteen votes to one,

Rejects the objections of the Kingdom of Belgium relating to jurisdiction, mootness and admissibility:

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buerghenthal; Judges ad hoc Bula-Bula, Van den Wyngaert;

AGAINST: Judge Oda;

(B) By fifteen votes to one,

Finds that it has jurisdiction to entertain the Application filed by the Democratic Republic of the Congo on 17 October 2000;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buerghenthal; Judges ad hoc Bula-Bula, Van den Wyngaert;

AGAINST: Judge Oda;

(C) By fifteen votes to one,

Finds that the Application of the Democratic Republic of the Congo is not without object and that accordingly the case is not moot;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren,
Kooijmans, Rezek, Al-Khasawneh, Buergenthal; Judges ad hoc Bula-Bula, Van den Wyngaert;

AGAINST: Judge Oda;

(D) By fifteen votes to one,

Finds that the Application of the Democratic Republic of the Congo is admissible;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; Judges ad hoc Bula-Bula, Van den Wyngaert;

AGAINST: Judge Oda;

(2) By thirteen votes to three,

Finds that the issue against Mr. Abdoulaye Yerodia Ndombasi of the arrest warrant of 11 April 2000, and its international circulation, constitute violations of a legal obligation of the Kingdom of Belgium towards the Democratic Republic of the Congo, in that they failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo enjoyed under international law;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Buergenthal; Judge ad hoc Bula-Bula;

AGAINST: Judges Oda, Al-Khasawneh; Judge ad hoc Van den Wyngaert;

(3) By ten votes to six,

Finds that the Kingdom of Belgium must, by means of its own choosing, cancel the arrest warrant of 11 April 2000 and so inform the authorities to whom that warrant was circulated.

IN FAVOUR: President Guillaume; Vice-President Shi Judges Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Rezek; Judge ad hoc Bula-Bula;

AGAINST: Judges Oda, Higgins, Kooijmans, Al-Khasawneh, Buergenthal; Judge ad hoc Van den Wyngaert.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this fourteenth day of February, two thousand and two, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Demo-
cratric Republic of the Congo and the Government of the Kingdom of Belgium, respectively.

(Signed) Gilbert GUILLAUME,
President.

(Signed) Philippe COUVREUR,
Registrar.

President GUILLAUME appends a separate opinion to the Judgment of the Court; Judge ODA appends a dissenting opinion to the Judgment of the Court; Judge RANJEVA appends a declaration to the Judgment of the Court; Judge KOROMA appends a separate opinion to the Judgment of the Court; Judges HIGGINS, KOOIJMANS and BUERGENTHAL append a joint separate opinion to the Judgment of the Court; Judge REZEGK appends a separate opinion to the Judgment of the Court; Judge AL-KHASAWNEH appends a dissenting opinion to the Judgment of the Court; Judge AD hoc BULA-BULA appends a separate opinion to the Judgment of the Court; Judge AD hoc VAN DEN WYNGAERT appends a dissenting opinion to the Judgment of the Court.

(Initialled) G.G.
(Initialled) Ph.C.
International Court of Justice

Questions relating to the Obligation to Prosecute or Extradite
(Belgium v. Senegal)
Judgment of 20 July 2012
QUESTIONS CONCERNANT L'OBLIGATION DE POURSUIVRE OU D'EXTRADER
(BELGIQUE c. SÉNÉGAL)

QUESTIONS RELATING TO THE OBLIGATION TO PROSECUTE OR EXTRADITE
(BELGIUM v. SENEGAL)
INTERNATIONAL COURT OF JUSTICE

YEAR 2012

20 July 2012

General List
No. 144

QUESTIONS RELATING TO THE OBLIGATION TO PROSECUTE OR EXTRADITE
(BELGIUM v. SENEGAL)

Historical and factual background.

Complaints filed against Mr. Habré in Senegal and in Belgium — Belgium’s first extradition request — Senegal’s referral of the “Hissène Habré case” to the African Union — Decision of the United Nations Committee against Torture — Senegalese legislative and constitutional reforms — Judgment of the Court of Justice of the Economic Community of West African States — Belgium’s second, third and fourth extradition requests.

Bases of jurisdiction of the Court — Article 30, paragraph 1, of the Convention against Torture (CAT) — The Parties’ declarations under Article 36, paragraph 2, of the Statute.

The existence of a dispute, condition required for both bases of jurisdiction — No dispute with regard to Article 5, paragraph 2, of CAT — Dispute with regard to Article 6, paragraph 2, and Article 7, paragraph 1, of CAT existed at the time of the Application and continues to exist — No dispute relating to breaches of obligations under customary international law.

Other conditions for jurisdiction under Article 30, paragraph 1, of CAT — Dispute could not be settled through negotiation — Belgium requested that dispute be submitted to arbitration — At least six months have passed after the request for arbitration.

The Court has jurisdiction to entertain the dispute concerning Article 6, paragraph 2, and Article 7, paragraph 1, of CAT — No need to consider whether the Court has jurisdiction on the basis of the declarations under Article 36, paragraph 2, of the Statute.

Admissibility of Belgium’s claims — Claims based on Belgium’s status as a party to CAT — Claims based on the existence of a special interest of Belgium — Object and purpose of CAT — Obligations erga omnes partes — State party’s right to make a claim concerning the cessation of an alleged breach by another State party — Belgium has standing as a State party to CAT to invoke the responsibility of Senegal for alleged breaches — Claims of Belgium based on Article 6, paragraph 2, and Article 7, paragraph 1, of CAT are admissible — No need to pronounce on whether Belgium has a special interest.

The alleged violations of the Convention against Torture.

Article 5, paragraph 2, of CAT as a condition for performance of other CAT obligations — Absence of the necessary legislation until 2007 affected Senegal’s implementation of obligations in Article 6, paragraph 2, and Article 7, paragraph 1.

The alleged breach of the obligation under Article 6, paragraph 2, of CAT — Preliminary inquiry required as soon as suspect is identified in territory of State — The Court finds that Senegalese authorities did not immediately initiate preliminary inquiry once they had reason to suspect Mr. Habré of being responsible for acts of torture.

The alleged breach of the obligation under Article 7, paragraph 1, of CAT — State must submit case for prosecution irrespective of existence of a prior extradition request — Institution of proceedings in light of evidence against suspect — Prosecution as an obligation under CAT — Extradition as an option under CAT.
The temporal scope of the obligation under Article 7, paragraph 1 — Prohibition of torture is part of customary international law and a peremptory norm (jus cogens) — Obligation to prosecute applies to facts having occurred after entry into force of CAT for a State — Article 28 of the Vienna Convention on the Law of Treaties — Decision of the Committee against Torture — Senegal’s obligation to prosecute does not apply to acts before entry into force of CAT for Senegal — Belgium entitled since becoming a Party to CAT to request the Court to rule on Senegal’s compliance with Article 7, paragraph 1.

Implementation of the obligation under Article 7, paragraph 1 — Senegal’s duty to comply with its obligations under CAT not affected by decision of Court of Justice of the Economic Community of West African States — Financial difficulties raised by Senegal cannot justify failure to initiate proceedings against Mr. Habré — Referral of the matter to the African Union cannot justify Senegal’s delays in complying with its obligations under CAT — Article 27 of the Vienna Convention on the Law of Treaties — Object and purpose of CAT and the need to undertake proceedings without delay — Failure to take all measures necessary for the implementation of Article 7, paragraph 1 — Breach by Senegal of that provision.

Remedies.

Purpose of Article 6, paragraph 2, and Article 7, paragraph 1 — Senegal’s international responsibility engaged for failure to comply with its obligations under these provisions — Senegal required to cease this continuing wrongful act — Senegal’s obligation to submit the case to its competent authorities for the purpose of prosecution, if it does not extradite Mr. Habré.

JUDGMENT

Present: President TOMKA; Vice-President SEPÚLVEDA-AMOR; Judges OWADA, ABRAHAM, KEITH, BENNOUA, SKOTNIKOV, CANÇADO TRINDADE, YUSUF, GREENWOOD, XUE, DONOGHUE, GAJA, SEBUTINDE; Judges ad hoc SUR, KIRSCH; Registrar COUVREUR.

In the case concerning questions relating to the obligation to prosecute or extradite, between the Kingdom of Belgium, represented by

Mr. Paul Rietjens, Director-General of Legal Affairs, Federal Public Service for Foreign Affairs, Foreign Trade and Development Co-operation,
as Agent;

Mr. Gérard Dive, Adviser, Head of the International Humanitarian Law Division, Federal Public Service for Justice,
as Co-Agent;

Mr. Eric David, Professor of Law at the Université Libre de Bruxelles,

Sir Michael Wood, K.C.M.G., member of the English Bar, member of the International Law Commission,

Mr. Daniel Müller, consultant in Public International Law, Researcher at the Centre de droit international de Nanterre (CEDIN), University of Paris Ouest, Nanterre-La Défense,
as Counsel and Advocates;

H.E. Mr. Willy De Buck, Ambassador, Permanent Representative of the Kingdom of Belgium to the International Organizations in The Hague,

Mr. Philippe Meire, Federal Prosecutor, Federal Prosecutor’s Office,

Mr. Alexis Goldman, Adviser, Public International Law Directorate, Directorate-General of Legal Affairs, Federal Public Service for Foreign Affairs, Foreign Trade and Development Co-operation,

Mr. Benjamin Goes, Adviser, Federal Public Service-Chancellery of the Prime Minister,

Ms Valérie Delcroix, Attaché, Public International Law Directorate, Directorate-General of Legal Affairs, Federal Public Service for Foreign Affairs, Foreign Trade and Development Co-operation,

Ms Pauline Wamotte, Attaché, International Humanitarian Law Division, Federal Public Service for Justice,

Ms Liesbet Masschelein, Attaché, Office of the Prime Minister,

Mr. Vaios Koutroulis, Senior Lecturer, Faculty of Law, Université Libre de Bruxelles,
Mr. Geoffrey Eekhout, Attaché, Permanent Representation of the Kingdom of Belgium to the International Organizations in The Hague,

Mr. Jonas Perilleux, Attaché, International Humanitarian Law Division, Federal Public Service for Justice,

as Advisers,

and

the Republic of Senegal,

represented by

H.E. Mr. Cheikh Tidiane Thiam, Professor, Ambassador, Director-General of Legal and Consular Affairs, Ministry of Foreign Affairs and Senegalese Abroad,

as Agent;

H.E. Mr. Amadou Kebe, Ambassador of the Republic of Senegal to the Kingdom of the Netherlands,

Mr. François Diouf, Magistrate, Director of Criminal Affairs and Pardons, Ministry of Justice,

as Co-Agents;

Professor Serigne Diop, Mediator of the Republic,

Mr. Abdoulaye Dianko, Agent judiciaire de l'Etat,

Mr. Ibrahima Bakhoum, Magistrate,

Mr. Oumar Gaye, Magistrate,

as Counsel;

Mr. Moustapha Ly, First Counsellor, Embassy of Senegal in The Hague,

Mr. Moustapha Sow, First Counsellor, Embassy of Senegal in The Hague,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. On 19 February 2009, the Kingdom of Belgium (hereinafter “Belgium”) filed in the Registry of the Court an Application instituting proceedings against the Republic of Senegal (hereinafter “Senegal”) in respect of a dispute concerning “Senegal’s compliance with its obligation to prosecute Mr. Hissène Habré, former President of the Republic of Chad, or to extradite him to Belgium for the purposes of criminal proceedings”. Belgium based its claims on the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 (hereinafter “the Convention against Torture” or the “Convention”), as well as on customary international law.

In its Application, Belgium invoked, as the basis for the jurisdiction of the Court, Article 30, paragraph 1, of the Convention against Torture and the declarations made under Article 36, paragraph 2, of the Statute of the Court, by Belgium on 17 June 1958 and by Senegal on 2 December 1985.

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

3. On 19 February 2009, immediately after the filing of its Application, Belgium, referring to Article 41 of the Statute and to Articles 73, 74 and 75 of the Rules of Court, filed in the Registry of the Court a Request for the indication of provisional measures and asked the Court “to indicate, pending a final judgment on the merits”, provisional measures requiring the Respondent to take “all the steps within its power to keep Mr. H. Habré under the control and surveillance of the judicial authorities of Senegal so that the rules of international law with which Belgium requests compliance may be correctly applied”.

4. Since the Court included upon the Bench no judge of the nationality of either of the Parties, each availed itself of its right under Article 31, paragraph 3, of the Statute to choose a judge ad hoc to sit in the case: Belgium chose Mr. Philippe Kirsch and Senegal Mr. Serge Sur.

5. By an Order of 28 May 2009, the Court, having heard the Parties, found that the circumstances, as they then presented themselves to the Court, were not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures (Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009, p. 156, para. 76).

6. By an Order of 9 July 2009, the Court fixed 9 July 2010 and 11 July 2011 as the time-limits for the filing of the Memorial of Belgium and the Counter-Memorial of Senegal, respectively. The Memorial of Belgium was duly filed within the time-limit so prescribed.

7. At the request of Senegal, the President of the Court, by an Order of 11 July 2011, extended to 29 August 2011 the time-limit for the filing of the Counter-Memorial. That pleading was duly filed within the time-limit thus extended.
8. At a meeting held by the President of the Court with the Agents of the Parties on 10 October 2011, the Parties indicated that they did not consider a second round of written pleadings to be necessary and that they wished the Court to fix the date of the opening of the hearings as soon as possible. The Court considered that it was sufficiently informed of the arguments on the issues of fact and law on which the Parties relied and that the submission of further written pleadings did not appear necessary. The case thus became ready for hearing.

9. In conformity with Article 53, paragraph 2, of the Rules of Court, the Court, after ascertaining the views of the Parties, decided that copies of the pleadings and annexed documents would be made accessible to the public at the opening of the oral proceedings. The pleadings without their annexes were also put on the Court’s website.

10. Public hearings were held between 12 March 2012 and 21 March 2012, during which the Court heard the oral arguments and replies of:

For Belgium:
- Mr. Paul Rietjens,
- Mr. Gérard Dive,
- Mr. Eric David,
- Sir Michael Wood,
- Mr. Daniel Müller.

For Senegal:
- H.E. Mr. Cheikh Tidiane Thiam,
- Mr. Oumar Gaye,
- Mr. François Diouf,
- Mr. Ibrahima Bakhoum,
- Mr. Abdoulaye Dianko.

11. At the hearing, questions were put by Members of the Court to the Parties, to which replies were given orally and in writing. In accordance with Article 72 of the Rules of Court, each Party submitted its written comments on the written replies provided by the other Party.

12. In its Application, Belgium presented the following submissions:

“Belgium respectfully requests the Court to adjudge and declare that:

— the Court has jurisdiction to entertain the dispute between the Kingdom of Belgium and the Republic of Senegal regarding Senegal’s compliance with its obligation to prosecute Mr. H. Habré or to extradite him to Belgium for the purposes of criminal proceedings;

— Belgium’s claim is admissible;

— the Republic of Senegal is obliged to bring criminal proceedings against Mr. H. Habré for acts including crimes of torture and crimes against humanity which are alleged against him as perpetrator, co-perpetrator or accomplice;

— failing the prosecution of Mr. H. Habré, the Republic of Senegal is obliged to extradite him to the Kingdom of Belgium so that he can answer for these crimes before the Belgian courts.

Belgium reserves the right to revise or supplement the terms of this Application.”

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

On behalf of the Government of Belgium,

in the Memorial:

“For the reasons set out in this Memorial, the Kingdom of Belgium requests the International Court of Justice to adjudge and declare that:

1. (a) Senegal breached its international obligations by failing to incorporate in its domestic law the provisions necessary to enable the Senegalese judicial authorities to exercise the universal jurisdiction provided for in Article 5, paragraph 2, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

(b) Senegal has breached and continues to breach its international obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and under customary international law by failing to bring criminal proceedings against Mr. Hissène Habré for acts characterized in particular as crimes of torture, genocide, war crimes and crimes against humanity alleged against him as perpetrator, co-perpetrator or accomplice, or to extradite him to Belgium for the purposes of such criminal proceedings;

(c) Senegal may not invoke financial or other difficulties to justify the breaches of its international obligations.

2. Senegal is required to cease these internationally wrongful acts

(a) by submitting without delay the Hissène Habré case to its competent authorities for prosecution; or

(b) failing that, by extraditing Mr. Habré to Belgium.

Belgium reserves the right to revise or amend these submissions as appropriate, in accordance with the provisions of the Statute and the Rules of Court.”
On behalf of the Government of Senegal, in the Counter-Memorial:

"For the reasons set out in this Counter-Memorial, the State of Senegal requests the International Court of Justice to adjudge and declare that:

1. Principally, it cannot adjudicate on the merits of the Application filed by the Kingdom of Belgium because it lacks jurisdiction as a result of the absence of a dispute between Belgium and Senegal, and the inadmissibility of that Application;

2. In the alternative, Senegal has not breached any of the provisions of the 1984 Convention against Torture, in particular those prescribing the obligation to 'extradite or try' (Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention), or, more generally, any rule of customary international law;

3. In taking the various measures that have been described, Senegal is fulfilling its commitments as a State Party to the 1984 Convention against Torture;

4. In taking the appropriate measures and steps to prepare for the trial of Mr. Habré, Senegal is complying with the declaration by which it made a commitment before the Court.

Senegal reserves the right to revise or amend these submissions, as appropriate, in accordance with the provisions of the Statute and the Rules of Court."

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

On behalf of the Government of Belgium, at the hearing of 19 March 2012:

"For the reasons set out in its Memorial and during the oral proceedings, the Kingdom of Belgium requests the International Court of Justice to adjudge and declare that:

1. (a) Senegal breached its international obligations by failing to incorporate in due time in its domestic law the provisions necessary to enable the Senegalese judicial authorities to exercise the universal jurisdiction provided for in Article 5, paragraph 2, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

(b) Senegal has breached and continues to breach its international obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and under other rules of international law by failing to bring criminal proceedings against Hissène Habré for acts characterized in particular as crimes of torture, war crimes, crimes against humanity and the crime of genocide alleged against him as perpetrator, co-perpetrator or accomplice, or, otherwise, to extradite him to Belgium for the purposes of such criminal proceedings;

(c) Senegal may not invoke financial or other difficulties to justify the breaches of its international obligations.

2. Senegal is required to cease these internationally wrongful acts

(a) by submitting without delay the Hissène Habré case to its competent authorities for prosecution; or

(b) failing that, by extraditing Hissène Habré to Belgium without further ado."

On behalf of the Government of Senegal, at the hearing of 21 March 2012:

"In the light of all the arguments and reasons contained in its Counter-Memorial, in its oral pleadings and in the replies to the questions put to it by judges, whereby Senegal has declared and sought to demonstrate that, in the present case, it has duly fulfilled its international commitments and has not committed any internationally wrongful act, [Senegal asks] the Court . . . to find in its favour on the following submissions and to adjudge and declare that:

1. Principally, it cannot adjudicate on the merits of the Application filed by the Kingdom of Belgium because it lacks jurisdiction as a result of the absence of a dispute between Belgium and Senegal, and the inadmissibility of that Application;

2. In the alternative, should it find that it has jurisdiction and that Belgium's Application is admissible, that Senegal has not breached any of the provisions of the 1984 Convention against Torture, in particular those prescribing the obligation to 'try or extradite' (Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention), or, more generally, any other rule of conventional law, general international law or customary international law in this area;

3. In taking the various measures that have been described, Senegal is fulfilling its commitments as a State Party to the 1984 Convention against Torture;

4. In taking the appropriate measures and steps to prepare for the trial of Mr. H. Habré, Senegal is complying with the declaration by which it made a commitment before the Court;

5. It consequently rejects all the requests set forth in the Application of the Kingdom of Belgium."
I. HISTORICAL AND FACTUAL BACKGROUND

15. The Court will begin with a brief description of the historical and factual background to the present case.

16. After taking power on 7 June 1982 at the head of a rebellion, Mr. Hissène Habré was President of the Republic of Chad for eight years, during which time large-scale violations of human rights were allegedly committed, including arrests of actual or presumed political opponents, detentions without trial or under inhumane conditions, mistreatment, torture, extrajudicial executions and enforced disappearances. Mr. Habré was overthrown on 1 December 1990 by his former defence and security adviser, Mr. Idriss Déby, current President of Chad. After a brief stay in Cameroon, he requested political asylum from the Senegalese Government, a request which was granted. He then settled in Dakar, where he has been living ever since.

17. On 25 January 2000, seven Chadian nationals residing in Chad, together with an association of victims, filed with the senior investigating judge at the Dakar Tribunal régional hors classe a complaint with civil-party application against Mr. Habré on account of crimes alleged to have been committed during his presidency. On 3 February 2000, the senior investigating judge, after having conducted a questioning at first appearance to establish Mr. Habré’s identity and having informed him of the acts said to be attributable to him, indicted Mr. Habré for having “aided or abetted X . . . in the commission of crimes against humanity and acts of torture and barbarity” and placed him under house arrest.

18. On 18 February 2000, Mr. Habré filed an application with the Chambre d’accusation of the Dakar Court of Appeal for annulment of the proceedings against him, arguing that the courts of Senegal had no jurisdiction; that there was no legal basis for the proceedings; that they were time-barred; and that they violated the Senegalese Constitution, the Senegalese Penal Code and the Convention Against Torture. In a judgment of 4 July 2000, that Chamber of the Court of Appeal found that the investigating judge lacked jurisdiction and annulled the proceedings against Mr. Habré, on the grounds that the crimes committed were committed outside the territory of Senegal by a foreign national against foreign nationals and that they would involve the exercise of universal jurisdiction, while the Senegalese Code of Criminal Procedure then in force did not provide for such jurisdiction. In a judgment of 20 March 2001, the Senegalese Court of Cassation dismissed an appeal by the civil complainants against the judgment of 4 July 2000, confirming that the investigating judge had no jurisdiction.

19. On 30 November 2000, a Belgian national of Chadian origin filed a complaint with civil-party application against Mr. Habré with a Belgian investigating judge for, inter alia, serious violations of international humanitarian law, crimes of torture and the crime of genocide. Between 30 November 2000 and 11 December 2001, another 20 persons filed similar complaints against Mr. Habré for acts of the same nature, before the same judge. These complaints, relating to the period 1982 to 1990, and filed by two persons with dual Belgian-Chadian nationality and eighteen Chadians, were based on crimes covered by the Belgian Law of 16 June 1993 concerning the punishment of serious violations of international humanitarian law, as amended by the Law of 10 February 1999 (hereinafter the “1993/1999 Law”), and by the Convention against Torture. The Convention was ratified by Senegal on 21 August 1986, without reservation, and became binding on it on 26 June 1987, the date of its entry into force. Belgium ratified the Convention on 25 June 1999, without reservation, and became bound by it on 25 July 1999.

20. After finding that the acts complained of — extermination, torture, persecution and enforced disappearances — could be characterized as “crimes against humanity” under the 1993/1999 Law, the Belgian investigating judge issued two international letters rogatory, to Senegal and Chad, on 19 September and 3 October 2001, respectively. In the first of these, he sought to obtain a copy of the record of all proceedings concerning Mr. Habré pending before the Senegalese judicial authorities; on 22 November 2001 Senegal provided Belgium with a file on the matter. The second letter rogatory sought to establish judicial co-operation between Belgium and Chad, in particular requesting that Belgian authorities be permitted to interview the Chadian complainants and witnesses, to have access to relevant records and to visit relevant sites. This letter rogatory was executed in Chad by the Belgian investigating judge between 26 February and 8 March 2002. Furthermore, in response to a question put by the Belgian investigating judge on 27 March 2002, asking whether Mr. Habré enjoyed any immunity from jurisdiction as a former Head of State, the Minister of Justice of Chad stated, in a letter dated 7 October 2002, that the Sovereign National Conference, held in N’Djamena from 15 January to 7 April 1993, had officially lifted from the former President all immunity from legal process. Between 2002 and 2005, various investigative steps were taken in Belgium, including examining complainants and witnesses, as well as analysing the documents provided by the Chadian authorities in execution of the letter rogatory.

21. On 19 September 2005, the Belgian investigating judge issued an international warrant in absentia for the arrest of Mr. Habré, indicted as the perpetrator or co-perpetrator, inter alia, of serious violations of international humanitarian law, torture, genocide, crimes against humanity and war crimes. By Note Verbale of 22 September 2005, Belgium transmitted the international arrest warrant to Senegal and requested the extradition of Mr. Habré. On 27 September 2005, Interpol — of which Belgium and Senegal have been members since 7 September 1923 and 4 September 1961, respectively — circulated a “red notice” concerning Mr. Habré, which serves as a request for provisional arrest with a view to extradition.

22. In a judgment of 25 November 2005, the Chambre d’accusation of the Dakar Court of Appeal ruled on Belgium’s extradition request, holding that, as “a court of ordinary law, [it could] not extend its jurisdiction to matters relating to the investigation or prosecution of a Head of State for acts allegedly committed in the exercise of his functions”; that Mr. Habré should “be given jurisdictional immunity”, which “is intended to survive the cessation of his duties as President of the Republic”; and that it could not therefore “adjudicate the lawfulness of [the] proceedings and the validity of the arrest warrant against a Head of State”.

23. The day after the delivery of the judgment of 25 November 2005, Senegal referred to the African Union the issue of the institution of proceedings against this former Head of State. In July 2006, the Union’s Assembly of Heads of State and Government, by Decision 127 (VII), inter alia “decided to consider the Hissène Habré case as falling within the competence of the African Union, . . . mandate[d] the Republic of Senegal to prosecute and ensure that Hissène Habré is tried, on behalf of Africa, by a competent Senegalese court with guarantees for fair trial”
interpretation would lead to recourse to the arbitration procedure provided for in Article 30 of the Convention. By Note Verbale of 21 June 2006, Senegal explained that it had not adopted such "measures as may be necessary to perform its obligations under Article 7 of the latter"

25. By Note Verbale of 11 January 2006, Belgium, referring to the ongoing negotiation mechanism, reiterated the view that the decision of the Chamber of Arbitration should not be taken into account by Senegal when it adopted its final decision to grant or refuse the extradition application in respect of Mr. Habré. As a result, Belgium stated that it interpreted the said referral of the "Hissène Habré case" to the African Union as "reflecting its position following the judgment of the Chamber of Arbitration".

26. By Note Verbale dated 4 May 2006, having noted the absence of an official response from Senegal, Belgium again referred to the Chamber of Arbitration's decision, with a view to establishing the obligation, for a State in whose territory the alleged offender is located to extradite him if it does not prosecute him, and stated that it interpreted Article 7 of the Convention as requiring the State on whose territory the alleged offender is located to extradite him to Belgium if it does not prosecute him.

27. The United Nations Committee against Torture considered a communication submitted by several persons, including Mr. Suleymane Guengueng, one of the Chadian nationals who had filed a complaint against Mr. Habré with the Chadian municipal court at the Dakar Tribunal on 25 January 2000 (see paragraph 17 above). In its decision of 17 May 2006, the Committee found that Senegal had not adopted such "measures as may be necessary to perform its obligations under Article 7 of the latter". The Committee also stated that Senegal had failed to perform its obligation to refer the "Hissène Habré case" to the African Union, stated that it interpreted the said Convention, and more specifically the obligation of a State, in this case, in the context of the extradition procedure provided for in Article 30 (see paragraph 42 below) began to run from that point.

28. In 2007, Senegal implemented a number of legislative reforms in order to bring its domestic law into conformity with Article 5, paragraph 2, of the Convention against Torture and taking note of the Committee's views on the matter. The new Articles 431-1 to 431-6 of the Penal Code defined and formally proscribed the crime of genocide, crimes against humanity, war crimes and other violations of international humanitarian law. In addition, under the terms of the new Article 431-6 of the Penal Code, any individual could be tried or sentenced for acts or omissions... which by its nature... being a perpetrator of or an accomplice to one of these offences... may be prosecuted... in the territory of the Republic of Senegal or... at the request of the Secretary-General of the Senegalese Ministry of Foreign Affairs and the Belgian Ambassador, the latter expressly invited Senegal to adopt a clear position on the request to submit the matter to arbitration. According to the same report, the Senegalese authorities took note of the Belgian request for arbitration... to the fact that the six month time-limit under Article 30 (see paragraph 42 below) began to run from that point.
A new Article 664bis was also incorporated into the Code of Criminal Procedure, according to which “[t]he national courts shall have jurisdiction over all criminal offences, punishable under Senegalese law, that are committed outside the territory of the Republic by a national or a foreigner, if the victim is of Senegalese nationality at the time the acts are committed”.

Senegal informed Belgium of these legislative reforms by Notes Verbales dated 20 and 21 February 2007. In its Note Verbal of 20 February, Senegal also recalled that the Assembly of the African Union, during its eighth ordinary session held on 29 and 30 January 2007, had

“[a]ppalled[ed] to Member States [of the Union], . . . international partners and the entire international community to mobilize all the resources, especially financial resources, required for the preparation and smooth conduct of the trial [of Mr. Habré]” (doc. Assembly AU/DEC.157 (VIII)).

29. In its Note Verbal of 21 February, Senegal stated that

“the principle of non-retroactivity, although recognized by Senegalese law[, ] does not block the judgment or sentencing of any individual for acts or omissions which, at the time they were committed, were considered criminal under the general principles of law recognized by all States”.

After having indicated that it had established “a working group charged with producing the proposals necessary to define the conditions and procedures suitable for prosecuting and judging the former President of Chad, on behalf of Africa, with the guarantees of a just and fair trial”, Senegal stated that the said trial “require[d] substantial funds which Senegal cannot mobilize without the assistance of the [i]nternational community”.

30. By Note Verbal dated 8 May 2007, Belgium recalled that it had informed Senegal, in a Note Verbal of 20 June 2006, “of its wish to constitute an arbitral tribunal to resolve the difference of opinion in the absence of finding a solution by means of negotiation as stipulated by Article 30 of the Convention [against Torture]”. It noted that “it ha[d] received no response from the Republic of Senegal [to its] proposal of arbitration” and reserved its rights on the basis of the above-mentioned Article 30. It took note of Senegal’s new legislative provisions and enquired whether those provisions would allow Mr. Habré to be tried in Senegal and, if so, within what time frame. Finally, Belgium made Senegal an offer of judicial co-operation, which envisaged that, in response to a letter rogatory from the competent Senegalese authorities, Belgium would transmit to Senegal a copy of the Belgian investigation file against Mr. Habré. By Note Verbal of 5 October 2007, Senegal informed Belgium of its decision to organize the trial of Mr. Habré and invited Belgium to a meeting of potential donors, with a view to financing that trial. Belgium reiterated its offer of judicial co-operation by Notes Verbales of 2 December 2008, 23 June 2009, 14 October 2009, 23 February 2010, 28 June 2010, 5 September 2010 and 17 January 2012. By Notes Verbales of 29 July 2009, 14 September 2009, 30 April 2010 and 15 June 2010, Senegal welcomed the proposal of judicial co-operation, stated that it had appointed investigating judges and expressed its willingness to accept the offer as soon as the forthcoming Donors’ Round Table had taken place. The Belgian authorities received no letter rogatory to that end from the Senegalese judicial authorities.

31. In 2008, Senegal amended Article 9 of its Constitution in order to provide for an exception to the principle of non-retroactivity of its criminal laws: although the second subparagraph of that Article provides that “[n]o one may be convicted other than by virtue of a law which became effective before the act was committed”, the third subparagraph stipulates that

“[h]owever, the provisions of the preceding subparagraph shall not prejudice the prosecution, trial and punishment of any person for any act or omission which, at the time when it was committed, was defined as criminal under the rules of international law concerning acts of genocide, crimes against humanity and war crimes”.

32. Following the above-mentioned legislative and constitutional reforms (see paragraphs 28 and 31 above), 14 victims (one of Senegalese nationality and 13 of Chadian nationality) filed a complaint with the Public Prosecutor of the Dakar Court of Appeal in September 2008, accusing Mr. Habré of acts of torture and crimes against humanity during the years of his presidency.

33. On 19 February 2009, Belgium filed in the Registry the Application instituting the present proceedings before the Court (see paragraph 1 above). On 8 April 2009, during the hearings relating to the request for the indication of provisional measures submitted by Belgium in the present case (see paragraphs 3 and 5 above), Senegal solemnly declared before the Court that it would not allow Mr. Habré to leave its territory while the case was pending (see I.C.J. Reports 2009, p. 154, para. 68). During the same hearings, it asserted that “[t]he only impediment . . . to the opening of Mr. Hissène Habré’s trial in Senegal [was] a financial one” and that Senegal “agreed to try Mr. Habré but at the very outset told the African Union that it would be unable to bear the costs of the trial by itself”. The budget for the said trial was adopted during a Donors Round Table held in Dakar in November 2010, involving Senegal, Belgium and a number of other States, as well as the African Union, the European Union, the Office of the United Nations High Commissioner for Human Rights and the United Nations Office for Project Services: it totals €8.6 million, a sum to which Belgium agreed to contribute a maximum of €1 million.

34. By judgment of 15 December 2009, the African Court on Human and Peoples’ Rights ruled that it had no jurisdiction to hear an application filed on 11 August 2008 against the Republic of Senegal, aimed at the withdrawal of the ongoing proceedings instituted by that State, with a view to charge, try and sentence Mr. Habré. The court based its decision on the fact that Senegal had not made a declaration accepting its jurisdiction to entertain such applications, under Article 34, paragraph 6, of the Protocol to the African Charter on Human and People’s Rights on the establishment of an African Court of Human and People’s Rights (African Court of Human and Peoples’ Rights, Michelot Yogogombaye v. Republic of Senegal, Application No. 001/2008, Judgment of 15 December 2009).

35. In a judgment of 18 November 2010, the Court of Justice of the Economic Community of West African States (hereinafter the “ECOWAS Court of Justice”) ruled on an application filed on 6 October 2008, in which Mr. Habré requested the court to find that his human rights would be violated by Senegal if proceedings were instituted against him. Having observed inter alia that
evidence existed pointing to potential violations of Mr. Habré’s human rights as a result of Senegal’s constitutional and legislative reforms, that Court held that Senegal should respect the rulings handed down by its national courts and, in particular, abide by the principle of res judicata, and ordered it accordingly to comply with the absolute principle of non-retroactivity. It further found that the mandate which Senegal received from the African Union was in fact to devise and propose all the necessary arrangements for the prosecution and trial of Mr. Habré to take place, within the strict framework of special ad hoc international proceedings (ECOWAS Court of Justice, Hissène Habré v. Republic of Senegal, Judgment No. ECW/CCJ/JUD/06/10 of 18 November 2010).

36. Following the delivery of the above-mentioned judgment by the ECOWAS Court of Justice, in January 2011 the Assembly of African Union Heads of State and Government “request[ed] the Commission to undertake consultations with the Government of Senegal in order to finalize the modalities for the expeditive trial of Hissène Habré through a special tribunal with an international character consistent with the ECOWAS Court of Justice Decision”.

At its seventeenth session, held in July 2011, the Assembly “confirm[ed] the mandate given to Senegal to try Hissène Habré on behalf of Africa” and

“urge[d] [the latter] to carry out its legal responsibility in accordance with the United Nations Convention against Torture[,] the decision of the United Nations . . . Committee against Torture[,] as well as the said mandate to put Hissène Habré on trial expeditiously or extradite him to any other country willing to put him on trial”.

37. By Note Verbale of 15 March 2011, Belgium transmitted to the Senegalese authorities a second request for the extradition of Mr. Habré. On 18 August 2011, the Chambre d’accusation of the Dakar Court of Appeal declared this second request for extradition inadmissible because it was not accompanied by the documents required under Senegalese Law No. 71-77 of 28 December 1971 (hereinafter the “Senegalese Law on Extradition”), in particular documents disclosing the existence of criminal proceedings alleged to have been instituted against Mr. Habré in Belgium and the legal basis of those proceedings, as required by Article 9 of the Law on Extradition, and “any record of the interrogation of the individual whose extradition is requested, as required by . . . Article 13 of the [same] Law”. The Chambre d’accusation further observed that Belgium had instituted proceedings against Senegal before the International Court of Justice; it therefore concluded that

“th[e] dispute [was] still pending before the said Court, which ha[d] sole competence to settle the question of the disputed interpretation by the two States of the extent and scope of the obligation aut dedere aut judicare under Article 4 of the . . . Convention [against Torture]”.

38. By Note Verbale of 5 September 2011, Belgium transmitted to Senegal a third request for the extradition of Mr. Habré. On 10 January 2012, the Chambre d’accusation of the Dakar Court of Appeal declared this request for extradition inadmissible on the grounds that the copy of the international arrest warrant placed on the file was not authentic, as required by Article 9 of the Senegalese Law on Extradition. Furthermore, it stated that “the report on the arrest, detention and questioning of the individual whose extradition [wa]s requested [wa]s not appended to the case file as required by Article 13 of the above-mentioned Law”.

39. On 12 January and 24 November 2011, the Rapporteur of the Committee Against Torture on follow-up to communications reminded Senegal, with respect to the Committee’s decision rendered on 17 May 2006 (see paragraph 27 above), of its obligation to submit the case of Mr. Habré to its competent authorities for the purpose of prosecution, if it did not extradite him.

40. By Note Verbale of 17 January 2012, Belgium addressed to Senegal, through the Embassy of Senegal in Brussels, a fourth request for the extradition of Mr. Habré. On 23 January 2012, the Embassy acknowledged receipt of the said Note and its annexes. It further stated that all those documents had been transmitted to the competent authorities in Senegal. By letter dated 14 May 2012, the Senegalese Ministry of Justice informed the Ministry of Foreign Affairs of Senegal that the extradition request had been transmitted in due course “as is, to the Public Prosecutor at the Dakar Court of Appeal, with the instruction to bring it before the Chambre d’accusation once the necessary legal formalities had been completed”.

41. At its eighteenth session, held in January 2012, the Assembly of the Heads of State and Government of the African Union observed that the Dakar Court of Appeal had not yet taken a decision on Belgium’s fourth request for extradition. It noted that Rwanda was prepared to organize Mr. Habré’s trial and

“request[ed] the Commission [of the African Union] to continue consultations with partner countries and institutions and the Republic of Senegal[,] and subsequently with the Republic of Rwanda[,] with a view to ensuring the expeditious trial of Hissène Habré and to consider the practical modalities as well as the legal and financial implications of the trial”.

II. JURISDICTION OF THE COURT

42. To found the jurisdiction of the Court, Belgium relies on Article 30, paragraph 1, of the Convention against Torture and on the declarations made by the Parties under Article 36, paragraph 2, of the Court’s Statute. Article 30, paragraph 1, of the Convention reads as follows:

“Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.”

Belgium’s declaration under Article 36, paragraph 2, of the Court’s Statute was made on 17 June 1958, and reads in the relevant part as follows:

“[Belgium] recognize[s] as compulsory ipso facto and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the International Court of Justice, in conformity with Article 36, paragraph 2, of the Statute of the Court, in legal disputes arising after 13 July 1948 concerning situations or facts subsequent to that date, except those in regard to which the parties have agreed or may agree to have recourse to another method of pacific settlement.”
Senegal’s declaration was made on 2 December 1985, and reads in the relevant part as follows:

“[Senegal] accepts on condition of reciprocity as compulsory ipso facto and without special convention, in relation to any other State accepting the same obligation, the jurisdiction of the Court over all legal disputes arising after the present declaration, concerning:

— the interpretation of a treaty;
— any question of international law;
— the existence of any fact which, if established, would constitute a breach of an international obligation;
— the nature or extent of the reparation to be made for the breach of international obligation.

This declaration is made on condition of reciprocity on the part of all States. However, Senegal may reject the Court’s competence in respect of:

— disputes in regard to which the parties have agreed to have recourse to some other method of settlement;
— disputes with regard to questions which, under international law, fall exclusively within the jurisdiction of Senegal.”

43. Senegal contests the existence of the Court’s jurisdiction on either basis, maintaining that the conditions set forth in the relevant instruments have not been met and, in the first place, that there is no dispute between the Parties.

A. The existence of a dispute

44. In the claims included in its Application, Belgium requested the Court to adjudge and declare that “the Republic of Senegal is obliged to bring criminal proceedings against Mr. H. Habré for acts including crimes of torture and crimes against humanity which are alleged against him as perpetrator, co-perpetrator or accomplice; failing the prosecution of Mr. H. Habré, the Republic of Senegal is obliged to extradite him to the Kingdom of Belgium so that he can answer for these crimes before the Belgian courts”. According to Belgium’s final submissions, the Court is requested to find that Senegal breached its obligations under Article 5, paragraph 2, of the Convention against Torture, and that, by failing to take action in relation to Mr. Habré’s alleged crimes, Senegal has breached and continues to breach its obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of that instrument and under certain other rules of international law.

Senegal submits that there is no dispute between the Parties with regard to the interpretation or application of the Convention against Torture or any other relevant rule of international law and that, as a consequence, the Court lacks jurisdiction.

45. The Court observes that the Parties have thus presented radically divergent views about the existence of a dispute between them and, if any dispute exists, its subject-matter. Given that the existence of a dispute is a condition of its jurisdiction under both bases of jurisdiction invoked by Belgium, the Court will first examine this issue.

46. The Court recalls that, in order to establish whether a dispute exists, “[i]t must be shown that the claim of one party is positively opposed by the other” (South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 328). The Court has previously stated that “[w]hether there exists an international dispute is a matter for objective determination” (Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950, p. 74) and that “[t]he Court’s determination must turn on an examination of the facts. The matter is one of substance, not of form.” (Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment of 1 April 2011, para. 30.) The Court has also noted that the “dispute must in principle exist at the time the Application is submitted to the Court” (ibid., para. 30).

47. The first request made in 2010 by Belgium in the submissions contained in its Memorial and then in 2012 in its final submissions, is that the Court should declare that Senegal breached Article 5, paragraph 2, of the Convention against Torture, which requires a State party to the Convention to “take such measures as may be necessary to establish its jurisdiction” over acts of torture when the alleged offender is “present in any territory under its jurisdiction” and that State does not extradite him to one of the States referred to in paragraph 1 of the same article. Belgium argues that Senegal did not enact “in a timely manner” provisions of national legislation allowing its judicial authorities to exercise jurisdiction over acts of torture allegedly committed abroad by foreign national who is present on its territory. Senegal does not contest that it complied only in 2007 with its obligation under Article 5, paragraph 2, but maintains that it has done so adequately by adopting Law No. 2007-05, which amended Article 690 of its Code of Criminal Procedure in order to extend the jurisdiction of Senegalese courts over certain offences, including torture, allegedly committed by a foreign national outside Senegal’s territory, irrespective of the nationality of the victim (see paragraph 28 above).

Senegal also points out that Article 9 of its Constitution was amended in 2008 so that the principle of non-retroactivity in criminal matters would not prevent the prosecution of an individual for genocide, crimes against humanity or war crimes if the acts in question were crimes under international law at the time when they were committed (see paragraph 31 above).

Belgium acknowledges that Senegal has finally complied with its obligation under Article 5, paragraph 2, but contends that the fact that Senegal did not comply with its obligation in a timely manner produced negative consequences concerning the implementation of some other obligations under the Convention.

48. The Court finds that any dispute that may have existed between the Parties with regard to the interpretation or application of Article 5, paragraph 2, of the Convention had ended by the time the Application was filed. Thus, the Court lacks jurisdiction to decide on Belgium’s claim relating to the obligation under Article 5, paragraph 2. However, this does not prevent the Court from considering the consequences that Senegal’s conduct in relation to the measures required by this provision may have had on its compliance with certain other obligations under the Convention, should the Court have jurisdiction in that regard.
Belgium further contends that Senegal breached its obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention against Torture. As was acknowledged by Senegal, “[a]t issue before the Court is a difference between two States as to how the execution of an obligation arising from an international instrument to which both States are parties should be understood.”

Senegal’s denial that there has been a breach appears to be based on its contention that Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention respectively require a State party to the Convention, when a person who has allegedly committed an act of torture is found on its territory, to “submit the case to its competent authorities for the purpose of prosecution.” Senegal maintains that there is no dispute with regard to the interpretation or scope of the obligations contained therein, and that it has met those obligations.

Before submitting its Application to the Court, Belgium on several occasions requested Senegal to comply with its obligation under the Convention “to extradite or judge” Mr. Habré for the alleged acts of torture. For instance, a Note Verbale of 9 March 2006 addressed by the Belgian Embassy in Dakar to the Ministry of Foreign Affairs of Senegal, including paragraph 2 of the Note, stated that the Convention had to be understood “as requiring the State on whose territory the alleged author of an offence under Article 4 of the [Constitutional Treaty] resides, to extradite him unless it has decided on the basis of the charges covered by said article.”

Similarly, a Note Verbale of 4 May 2006 addressed by the Belgian Ministry of Foreign Affairs to the Ministry of Foreign Affairs of Senegal, including paragraph 2 of the Note, stated that Belgium interpreted Article 7 of the Convention against Torture as requiring the State on whose territory the alleged author of an offence under Article 7 of the Convention against Torture resides, to extradite him unless it has decided on the basis of the charges covered by said article. Thus, the Court notes that it was not disputable between the Parties concerning the existence or application of those obligations contained therein, and that it has met those obligations.

While it is the case that the Belgian international arrest warrant transmitted to Senegal on 22 September 2005 (see paragraph 21 above) referred to violations of international humanitarian law, torture, genocide, crimes against humanity, war crimes, murder and other crimes, neither document stated or implied that Senegal had an obligation under customary international law to exercise its jurisdiction over those crimes if it did not extradite Mr. Habré. In the light of the diplomatic exchanges between the Parties, the Court considers that no dispute existed between the Parties concerning the application of the obligations resulting from the relevant provisions of the Convention to the facts of the case.

Before submitting its Application to the Court, Belgium on several occasions requested Senegal to comply with the obligation to hold a preliminary inquiry into the facts of the case. In its pleadings, Belgium stresses the obligation to submit Mr. Habré’s case to prosecution. This does not change the core of the dispute, as it aims to ensure that the obligation to comply with the primary obligations under the Convention against Torture and raises quite different legal problems.
55. The Court concludes that, at the time of the filing of the Application, the dispute between the Parties did not relate to breaches of obligations under customary international law and that it thus has no jurisdiction to decide on Belgium’s claims related thereto.

It is thus only with regard to the dispute concerning the interpretation and application of Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention against Torture that the Court will have to find whether there exists a legal basis of jurisdiction.

B. Other conditions for jurisdiction

56. The Court will turn to the other conditions which should be met for it to have jurisdiction under Article 30, paragraph 1, of the Convention against Torture (see paragraph 42 above). These conditions are that the dispute cannot be settled through negotiation and that, after a request for arbitration has been made by one of the parties, they have been unable to agree on the organization of the arbitration within six months from the request. The Court will consider these conditions in turn.

57. With regard to the first of these conditions, the Court must begin by ascertaining whether there was, “at the very least[,] a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute” (Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment of 1 April 2011, para. 157). According to the Court’s jurisprudence, “the precondition of negotiation is met only when there has been a failure of negotiations, or when negotiations have become futile or deadlocked” (ibid., para. 159). The requirement that the dispute “cannot be settled through negotiation” could not be understood as referring to a theoretical impossibility of reaching a settlement. It rather implies that, as the Court noted with regard to a similarly worded provision, “no reasonable probability exists that further negotiations would lead to a settlement” (South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 345).

58. Several exchanges of correspondence and various meetings were held between the Parties concerning the case of Mr. Habré, when Belgium insisted on Senegal’s compliance with the obligation to judge or extradite him. Belgium expressly stated that it was acting within the framework of the negotiating process under Article 30 of the Convention against Torture in Notes Verbales addressed to Senegal on 11 January 2006, 9 March 2006, 4 May 2006 and 20 June 2006 (see paragraphs 25-26 above). The same approach results from a report sent by the Belgian Ambassador in Dakar on 21 June 2006 concerning a meeting with the Secretary-General of the Ministry of Foreign Affairs of Senegal (see paragraph 26 above). Senegal did not object to the characterization by Belgium of the diplomatic exchanges as negotiations.

59. In view of Senegal’s position that, even though it did not agree on extradition and had difficulties in proceeding towards prosecution, it was nevertheless complying with its obligations under the Convention (for instance, in the Note Verbale of 9 May 2006; see paragraph 26 above), negotiations did not make any progress towards resolving the dispute. This was observed by Belgium in a Note Verbale of 20 June 2006 (see paragraph 26 above). There was no change in the respective positions of the Parties concerning the prosecution of Mr. Habré’s alleged acts of torture during the period covered by the above exchanges. The fact that, as results from the pleadings of the Parties, their basic positions have not subsequently evolved confirms that negotiations did not and could not lead to the settlement of the dispute. The Court therefore concludes that the condition set forth in Article 30, paragraph 1, of the Convention that the dispute cannot be settled by negotiation has been met.

60. With regard to the submission to arbitration of the dispute on the interpretation of Article 7 of the Convention against Torture, a Note Verbale of the Belgian Ministry of Foreign Affairs of 4 May 2006 (see paragraph 26 above) observed that “[a]n unresolved dispute regarding this interpretation would lead to the recourse to the arbitration procedure provided for in Article 30 of the Convention against Torture”. In a Note Verbale of 9 May 2006 (see paragraph 26 above) the Ambassador of Senegal in Brussels responded that

“As to the possibility of Belgium having recourse to the arbitration procedure provided for in Article 30 of the Convention against Torture, the Embassy can only take note of this, restating the commitment of Senegal to the excellent relationship between the two countries in terms of cooperation and the combating of impunity.”

A direct request to resort to arbitration was made by Belgium in a Note Verbale of 20 June 2006 (see paragraph 26 above). In that Note Verbale, Belgium remarked that “the attempted negotiation with Senegal, which started in November 2005, had not succeeded”; Belgium, “in accordance with Article 30, paragraph 1, of the Torture Convention, consequently asked Senegal to submit the dispute to arbitration under conditions to be agreed mutually.” In its Order of 28 May 2009 on Belgium’s request for the indication of provisional measures, the Court has already observed that this Note Verbale:

“contains an explicit offer from Belgium to Senegal to have recourse to arbitration, pursuant to Article 30, paragraph 1, of the Convention against Torture, in order to settle the dispute concerning the application of the Convention in the case of Mr. Habré” (I.C.J. Reports 2009, p. 150, para. 52).

In a Note Verbale of 8 May 2007 (see paragraph 30 above) Belgium recalled “its wish to constitute an arbitral tribunal” and remarked that it had “received no response from the Republic of Senegal on the issue of this proposal of arbitration”. Although Senegal maintains that it had not received the Note Verbale dated 20 June 2006, it did not mention that matter after having received the Note Verbale of 8 May 2007. On that occasion, there was again no response on the part of Senegal to the request for arbitration.
61. Following its request for arbitration, Belgium did not make any detailed proposal for determining the issues to be submitted to arbitration and the organization of the arbitration proceedings. In the Court’s view, however, this does not mean that the condition that “the Parties are unable to agree on the organization of the arbitration” has not been fulfilled. A State may defer proposals concerning these aspects to the time when a positive response is given in principle to its request to settle the dispute by arbitration. As the Court said with regard to a similar treaty provision:

“The lack of agreement between the parties as to the organization of an arbitration cannot be presumed. The existence of such disagreement can follow only from a proposal for arbitration by the applicant, to which the respondent has made no answer or which it has expressed its intention not to accept.” (Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006, p. 41, para. 92.)

The present case is one in which the inability of the Parties to agree on the organization of the arbitration results from the absence of any response on the part of the State to which the request for arbitration was addressed.

62. Article 30, paragraph 1, of the Convention against Torture requires that at least six months should pass after the request for arbitration before the case is submitted to the Court. In the present case, this requirement has been complied with, since the Application was filed over two years after the request for arbitration had been made.

63. Given that the conditions set out in Article 30, paragraph 1, of the Convention against Torture have been met, the Court concludes that it has jurisdiction to entertain the dispute between the Parties concerning the interpretation and application of Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention.

Having reached this conclusion, the Court does not find it necessary to consider whether its jurisdiction also exists with regard to the same dispute on the basis of the declarations made by the Parties under Article 36, paragraph 2, of its Statute.

III. ADMISSIBILITY OF BELGIUM’S CLAIMS

64. Senegal objects to the admissibility of Belgium’s claims. It maintains that “Belgium is not entitled to invoke the international responsibility of Senegal for the alleged breach of its obligation to submit the Hissène Habré case to its competent authorities for the purpose of prosecution, unless it extradites him”. In particular, Senegal contends that none of the alleged victims of the acts said to be attributable to Mr. Habré was of Belgian nationality at the time when the acts were committed.

65. Belgium does not dispute the contention that none of the alleged victims was of Belgian nationality at the time of the alleged offences. However, it noted in its Application that “[a]s the present jurisdiction of the Belgian courts is based on the complaint filed by a Belgian national of Chadian origin, the Belgian courts intend to exercise passive personal jurisdiction”. In its Application Belgium requested the Court to adjudge and declare that its claim was admissible. In the oral proceedings, Belgium also claimed to be in a “particular position” since “it has availed itself of its right under Article 5 to exercise its jurisdiction and to request extradition”. Moreover, Belgium argued that “[u]nder the Convention, every State party, irrespective of the nationality of the victims, is entitled to claim performance of the obligation concerned, and, therefore, can invoke the responsibility resulting from the failure to perform”.

66. The divergence of views between the Parties concerning Belgium’s entitlement to bring its claims against Senegal before the Court with regard to the application of the Convention in the case of Mr. Habré raises the issue of Belgium’s standing. For that purpose, Belgium based its claims not only on its status as a party to the Convention but also on the existence of a special interest that would distinguish Belgium from the other parties to the Convention and give it a specific entitlement in the case of Mr. Habré.

67. The Court will first consider whether being a party to the Convention is sufficient for a State to be entitled to bring a claim to the Court concerning the cessation of alleged violations by another State party of its obligations under that instrument.

68. As stated in its Preamble, the object and purpose of the Convention is “to make more effective the struggle against torture… throughout the world”. The States parties to the Convention have a common interest to ensure, in view of their shared values, that acts of torture are prevented and that, if they occur, their authors do not enjoy impunity. The obligations of a State party to conduct a preliminary inquiry into the facts and to submit the case to its competent authorities for prosecution are triggered by the presence of the alleged offender in its territory, regardless of the nationality of the offender or the victims, or of the place where the alleged offences occurred. All the other States parties have a common interest in compliance with these obligations by the State in whose territory the alleged offender is present. That common interest implies that the obligations in question are owed by any State party to all the other States parties to the Convention. All the States parties “have a legal interest” in the protection of the rights involved (Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970, p. 32, para. 33). These obligations may be defined as “obligations erga omnes partes” in the sense that each State party has an interest in compliance with them in any given case. In this respect, the relevant provisions of the Convention against Torture are similar to those of the Convention on the Prevention and Punishment of the Crime of Genocide, with regard to which the Court observed that

“In such a convention the contracting States do not have any interests of their own: they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the raison d’être of the Convention.” (Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 23.)
As a consequence, there is no need for the Court to pronounce on whether Belgium also has a special interest with respect to Senegal’s compliance with the relevant provisions of the Convention in the case of Mr. Habré.

IV. THE ALLEGED VIOLATIONS OF THE CONVENTION AGAINST TORTURE

71. In its Application instituting proceedings, Belgium requested the Court to adjudicate and declare that Senegal has breached its obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention in the present proceedings. Therefore, the claims of Belgium based on these provisions are admissible.

72. Belgium has pointed out during the proceedings that the obligations deriving from Article 5, paragraph 3, Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention are closely linked with the obligation to criminalize torture and to establish its jurisdiction over it. As such, it requested the Court, in its final submissions, to declare that Senegal’s failure to adopt the necessary legislation until 2007, Senegal’s delay in extraditing Mr. Habré, and Senegal’s failure to bring criminal proceedings against him in its courts are breaches of its obligations under Article 5, paragraph 3, Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention.

73. Senegal contends Belgium’s allegations are inadmissible in light of Article 1-1 of the Convention, which requires that the proceedings be brought in good faith and that the facts in issue are not in dispute. Belgium maintains that Senegal’s lack of legislation is a failure to comply with its obligations under Article 5, paragraph 3, and Article 6, paragraph 2, of the Convention.

74. Although, for the reasons given above, the Court has no jurisdiction in this case over the alleged violation of Article 5, paragraph 3, of the Convention, it notes that the performance of torture by the State of Senegal, as a State party to the Convention, is actionable under international law. Article 6, paragraph 2, of the Convention, provides that Senegal’s failure to extradite Mr. Habré constitutes a breach of its obligations under Article 7, paragraph 1, of the Convention. Senegal’s failure to prosecute Mr. Habré for crimes against humanity, acts of torture and barbarity, in the absence of appropriate legislation allowing the Court to adjudge and decide that Senegal is obliged to bring criminal proceedings against Mr. Habré, who has been indicted for crimes against humanity, acts of torture and barbarity in the absence of appropriate legislation allowing such proceedings within the domestic legal order (see paragraph 18 above).

75. The obligation for the States to make the struggle against torture more effective by adopting measures in preparation for the commercial use of the Convention, as provided for by Article 6, paragraph 2, of the Convention, and to bring that failure to an end.

76. The Court considers that by not adopting the necessary legislation until 2007, Senegal’s delay in extraditing Mr. Habré, and Senegal’s failure to bring criminal proceedings against him, Senegal has not fulfilled its obligations under Article 5, paragraph 2, Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention.

77. For these reasons, the Court concludes that Belgium, as a State party to the Convention against Torture, has standing to invoke the responsibility of Senegal for the alleged breaches of its obligations under Article 5, paragraph 2, and Article 7, paragraph 1, of the Convention, and to bring that failure to an end.

78. This judgment was subsequently upheld by the Senegalese Court of Cassation (Court of Cassation, Judgment No. 14, 20 March 2011).
77. Thus, the fact that the required legislation had been adopted only in 2007 necessarily affected Senegal’s implementation of the obligations imposed on it by Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention.

78. The Court, bearing in mind the link which exists between the different provisions of the Convention, will now analyse the alleged breaches of Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention.

A. The alleged breach of the obligation laid down in Article 6, paragraph 2, of the Convention

79. Under the terms of Article 6, paragraph 2, of the Convention, the State in whose territory a person alleged to have committed acts of torture is present “shall immediately make a preliminary inquiry into the facts”.

80. Belgium considers that this procedural obligation is obviously incumbent on Senegal, since the latter must have the most complete information available in order to decide whether there are grounds either to submit the matter to its prosecuting authorities or, when possible, to extradite the suspect. The State in whose territory the suspect is present should take effective measures to gather evidence, if necessary through mutual judicial assistance, by addressing letters rogatory to countries likely to be able to assist it. Belgium takes the view that Senegal, by failing to take these measures, breached the obligation imposed on it by Article 6, paragraph 2, of the Convention. It points out that it nonetheless invited Senegal to issue a letter rogatory, in order to have access to the evidence in the hands of Belgian judges (see paragraph 30 above).

81. In answer to the question put by a Member of the Court concerning the interpretation of the obligation laid down by Article 6, paragraph 2, of the Convention, Belgium has pointed out that the nature of the inquiry required by Article 6, paragraph 2, depends to some extent on the legal system concerned, but also on the particular circumstances of the case. This would be the inquiry carried out before the case was transmitted to the authorities responsible for prosecution, if the State decided to exercise its jurisdiction. Lastly, Belgium recalls that paragraph 4 of this Article provides that interested States must be informed of the findings of the inquiry, so that they may, if necessary, seek the extradition of the alleged offender. According to Belgium, there is no information before the Court suggesting that a preliminary inquiry has been conducted by Senegal, and it concludes from this that Senegal has violated Article 6, paragraph 2, of the Convention.

82. Senegal, in answer to the same question, has maintained that the inquiry is aimed at establishing the facts, but that it does not necessarily lead to prosecution, since the prosecutor may, in the light of the results, consider that there are no grounds for such proceedings. Senegal takes the view that this is simply an obligation of means, which it claims to have fulfilled.

83. In the opinion of the Court, the preliminary inquiry provided for in Article 6, paragraph 2, is intended, like any inquiry carried out by the competent authorities, to corroborate or not the suspicions regarding the person in question. That inquiry is conducted by those authorities which have the task of drawing up a case file and collecting facts and evidence; this may consist of documents or witness statements relating to the events at issue and to the suspect’s possible involvement in the matter concerned. Thus the co-operation of the Chadian authorities should have been sought in this instance, and that of any other State where complaints have been filed in relation to the case, so as to enable the State to fulfil its obligation to make a preliminary inquiry.

84. Moreover, the Convention specifies that, when they are operating on the basis of universal jurisdiction, the authorities concerned must be just as demanding in terms of evidence as when they have jurisdiction by virtue of a link with the case in question. Article 7, paragraph 2, of the Convention thus stipulates:

“In the cases referred to in Article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in Article 5, paragraph 1.”

85. The Court observes that Senegal has not included in the case file any material demonstrating that the latter has carried out such an inquiry in respect of Mr. Habré, in accordance with Article 6, paragraph 2, of the Convention. It is not sufficient, as Senegal maintains, for a State party to the Convention to have adopted all the legislative measures required for its implementation; it must also exercise its jurisdiction over any act of torture which is at issue, starting by establishing the facts. The questioning at first appearance which the investigating judge at the Tribunal régional hors classe in Dakar conducted in order to establish Mr. Habré’s identity and to inform him of the acts of which he was accused cannot be regarded as performance of the obligation laid down in Article 6, paragraph 2, as it did not involve any inquiry into the charges against Mr. Habré.

86. While the choice of means for conducting the inquiry remains in the hands of the States parties, taking account of the case in question, Article 6, paragraph 2, of the Convention requires that steps must be taken as soon as the suspect is identified in the territory of the State, in order to conduct an investigation of that case. That provision must be interpreted in the light of the object and purpose of the Convention, which is to make more effective the struggle against torture. The establishment of the facts at issue, which is an essential stage in that process, became imperative in the present case at least since the year 2000, when a complaint was filed in Senegal against Mr. Habré (see paragraph 17 above).

87. The Court observes that a further complaint against Mr. Habré was filed in Dakar in 2008 (see paragraph 32 above), after the legislative and constitutional amendments made in 2007 and 2008, respectively, which were enacted in order to comply with the requirements of Article 5, paragraph 2, of the Convention (see paragraphs 28 and 31 above). But there is nothing in the materials submitted to the Court to indicate that a preliminary inquiry was opened following this second complaint. Indeed, in 2010 Senegal stated before the ECOWAS Court of Justice that no proceedings were pending or prosecution ongoing against Mr. Habré in Senegalese courts.
88. The Court finds that the Senegalese authorities did not immediately initiate a preliminary inquiry as soon as they had reason to suspect Mr. Habré, who was in their territory, of being responsible for acts of torture. That point was reached, at the latest, when the first complaint was filed against Mr. Habré in 2000.

The Court therefore concludes that Senegal has breached its obligation under Article 6, paragraph 2, of the Convention.

B. The alleged breach of the obligation laid down in Article 7, paragraph 1, of the Convention

89. Article 7, paragraph 1, of the Convention provides:

"The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in Article 4 is found shall in the cases contemplated in Article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution."

90. As is apparent from the travaux préparatoires of the Convention, Article 7, paragraph 1, is based on a similar provision contained in the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970. The obligation to submit the case to the competent authorities for the purpose of prosecution (hereinafter the “obligation to prosecute”) was formulated in such a way as to leave it to those authorities to decide whether or not to initiate proceedings, thus respecting the independence of States parties’ judicial systems. These two conventions emphasize, moreover, that the authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of the State concerned (Article 7, paragraph 2, of the Convention against Torture and Article 7 of the Hague Convention of 1970). It follows that the competent authorities involved remain responsible for deciding on whether to initiate a prosecution, in the light of the evidence before them and the relevant rules of criminal procedure.

91. The obligation to prosecute provided for in Article 7, paragraph 1, is normally implemented in the context of the Convention Against Torture after the State has performed the other obligations provided for in the preceding articles, which require it to adopt adequate legislation to enable it to criminalize torture, give its courts universal jurisdiction in the matter and make an inquiry into the facts. These obligations, taken as a whole, may be regarded as elements of a single conventional mechanism aimed at preventing suspects from escaping the consequences of their criminal responsibility, if proven. Belgium’s claim relating to the application of Article 7, paragraph 1, raises a certain number of questions regarding the nature and meaning of the obligation contained therein and its temporal scope, as well as its implementation in the present case.

1. The nature and meaning of the obligation laid down in Article 7, paragraph 1

92. According to Belgium, the State is required to prosecute the suspect as soon as the latter is present in its territory, whether or not he has been the subject of a request for extradition to one of the countries referred to in Article 5, paragraph 1 — that is, if the offence was committed within the territory of the latter State, or if one of its nationals is either the alleged perpetrator or the victim — or in Article 5, paragraph 3, that is, another State with criminal jurisdiction exercised in accordance with its internal law. In the cases provided for in Article 5, the State can consent to extradition. This is a possibility afforded by the Convention, and, according to Belgium, that is the meaning of the maxim “aut dedere aut judicare” under the Convention. Thus, if the State does not opt for extradition, its obligation to prosecute remains unaffected. In Belgium’s view, it is only if for one reason or another the State concerned does not prosecute, and a request for extradition is received, that the State has to extradite if it is to avoid being in breach of this central obligation under the Convention.

93. For its part, Senegal takes the view that the Convention certainly requires it to prosecute Mr. Habré, which it claims has endeavoured to do by following the legal procedure provided for in that instrument, but that it has no obligation to Belgium under the Convention to extradite him.

94. The Court considers that Article 7, paragraph 1, requires the State concerned to submit the case to its competent authorities for the purpose of prosecution, irrespective of the existence of a prior request for the extradition of the suspect. That is why Article 6, paragraph 2, obliges the State to make a preliminary inquiry immediately from the time that the suspect is present in its territory. The obligation to submit the case to the competent authorities, under Article 7, paragraph 1, may or may not result in the institution of proceedings, in the light of the evidence before them, relating to the charges against the suspect.

95. However, if the State in whose territory the suspect is present has received a request for extradition in any of the cases envisaged in the provisions of the Convention, it can relieve itself of its obligation to prosecute by acceding to that request. It follows that the choice between extradition or submission for prosecution, pursuant to the Convention, does not mean that the two alternatives are to be given the same weight. Extradition is an option offered to the State by the Convention, whereas prosecution is an international obligation under the Convention, the violation of which is a wrongful act engaging the responsibility of the State.

2. The temporal scope of the obligation laid down in Article 7, paragraph 1

96. A Member of the Court asked the Parties, first, whether the obligations incumbent upon Senegal under Article 7, paragraph 1, of the Convention applied to offences alleged to have been committed before 26 June 1987, the date when the Convention entered into force for Senegal, and, secondly, if, in the circumstances of the present case, those obligations extended to offences allegedly committed before 25 June 1999, the date when the Convention entered into force for Belgium (see paragraph 19 above). Those questions relate to the temporal application of Article 7, paragraph 1, of the Convention, according to the time when the offences are alleged to have been committed and the dates of entry into force of the Convention for each of the Parties.

97. In their replies, the Parties agree that acts of torture are regarded by customary international law as international crimes, independently of the Convention.
As regards the first aspect of the question put by the Member of the Court, namely, "torture" for purposes of the Convention, it can only mean torture that occurs subsequent to the entry into force of the Convention. However, when the Committee itself addressed the question in its report (see paragraphs 17, 19-21, and 32 above), the Committee did not apply to acts alleged to have been committed before the entry into force of the Convention. Senators, whether it make the entry into force of the Convention, 26 June 1987, Belgium contends that the Convention for Senegal, even though the alleged acts occurred before that date. Belgium further argues that under the Convention for Senegal, it is intended to strengthen the existing law by laying down specific procedural obligations, the purpose of which is to ensure that there will be no impunity and that, in these circumstances, those procedural obligations could apply to crimes committed before 26 June 1987.

99. In the Court's opinion, the prohibition of torture is part of customary international law and it has become a peremptory norm (jus cogens).

100. However, the obligation to prosecute the alleged perpetrators of acts of torture under the Convention applies only to facts having occurred after its entry into force for the State concerned.

101. The Court concludes that Senegal's obligation to prosecute pursuant to Article 7, paragraph 1, of the Convention does not apply to acts alleged to have been committed before the entry into force of the Convention for Senegal. Consequently, Senegal is under an obligation to submit the allegations concerning those acts to its competent authorities for the purpose of prosecution. Although Senegal itself did not require the Convention to institute proceedings in that case, it could not seek retroactive application of the Convention.

102. The Court concludes that Senegal's obligation to prosecute pursuant to Article 7, paragraph 1, of the Convention does not apply to acts alleged to have been committed before the entry into force of the Convention. Consequently, Senegal is under an obligation to submit the allegations concerning those acts to its competent authorities for the purpose of prosecution. Although Senegal itself did not require the Convention to institute proceedings in that case, it could not seek retroactive application of the Convention.
the purpose of prosecution. Preconditioning on the other hand is a reaction on the part of Senegal, violating its obligations. Article 36. The Court finds that the obligation provided for in paragraph 1 of Article 7 of the Convention, in particular by invoking the provisions of its internal law, in particular by invoking the decisions as to lack of jurisdiction rendered by its courts in 2000 and 2001, or the fact that it did not adopt the necessary legislation pursuant to Article 5, paragraph 2, of that Convention until 2007.

107. The Court is of the opinion that the financial difficulties raised by Senegal cannot justify the fact that it failed to initiate proceedings against Mr. Habré. For its part, Senegal itself states that it has never sought to use the issue of financial support to justify the failure to prosecute. Nor can the financial difficulties invoked by Senegal (see paragraphs 28-29 and 33 above) justify the fact that it failed to initiate proceedings against Mr. Habré. Senegal itself by Senegal, as recognized by Senegal itself, cannot justify the fact that it failed to initiate proceedings against Mr. Habré. It is therefore inappropriate to consider the financial difficulties as a reason for the delay in compliance with its obligation to prosecute.

108. With regard to the legal difficulties which Senegal claims to have faced in its domestic courts, the Court notes that Senegal itself has never sought to use the issue of legal difficulty as a reason for the failure to initiate proceedings against Mr. Habré. Senegal has repeatedly affirmed, throughout the proceedings, its intention to comply with its obligation under Article 7, paragraph 1, of the Convention, by taking the necessary measures in order to proceed with the trial that was to be conducted in Dakar. Senegal has also stated that it is subject to the jurisdiction of the ECOWAS Court of Justice, which has the authority to exercise the universal jurisdiction provided for in Article 5, paragraph 2, of the Convention.

110. Moreover, Senegal observes that the judgment of the ECOWAS Court of Justice against Senegal in 2000, which was based on paragraph 1 of Article 7, paragraph 1, of the Convention against Senegal, cannot be invoked against it. Senegal notes that the judgment of the ECOWAS Court of Justice is a case of ad hoc jurisdiction, which is not subject to the same standards as permanent jurisdiction. Senegal also observes that the judgment of the ECOWAS Court of Justice is not a case of ad hoc jurisdiction, which is subject to the same standards as permanent jurisdiction.

111. The Court considers that Senegal's duty to comply with its obligations under the Convention cannot be affected by the decision of the ECOWAS Court of Justice. Senegal has repeatedly affirmed, throughout the proceedings, its intention to comply with its obligation under Article 7, paragraph 1, of the Convention, by taking the necessary measures in order to proceed with the trial that was to be conducted in Dakar. Senegal has also stated that it is subject to the jurisdiction of the ECOWAS Court of Justice, which has the authority to exercise the universal jurisdiction provided for in Article 5, paragraph 2, of the Convention.

112. The Court finds that Senegal breached its international obligation by failing to incorporate in due time into its domestic law the provisions necessary to enable the Senegalese judicial authorities to exercise the universal jurisdiction provided for in Article 5, paragraph 2, of the Convention.
Torture, and that it has breached and continues to breach its international obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention by failing to bring criminal proceedings against Mr. Habré for the crimes he is alleged to have committed, or, otherwise, to extradite him to Belgium for the purposes of such criminal proceedings. Secondly, Belgium requests the Court to adjudge and declare that Senegal is required to cease these internationally wrongful acts by submitting without delay the “Hissène Habré case” to its competent authorities for the purpose of prosecution, or, failing that, by extraditing Mr. Habré to Belgium without further ado (see paragraph 14 above).

119. The Court recalls that Senegal’s failure to adopt until 2007 the legislative measures necessary to institute proceedings on the basis of universal jurisdiction delayed the implementation of its other obligations under the Convention. The Court further recalls that Senegal was in breach of its obligation under Article 6, paragraph 2, of the Convention to make a preliminary inquiry into the crimes of torture alleged to have been committed by Mr. Habré, as well as of the obligation under Article 7, paragraph 1, to submit the case to its competent authorities for the purpose of prosecution.

120. The purpose of these treaty provisions is to prevent alleged perpetrators of acts of torture from going unpunished, by ensuring that they cannot find refuge in any State Party. The State in whose territory the suspect is present does indeed have the option of extraditing him to a country which has made such a request, but on the condition that it is to a State which has jurisdiction in some capacity, pursuant to Article 5 of the Convention, to prosecute and try him.

121. The Court emphasizes that, in failing to comply with its obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention, Senegal has engaged its international responsibility. Consequently, Senegal is required to cease this continuing wrongful act, in accordance with general international law on the responsibility of States for internationally wrongful acts. Senegal must therefore take without further delay the necessary measures to submit the case to its competent authorities for the purpose of prosecution, if it does not extradite Mr. Habré.

(1) Unanimously,

*  *

*  *

122. For these reasons,

THE COURT,

(2) By fourteen votes to two,

Finds that it has no jurisdiction to entertain the claims of the Kingdom of Belgium relating to alleged breaches, by the Republic of Senegal, of obligations under customary international law;

IN FAVOUR: President Tomka; Vice-President Sepúlveda-Amor; Judges Owada, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue, Gaja, Sebutinde; Judge ad hoc Kirsch;

AGAINST: Judge Abraham; Judge ad hoc Sur;

(3) By fourteen votes to two,

Finds that the claims of the Kingdom of Belgium based on Article 6, paragraph 2, and Article 7, paragraph 1, of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 are admissible;

IN FAVOUR: President Tomka; Vice-President Sepúlveda-Amor; Judges Owada, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Donoghue, Gaja, Sebutinde; Judge ad hoc Kirsch;

AGAINST: Judge Xue; Judge ad hoc Sur;

(4) By fourteen votes to two,

Finds that the Republic of Senegal, by failing to make immediately a preliminary inquiry into the facts relating to the crimes allegedly committed by Mr. Hissène Habré, has breached its obligation under Article 6, paragraph 2, of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984;

IN FAVOUR: President Tomka; Vice-President Sepúlveda-Amor; Judges Owada, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Greenwood, Donoghue, Gaja, Sebutinde; Judges ad hoc Sur, Kirsch;

AGAINST: Judges Yusuf, Xue;

(5) By fourteen votes to two,

Finds that the Republic of Senegal, by failing to submit the case of Mr. Hissène Habré to its competent authorities for the purpose of prosecution, has breached its obligation under Article 7, paragraph 1, of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984;

IN FAVOUR: President Tomka; Vice-President Sepúlveda-Amor; Judges Owada, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Donoghue, Gaja, Sebutinde; Judge ad hoc Kirsch;

AGAINST: Judge Xue; Judge ad hoc Sur;
(6) Unanimously,

Finds that the Republic of Senegal must, without further delay, submit the case of Mr. Hissène Habré to its competent authorities for the purpose of prosecution, if it does not extradite him.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this twentieth day of July, two thousand and twelve, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Kingdom of Belgium and the Government of the Republic of Senegal, respectively.

(Signed) Peter Tomka,
President.

(Signed) Philippe Couvreur,
Registrar.

Judge Owada appends a declaration to the Judgment of the Court; Judges Abraham, Skotnikov, Cançado Trindade and Yusuf append separate opinions to the Judgment of the Court; Judge Xue appends a dissenting opinion to the Judgment of the Court; Judge Donoghue appends a declaration to the Judgment of the Court; Judge Sebutinde appends a separate opinion to the Judgment of the Court; Judge ad hoc Sur appends a dissenting opinion to the Judgment of the Court.

(Initialled) P. T.

(Initialled) Ph. C.
International Court of Justice

United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran) Judgment

I.C.J. Reports 1980
INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING UNITED STATES
DIPLOMATIC AND CONSULAR STAFF
IN TEHRAN

(UNITED STATES OF AMERICA v. IRAN)

JUDGMENT OF 24 MAY 1980

1980

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE RELATIVE AU PERSONNEL
DIPLOMATIQUE ET CONSULAIRE
DES ÉTATS-UNIS À TÉHÉRAN

(ÉTATS-UNIS D'AMÉRIQUE c. IRAN)

ARRÊT DU 24 MAI 1980

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arrêt, C.I.J. Recueil 1980, p. 3.
INTERNATIONAL COURT OF JUSTICE

YEAR 1980

24 May 1980

CASE CONCERNING UNITED STATES DIPLOMATIC AND CONSULAR STAFF IN TEHRAN

(UNITED STATES OF AMERICA v. IRAN)

Article 53 of the Statute — Proof of Facts — Admissibility of Proceedings — Existence of wider political dispute no bar to legal proceedings — Security Council proceedings no restriction on functioning of the Court — Fact-finding commission established by Secretary-General.


State responsibility for violations of Vienna Conventions of 1961 and 1963 on Diplomatic and Consular Relations — Action by persons not acting on behalf of State — Non-imputability thereof to State — Breach by State of obligation of protection — Subsequent decision to maintain situation so created on behalf of State — Use of situation as means of coercion.

Question of special circumstances as possible justification of conduct of State — Remedies provided for by diplomatic law for abuses.

Cumulative effect of successive breaches of international obligations — Fundamental character of international diplomatic and consular law.

JUDGMENT

Present: President Sir Humphrey Waldock; Vice-President Elias; Judges Forster, Gros, Lachs, Morozov, Nagendra Singh, Ruda, Mosler, Tarazi, Oda, Ago, El-Erian, Sette-Camara, Baxter; Registrar Aquarone.

4 DIPLOMATIC AND CONSULAR STAFF (JUDGMENT)

In the case concerning United States Diplomatic and Consular Staff in Tehran,

between

the United States of America,

represented by

The Honorable Roberts B. Owen, Legal Adviser, Department of State, as Agent,

H.E. Mrs. Geri Joseph, Ambassador of the United States of America to the Netherlands, as Deputy Agent,

Mr. Stephen M. Schwebel, Deputy Legal Adviser, Department of State, as Deputy Agent and Counsel,

Mr. Thomas J. Dunnigan, Counsellor, Embassy of the United States of America, as Deputy Agent,

assisted by

Mr. David H. Small, Assistant Legal Adviser, Department of State,

Mr. Ted L. Stein, Attorney-Adviser, Department of State,

Mr. Hugh V. Simon, Jr., Second Secretary, Embassy of the United States of America, as Advisers,

and

the Islamic Republic of Iran,

THE COURT,

composed as above,

delivers the following Judgment:

1. On 29 November 1979, the Legal Adviser of the Department of State of the United States of America handed to the Registrar an Application instituting proceedings against the Islamic Republic of Iran in respect of a dispute concerning the seizure and holding as hostages of members of the United States diplomatic and consular staff and certain other United States nationals.

2. Pursuant to Article 40, paragraph 2, of the Statute and Article 38, paragraph 4, of the Rules of Court, the Application was at once communicated to the Government of Iran. In accordance with Article 40, paragraph 3, of the Statute and Article 42 of the Rules of Court, the Secretary-General of the United Nations, the Members of the United Nations, and other States entitled to appear before the Court were notified of the Application.

3. On 29 November 1979, the same day as the Application was filed, the
Government of the United States filed in the Registry of the Court a request for the indication of provisional measures under Article 41 of the Statute and Article 73 of the Rules of Court. By an Order dated 15 December 1979, and adopted unanimously, the Court indicated provisional measures in the case.

4. By an Order made by the President of the Court dated 24 December 1979, 15 January 1980 was fixed as the time-limit for the filing of the Memorial of the United States, and 18 February 1980 as the time-limit for the Counter-Memorial of Iran, with liberty for Iran, if it appointed an Agent for the purpose of appearing before the Court and presenting its observations on the case, to apply for reconsideration of such time-limit. The Memorial of the United States was filed on 15 January 1980, within the time-limit prescribed, and was communicated to the Government of Iran; no Counter-Memorial was filed by the Government of Iran, nor was any agent appointed or any application made for reconsideration of the time-limit.

5. The case thus became ready for hearing on 19 February 1980, the day following the expiration of the time-limit fixed for the Counter-Memorial of Iran. In circumstances explained in paragraphs 41 and 42 below, and after due notice to the Parties, 18 March 1980 was fixed as the date for the opening of the oral proceedings; on 18, 19 and 20 March 1980, public hearings were held, in the course of which the Court heard the oral argument of the Agent and Counsel of the United States; the Government of Iran was not represented at the hearings. Questions were addressed to the Agent of the United States by Members of the Court both during the course of the hearings and subsequently, and replies were given either orally at the hearings or in writing, in accordance with Article 61, paragraph 4, of the Rules of Court.

6. On 6 December 1979, the Registrar addressed the notifications provided for in Article 63 of the Statute of the Court to the States which according to information supplied by the Secretary-General of the United Nations as depository were parties to one or more of the following Conventions and Protocols:

(a) the Vienna Convention on Diplomatic Relations of 1961;
(b) the Optional Protocol to that Convention concerning the Compulsory Settlement of Disputes;
(c) the Vienna Convention on Consular Relations of 1963;
(d) the Optional Protocol to that Convention concerning the Compulsory Settlement of Disputes;
(e) the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, of 1973.

7. The Court, after ascertaining the views of the Government of the United States on the matter, and affording the Government of Iran the opportunity of making its views known, decided pursuant to Article 53, paragraph 2, of the Rules of Court that copies of the pleadings and documents annexed should be made accessible to the public with effect from 25 March 1980.

8. In the course of the written proceedings the following submissions were presented on behalf of the Government of the United States of America:

in the Application:

"The United States requests the Court to adjudge and declare as follows:

(a) That the Government of Iran, in tolerating, encouraging, and failing to prevent and punish the conduct described in the preceding Statement of Facts, violated its international legal obligations to the United States as provided by:
- Articles 22, 24, 25, 27, 29, 31, 37 and 47 of the Vienna Convention on Diplomatic Relations,
- Articles 28, 31, 33, 34, 36 and 40 of the Vienna Convention on Consular Relations,
- Articles 4 and 7 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, and
- Articles II (4), XIII, XVIII and XIX of the Treaty of Amity, Economic Relations, and Consular Rights between the United States and Iran, and
- Articles 2 (3), 2 (4) and 33 of the Charter of the United Nations;

(b) That pursuant to the foregoing international legal obligations, the Government of Iran is under a particular obligation immediately to secure the release of all United States nationals currently being detained within the premises of the United States Embassy in Tehran and to assure that all such persons and all other United States nationals in Tehran are allowed to leave Iran safely;

(c) That the Government of Iran shall pay to the United States, in its own right and in the exercise of its right of diplomatic protection of its nationals, reparation for the foregoing violations of Iran's international legal obligations to the United States, in a sum to be determined by the Court; and

(d) That the Government of Iran submit to its competent authorities for the purpose of prosecution those persons responsible for the crimes committed against the premises and staff of the United States Embassy and against the premises of its Consulates";

in the Memorial:

"The Government of the United States respectfully requests that the Court adjudge and declare as follows:

(a) that the Government of the Islamic Republic of Iran, in permitting, tolerating, encouraging, adopting, and endeavouring to exploit, as well as in failing to prevent and punish, the conduct described in the Statement of the Facts, violated its international legal obligations to the United States as provided by:
- Articles 22, 24, 25, 26, 27, 29, 31, 37, 44 and 47 of the Vienna Convention on Diplomatic Relations;
- Articles 5, 27, 28, 31, 33, 34, 35, 36, 40 and 72 of the Vienna Convention on Consular Relations;
— Article II (4), XIII, XVIII and XIX of the Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran; and
— Articles 2, 4 and 7 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents;
(b) that, pursuant to the foregoing international legal obligations:

(i) the Government of the Islamic Republic of Iran shall immediately ensure that the premises at the United States Embassy, Chancery and Consulates are restored to the possession of the United States authorities under their exclusive control, and shall ensure their inviolability and effective protection as provided for by the treaties in force between the two States, and by general international law;

(ii) the Government of the Islamic Republic of Iran shall ensure the immediate release, without any exception, of all persons of United States nationality who are or have been held in the Embassy of the United States of America or in the Ministry of Foreign Affairs in Tehran, or who are or have been held as hostages elsewhere, and afford full protection to all such persons, in accordance with the treaties in force between the two States, and with general international law;

(iii) the Government of the Islamic Republic of Iran shall, as from that moment, afford to all the diplomatic and consular personnel of the United States the protection, privileges and immunities to which they are entitled under the treaties in force between the two States, and under general international law, including immunity from any form of criminal jurisdiction and freedom and facilities to leave the territory of Iran;

(iv) the Government of the Islamic Republic of Iran shall, in affording the diplomatic and consular personnel of the United States the protection, privileges and immunities to which they are entitled, including immunity from any form of criminal jurisdiction, ensure that no such personnel shall be obliged to appear on trial or as a witness, deponent, source of information, or in any other role, at any proceedings, whether formal or informal, initiated by or with the acquiescence of the Iranian Government, whether such proceedings be denominated a `trial', `grand jury', `international commission' or otherwise;

(v) the Government of the Islamic Republic of Iran shall submit to its competent authorities for the purpose of prosecution, or extradite to the United States, those persons responsible for the crimes committed against the personnel and premises of the United States Embassy and Consulates in Iran;

(c) that the United States of America is entitled to the payment to it, in its own right and in the exercise of its right of diplomatic protection of its nationals held hostage, of reparation by the Islamic Republic of Iran for the violations of the above international legal obligations which it owes to the United States, in a sum to be determined by the Court at a subsequent stage of the proceedings.”

9. At the close of the oral proceedings, written submissions were filed in the Registry of the Court on behalf of the Government of the United States of America in accordance with Article 60, paragraph 2, of the Rules of Court; a copy thereof was transmitted to the Government of Iran. Those submissions were identical with the submissions presented in the Memorial of the United States.

10. No pleadings were filed by the Government of Iran, which also was not represented at the oral proceedings, and no submissions were therefore presented on its behalf. The position of that Government was, however, defined in two communications addressed to the Court by the Minister for Foreign Affairs of Iran; the first of these was a letter dated 9 December 1979 and transmitted by telegram the same day (the text of which was set out in full in the Court’s Order of 15 December 1979, I.C.J. Reports 1979, pp. 10-11); the second was a letter transmitted by telex dated 16 March 1980 and received on 17 March 1980, the text of which followed closely that of the letter of 9 December 1979 and reads as follows:

[Translation from French]

“The Government of the Islamic Republic of Iran wishes to express its respect for the International Court of Justice, and for its distinguished Members, for what they have achieved in the quest for a just and equitable solution to legal conflicts between States, and respectfully draws the attention of the Court to the deeply rootedness and the essential character of the Islamic Revolution of Iran, a revolution of a whole oppressed nation against its oppressors and their masters, the examination of whose numerous repercussions is essentially and directly a matter within the national sovereignty of Iran.

The Government of the Islamic Republic of Iran considers that the Court cannot and should not take cognizance of the case which the Government of the United States of America has submitted to it, and in the most significant fashion, a case confined to what is called the question of the ‘hostages of the American Embassy in Tehran’.

For this question only represents a marginal and secondary aspect of an overall problem, one such that it cannot be studied separately, and which involves, inter alia, more than 25 years of continual interference by the United States in the internal affairs of Iran, the shameless exploitation of our country, and numerous crimes perpetrated against the Iranian people, contrary to and in conflict with all international and humanitarian norms.

The problem involved in the conflict between Iran and the United States is thus not one of the interpretation and the application of the treaties upon
which the American Application is based, but results from an overall situation containing much more fundamental and more complex elements. Consequently, the Court cannot examine the American Application divorced from its proper context, namely the whole political dossier of the relations between Iran and the United States over the last 25 years. With regard to the request for provisional measures, as formulated by the United States, it in fact implies that the Court should have passed judgment on the actual substance of the case submitted to it, which the Court cannot do without breach of the norms governing its jurisdiction. Furthermore, since provisional measures are by definition intended to protect the interest of the parties, they cannot be unilateral, as they are in the request submitted by the American Government.”

The matters raised in those two communications are considered later in this Judgment (paragraphs 33-38 and 81-82).

11. The position taken up by the Iranian Government in regard to the present proceedings brings into operation Article 53 of the Statute, under which the Court is required inter alia to satisfy itself that the claims of the Applicant are well founded in fact. As to this article the Court pointed out in the Corfu Channel case that this requirement is to be understood as applying within certain limits:

“While Article 53 thus obliges the Court to consider the submissions of the Party which appears, it does not compel the Court to examine their accuracy in all their details; for this might in certain unopposed cases prove impossible in practice. It is sufficient for the Court to convince itself by such methods as it considers suitable that the submissions are well founded.” (I.C.J. Reports 1949, p. 248.)

In the present case, the United States has explained that, owing to the events in Iran of which it complains, it has been unable since then to have access to its diplomatic and consular representatives, premises and archives in Iran; and that in consequence it has been unable to furnish detailed factual evidence on some matters occurring after 4 November 1979. It mentioned in particular the lack of any factual evidence concerning the treatment and conditions of the persons held hostage in Tehran. On this point, however, without giving the names of the persons concerned, it has submitted copies of declarations sworn by six of the 13 hostages who had been released after two weeks of detention and returned to the United States in November 1979.

12. The essential facts of the present case are, for the most part, matters of public knowledge which have received extensive coverage in the world press and in radio and television broadcasts from Iran and other countries.

13. They have been presented to the Court by the United States in its Memorial, in statements of its Agent and Counsel during the oral proceedings, and in written replies to questions put by Members of the Court. Annexed or appended to the Memorial are numerous extracts of statements made by Iranian and United States officials, either at press conferences or on radio or television, and submitted to the Court in support of the request for provisional measures and as a means of demonstrating the truth of the account of the facts stated in the Memorial. Included also in the Memorial is a “Statement of Verification” made by a high official of the United States Department of State having “overall responsibility within the Department for matters relating to the crisis in Iran”. While emphasizing that in the circumstances of the case the United States has had to rely on newspaper, radio and television reports for a number of the facts stated in the Memorial, the high official concerned certifies that to the best of his knowledge and belief the facts there stated are true. In addition, after the filing of the Memorial, and by leave of the Court, a large quantity of further documents of a similar kind to those already presented were submitted by the United States for the purpose of bringing up to date the Court’s information concerning the continuing situation in regard to the occupation of the Embassy and detention of the hostages.

14. Before examining the events of 4 November 1979, directly complained of by the Government of the United States, it is appropriate to mention certain other incidents which occurred before that date. At about 10.45 a.m. on 14 February 1979, during the unrest in Iran following the fall of the Government of Dr. Bakhtiar, the last Prime Minister appointed by the Shah, an armed group attacked and seized the United States Embassy in Tehran, taking prisoner the 70 persons they found there, including the Ambassador. Two persons associated with the Embassy staff were killed; serious damage was caused to the Embassy and there were some acts of
pilling of the Ambassador’s residence. On this occasion, while the Iranian authorities had not been able to prevent the incursion, they acted promptly in response to the urgent appeal for assistance made by the Embassy during the attack. At about 12 noon, Mr. Yazdi, then a Deputy Prime Minister, arrived at the Embassy accompanied by a member of the national police, at least one official and a contingent of Revolutionary Guards; they quelled the disturbance and returned control of the compound to American diplomatic officials. On 11 March 1979 the United States Ambassador received a letter dated 1 March from the Prime Minister, Dr. Bazargan, expressing regrets for the attack on the Embassy, stating that arrangements had been made to prevent any repetition of such incidents, and indicating readiness to make reparation for the damage. Attacks were also made during the same period on the United States Consulates in Tabriz and Shiraz.

15. In October 1979, the Government of the United States was contemplating permitting the former Shah of Iran, who was then in Mexico, to enter the United States for medical treatment. Officials of the United States Government feared that, in the political climate prevailing in Iran, the admission of the former Shah might increase the tension already existing between the two States, and <i>inter alia</i> result in renewed violence against the United States Embassy in Tehran, and it was decided for this reason to request assurances from the Government of Iran that adequate protection would be provided. On 21 October 1979, at a meeting at which were present the Iranian Prime Minister, Dr. Bazargan, the Iranian Minister for Foreign Affairs, Dr. Yazdi, and the United States Chargé d’affaires in Tehran, the Government of Iran was informed of the decision to admit the former Shah to the United States, and of the concern felt by the United States Government about the possible public reaction in Tehran. When the United States Chargé d’affaires requested assurances that the Embassy and its personnel would be adequately protected, assurances were given by the Foreign Minister that the Government of Iran would fulfil its international obligation to protect the Embassy. The request for such assurances was repeated at a further meeting the following day, 22 October, and the Foreign Minister renewed his assurances that protection would be provided. The former Shah arrived in the United States on 22 October. On 30 October, the Government of Iran, which had repeatedly expressed its serious opposition to the admission of the former Shah to the United States, and had asked the United States to permit two Iranian physicians to verify the reality and the nature of his illness, requested the United States to bring about his return to Iran. Nevertheless, on 31 October, the Security Officer of the United States Embassy was told by the Commander of the Iranian National Police that the police had been instructed to provide full protection for the personnel of the Embassy.

16. On 1 November 1979, while a very large demonstration was being held elsewhere in Tehran, large numbers of demonstrators marched to and fro in front of the United States Embassy. Under the then existing security arrangements the Iranian authorities normally maintained 10 to 15 uni-

formed policemen outside the Embassy compound and a contingent of Revolutionary Guards nearby; on this occasion the normal complement of police was stationed outside the compound and the Embassy reported to the State Department that it felt confident that it could get more protection if needed. The Chief of Police came to the Embassy personally and met the Chargé d’affaires, who informed Washington that the Chief was “taking his job of protecting the Embassy very seriously”. It was announced on the radio, and by the prayer leader at the main demonstration in another location in the city, that people should not go to the Embassy. During the day, the number of demonstrators at the Embassy was around 5,000, but protection was maintained by Iranian security forces. That evening, as the crowd dispersed, both the Iranian Chief of Protocol and the Chief of Police expressed relief to the Chargé d’affaires that everything had gone well.

17. At approximately 10.30 a.m. on 4 November 1979, during the course of a demonstration of approximately 3,000 persons, the United States Embassy compound in Tehran was overrun by a strong armed group of several hundred people. The Iranian security personnel are reported to have simply disappeared from the scene; at all events it is established that they made no apparent effort to deter or prevent the demonstrators from seizing the Embassy’s premises. The invading group (who subsequently described themselves as “Muslim Student Followers of the Imam’s Policy”, and who will hereafter be referred to as “the militants”) gained access by force to the compound and to the ground floor of the Chancery building. Over two hours after the beginning of the attack, and after the militants had attempted to set fire to the Chancery building and to cut through the upstairs steel doors with a torch, they gained entry to the upper floor; one hour later they gained control of the main vault. The militants also seized the other buildings, including the various residences, on the Embassy compound. In the course of the attack, all the diplomatic and consular personnel and other persons present in the premises were seized as hostages, and detained in the Embassy compound; subsequently other United States personnel and one United States private citizen seized elsewhere in Tehran were brought to the compound and added to the number of hostages.

18. During the three hours or more of the assault, repeated calls for help were made from the Embassy to the Iranian Foreign Ministry, and repeated efforts to secure help from the Iranian authorities were also made through direct discussions by the United States Chargé d’affaires, who was at the Foreign Ministry at the time, together with two other members of the mission. From there he made contact with the Prime Minister’s Office and with Foreign Ministry officials. A request was also made to the Iranian Chargé d’affaires in Washington for assistance in putting an end to the seizure of the Embassy. Despite these repeated requests, no Iranian secu-
rity forces were sent in time to provide relief and protection to the Embassys. In fact when Revolutionary Guards ultimately arrived on the scene, despatched by the Government “to prevent clashes”, they considered that their task was merely to “protect the safety of both the hostages and the students”, according to statements subsequently made by the Iranian Government’s spokesman, and by the operations commander of the Guards. No attempt was made by the Iranian Government to clear the Embassy premises, to rescue the persons held hostage, or to persuade the militants to terminate their action against the Embassy.

19. During the morning of 5 November, only hours after the seizure of the Embassy, the United States Consulates in Tabriz and Shiraz were also seized; again the Iranian Government took no protective action. The operation of these Consulates had been suspended since the attack in February 1979 (paragraph 14 above), and therefore no United States personnel were seized on these premises.

20. The United States diplomatic mission and consular posts in Iran were not the only ones whose premises were subjected to demonstrations during the revolutionary period in Iran. On 5 November 1979, a group invaded the British Embassy in Tehran but was ejected after a brief occupation. On 6 November 1979 a brief occupation of the Consulate of Iraq at Kermanshah occurred but was brought to an end on instructions of the Ayatollah Khomeini; no damage was done to the Consulate or its contents. On 1 January 1980 an attack was made on the Embassy in Tehran by a large mob, but as a result of the protection given by the Iranian authorities to the Embassy, no serious damage was done.

21. The premises of the United States Embassy in Tehran have remained in the hands of militants; and the same applies to the case with the Consulates at Tabriz and Shiraz. Of the total number of United States citizens seized and held as hostages, 13 were released on 18-20 November 1979, but the remainder have continued to be held up to the present time. The release of the 13 hostages was effected pursuant to a decree by the Ayatollah Khomeini addressed to the militants, dated 17 November 1979, in which he called upon the militants to “hand over the blacks and the women, if it is proven they did not spy, to the Ministry of Foreign Affairs so that they may be immediately expelled from Iran”.

22. The persons still held hostage in Iran include, according to the information furnished to the Court by the United States, at least 28 persons having the status, duly recognized by the Government of Iran, of “member of the diplomatic staff” within the meaning of the Vienna Convention on Diplomatic Relations of 1961; at least 20 persons having the status, similarly recognized, of “member of the administrative and technical staff” within the meaning of that Convention; and two other persons of United States nationality not possessing either diplomatic or consular status. Of the persons with the status of member of the diplomatic staff, four are members of the Consular Section of the Mission.

23. Allegations have been made by the Government of the United States of inhuman treatment of hostages; the militants and Iranian authorities have asserted that the hostages have been well treated, and have allowed special visits to the hostages by religious personalities and by representatives of the International Committee of the Red Cross. The specific allegations of ill-treatment have not however been refuted. Examples of such allegations, which are mentioned in some of the sworn declarations of hostages released in November 1979, are as follows: at the outset of the occupation of the Embassy some were paraded bound and blindfolded before hostile and chanting crowds; at least during the initial period of their captivity, hostages were kept bound, and frequently blindfolded, denied mail or any communication with their government or with each other, subjected to interrogation, threatened with weapons.

24. Those archives and documents of the United States Embassy which were not destroyed by the staff during the attack on 4 November have been ransacked by the militants. Documents purporting to come from this source have been disseminated by the militants and by the Government-controlled media.

25. The United States Chargé d’affaires in Tehran and the two other members of the diplomatic staff of the Embassy who were in the premises of the Iranian Ministry of Foreign Affairs at the time of the attack have not left the Ministry since; their exact situation there has been the subject of conflicting statements. On 7 November 1979, it was stated in an announcement by the Iranian Foreign Ministry that “as the protection of foreign nationals is the duty of the Iranian Government”, the Chargé d’affaires was “staying in” the Ministry. On 1 December 1979, Mr. Sadegh Ghotbzadeh, who had become Foreign Minister, stated that

“it has been announced that, if the U.S. Embassy’s chargé d’affaires and his two companions, who have sought asylum in the Iranian Ministry of Foreign Affairs, should leave this ministry, the ministry would not accept any responsibility for them”.

According to a press report of 4 December, the Foreign Minister amplified this statement by saying that as long as they remained in the ministry he was personally responsible for ensuring that nothing happened to them, but that “as soon as they leave the ministry precincts they will fall back into the hands of justice, and then I will be the first to demand that they be arrested and tried”. The militants made it clear that they regarded the Chargé and his two colleagues as hostages also. When in March 1980 the Public Prosecutor of the Islamic Revolution of Iran called for one of the three diplomats to be handed over to him, it was announced by the Foreign Minister that

“Regarding the fate of the three Americans in the Ministry of Foreign Affairs, the decision rests first with the imam of the nation [i.e., the Ayatollah Khomeini]; in case there is no clear decision by the
imam of the nation, the Revolution Council will make a decision on this matter.”

26. From the outset of the attack upon its Embassy in Tehran, the United States protested to the Government of Iran both at the attack and at the seizure and detention of the hostages. On 7 November a former Attorney-General of the United States, Mr. Ramsey Clark, was instructed to go with an assistant to Iran to deliver a message from the President of the United States to the Ayatollah Khomeini. The text of that message has not been made available to the Court by the Applicant, but the United States Government has informed the Court that it thereby protested at the conduct of the Government of Iran and called for release of the hostages, and that Mr. Clark was also authorized to discuss all avenues for resolution of the crisis. While he was en route, Tehran radio broadcast a message from the Ayatollah Khomeini dated 7 November, solemnly forbidding members of the Revolutionary Council and all the responsible officials to meet the United States representatives. In that message it was asserted that “the U.S. Embassy in Iran is our enemies’ centre of espionage against our sacred Islamic movement”, and the message continued:

“Should the United States hand over to Iran the deposed shah . . . and give up espionage against our movement, the way to talks would be opened on the issue of certain relations which are in the interests of the nation.”

Subsequently, despite the efforts of the United States Government to open negotiations, it became clear that the Iranian authorities would have no direct contact with representatives of the United States Government concerning the holding of the hostages.

27. During the period which has elapsed since the seizure of the Embassy a number of statements have been made by various governmental authorities in Iran which are relevant to the Court’s examination of the responsibility attributed to the Government of Iran in the submissions of the United States. These statements will be examined by the Court in considering these submissions (paragraphs 59 and 70-74 below).

* * *

28. On 9 November 1979, the Permanent Representative of the United States to the United Nations addressed a letter to the President of the Security Council, requesting urgent consideration of what might be done to secure the release of the hostages and to restore the “sanctity of diplomatic personnel and establishments”. The same day, the President of the Security Council made a public statement urging the release of the hostages, and the President of the General Assembly announced that he was sending a personal message to the Ayatollah Khomeini appealing for their release. On 25 November 1979, the Secretary-General of the United Nations addressed a letter to the President of the Security Council referring to the seizure of the United States Embassy in Tehran and the detention of its diplomatic personnel, and requesting an urgent meeting of the Security Council “in an effort to seek a peaceful solution to the problem”. The Security Council met on 27 November and 4 December 1979; on the latter occasion, no representative of Iran was present, but the Council took note of a letter of 13 November 1979 from the Supervisor of the Iranian Foreign Ministry to the Secretary-General. The Security Council then adopted resolution 457 (1979), calling on Iran to release the personnel of the Embassy immediately, to provide them with protection and to allow them to leave the country. The resolution also called on the two Governments to take steps to resolve peacefully the remaining issues between them, and requested the Secretary-General to lend his good offices for the immediate implementation of the resolution, and to take all appropriate measures at that end. It further stated that the Council would “remain actively seized of the matter” and requested the Secretary-General to report to it urgently on any developments with regard to his efforts.

29. On 31 December 1979, the Security Council met again and adopted resolution 461 (1979), in which it reiterated both its calls to the Iranian Government and its request to the Secretary-General to lend his good offices for achieving the object of the Council’s resolution. The Secretary-General visited Tehran on 1-3 January 1980, and reported to the Security Council on 6 January. On 20 February 1980, the Secretary-General announced the setting up of a commission to undertake a “fact-finding mission” to Iran. The Court will revert to the terms of reference of this commission and the progress of its work in connection with a question of admissibility of the proceedings (paragraphs 39-40 below).

* * *

30. Prior to the institution of the present proceedings, in addition to the approach made by the Government of the United States to the United Nations Security Council, that Government also took certain unilateral action in response to the actions for which it holds the Government of Iran responsible. On 10 November 1979, steps were taken to identify all Iranian students in the United States who were not in compliance with the terms of their entry visas, and to commence deportation proceedings against those who were in violation of applicable immigration laws and regulations. On 12 November 1979, the President of the United States ordered the discontinuation of all oil purchases from Iran for delivery to the United States. Believing that the Government of Iran was about to withdraw all Iranian funds from United States banks and to refuse to accept payment in dollars for oil, and to repudiate obligations owed to the United States and to United States nationals, the President on 14 November 1979 acted to block the very large official Iranian assets in the United States or in United
States control, including deposits both in banks in the United States and in foreign branches and subsidiaries of United States banks. On 12 December 1979, after the institution of the present proceedings, the United States informed the Iranian Chargé d'Affaires in Washington that the number of personnel assigned to the Iranian Embassy and consular posts in the United States was to be restricted.

31. Subsequently to the indication by the Court of provisional measures, and during the present proceedings, the United States Government took no action. A draft resolution was introduced into the United Nations Security Council calling for economic sanctions against Iran. When it was put to the vote on 13 January 1980, the result was 13 votes in favour, 2 against, and 2 abstentions (one member not having participated in the voting); as a permanent member of the Council cast a negative vote, the draft resolution was not adopted. On 7 April 1980 the United States Government broke off diplomatic relations with the Government of Iran. At the same time, the United States Government prohibited exports from the United States to Iran — one of the sanctions previously proposed by it to the Security Council. Steps were taken to prepare an inventory of the assets of the Government of Iran frozen on 14 November 1979, and to make a census of outstanding claims of American nationals against the Government of Iran, with a view to “designing a program against Iran for the hostages, the hostage families and other U.S. claimants” involving the preparation of legislation “to facilitate processing and paying of these claims” and all visas issued to Iranian citizens for future entry into the United States were cancelled. On 17 April 1980, the United States Government announced further economic measures directed against Iran, prohibited travel there by United States citizens, and made further plans for reparations to be paid to the hostages and their families out of frozen Iranian assets.

32. During the night of 24-25 April 1980 the President of the United States set in motion, and subsequently terminated for technical reasons, an operation within Iranian territory designed to effect the rescue of the hostages by United States military units. In an announcement made on 25 April, President Carter explained that the operation had been planned over a long period as a humanitarian mission to rescue the hostages, and had finally been set in motion by him in the belief that the situation in Iran posed mounting dangers to the safety of the hostages and that their early release was highly unlikely. He stated that the operation had been under way in Iran when equipment failure compelled its termination; and that in the course of the withdrawal of the rescue forces two United States aircraft had collided in a remote desert location in Iran. He further stated that precautions for the rescue operations had been ordered for humanitarian reasons, to protect the national interests of the United States, and to alleviate international tensions. At the same time, he emphasized that the operation had not been motivated by hostility towards Iran or the Iranian people. The texts of President Carter’s announcement and of certain other official documents relating to the operation have been transmitted to the Court by the United States Agent in response to a request made by the President of the Court on 25 April. Amongst these documents is the text of a report made by the United States to the Security Council on 25 April, “pursuant to Article 51 of the Charter of the United Nations”. In that report, the United States maintained that the mission had been carried out by it “in exercise of its inherent right of self-defence with the aim of extricating American nationals who have been and remain the victims of the Iranian armed attack on our Embassy”. The Court will refer further to this operation later in the present Judgment (paragraphs 93 and 94 below).

* * *

33. It is to be regretted that the Iranian Government has not appeared before the Court in order to put forward its arguments on the questions of law and of fact which arise in the present case; and that, in consequence, the Court has not had the assistance it might have derived from such arguments or from any evidence adduced in support of them. Nevertheless, in accordance with its settled jurisprudence, the Court, in applying Article 53 of its Statute, must first take up, proprio motu, any preliminary question, whether of admissibility or of jurisdiction, that appears from the information before it to arise in the case and the decision of which might constitute a bar to any further examination of the merits of the Applicant’s case. The Court will, therefore, first address itself to the considerations put forward by the Iranian Government in its letters of 9 December 1979 and 16 March 1980, on the basis of which it maintains that the Court ought not to take cognizance of the present case.

34. The Iranian Government in its letter of 9 December 1979 drew attention to what it referred to as the “deep rootedness and the essential character of the Islamic Revolution of Iran, a revolution of a whole oppressed nation against its oppressors and their masters”. The examination of the “numerous repercussions” of the revolution, it added, is “a matter essentially and directly within the national sovereignty of Iran”. However, as the Court pointed out in its Order of 15 December 1979,

“a dispute which concerns diplomatic and consular premises and the detention of internationally protected persons, and involves the interpretation or application of multilateral conventions codifying the international law governing diplomatic and consular relations, is one which by its very nature falls within international jurisdiction” (I.C.J. Reports 1979, p. 16, para. 25).

In its later letter of 16 March 1980 the Government of Iran confined itself to repeating the observations on this point which it had made in its letter of 9 December 1979, without putting forward any additional arguments or explanations. In these circumstances, the Court finds it sufficient here to recall and confirm its previous statement on the matter in its Order of 15 December 1979.
35. In its letter of 9 December 1979 the Government of Iran maintained that the Court could not and should not take cognizance of the present case for another reason, namely that the case submitted to the Court by the United States, is “confined to what is called the question of the ‘hostages of the American Embassy in Tehran’”. It then went on to explain why it considered this to preclude the Court from taking cognizance of the case:

“For this question only represents a marginal and secondary aspect of an overall problem, one such that it cannot be studied separately, and which involves, inter alia, more than 25 years of continual interference by the United States in the internal affairs of Iran, the shameless exploitation of our country, and numerous crimes perpetrated against the Iranian people, contrary to and in conflict with all international and humanitarian norms. The problem involved in the conflict between Iran and the United States is thus not one of the interpretation and the application of the treaties upon which the American Application is based, but results from an overall situation containing much more fundamental and more complex elements. Consequently, the Court cannot examine the American Application divorced from its proper context, namely the whole political dossier of the relations between Iran and the United States over the last 25 years. This dossier includes, inter alia, all the crimes perpetrated in Iran by the American Government, in particular the coup d'etat of 1953 stirred up and carried out by the CIA, the overthrow of the lawful national government of Dr. Mossadegh, the restoration of the Shah and of his régime which was under the control of American interests, and all the social, economic, cultural and political consequences of the direct interventions in our internal affairs, as well as grave, flagrant and continuous violations of all international norms, committed by the United States in Iran.”

36. The Court, however, in its Order of 15 December 1979, made it clear that the seizure of the United States Embassy and Consulates and the detention of internationally protected persons as hostages cannot be considered as something “secondary” or “marginal”, having regard to the importance of the legal principles involved. It also referred to a statement of the Secretary-General of the United Nations, and to Security Council resolution 457 (1979), as evidencing the importance attached by the international community as a whole to the observance of those principles in the present case as well as its concern at the dangerous level of tension between Iran and the United States. The Court, at the same time, pointed out that no provision of the Statute or Rules contemplates that the Court should decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important. It further underlined that, if the Iranian Government considered the alleged activities of the United States in Iran legally to have a close connection with the subject-matter of the United States’ Application, it was open to that Government to present its own arguments regarding those activities to the Court either by way of defence in a Counter-Memorial or by way of a counter-claim.

37. The Iranian Government, notwithstanding the terms of the Court’s Order, did not file any pleadings and did not appear before the Court. By its own choice, therefore, it has foregone the opportunities offered to it under the Statute and Rules of Court to submit evidence and arguments in support of its contention in regard to the “overall problem”. Even in its later letter of 16 March 1980, the Government of Iran confined itself to repeating what it had said in its letter of 9 December 1979, without offering any explanations in regard to the points to which the Court had drawn attention in its Order of 15 December 1979. It has provided no explanation of the reasons why it considers that the violations of diplomatic and consular law alleged in the United States’ Application cannot be examined by the Court separately from what it describes as the “overall problem” involving “more than 25 years of continual interference by the United States in the internal affairs of Iran”. Nor has it made any attempt to explain, still less define, what connection, legal or factual, there may be between the “overall problem” of its general grievances against the United States and the particular events that gave rise to the United States’ claims in the present case which, in its view, precludes the separate examination of those claims by the Court. This was the more necessary because legal disputes between sovereign States by their very nature are likely to occur in political contexts, and often form only one element in a wider and long-standing political dispute between the States concerned. Yet never has the view been put forward before that, because a legal dispute submitted to the Court is only one aspect of a political dispute, the Court should decline to resolve for the parties the legal questions at issue between them. Nor can any basis for such a view of the Court’s functions or jurisdiction be found in the Charter or the Statute of the Court; if the Court were, contrary to its settled jurisprudence, to adopt such a view, it would impose a far-reaching and unwarranted restriction upon the role of the Court in the peaceful solution of international disputes.

38. It follows that the considerations and arguments put forward in the Iranian Government’s letters of 9 December 1979 and 16 March 1980 do not, in the opinion of the Court, disclose any ground on which it should conclude that it cannot or ought not to take cognizance of the present case.

* * *

39. The Court, however, has also thought it right to examine, ex officio, whether its competence to decide the present case, or the admissibility of the present proceedings, might possibly have been affected by the setting up of the Commission announced by the Secretary-General of the United
Nations on 20 February 1980. As already indicated, the occupation of the Embassy and detention of its diplomatic and consular staff as hostages was referred to the United Nations Security Council by the United States on 9 November 1979 and by the Secretary-General on 25 November. Four days later, while the matter was still before the Security Council, the United States submitted the present Application to the Court together with a request for the indication of provisional measures. On 4 December, the Security Council adopted resolution 457 (1979) (the terms of which have already been indicated in paragraph 28 above), whereby the Council would “remain actively seized of the matter” and the Secretary-General was requested to report to it urgently on developments regarding the efforts he was to make pursuant to the resolution. In announcing the setting up of the Commission on 20 February 1980, the Secretary-General stated its terms of reference to be “to undertake a fact-finding mission to Iran to hear Iran’s grievances and to allow for an early solution of the crisis between Iran and the United States” ; and he further stated that it was to complete its work as soon as possible and submit its report to him. Subsequently, in a message cabled to the President of the Court on 15 March 1980, the Secretary-General confirmed the mandate of the Commission to be as stated in his announcement of 20 February, adding that the Governments of Iran and the United States had “agreed to the establishment of the Commission on that basis”. In this message, the Secretary-General also informed the Court of the decision of the Commission to suspend its activities in Tehran and to return to New York on 11 March 1980 “to confer with the Secretary-General with a view to pursuing its tasks which it regards as indivisible”. The message stated that while, in the circumstances, the Commission was not in a position to submit its report, it was prepared to return to Tehran, in accordance with its mandate and the instructions of the Secretary-General, when the situation required. The message further stated that the Secretary-General would continue his efforts, as requested by the Security Council, to search for a peaceful solution of the crisis, and would remain in contact with the parties and the Commission regarding the resumption of its work.

40. Consequently, there can be no doubt at all that the Security Council was “actively seized of the matter” and that the Secretary-General was under an express mandate from the Council to use his good offices in the matter when, on 15 December, the Court decided unanimously that it was competent to entertain the United States’ request for an indication of provisional measures, and proceeded to indicate such measures. As already mentioned the Council met again on 31 December 1979 and adopted resolution 461 (1979). In the preamble to this second resolution the Security Council expressly took into account the Court’s Order of 15 December 1979 indicating provisional measures; and it does not seem to have occurred to any member of the Council that there was or could be anything irregular in the simultaneous exercise of their respective functions by the Court and the Security Council. Nor is there in this any cause for surprise.

Whereas Article 12 of the Charter expressly forbids the General Assembly to make any recommendation with regard to a dispute or situation while the Security Council is exercising its functions in respect of that dispute or situation, no such restriction is placed on the functioning of the Court by any provision of either the Charter or the Statute of the Court. The reasons are clear. It is for the Court, the principal judicial organ of the United Nations, to resolve any legal questions that may be in issue between parties to a dispute ; and the resolution of such legal questions by the Court may be an important, and sometimes decisive, factor in promoting the peaceful settlement of the dispute. This is indeed recognized by Article 36 of the Charter, paragraph 3 of which specifically provides that:

“In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.”

41. In the present instance the proceedings before the Court continued in accordance with the Statute and Rules of Court and, on 15 January 1980, the United States filed its Memorial. The time-limit fixed for delivery of Iran’s Counter-Memorial then expired on 18 February 1980 without Iran’s having filed a Counter-Memorial or having made a request for the extension of the time-limit. Consequently, on the following day the case became ready for hearing and, pursuant to Article 31 of the Rules, the views of the Applicant State were requested regarding the date for the opening of the oral proceedings. On 19 February 1980 the Court was informed by the United States Agent that, owing to the delicate stage of negotiations bearing upon the release of the hostages in the United States Embassy, he would be grateful if the Court for the time being would defer setting a date for the opening of the oral proceedings. On the very next day, 20 February, the Secretary-General announced the establishment of the above-mentioned Commission, which commenced its work in Tehran on 23 February. Asked on 27 February to clarify the position of the United States in regard to the future procedure, the Agent stated that the Commission would not address itself to the claims submitted by the United States to the Court. The United States, he said, continued to be anxious to secure an early judgment on the merits, and he suggested 17 March as a convenient date for the opening of the oral proceedings. At the same time, however, he added that consideration of the well-being of the hostages might lead the United States to suggest a later date. The Iranian Government was then asked, in a telex message of 28 February, for any views it might wish to express as to the date for the opening of the hearings, mention being made of 17 March as one possible date. No reply had been received from the Iranian Government when, on 10 March, the Commission, unable to complete its mission, decided to suspend its activities in Tehran and to return to New York.

42. On 11 March, that is immediately upon the departure of the Com-
mission from Tehran, the United States notified the Court of its readiness to proceed with the hearings, suggesting that they should begin on 17 March. A further telex was accordingly sent to the Iranian Government on 12 March informing it of the United States' request and stating that the Court would meet on 17 March to determine the subsequent procedure. The Iranian Government’s reply was contained in the letter of 16 March to which the Court has already referred (paragraph 10 above). In that letter, while making no mention of the proposed oral proceedings, the Iranian Government reiterated the reasons advanced in its previous letter of 9 December 1979 for considering that the Court ought not to take cognizance of the case. The letter contained no reference to the Commission, and still less any suggestion that the continuance of the proceedings before the Court might be affected by the existence of the Commission or the mandate given to the Secretary-General by the Security Council. Having regard to the circumstances which the Court has described, it can find no trace of any understanding on the part of either the United States or Iran that the establishment of the Commission might involve a postponement of all proceedings before the Court until the conclusion of the work of the Commission and of the Security Council's consideration of the matter.

43. The Commission, as previously observed, was established to undertake a “fact-finding mission to Iran to hear Iran’s grievances and to allow for an early solution of the crisis between Iran and the United States” (emphasis added). It was not set up by the Secretary-General as a tribunal empowered to decide the matters of fact or of law in dispute between Iran and the United States; nor was its setting up accepted by them on any such basis. On the contrary, he created the Commission rather as an organ or instrument for mediation, conciliation or negotiation to provide a means of easing the situation of crisis existing between the two countries; and this, clearly, was the basis on which Iran and the United States agreed to its being set up. The establishment of the Commission by the Secretary-General with the agreement of the two States cannot, therefore, be considered in itself as in any way incompatible with the continuance of parallel proceedings before the Court. Negotiation, enquiry, mediation, conciliation, arbitration and judicial settlement are enumerated together in Article 33 of the Charter as means for the peaceful settlement of disputes. As was pointed out in the Aegean Sea Continental Shelf case, the jurisprudence of the Court provides various examples of cases in which negotiations and recourse to judicial settlement by the Court have been pursued pari passu. In that case, in which also the dispute had been referred to the Security Council, the Court held expressly that “the fact that negotiations are being actively pursued during the present proceedings is not, legally, any obstacle to the exercise by the Court of its judicial function” (I.C.J. Reports 1978, p. 12, para. 29).

44. It follows that neither the mandate given by the Security Council to the Secretary-General in resolutions 457 and 461 of 1979, nor the setting up of the Commission by the Secretary-General, can be considered as constituting any obstacle to the exercise of the Court's jurisdiction in the present case. It further follows that the Court must now proceed, in accordance with Article 53, paragraph 2, of the Statute, to determine whether it has jurisdiction to decide the present case and whether the United States' claims are well founded in fact and in law.

* * *

45. Article 53 of the Statute requires the Court, before deciding in favour of an Applicant's claim, to satisfy itself that it has jurisdiction, in accordance with Articles 36 and 37, empowering it to do so. In the present case the principal claims of the United States relate essentially to alleged violations by Iran of its obligations under the Vienna Conventions of 1961 on Diplomatic Relations and of 1963 on Consular Relations. With regard to these claims the United States has invoked as the basis for the Court's jurisdiction Article I of the Optional Protocols concerning the Compulsory Settlement of Disputes which accompany these Conventions. The United Nations publication Multilateral Treaties in respect of which the Secretary-General Performs Depository Functions lists both Iran and the United States as parties to the Vienna Conventions of 1961 and 1963, as also to their accompanying Protocols concerning the Compulsory Settlement of Disputes, and in each case without any reservation of the instrument in question. The Vienna Conventions, which codify the law of diplomatic and consular relations, state principles and rules essential for the maintenance of peaceful relations between States and accepted throughout the world by nations of all creeds, cultures and political complexes. Moreover, the Iranian Government has not maintained in its communications to the Court that the two Vienna Conventions and Protocols are not in force as between Iran and the United States. Accordingly, as indicated in the Court’s Order of 15 December 1979, the Optional Protocols manifestly provide a possible basis for the Court’s jurisdiction, with respect to the United States’ claims under the Vienna Conventions of 1961 and 1963. It only remains, therefore, to consider whether the present dispute in fact falls within the scope of their provisions.

46. The terms of Article I, which are the same in the two Protocols, provide:

“Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.”

The United States’ claims here in question concern alleged violations by Iran of its obligations under several articles of the Vienna Conventions of 1961 and 1963 with respect to the privileges and immunities of the per-
sonnel, the inviolability of the premises and archives, and the provision of facilities for the performance of the functions of the United States Embassy and Consulates in Iran. In so far as its claims relate to two private individuals held hostage in the Embassy, the situation of these individuals falls under the provisions of the Vienna Convention of 1961 guaranteeing the inviolability of the premises of embassies, and of Article 5 of the 1963 Convention concerning the consular functions of assisting nationals and protecting and safeguarding their interests. By their very nature all these claims concern the interpretation or application of one or other of the two Vienna Conventions.

47. The occupation of the United States Embassy by militants on 4 November 1979 and the detention of its personnel as hostages was an event of a kind to provoke an immediate protest from any government, as it did from the United States Government, which despatched a special emissary to Iran to deliver a formal protest. Although the special emissary, denied all contact with Iranian officials, never entered Iran, the Iranian Government was left in no doubt as to the reaction of the United States to the taking over of its Embassy and detention of its diplomatic and consular staff as hostages. Indeed, the Court was informed that the United States was meanwhile making its views known to the Iranian Government through its Chargé d’affaires, who has been kept since 4 November 1979 in the Iranian Foreign Ministry itself, where he happened to be with two other members of his mission during the attack on the Embassy. In any event, by a letter of 9 November 1979, the United States brought the situation in regard to its Embassy before the Security Council. The Iranian Government did not take any part in the debates on the matter in the Council, and it was still refusing to enter into any discussions on the subject when, on 29 November 1979, the United States filed the present Application submitting its claims to the Court. It is clear that on that date there existed a dispute arising out of the interpretation or application of the Vienna Conventions and thus one falling within the scope of Article I of the Protocols.

48. Articles II and III of the Protocols, it is true, provide that within a period of two months after one party has notified its opinion to the other that a dispute exists, the parties may agree either: (a) "to resort not to the International Court of Justice but to an arbitral tribunal", or (b) "to adopt a conciliation procedure before resorting to the International Court of Justice". The terms of Articles II and III however, when read in conjunction with those of Article I and with the Preamble to the Protocols, make it crystal clear that they are not to be understood as laying down a pre-condition of the applicability of the precise and categorical provision contained in Article I establishing the compulsory jurisdiction of the Court in respect of disputes arising out of the interpretation or application of the Vienna Convention in question. Articles II and III provide only that, as a substitute for recourse to the Court, the parties may agree upon resort either to arbitration or to conciliation. It follows, first, that Articles II and III have no application unless recourse to arbitration or conciliation has been proposed by one of the parties to the dispute and the other has expressed its readiness to consider the proposal. Secondly, it follows that only then may the provisions in those articles regarding a two months' period come into play, and function as a time-limit upon the conclusion of the agreement as to the organization of the alternative procedure.

49. In the present instance, neither of the parties to the dispute proposed recourse to either of the two alternatives, before the filing of the Application or at any time afterwards. On the contrary, the Iranian authorities refused to enter into any discussion of the matter with the United States, and this could only be understood by the United States as ruling out, in limine, any question of arriving at an agreement to resort to arbitration or conciliation under Article II or Article III of the Protocols, instead of recourse to the Court. Accordingly, when the United States filed its Application on 29 November 1979, it was unquestionably free to have recourse to Article I of the Protocols, and to invoke it as a basis for establishing the Court's jurisdiction with respect to its claims under the Vienna Conventions of 1961 and 1963.

50. However, the United States also presents claims in respect of alleged violations by Iran of Articles II, paragraph 4, XIII, XVIII and XIX of the Treaty of Amity, Economic Relations, and Consular Rights of 1955 between the United States and Iran, which entered into force on 16 June 1957. With regard to these claims the United States has invoked paragraph 2 of Article XXI of the Treaty as the basis for the Court's jurisdiction. The claims of the United States under this Treaty overlap in considerable measure with its claims under the two Vienna Conventions and more especially the Convention of 1963. In this respect, therefore, the dispute between the United States and Iran regarding those claims is at the same time a dispute arising out of the interpretation or application of the Vienna Conventions which falls within Article I of their Protocols. It was for this reason that in its Order of 15 December 1979 indicating provisional measures the Court did not find it necessary to enter into the question whether Article XXI, paragraph 2, of the 1955 Treaty might also have provided a basis for the exercise of its jurisdiction in the present case. But taking into account that Article II, paragraph 4, of the 1955 Treaty provides that "nationals of either High Contracting Party shall receive the most constant protection and security within the territories of the other High Contracting Party . . .", the Court considers that at the present stage of the proceedings that Treaty has importance in regard to the claims of the United States in respect of the two private individuals said to be held
hostage in Iran. Accordingly, the Court will now consider whether a basis for the exercise of its jurisdiction with respect to the alleged violations of the 1955 Treaty may be found in Article XXI, paragraph 2, of the Treaty.

51. Paragraph 2 of that Article reads:

"Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means."

As previously pointed out, when the United States filed its Application on 29 November 1979, its attempts to negotiate with Iran in regard to the overrunning of its Embassy and detention of its nationals as hostages had reached a deadlock, owing to the refusal of the Iranian Government to enter into any discussion of the matter. In consequence, there existed at that date not only a dispute but, beyond any doubt, a "dispute . . . not satisfactorily adjusted by diplomacy" within the meaning of Article XXI, paragraph 2, of the 1955 Treaty; and this dispute comprised, inter alia, the matters that are the subject of the United States' claims under that Treaty.

52. The provision made in the 1955 Treaty for disputes as to its interpretation or application to be referred to the Court is similar to the system adopted in the Optional Protocols to the Vienna Conventions which the Court has already explained. Article XXI, paragraph 2, of the Treaty establishes the jurisdiction of the Court as compulsory for such disputes, unless the parties agree to settlement by some other means. In the present instance, as in the case of the Optional Protocols, the immediate and total refusal of the Iranian authorities to enter into any negotiations with the United States excluded in limine any question of an agreement to have recourse to "some other pacific means" for the settlement of the dispute. Consequently, under the terms of Article XXI, paragraph 2, the United States was free on 29 November 1979 to invoke its provisions for the purpose of referring its claims against Iran under the 1955 Treaty to the Court. While that Article does not provide in express terms that either party may bring a case to the Court by unilateral application, it is evident, as the United States contended in its Memorial, that this is what the parties intended. Provisions drawn in similar terms are very common in bilateral treaties of amity or of establishment, and the intention of the parties in accepting such clauses is clearly to provide for such a right of unilateral recourse to the Court, in the absence of agreement to employ some other pacific means of settlement.

53. The point has also been raised whether, having regard to certain counter-measures taken by the United States vis-à-vis Iran, it is open to the United States to rely on the Treaty of Amity, Economic Relations, and

Consular Rights in the present proceedings. However, all the measures in question were taken by the United States after the seizure of its Embassy by an armed group and subsequent detention of its diplomatic and consular staff as hostages. They were measures taken in response to what the United States believed to be grave and manifest violations of international law by Iran, including violations of the 1955 Treaty itself. In any event, any alleged violation of the Treaty by either party could not have the effect of precluding that party from invoking the provisions of the Treaty concerning pacific settlement of disputes.

54. No suggestion has been made by Iran that the 1955 Treaty was not in force on 4 November 1979 when the United States Embassy was overrun and its nationals taken hostage, or on 29 November when the United States submitted the dispute to the Court. The very purpose of a treaty of amity, and indeed of a treaty of establishment, is to promote friendly relations between the two countries concerned, and between their two peoples, more especially by mutual undertakings to ensure the protection and security of their nationals in each other's territory. It is precisely when difficulties arise that the treaty assumes its greatest importance, and the whole object of Article XXI, paragraph 2, of the 1955 Treaty was to establish the means for arriving at a friendly settlement of such difficulties by the Court or by other peaceful means. It would, therefore, be incompatible with the whole purpose of the 1955 Treaty if recourse to the Court under Article XXI, paragraph 2, were now to be found not to be open to the parties precisely at the moment when such recourse was most needed. Furthermore, although the machinery for the effective operation of the 1955 Treaty has, no doubt, now been impaired by reason of diplomatic relations between the two countries having been broken off by the United States, its provisions remain part of the corpus of law applicable between the United States and Iran.

* * *

55. The United States has further invoked Article 13 of the Convention of 1973 on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, as a basis for the exercise of the Court's jurisdiction with respect to its claims under that Convention. The Court does not, however, find it necessary in the present Judgment to enter into the question whether, in the particular circumstances of the case, Article 13 of that Convention provides a basis for the exercise of the Court's jurisdiction with respect to those claims.

* * *

56. The principal facts material for the Court's decision on the merits of the present case have been set out earlier in this Judgment. Those facts have
to be looked at by the Court from two points of view. First, it must
determine how far, legally, the acts in question may be regarded as im-
putable to the Iranian State. Secondly, it must consider their compatibility
or incompatibility with the obligations of Iran under treaties in force or
under any other rules of international law that may be applicable. The
events which are the subject of the United States’ claims fall into two
phases which it will be convenient to examine separately.

57. The first of these phases covers the armed attack on the United
States Embassy by militants on 4 November 1979, the overrunning of its
premises, the seizure of its inmates as hostages, the appropriation of its
property and archives and the conduct of the Iranian authorities in the face
of those occurrences. The attack and the subsequent overrunning, bit by
bit, of the whole Embassy premises, was an operation which continued
over a period of some three hours without any body of police, any military
unit or any Iranian official intervening to try to stop or impede it from
being carried through to its completion. The result of the attack was
considerable damage to the Embassy premises and property, the forcible
opening and seizure of its archives, the confiscation of the archives and
other documents found in the Embassy and, most grave of all, the seizure
by force of its diplomatic and consular personnel as hostages, together with
two United States nationals.

58. No suggestion has been made that the militants, when they executed
their attack on the Embassy, had any form of official status as recognized
“agents” or organs of the Iranian State. Their conduct in mounting the
attack, overrunning the Embassy and seizing its inmates as hostages can-
not, therefore, be regarded as imputable to that State on that basis. Their
conduct might be considered as itself directly imputable to the Iranian State
only if it were established that, in fact, on the occasion in question the
militants acted on behalf on the State, having been charged by some
competent organ of the Iranian State to carry out a specific operation. The
information before the Court does not, however, suffice to establish with
the requisite certainty the existence at that time of such a link between
the militants and any competent organ of the State.

59. Previously, it is true, the religious leader of the country, the Aya-
tollah Khomeini, had made several public declarations inveighing against
the United States as responsible for all his country’s problems. In so doing,
it would appear, the Ayatollah Khomeini was giving utterance to the
general resentment felt by supporters of the revolution at the admission of
the former Shah to the United States. The information before the Court
also indicates that a spokesman for the militants, in explaining their action
afterwards, did expressly refer to a message issued by the Ayatollah
Khomeini, on 1 November 1979. In that message the Ayatollah Khomeini
had declared that it was “up to the dear pupils, students and theological
students to expand with all their might their attacks against the United
States and Israel, so they may force the United States to return the deposed
criminal shah, and to condemn this great plot” (that is, a plot to stir up
dissension between the main streams of Islamic thought). In the view of the
Court, however, it would be going too far to interpret such general decla-
rations of the Ayatollah Khomeini to the people or students of Iran as
amounting to an authorization from the State to undertake the specific
operation of invading and seizing the United States Embassy. To do so
would, indeed, conflict with the assertions of the militants themselves who
are reported to have claimed credit for having devised and carried out the
plan to occupy the Embassy. Again, congratulations after the event, such
as those reportedly telephoned to the militants by the Ayatollah Khomeini
on the actual evening of the attack, and other subsequent statements of
official approval, though highly significant in another context shortly to be
considered, do not alter the initially independent and unofficial character
of the militants’ attack on the Embassy.

60. The first phase, here under examination, of the events complained
of also includes the attacks on the United States Consulates at Tabriz and
Shiraz. Like the attack on the Embassy, they appear to have been executed
by militants not having an official character, and successful because of lack
of sufficient protection.

61. The conclusion just reached by the Court, that the initiation of the
attack on the United States Embassy on 4 November 1979, and of the
attacks on the Consulates at Tabriz and Shiraz the following day, cannot
be considered as in itself imputable to the Iranian State does not mean that
Iran is, in consequence, free of any responsibility in regard to those
attacks : for its own conduct was in conflict with its international obli-
gations. By a number of provisions of the Vienna Conventions of 1961 and
1963, Iran was placed under the most categorical obligations, as a receiving
State, to take appropriate steps to ensure the protection of the United
States Embassy and Consulates, their staffs, their archives, their means of
communication and the freedom of movement of the members of their
staffs.

62. Thus, after solemnly proclaiming the inviolability of the premises
of a diplomatic mission, Article 22 of the 1961 Convention continues in
paragraph 2 :

“The receiving State is under a special duty to take all appropriate steps
to protect the premises of the mission against any intrusion or damage
and to prevent any disturbance of the peace of the mission or impair-
ment of its dignity.” (Emphasis added.)

So, too, after proclaiming that the person of a diplomatic agent shall be
inviolable, and that he shall not be liable to any form of arrest or detention,
Article 29 provides :

“The receiving State shall treat him with due respect and shall take all
appropriate steps to prevent any attack on his person, freedom or
dignity.” (Emphasis added.)

The obligation of a receiving State to protect the inviolability of the
archives and documents of a diplomatic mission is laid down in Article 24, which specifically provides that they are to be "inviolable at any time and wherever they may be". Under Article 25 it is required to "accord full facilities for the performance of the functions of the mission", under Article 26 to "ensure to all members of the mission freedom of movement and travel in its territory", and under Article 27 to "permit and protect free communication on the part of the mission for all official purposes". Analogous provisions are to be found in the 1963 Convention regarding the privileges and immunities of consular missions and their staffs (Art. 31, para. 2, Arts. 40, 33, 28, 34 and 35). In the view of the Court, the obligations of the Iranian Government here in question are not merely contractual obligations established by the Vienna Conventions of 1961 and 1963, but also obligations under general international law.

63. The facts set out in paragraphs 14 to 27 above establish to the satisfaction of the Court that on 4 November 1979 the Iranian Government failed altogether to take any "appropriate steps" to protect the premises, staff and archives of the United States' mission against attack by the militants, and to take any steps either to prevent this attack or to stop it before it reached its completion. They also show that on 5 November 1979 the Iranian Government similarly failed to take appropriate steps for the protection of the United States Consulates at Tabriz and Shiraz. In addition they show, in the opinion of the Court, that the failure of the Iranian Government to take such steps was due to more than mere negligence or lack of appropriate means.

64. The total inaction of the Iranian authorities on that date in face of urgent and repeated requests for help contrasts very sharply with its conduct on several other occasions of a similar kind. Some eight months earlier, on 14 February 1979, the United States Embassy in Tehran had itself been subjected to the armed attack mentioned above (paragraph 14), in the course of which the attackers had taken the Ambassador and his staff prisoner. On that occasion, however, a detachment of Revolutionary Guards, sent by the Government, had arrived promptly, together with a Deputy Prime Minister, and had quickly succeeded in freeing the Ambassador and his staff and restoring the Embassy to him. On 1 March 1979, moreover, the Prime Minister of Iran had sent a letter expressing deep regret at the incident, giving an assurance that appropriate arrangements had been made to prevent any repetition of such incidents, and indicating the willingness of his Government to indemnify the United States for the damage. On 1 November 1979, only three days before the events which gave rise to the present case, the Iranian police intervened quickly and effectively to protect the United States Embassy when a large crowd of demonstrators spent several hours marching up and down outside it. Furthermore, on other occasions in November 1979 and January 1980, invasions or attempted invasions of other foreign embassies in Tehran were frustrated or speedily terminated.

65. A similar pattern of facts appears in relation to consulates. In February 1979, at about the same time as the first attack on the United States Embassy, attacks were made by demonstrators on its Consulates in Tabriz and Shiraz; but the Iranian authorities then took the necessary steps to clear them of the demonstrators. On the other hand, the Iranian authorities took no action to prevent the attack of 5 November 1979, or to restore the Consulates to the possession of the United States. In contrast, when on the next day militants invaded the Iraqi Consulate in Kermanshah, prompt steps were taken by the Iranian authorities to secure their withdrawal from the Consultate. Thus in this case, the Iranian authorities and police took the necessary steps to prevent and check the attempted invasion or return the premises to their rightful owners.

66. As to the actual conduct of the Iranian authorities when faced with the events of 4 November 1979, the information before the Court establishes that, despite assurances previously given by them to the United States Government and despite repeated and urgent calls for help, they took no apparent steps either to prevent the militants from invading the Embassy or to persuade or to compel them to withdraw. Furthermore, after the militants had forced an entry into the premises of the Embassy, the Iranian authorities made no effort to compel or to persuade them to withdraw from the Embassy and to free the diplomatic and consular staff whom they had made prisoner.

67. This inaction of the Iranian Government by itself constituted clear and serious violation of Iran's obligations to the United States under the provisions of Article 22, paragraph 2, and Articles 24, 25, 26, 27 and 29 of the 1961 Vienna Convention on Diplomatic Relations, and Articles 5 and 36 of the 1963 Vienna Convention on Consular Relations. Similarly, with respect to the attacks on the Consulates at Tabriz and Shiraz, the inaction of the Iranian authorities entailed clear and serious breaches of its obligations under the provisions of several further articles of the 1963 Convention on Consular Relations. So far as concerns the two private United States nationals seized as hostages by the invading militants, that inaction entailed, albeit incidentally, a breach of its obligations under Article II, paragraph 4, of the 1955 Treaty of Amity, Economic Relations, and Consular Rights which, in addition to the obligations of Iran existing under general international law, requires the parties to ensure "the most constant protection and security" to each other's nationals in their respective territories.

68. The Court is therefore led inevitably to conclude, in regard to the first phase of the events which has so far been considered, that on 4 November 1979 the Iranian authorities:

(a) were fully aware of their obligations under the conventions in force to take appropriate steps to protect the premises of the United States Embassy and its diplomatic and consular staff from any attack and from any infringement of their inviolability, and to ensure the
security of such other persons as might be present on the said premises;
(b) were fully aware, as a result of the appeals for help made by the United States Embassy, of the urgent need for action on their part;
(c) had the means at their disposal to perform their obligations;
(d) completely failed to comply with these obligations.

Similarly, the Court is led to conclude that the Iranian authorities were equally aware of their obligations to protect the United States Consulates at Tabriz and Shiraz, and of the need for action on their part, and similarly failed to use the means which were at their disposal to comply with their obligations.

* * *

69. The second phase of the events which are the subject of the United States’ claims comprises the whole series of facts which occurred following the completion of the occupation of the United States Embassy by the militants, and the seizure of the Consulates at Tabriz and Shiraz. The occupation having taken place and the diplomatic and consular personnel of the United States’ mission having been taken hostage, the action required of the Iranian Government by the Vienna Conventions and by general international law was manifest. Its plain duty was at once to make every effort, and to take every appropriate step, to bring these flagrant infringements of the inviolability of the premises, archives and diplomatic and consular staff of the United States Embassy to a speedy end, to restore the Consulates at Tabriz and Shiraz to United States control, and in general to re-establish the status quo and to offer reparation for the damage.

70. No such step was, however, taken by the Iranian authorities. At a press conference on 5 November the Foreign Minister, Mr. Yazdi, conceded, that “according to international regulations the Iranian Government is duty bound to safeguard the life and property of foreign nationals”. But he made no mention of Iran’s obligation to safeguard the inviolability of foreign embassies and diplomats; and he ended by announcing that the action of the students “enjoys the endorsement and support of the government, because America herself is responsible for this incident”. As to the Prime Minister, Mr. Bazargan, he does not appear to have made any statement on the matter before resigning his office on 5 November.

71. In any event expressions of approval of the take-over of the Embassy, and indeed also of the Consulates at Tabriz and Shiraz, by militants came immediately from numerous Iranian authorities, including religious, judicial, executive, police and broadcasting authorities. Above all, the Ayatollah Khomeini himself made crystal clear the endorsement by the State both of the take-over of the Embassy and Consulates and of the detention of the Embassy staff as hostages. At a reception in Qom on 5 November, the Ayatollah Khomeini left his audience in no doubt as to his approval of the action of the militants in occupying the Embassy, to which he said they had resorted “because they saw that the Shah was allowed in America”. Saying that he had been informed that the “centre occupied by our young men... has been a lair of espionage and plotting”, he asked how the young people could be expected “simply to remain idle and witness all these things”. Furthermore he expressly stigmatized as “rotten roots” those in Iran who were “hoping we would mediate and tell the young people to leave this place”. The Ayatollah’s refusal to order “the young people” to put an end to their occupation of the Embassy, or the militants in Tabriz and Shiraz to evacuate the United States Consulates there, must have appeared the more significant when, on 6 November, he instructed “the young people” who had occupied the Iraqi Consulate in Kermanshah that they should leave it as soon as possible. The true significance of this was only reinforced when, next day, he expressly forbade members of the Revolutionary Council and all responsible officials to meet the special representatives sent by President Carter to try and obtain the release of the hostages and evacuation of the Embassy.

72. At any rate, thus fortified in their action, the militants at the Embassy at once went one step farther. On 6 November they proclaimed that the Embassy, which they too referred to as “the U.S. centre of plots and espionage”, would remain under their occupation, and that they were watching “most closely” the members of the diplomatic staff taken hostage whom they called “U.S. mercenaries and spies”.

73. The seal of official government approval was finally set on this situation by a decree issued on 17 November 1979 by the Ayatollah Khomeini. His decree began with the assertion that the American Embassy was “a centre of espionage and conspiracy” and that “those people who hatched plots against our Islamic movement in that place do not enjoy international diplomatic respect”. He went on expressly to declare that the premises of the Embassy and the hostages would remain as they were until the United States had handed over the former Shah for trial and returned his property to Iran. This statement of policy the Ayatollah qualified only to the extent of requesting the militants holding the hostages to “hand over the blacks and the women, if it is proven that they did not spy, to the Ministry of Foreign Affairs so that they may be immediately expelled from Iran”. As to the rest of the hostages, he made the Iranian Government’s intentions all too clear:

“The noble Iranian nation will not give permission for the release of the rest of them. Therefore, the rest of them will be under arrest until the American Government acts according to the wish of the nation.”
74. The policy thus announced by the Ayatollah Khomeini, of maintaining the occupation of the Embassy and the detention of its inmates as hostages for the purpose of exerting pressure on the United States Government was complied with by other Iranian authorities and endorsed by them repeatedly in statements made in various contexts. The result of that policy was fundamentally to transform the legal nature of the situation created by the occupation of the Embassy and the detention of its diplomatic and consular staff as hostages. The approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of the hostages into acts of that State. The militants, authors of the invasion and jailing of the hostages, had now become agents of the Iranian State for whose acts the State itself was internationally responsible. On 6 May 1980, the Minister for Foreign Affairs, Mr. Ghotbzadeh, is reported to have said in a television interview that the occupation of the United States Embassy had been “done by our nation”. Moreover, in the prevailing circumstances the situation of the hostages was aggravated by the fact that their detention by the militants did not even offer the normal guarantees which might have been afforded by police and security forces subject to the discipline and the control of official superiors.

75. During the six months which have elapsed since the situation just described was created by the decree of the Ayatollah Khomeini, it has undergone no material change. The Court’s Order of 15 December 1979 indicating provisional measures, which called for the immediate restoration of the Embassy to the United States and the release of the hostages, was publicly rejected by the Minister for Foreign Affairs on the following day and has been ignored by all Iranian authorities. On two occasions, namely on 23 February and on 7 April 1980, the Ayatollah Khomeini laid it down that the hostages should remain at the United States Embassy under the control of the militants until the new Iranian parliament should have assembled and taken a decision as to their fate. His adherence to that policy also made it impossible to obtain his consent to the transfer of the hostages from the control of the militants to that of the Government or of the Council of the Revolution. In any event, while highly desirable from the humanitarian and safety points of view, such a transfer would not have resulted in any material change in the legal situation, for its sponsors themselves emphasized that it must not be understood as signifying the release of the hostages.

76. The Iranian authorities’ decision to continue the subjection of the premises of the United States Embassy to occupation by militants and of the Embassy staff to detention as hostages, clearly gave rise to repeated and multiple breaches of the applicable provisions of the Vienna Conven-

77. In the first place, these facts constituted breaches additional to those already committed of paragraph 2 of Article 22 of the 1961 Vienna Convention on Diplomatic Relations which requires Iran to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of its peace or impairment of its dignity. Paragraphs 1 and 3 of that Article have also been infringed, and continue to be infringed, since they forbid agents of a receiving State to enter the premises of a mission without consent or to undertake any search, requisition, attachment or like measure on the premises. Secondly, they constitute continuing breaches of Article 29 of the same Convention which forbids any arrest or detention of a diplomatic agent and any attack on his person, freedom or dignity. Thirdly, the Iranian authorities are without doubt in continuing breach of the provisions of Articles 25, 26 and 27 of the 1961 Vienna Convention and of pertinent provisions of the 1963 Vienna Convention concerning facilities for the performance of functions, freedom of movement and communications for diplomatic and consular staff, as well as of Article 24 of the former Convention and Article 33 of the latter, which provide for the absolute inviolability of the archives and documents of diplomatic missions and consulates. This particular violation has been made manifest to the world by repeated statements by the militants occupying the Embassy, who claim to be in possession of documents from the archives, and by various government authorities, purporting to specify the contents thereof. Finally, the continued detention as hostages of the two private individuals of United States nationality entails a renewed breach of the obligations of Iran under Article II, paragraph 4, of the 1955 Treaty of Amity, Economic Relations, and Consular Rights.

78. Inevitably, in considering the compatibility or otherwise of the conduct of the Iranian authorities with the requirements of the Vienna Conventions, the Court has focussed its attention primarily on the occupation of the Embassy and the treatment of the United States diplomatic and consular personnel within the Embassy. It is however evident that the question of the compatibility of their conduct with the Vienna Conventions also arises in connection with the treatment of the United States Chargé d’affaires and two members of his staff in the Ministry of Foreign Affairs on 4 November 1979 and since that date. The facts of this case establish to the satisfaction of the Court that on 4 November 1979 and thereafter the Iranian authorities have withheld from the Chargé d’affaires and the two members of his staff the necessary protection and facilities to permit them to leave the Ministry in safety. Accordingly it appears to the Court that with respect to these three members of the United States’ mission the Iranian authorities have committed a continuing breach of their obligations under Articles 26 and 29 of the 1961 Vienna Convention on Diplomatic Relations. It further appears to the Court that the con-
tinuation of that situation over a long period has, in the circumstances, amounted to detention in the Ministry.

79. The Court moreover cannot conclude its observations on the series of acts which it has found to be imputable to the Iranian State and to be patently inconsistent with its international obligations under the Vienna Conventions of 1961 and 1963 without mention also of another fact. This is that judicial authorities of the Islamic Republic of Iran and the Minister for Foreign Affairs have frequently voiced or associated themselves with, a threat first announced by the militants, of having some of the hostages submitted to trial before a court or some other body. These threats may at present merely be acts in contemplation. But the Court considers it necessary here and now to stress that, if the intention to submit the hostages to any form of criminal trial or investigation were to be put into effect, that would constitute a grave breach by Iran of its obligations under Article 31, paragraph 1, of the 1961 Vienna Convention. This paragraph states in the most express terms: “A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State.” Again, if there were an attempt to compel the hostages to bear witness, a suggestion renewed at the time of the visit to Iran of the Secretary-General’s Commission, Iran would without question be violating paragraph 2 of that same Article of the 1961 Vienna Convention which provides that: “A diplomatic agent is not obliged to give evidence as a witness.”

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80. The facts of the present case, viewed in the light of the applicable rules of law, thus speak loudly and clearly of successive and still continuing breaches by Iran of its obligations to the United States under the Vienna Conventions of 1961 and 1963, as well as under the Treaty of 1955. Before drawing from this finding the conclusions which flow from it, in terms of the international responsibility of the Iranian State vis-à-vis the United States of America, the Court considers that it should examine once further point. The Court cannot overlook the fact that on the Iranian side, in often imprecise terms, the idea has been put forward that the conduct of the Iranian Government, at the time of the events of 4 November 1979 and subsequently, might be justified by the existence of special circumstances.

81. In his letters of 9 December 1979 and 16 March 1980, as previously recalled, Iran’s Minister for Foreign Affairs referred to the present case as only “a marginal and secondary aspect of an overall problem”. This problem, he maintained, “involves, inter alia, more than 25 years of continual interference by the United States in the internal affairs of Iran, the shameless exploitation of our country, and numerous crimes perpetrated against the Iranian people, contrary to and in conflict with all international and humanitarian norms”. In the first of the two letters he indeed singled out amongst the “crimes” which he attributed to the United States an alleged complicity on the part of the Central Intelligence Agency in the coup d’état of 1953 and in the restoration of the Shah to the throne of Iran.

Invoking these alleged crimes of the United States, the Iranian Foreign Minister took the position that the United States’ Application could not be examined by the Court divorced from its proper context, which he insisted was “the whole political dossier of the relations between Iran and the United States over the last 25 years”.

82. The Court must however observe, first of all, that the matters alleged in the Iranian Foreign Minister’s letters of 9 December 1979 and 16 March 1980 are of a kind which, if invoked in legal proceedings, must clearly be established to the satisfaction of the tribunal with all the requisite proof. The Court, in its Order of 15 December 1979, pointed out that if the Iranian Government considered the alleged activities of the United States in Iran legally to have a close connection with the subject-matter of the Application it was open to Iran to present its own case regarding those activities to the Court by way of defence to the United States’ claims. The Iranian Government, however, did not appear before the Court. Moreover, even in his letter of 16 March 1980, transmitted to the Court some three months after the issue of that Order, the Iranian Foreign Minister did not furnish the Court with any further information regarding the alleged criminal activities of the United States in Iran, or explain on what legal basis he considered these allegations to constitute a relevant answer to the United States’ claims. The large body of information submitted by the United States itself to the Court includes, it is true, some statements emanating from Iranian authorities or from the militants in which reference is made to alleged espionage and interference in Iran by the United States centred upon its Embassy in Tehran. These statements are, however, of the same general character as the assertions of alleged criminal activities of the United States contained in the Foreign Minister’s letters, and are unsupported by evidence furnished by Iran before the Court. Hence they do not provide a basis on which the Court could form a judicial opinion on the truth or otherwise of the matters there alleged.

83. In any case, even if the alleged criminal activities of the United States in Iran could be considered as having been established, the question would remain whether they could be regarded by the Court as constituting a justification of Iran’s conduct and thus a defence to the United States’ claims in the present case. The Court, however, is unable to accept that they can be so regarded. This is because diplomatic law itself provides the necessary means of defence against, and sanction for, illicit activities by members of diplomatic or consular missions.

84. The Vienna Conventions of 1961 and 1963 contain express provisions to meet the case when members of an embassy staff, under the cover of diplomatic privileges and immunities, engage in such abuses of their functions as espionage or interference in the internal affairs of the receiving State. It is precisely with the possibility of such abuses in contemplation that Article 41, paragraph 1, of the Vienna Convention on Diplomatic
Relations, and Article 55, paragraph 1, of the Vienna Convention on Consular Relations, provide

"Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State."

Paragraph 3 of Article 41 of the 1961 Convention further states: "The premises of the mission must not be used in any manner incompatible with the functions of the missions..."; an analogous provision, with respect to consular premises is to be found in Article 55, paragraph 2, of the 1963 Convention.

85. Thus, it is for the very purpose of providing a remedy for such possible abuses of diplomatic functions that Article 9 of the 1961 Convention on Diplomatic Relations stipulates:

"1. The receiving State may at any time and without having to explain its decision, notify the sending State that the head of the mission or any member of the diplomatic staff of the mission is persona non grata or that any other member of the staff of the mission is not acceptable. In any such case, the sending State shall, as appropriate, either recall the person concerned or terminate his functions with the mission. A person may be declared non grata or not acceptable before arriving in the territory of the receiving State.
2. If the sending State refuses or fails within a reasonable period to carry out its obligations under paragraph 1 of this Article, the receiving State may refuse to recognize the person concerned as a member of the mission."

The 1963 Convention contains in Article 23, paragraphs 1 and 4, analogous provisions in respect of consular officers and consular staff. Paragraph 1 of Article 9 of the 1961 Convention, and paragraph 4 of Article 23 of the 1963 Convention, take account of the difficulty that may be experienced in practice of proving such abuses in every case or, indeed, of determining exactly when exercise of the diplomatic function, expressly recognized in Article 3 (1) (d) of the 1961 Convention, of "ascertaining by all lawful means conditions and developments in the receiving State" may be considered as involving such acts as "espionage" or "interference in internal affairs". The way in which Article 9, paragraph 1, takes account of any such difficulty is by providing expressly in its opening sentence that the receiving State may "at any time and without having to explain its decision" notify the sending State that any particular member of its diplomatic mission is "persona non grata" or "not acceptable" (and similarly Article 23, paragraph 4, of the 1963 Convention provides that "the receiving State is not obliged to give to the sending State reasons for its decision"). Beyond that remedy for dealing with abuses of the diplomatic function by individual members of a mission, a receiving State has in its hands a more radical remedy if abuses of their functions by members of a mission reach serious proportions. This is the power which every receiving State has, at its own discretion, to break off diplomatic relations with a sending State and to call for the immediate closure of the offending mission.

86. The rules of diplomatic law, in short, constitute a self-contained régime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse. These means are, by their nature, entirely efficacious, for unless the sending State recalls the member of the mission objected to forthwith, the prospect of the almost immediate loss of his privileges and immunities, because of the withdrawal by the receiving State of his recognition as a member of the mission, will in practice compel that person, in his own interest, to depart at once. But the principle of the inviolability of the persons of diplomatic agents and the premises of diplomatic missions is one of the very foundations of this long-established régime, to the evolution of which the traditions of Islam made a substantial contribution. The fundamental character of the principle of inviolability is, moreover, strongly underlined by the provisions of Articles 44 and 45 of the Convention of 1961 (cf. also Articles 26 and 27 of the Convention of 1963). Even in the case of armed conflict or in the case of a breach in diplomatic relations those provisions require that both the inviolability of the members of a diplomatic mission and of the premises, property and archives of the mission must be respected by the receiving State. Naturally, the observance of this principle does not mean - and this the Applicant Government expressly acknowledges - that a diplomatic agent caught in the act of committing an assault or other offence may not, on occasion, be briefly arrested by the police of the receiving State in order to prevent the commission of the particular crime. But such eventualities bear no relation at all to what occurred in the present case.

87. In the present case, the Iranian Government did not break off diplomatic relations with the United States; and in response to a question put to him by a Member of the Court, the United States Agent informed the Court that at no time before the events of 4 November 1979 had the Iranian Government declared, or indicated any intention to declare, any member of the United States diplomatic or consular staff in Tehran persona non grata. The Iranian Government did not, therefore, employ the remedies placed at its disposal by diplomatic law specifically for dealing with activities of the kind of which it now complains. Instead, it allowed a group of militants to attack and occupy the United States Embassy by force, and to seize the diplomatic and consular staff as hostages; instead, it has endorsed that action of those militants and has deliberately maintained their occupation of the Embassy and detention of its staff as a
means of coercing the sending State. It has, at the same time, refused altogether to discuss this situation with representatives of the United States. The Court, therefore, can only conclude that Iran did not have recourse to the normal and efficacious means at its disposal, but resorted to coercive action against the United States Embassy and its staff.

88. In an address given on 5 November 1979, the Ayatollah Khomeini traced the origin of the operation carried out by the Islamic militants on the previous day to the news of the arrival of the former Shah of Iran in the United States. That fact may no doubt have been the ultimate catalyst of the resentment felt in certain circles in Iran and among the Iranian population against the former Shah for his alleged misdeeds, and also against the United States Government which was being publicly accused of having restored him to the throne, of having supported him for many years and of planning to go on doing so. But whatever be the truth in regard to those matters, they could hardly be considered as having provided a justification for the attack on the United States Embassy and its diplomatic mission. Whatever extenuation of the responsibility to be attached to the conduct of the Iranian authorities may be found in the offence felt by them because of the admission of the Shah to the United States, that feeling of offence could not affect the imperative character of the legal obligations incumbent upon the Iranian Government which is not altered by a state of diplomatic tension between the two countries. Still less could a mere refusal or failure on the part of the United States to extradite the Shah to Iran be considered to modify the obligations of the Iranian authorities, quite apart from any legal difficulties, in internal or international law, there might be in according to such a request for extradition.

89. Accordingly, the Court finds that no circumstances exist in the present case which are capable of negating the fundamentally unlawful character of the conduct pursued by the Iranian State on 4 November 1979 and thereafter. This finding does not however exclude the possibility that some of the circumstances alleged, if duly established, may later be found to have some relevance in determining the consequences of the responsibility incurred by the Iranian State with respect to that conduct. Although they could not be considered to alter its unlawful character.

* * *

90. On the basis of the foregoing detailed examination of the merits of the case, the Court finds that Iran, by committing successive and continuing breaches of the obligations laid upon it by the Vienna Conventions of 1961 and 1963 on Diplomatic and Consular Relations, the Treaty of Amity, Economic Relations, and Consular Rights of 1955, and the applicable rules of general international law, has incurred responsibility towards the United States. As to the consequences of this finding, it clearly entails an obligation on the part of the Iranian State to make reparation for the injury thereby caused to the United States. Since however Iran’s breaches of its obligations are still continuing, the form and amount of such reparation cannot be determined at the present date.

91. At the same time the Court finds itself obliged to stress the cumulative effect of Iran’s breaches of its obligations when taken together. A marked escalation of these breaches can be seen to have occurred in the transition from the failure on the part of the Iranian authorities to oppose the armed attack by the militants on 4 November 1979 and their seizure of the Embassy premises and staff, to the almost immediate endorsement by those authorities of the situation thus created, and then to their maintaining deliberately for many months the occupation of the Embassy and detention of its staff by a group of armed militants acting on behalf of the State for the purpose of forcing the United States to bow to certain demands. Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights. But what has above all to be emphasized is the extent and seriousness of the conflict between the conduct of the Iranian State and its obligations under the whole corpus of the international rules of which diplomatic and consular law is comprised, rules the fundamental character of which the Court must here again strongly affirm. In its Order of 15 December 1979, the Court made a point of stressing that the obligations laid on States by the two Vienna Conventions are of cardinal importance for the maintenance of good relations between States in the interdependent world of today. “There is no more fundamental prerequisite for the conduct of relations between States”, the Court there said, “than the inviolability of diplomatic envoys and embassies, so that throughout history nations of all creeds and cultures have observed reciprocal obligations for that purpose.” The institution of diplomacy, the Court continued, has proved to be “an instrument essential for effective co-operation in the international community, and for enabling States, irrespective of their differing constitutional and social systems, to achieve mutual understanding and to resolve their differences by peaceful means” (I.C.J. Reports 1979, p. 19).

92. It is a matter of deep regret that the situation which occasioned those observations has not been rectified since they were made. Having regard to their importance the Court considers it essential to reiterate them in the present Judgment. The frequency with which at the present time the principles of international law governing diplomatic and consular relations are set naught by individuals or groups of individuals is already deplorable. But this case is unique and of very particular gravity because here it is not only private individuals or groups of individuals that have disregarded and set at naught the inviolability of a foreign embassy, but the government of the receiving State itself. Therefore in recalling yet again the extreme importance of the principles of law which it is called upon to apply
in the present case, the Court considers it to be its duty to draw the attention of the entire international community, of which Iran itself has been a member since time immemorial, to the irreparable harm that may be caused by events of the kind now before the Court. Such events cannot fail to undermine the edifice of law carefully constructed by mankind over a period of centuries, the maintenance of which is vital for the security and well-being of the complex international community of the present day, to which it is more essential than ever that the rules developed to ensure the ordered progress of relations between its members should be constantly and scrupulously respected.

* * *

93. Before drawing the appropriate conclusions from its findings on the merits in this case, the Court considers that it cannot let pass without comment the incursion into the territory of Iran made by United States military units on 24-25 April 1980, an account of which has been given earlier in this Judgment (paragraph 32). No doubt the United States Government may have had understandable preoccupations with respect to the well-being of its nationals held hostage in its Embassy for over five months. No doubt also the United States Government may have had understandable feelings of frustration at Iran's long-continued detention of the hostages, notwithstanding two resolutions of the Security Council as well as the Court's own Order of 15 December 1979 calling expressly for their immediate release. Nevertheless, in the circumstances of the present proceedings, the Court cannot fail to express its concern in regard to the United States' incursion into Iran. When, as previously recalled, this case had become ready for hearing on 19 February 1980, the United States Agent requested the Court, owing to the delicate stage of certain negotiations, to defer setting a date for the hearings. Subsequently, on 11 March, the Agent informed the Court of the United States Government's anxiety to obtain an early judgment on the merits of the case. The hearings were accordingly held on 18, 19 and 20 March, and the Court was in course of preparing the present judgment adjudicating upon the claims of the United States against Iran when the operation of 24 April 1980 took place. The Court therefore feels bound to observe that an operation undertaken in those circumstances, from whatever motive, is of a kind calculated to undermine respect for the judicial process in international relations; and to recall that in paragraph 47, 1 B, of its Order of 15 December 1979 the Court had indicated that no action was to be taken by either party which might aggravate the tension between the two countries.

94. At the same time, however, the Court must point out that neither the question of the legality of the operation of 24 April 1980, under the Charter of the United Nations and under general international law, nor any possible question of responsibility flowing from it, is before the Court. It must also point out that this question can have no bearing on the evaluation of the conduct of the Iranian Government over six months earlier, on 4 November 1979, which is the subject-matter of the United States' Application. It follows that the findings reached by the Court in this Judgment are not affected by that operation.

* * *

95. For these reasons,

THE COURT,

1. By thirteen votes to two,

Decides that the Islamic Republic of Iran, by the conduct which the Court has set out in this Judgment, has violated in several respects, and is still violating, obligations owed by it to the United States of America under international conventions in force between the two countries, as well as under long-established rules of general international law;

IN FAVOUR: President Sir Humphrey Waldock; Vice-President Elias; Judges Forster, Gros, Lachs, Nagendra Singh, Ruda, Mosler, Oda, Ago, El-Erian, Sette-Camara and Baxter.

AGAINST: Judges Morozov and Tarazi.

2. By thirteen votes to two,

Decides that the violations of these obligations engage the responsibility of the Islamic Republic of Iran towards the United States of America under international law;

IN FAVOUR: President Sir Humphrey Waldock; Vice-President Elias; Judges Forster, Gros, Lachs, Nagendra Singh, Ruda, Mosler, Oda, Ago, El-Erian, Sette-Camara and Baxter.

AGAINST: Judges Morozov and Tarazi.

3. Unanimously,

Decides that the Government of the Islamic Republic of Iran must immediately take all steps to redress the situation resulting from the events of 4 November 1979 and what followed from these events, and to that end:

(a) must immediately terminate the unlawful detention of the United States Chargé d'affaires and other diplomatic and consular staff and other United States nationals now held hostage in Iran, and must immediately release each and every one and entrust them to the protecting Power (Article 45 of the 1961 Vienna Convention on Diplomatic Relations);
(b) must ensure that all the said persons have the necessary means of leaving Iranian territory, including means of transport;

(c) must immediately place in the hands of the protecting Power the premises, property, archives and documents of the United States Embassy in Tehran and of its Consulates in Iran;

4. Unanimously,

Decides that no member of the United States diplomatic or consular staff may be kept in Iran to be subjected to any form of judicial proceedings or to participate in them as a witness;

5. By twelve votes to three,

Decides that the Government of the Islamic Republic of Iran is under an obligation to make reparation to the Government of the United States of America for the injury caused to the latter by the events of 4 November 1979 and what followed from these events;

IN FAVOUR: President Sir Humphrey Waldock; Vice-President Elias; Judges Forster, Gros, Nagendra Singh, Ruda, Mosler, Oda, Ago, El-Erian, Sette-Camara and Baxter.

AGAINST: Judges Lachs, Morozov and Tarazi.

6. By fourteen votes to one,

Decides that the form and amount of such reparation, failing agreement between the Parties, shall be settled by the Court, and reserves for this purpose the subsequent procedure in the case.

IN FAVOUR: President Sir Humphrey Waldock; Vice-President Elias; Judges Forster, Gros, Lachs, Nagendra Singh, Ruda, Mosler, Tarazi, Oda, Ago, El-Erian, Sette-Camara and Baxter.

AGAINST: Judge Morozov.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-fourth day of May, one thousand nine hundred and eighty, in three copies, one of which will be placed in the archives of the Court, and the others transmitted to the Government of the United States of America and the Government of the Islamic Republic of Iran, respectively.

(Signed) Humphrey WALDOCK,
President.

(Signed) S. AQUARONE,
Registrar.
International Court of Justice

Avena and Other Mexican Nationals
(Mexico v. United States of America)
Judgment

I.C.J. Reports 2004
CASE CONCERNING AVENA AND OTHER MEXICAN NATIONALS
(MEXICO v. UNITED STATES OF AMERICA)

JUDGMENT OF 31 MARCH 2004

2004

AFFAIRE AVENA ET AUTRES RESSORTISSANTS MEXICAINS
(MEXIQUE c. ÉTATS-UNIS D'AMÉRIQUE)

ARRÊT DU 31 MARS 2004
INTERNATIONAL COURT OF JUSTICE

YEAR 2004

31 March 2004

CASE CONCERNING AVENA AND OTHER MEXICAN NATIONALS
(MEXICO v. UNITED STATES OF AMERICA)


* *

Mexico’s objection to the United States objections to jurisdiction and admissibility — United States objections not presented as preliminary objections — Article 79 of Rules of Court not pertinent in present case.

* *

Jurisdiction of the Court.
First United States objection to jurisdiction — Contention that Mexico’s submissions invite the Court to rule on the operation of the United States criminal justice system — Jurisdiction of Court to determine the nature and extent of obligations arising under Vienna Convention — Enquiry into the conduct of criminal proceedings in United States courts a matter belonging to the merits.

Second United States objection to jurisdiction — Contention that the first submission of Mexico’s Memorial is excluded from the Court’s jurisdiction — Mexico defending an interpretation of the Vienna Convention whereby not only the absence of consular notification but also the arrest, detention, trial and conviction of its nationals were unlawful, failing such notification — Interpretation of Vienna Convention a matter within the Court’s jurisdiction.

Third United States objection to jurisdiction — Contention that Mexico’s submissions on remedies go beyond the Court’s jurisdiction — Jurisdiction of Court to consider the question of remedies — Question whether or how far the Court may order the requested remedies a matter belonging to the merits.

Fourth United States objection to jurisdiction — Contention that the Court lacks jurisdiction to determine whether or not consular notification is a human right — Question of interpretation of Vienna Convention.

* *

Admissibility of Mexico’s claims.
First United States objection to admissibility — Contention that Mexico’s claims are not within the jurisdiction of the Court — United States claims to have the Court function as a court of criminal appeal — Question belonging to the merits.

Second United States objection to admissibility — Contention that Mexico’s claims to have the Court rule on the violation of international law are admissible on grounds that local remedies have not been exhausted — Interdependence in the present case of rights of the State and of individual rights — Mexico requesting the Court to rule on the violation of rights which it suffered both directly and through the violation of individual rights of its nationals — Duty to exhaust local remedies does not apply to such a request.

Third United States objection to admissibility — Contention that certain Mexican nationals also have United States nationality — Question belonging to the merits.

Fourth United States objection to admissibility — Contention that Mexico had actual knowledge of a breach but failed to bring such breach to the attention of the United States or did so only after considerable delay — No contention in the present case of any prejudice caused by such delay — No implied waiver by Mexico of its rights.

Fifth United States objection to admissibility — Contention that Mexico invokes standards that it does not follow in its own practice — Nature of Vienna Convention precludes such an argument.

* *

Article 36, paragraph 1 — Mexican nationality of 22 individuals concerned — United States has not proved its contention that some were also United States nationals.

Article 36, paragraph 1 (b) — Consular information — Duty to provide consular information as soon as arresting authorities realize that arrested person is a foreign national, or have grounds for so believing — Provision of consular information in parallel with reading of “Miranda rights” — Contention that seven individuals stated at the time of arrest that they were United States nationals — Interpretation of phrase “without delay” — Violation by United States of the obligation to provide consular information in 51 cases.

Consular notification — Violation by United States of the obligation of consular notification in 49 cases.

Article 36, paragraph 1 (a) and (c) — Interrelated nature of the three subparagraphs of paragraph 1 — Violation by United States of the obligation to enable Mexican consular officers to communicate with, have access to and visit their nationals in 49 cases — Violation by United States of the obligation to
enable Mexican consular officers to arrange for legal representation of their nationals in 34 cases.

Article 36, paragraph 2 — "Procedural default" rule — Possibility of judicial remedies still open in 49 cases — Violation by United States of its obligations under Article 36, paragraph 2, in three cases.

* * *

Legal consequences of the breach.

Question of adequate reparation for violations of Article 36 — Review and reconsideration by United States courts of convictions and sentences of the Mexican nationals — Choice of means: left to United States — Review and reconsideration to be carried out by taking account of violation of Vienna Convention rights — "Procedural default" rule.

Judicial process suited to the task of review and reconsideration — Clemency process, as currently practised within the United States criminal justice system, not sufficient in itself to serve as appropriate means of "review and reconsideration" — Appropriate clemency procedures can supplement judicial review and reconsideration.

Mexico requesting cessation of wrongful acts and guarantees and assurances of non-repetition — No evidence to establish "regular and continuing" pattern of breaches by United States of Article 36 of Vienna Convention — Measures taken by United States to comply with its obligations under Article 36, paragraph 1 — Commitment undertaken by United States to ensure implementation of its obligations under that provision.

* * *

No a contrario argument can be made in respect of the Court's findings in the present Judgment concerning Mexican nationals.

* * *

United States obligations declared in Judgment replace those arising from Provisional Measures Order of 3 February 2003 — In the three cases where the United States violated its obligations under Article 36, paragraph 2, it must find an appropriate remedy having the nature of review and reconsideration according to the criteria indicated in the Judgment.

JUDGMENT

Present: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Veresichetin, Higgins, Parra-Aranguren, Koijmans, Rezek, Al-Khasawneh, Buergenthaal, Elasaby, Owada, Tomka; Judge ad hoc Sepúlveda; Registrar Couvreur.

In the case concerning Avena and other Mexican nationals, between the United Mexican States, represented by H.E. Mr. Juan Manuel Gómez-Robledo, Ambassador, former Legal Adviser, Ministry of Foreign Affairs, Mexico City, as Agent;

H.E. Mr. Santiago Oñate, Ambassador of Mexico to the Kingdom of the Netherlands, as Agent (until 12 February 2004);

Mr. Arturo A. Dager, Legal Adviser, Ministry of Foreign Affairs, Mexico City;

Ms María del Refugio González Domínguez, Chief, Legal Co-ordination Unit, Ministry of Foreign Affairs, Mexico City, as Agents (from 2 March 2004);

H.E. Ms Sandra Fuentes Berain, Ambassador-Designate of Mexico to the Kingdom of the Netherlands, as Agent (from 17 March 2004);

Mr. Pierre-Marie Dupuy, Professor of Public International Law at the University of Paris II (Panthéon-Assas) and at the European University Institute, Florence,

Mr. Donald Francis Donovan, Attorney at Law, Debevoise & Plimpton, New York,

Ms Sandra L. Babcock, Attorney at Law, Director of the Mexican Capital Legal Assistance Programme,

Mr. Carlos Bernal, Attorney at Law, Noriega y Escobedo, and Chairman of the Commission on International Law at the Mexican Bar Association, Mexico City,

Ms Katherine Birmingham Wilmore, Attorney at Law, Debevoise & Plimpton, London,

Mr. Dietmar W. Prager, Attorney at Law, Debevoise & Plimpton, New York,

Ms Sócorro Flores Liera, Chief of Staff, Under-Secretariat for Global Affairs and Human Rights, Ministry of Foreign Affairs, Mexico City,

Mr. Victor Manuel Uribe Aviña, Head of the International Litigation Section, Legal Adviser's Office, Ministry of Foreign Affairs, Mexico City, as Counsellors and Advocates;

Mr. Erasmo A. Lara Cabrera, Head of the International Law Section, Legal Adviser's Office, Ministry of Foreign Affairs, Mexico City,

Ms Natalie Klein, Attorney at Law, Debevoise & Plimpton, New York,

Ms Catherine Amirfar, Attorney at Law, Debevoise & Plimpton, New York,

Mr. Thomas Bollyky, Attorney at Law, Debevoise & Plimpton, New York,

Ms Cristina Hoss, Research Fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg,

Mr. Mark Warren, International Law Researcher, Ottawa, as Advisers;
Mr. Michel L’Enfant, Debevoise & Plimpton, Paris, as Assistant, and
the United States of America, represented by
The Honourable William H. Taft, IV, Legal Adviser, United States Department of State, as Agent;
Mr. James H. Thessin, Principal Deputy Legal Adviser, United States Department of State, as Co-Agent;
Ms Catherine W. Brown, Assistant Legal Adviser for Consular Affairs, United States Department of State,
Mr. D. Stephen Mathias, Assistant Legal Adviser for United Nations Affairs, United States Department of State,
Mr. Patrick F. Philbin, Associate Deputy Attorney General, United States Department of Justice,
Mr. John Byron Sandage, Attorney-Adviser for United Nations Affairs, United States Department of State,
Mr. Thomas Weigend, Professor of Law and Director of the Institute of Foreign and International Criminal Law, University of Cologne,
Ms Elisabeth Zoller, Professor of Public Law, University of Paris II (Panthéon-Assas), as Counsel and Advocates;
Mr. Jacob Katz Cogan, Attorney-Adviser for United Nations Affairs, United States Department of State,
Ms Sara Criscitelli, Member of the Bar of the State of New York,
Mr. Robert J. Erickson, Principal Deputy Chief, Criminal Appellate Section, United States Department of Justice,
Mr. Noel J. Francisco, Deputy Assistant Attorney General. Office of Legal Counsel, United States Department of Justice,
Mr. Steven Hill, Attorney-Adviser for Economic and Business Affairs, United States Department of State,
Mr. Clifton M. Johnson, Legal Counsellor, United States Embassy, The Hague,
Mr. David A. Kaye, Deputy Legal Counsellor, United States Embassy, The Hague,
Mr. Peter W. Mason, Attorney-Adviser for Consular Affairs, United States Department of State, as Counsel;
Ms Barbara Barrett-Spencer, United States Department of State,
Ms Marianne Hata, United States Department of State,
Ms Cecile Jouget, United States Embassy, Paris,
Ms Joanne Nelligan, United States Department of State,
Ms Laura Romain, United States Embassy, The Hague, as Administrative Staff,

THE COURT,
composed as above, after deliberation,

delivers the following Judgment:

1. On 9 January 2003 the United Mexican States (hereinafter referred to as “Mexico”) filed in the Registry of the Court an Application instituting proceedings against the United States of America (hereinafter referred to as the “United States”) for “violations of the Vienna Convention on Consular Relations” of 24 April 1963 (hereinafter referred to as the “Vienna Convention”) allegedly committed by the United States.

In its Application, Mexico based the jurisdiction of the Court on Article 36, paragraph 1, of the Statute of the Court and on Article I of the Optional Protocol concerning the Compulsory Settlement of Disputes, which accompanies the Vienna Convention (hereinafter referred to as the “Optional Protocol”).

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

3. On 9 January 2003, the day on which the Application was filed, the Mexican Government also filed in the Registry of the Court a request for the indication of provisional measures based on Article 41 of the Statute and Articles 73, 74 and 75 of the Rules of Court.

By an Order of 5 February 2003, the Court indicated the following provisional measures:

“(a) The United States of America shall take all measures necessary to ensure that Mr. César Roberto Fierro Reyna, Mr. Roberto Moreno Ramos and Mr. Osvaldo Torres Aguilera are not executed pending final judgment in these proceedings;

(b) The Government of the United States of America shall inform the Court of all measures taken in implementation of this Order.”

It further decided that, “until the Court has rendered its final judgment, it shall remain seised of the matters” which formed the subject of that Order.

In a letter of 2 November 2003, the Agent of the United States advised the Court that the United States had “informed the relevant state authorities of Mexico’s application”; that, since the Order of 5 February 2003, the United States had “obtained from them information about the status of the fifty-four cases, including the three cases identified in paragraph 59 (I) (a) of that Order”; and that the United States could “confirm that none of the named individuals [had] been executed”.

4. In accordance with Article 43 of the Rules of Court, the Registrar sent the notification referred to in Article 63, paragraph 1, of the Statute to all States parties to the Vienna Convention or to that Convention and the Optional Protocol.

5. By an Order of 5 February 2003, the Court, taking account of the views of the Parties, fixed 6 June 2003 and 6 October 2003, respectively, as the time-limits for the filing of a Memorial by Mexico and of a Counter-Memorial by the United States.
6. By an Order of 22 May 2003, the President of the Court, on the joint request of the Agents of the two Parties, extended to 20 June 2003 the time-limit for the filing of the Memorial; the time-limit for the filing of the Counter-Memorial was extended, by the same Order, to 3 November 2003.

By a letter dated 20 June 2003 and received in the Registry on the same day, the Agent of Mexico informed the Court that Mexico was unable for technical reasons to file the original of its Memorial on time and accordingly asked the Court to decide, under Article 44, paragraph 3, of the Rules of Court, that the filing of the Memorial after the expiration of the time-limit fixed therefor would be considered as valid; that letter was accompanied by two electronic copies of the Memorial and its annexes. Mexico having filed the original of the Memorial on 23 June 2003 and the United States having informed the Court, by a letter of 24 June 2003, that it had no comment to make on the matter, the Court decided on 25 June 2003 that the filing would be considered as valid.

7. In a letter of 14 October 2003, the Agent of Mexico expressed his Government’s wish to amend its submissions in order to include therein the cases of two Mexican nationals, Mr. Victor Miranda Guerrero and Mr. Tonatiuh Aguilar Saucedo, who had been sentenced to death, after the filing of Mexico’s Memorial, as a result of criminal proceedings in which, according to Mexico, the United States had failed to comply with its obligations under Article 36 of the Vienna Convention.

In a letter of 2 November 2003, under cover of which the United States filed its Counter-Memorial within the time-limit prescribed, the Agent of the United States informed the Court that his Government objected to the amendment of Mexico’s submissions, on the grounds that the request was late, that Mexico had submitted no evidence concerning the alleged facts and that there was not enough time for the United States to investigate them.

In a letter received in the Registry on 28 November 2003, Mexico responded to the United States objection and at the same time amended its submissions so as to withdraw its request for relief in the cases of two Mexican nationals mentioned in the Memorial, Mr. Enrique Zambrano Garibi and Mr. Pedro Hernández Alberto, having come to the conclusion that the former had dual Mexican and United States nationality and that the latter had been informed of his right of consular notification prior to interrogation.

On 9 December 2003, the Registrar informed Mexico and the United States that, in order to ensure the procedural equality of the Parties, the Court had decided not to authorize the amendment of Mexico’s submissions so as to include the two additional Mexican nationals mentioned above. He also informed the Parties that the Court had taken note that the United States had made no objection to the withdrawal by Mexico of its request for relief in the cases of Mr. Zambrano and Mr. Hernández.

8. On 28 November 2003 and 2 December 2003, Mexico filed various documents which it wished to produce in accordance with Article 36 of the Rules of Court. By letters dated 2 December 2003 and 5 December 2003, the Agent of the United States informed the Court that his Government did not object to the production of these new documents and that it intended to exercise its right to comment upon these documents and to submit documents in support of its comments, pursuant to paragraph 3 of that Article. By letters dated 9 December 2003, the Registrar informed the Parties that the Court had taken note that the United States had no objection to the production of these documents and that accordingly counsel would be free to refer to them in the course of the hearings. On 10 December 2003, the Agent of the United States filed the comments of his Government on the new documents produced by Mexico, together with a number of documents in support of those comments.

9. Since the Court included upon the Bench no judge of Mexican nationality, Mexico availed itself of its right under Article 31, paragraph 2, of the Statute to choose a judge ad hoc to sit in the case: it chose Mr. Bernardo Sepúlveda.

10. Pursuant to Article 53, paragraph 2, of its Rules, the Court, having consulted the Parties, decided that copies of the pleadings and documents annexed would be made accessible to the public on the opening of the oral proceedings.

11. Public sittings were held between 15 and 19 December 2003, at which the Court heard the oral arguments and replies of:

For Mexico:
H.E. Mr. Juan Manuel Gómez-Robledo,
Ms Sandra L. Babcock,
Mr. Victor Manuel Uribe Aviña,
Mr. Donald Francis Donovan,
Ms Katherine Birmingham Wilmore,
H.E. Mr. Santiago Oñate,
Ms Socorro Flores Liera,
Mr. Carlos Bernal,
Mr. Dietmar W. Prager,
Mr. Pierre-Marie Dupuy.

For the United States:
The Honourable William H. Taft, IV,
Ms Elisabeth Zoller,
Mr. Patrick F. Philbin,
Mr. John Byron Sandage,
Ms Catherine W. Brown,
Mr. D. Stephen Mathias,
Mr. James H. Thessin,
Mr. Thomas Weigend.

12. In its Application, Mexico formulated the decision requested in the following terms:
“...The Government of the United Mexican States therefore asks the Court to adjudge and declare:
(1) that the United States, in arresting, detaining, trying, convicting, and sentencing the 54 Mexican nationals on death row described in this Application, violated its international legal obligations to Mexico, in its own right and in the exercise of its right of consular protection of its nationals, as provided by Articles 5 and 36, respectively of the Vienna Convention;

(2) that Mexico is therefore entitled to restitution in integrum;

(3) that the United States is under an international legal obligation not to
applthe doctrine of procedural default, or any other doctrine of its municipal law, to preclude the exercise of the rights afforded by Article 36 of the Vienna Convention;

(4) that the United States is under an international legal obligation to carry out in conformity with the foregoing international legal obligations any future detention of or criminal proceedings against the fifty-four Mexican nationals on death row or any other Mexican nationals in its territory, whether by a constituent, legislative, executive, judicial or other power, whether that power holds a superior or a subordinate position in the organization of the United States, and whether that power's functions are international or internal in character;

(5) that the right to consular notification under the Vienna Convention is a human right;

and that, pursuant to the foregoing international legal obligations,

(1) the United States must restore the status quo ante, that is, re-establish the situation that existed before the detention of, proceedings against, and convictions and sentences of, Mexico's nationals in violation of the United States international legal obligations;

(2) the United States must take the steps necessary and sufficient to ensure that the provisions of its municipal law enable full effect to be given to the purposes for which the rights afforded by Article 36 are intended;

(3) the United States must take the steps necessary and sufficient to establish a meaningful remedy at law for violations of the rights afforded Mexico and its nationals by Article 36 of the Vienna Convention, including by barring the imposition, as a matter of municipal law, of any procedural penalty for the failure timely to raise a claim or defence based on the Vienna Convention where competent authorities of the United States have breached their obligation to advise the national of his or her rights under the Convention; and

(4) the United States, in light of the pattern and practice of violations set forth in this Application, must provide Mexico a full guarantee of the non-repetition of the illegal acts."

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

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

"For these reasons, ... the Government of Mexico respectfully requests the Court to adjudge and declare

(1) that the United States, in arresting, detaining, trying, convicting, and sentencing the fifty-four Mexican nationals on death row described in

Mexico's Application and this Memorial, violated its international legal obligations to Mexico, in its own right and in the exercise of its right of diplomatic protection of its nationals, as provided by Article 36 of the Vienna Convention;

(2) that the obligation in Article 36 (1) of the Vienna Convention requires notification before the competent authorities of the receiving State interrogate the foreign national or take any other action potentially detrimental to his or her rights;

(3) that the United States, in applying the doctrine of procedural default, or any other doctrine of its municipal law, to preclude the exercise and review of the rights afforded by Article 36 of the Vienna Convention, violated its international legal obligations to Mexico, in its own right and in the exercise of its right of diplomatic protection of its nationals, as provided by Article 36 of the Vienna Convention; and

(4) that the United States is under an international legal obligation to carry out in conformity with the foregoing international legal obligations any future detention of or criminal proceedings against the fifty-four Mexican nationals on death row and any other Mexican national in its territory, whether by a constituent, legislative, executive, judicial or other power, whether that power holds a superior or a subordinate position in the organization of the United States, and whether that power's functions are international or internal in character;

and that, pursuant to the foregoing international legal obligations,

(1) Mexico is entitled to restitutio in integrum and the United States therefore is under an obligation to restore the status quo ante, that is, re-establish the situation that existed at the time of the detention and prior to the interrogation of, proceedings against, and convictions and sentences of, Mexico's nationals in violation of the United States' international legal obligations, specifically by, among other things,

(a) vacating the convictions of the fifty-four Mexican nationals;

(b) vacating the sentences of the fifty-four Mexican nationals;

(c) excluding any subsequent proceedings against the fifty-four Mexican nationals any statements and confessions obtained from them prior to notification of their rights to consular notification and access;

(d) preventing the application of any procedural penalty for a Mexican national's failure timely to raise a claim or defence based on the Vienna Convention where competent authorities of the United States have breached their obligation to advise the national of his rights under the Convention;
(e) preventing the application of any municipal law doctrine or judicial holding that prevents a court in the United States from providing a remedy, including the relief to which this Court holds that Mexico is entitled here, to a Mexican national whose Article 36 rights have been violated; and

(f) preventing the application of any municipal law doctrine or judicial holding that requires an individualized showing of prejudice as a prerequisite to relief for the violations of Article 36;

(2) the United States, in light of the regular and continuous violations set forth in Mexico’s Application and Memorial, is under an obligation to take all legislative, executive, and judicial steps necessary to:

(a) ensure that the regular and continuing violations of the Article 36 consular notification, access, and assistance rights of Mexico and its nationals cease;

(b) guarantee that its competent authorities, of federal, state, and local jurisdiction, maintain regular and routine compliance with their Article 36 obligations;

(c) ensure that its judicial authorities cease applying, and guarantee that in the future they will not apply:

(i) any procedural penalty for a Mexican national’s failure timely to raise a claim or defence based on the Vienna Convention where competent authorities of the United States have breached their obligation to advise the national of his or her rights under the Convention;

(ii) any municipal law doctrine or judicial holding that prevents a court in the United States from providing a remedy, including the relief to which this Court holds that Mexico is entitled here, to a Mexican national whose Article 36 rights have been violated; and

(iii) any municipal law doctrine or judicial holding that requires an individualized showing of prejudice as a prerequisite to relief for the Vienna Convention violations shown here.

On behalf of the Government of the United States,

in the Counter-Memorial:

"On the basis of the facts and arguments set out above, the Government of the United States of America requests that the Court adjudge and declare that the claims of the United Mexican States are dismissed."

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

On behalf of the Government of Mexico,

"The Government of Mexico respectfully requests the Court to adjudge and declare

(1) that the United States of America, in arresting, detaining, trying, convicting, and sentencing the 52 Mexican nationals on death row described in Mexico’s Memorial, violated its international legal obligations to Mexico, in its own right and in the exercise of its right to diplomatic protection of its nationals, by failing to inform, without delay, the 52 Mexican nationals after their arrest of their right to consular notification and access under Article 36 (1) (b) of the Vienna Convention on Consular Relations, and by depriving Mexico of its right to provide consular protection and the 52 nationals’ right to receive such protection as Mexico would provide under Article 36 (1) (a) and (c) of the Convention;

(2) that the obligation in Article 36 (1) of the Vienna Convention requires notification of consular rights and a reasonable opportunity for consular access before the competent authorities of the receiving State take any action potentially detrimental to the foreign national’s rights;

(3) that the United States of America violated its obligations under Article 36 (2) of the Vienna Convention by failing to provide meaningful and effective review and reconsideration of convictions and sentences impaired by a violation of Article 36 (1); by substituting for such review and reconsideration clemency proceedings; and by applying the ‘procedural default’ doctrine and other municipal law doctrines that fail to attach legal significance to an Article 36 (1) violation on its own terms;

(4) that pursuant to the injuries suffered by Mexico in its own right and in the exercise of diplomatic protection of its nationals, Mexico is entitled to full reparation for those injuries in the form of restitutio in integrum;

(5) that this restitution consists of the obligation to restore the status quo ante by annulling or otherwise depriving of full force or effect the convictions and sentences of all 52 Mexican nationals;

(6) that this restitution also includes the obligation to take all measures necessary to ensure that a prior violation of Article 36 shall not affect the subsequent proceedings;

(7) that to the extent that any of the 52 convictions or sentences are not annulled, the United States shall provide, by means of its own choosing, meaningful and effective review and reconsideration of the convictions and sentences of the 52 nationals, and that this obligation cannot be satisfied by means of clemency proceedings or if any municipal law rule or doctrine inconsistent with paragraph (3) above is applied; and
(8) that the United States of America shall cease its violations of Article 36 of the Vienna Convention with regard to Mexico and its 52 nationals and shall provide appropriate guarantees and assurances that it shall take measures sufficient to achieve increased compliance with Article 36 (1) and to ensure compliance with Article 36 (2)."

On behalf of the Government of the United States,

"On the basis of the facts and arguments made by the United States in its Counter-Memorial and in these proceedings, the Government of the United States of America requests that the Court, taking into account that the United States has conformed its conduct to this Court’s Judgment in the LaGrand Case (Germany v. United States of America), not only with respect to German nationals but, consistent with the Declaration of the President of the Court in that case, to all detained foreign nationals, adjudge and declare that the claims of the United Mexican States are dismissed."

* * *

15. The present proceedings have been brought by Mexico against the United States on the basis of the Vienna Convention, and of the Optional Protocol providing for the jurisdiction of the Court over "disputes arising out of the interpretation or application" of the Convention. Mexico and the United States are, and were at all relevant times, parties to the Vienna Convention and to the Optional Protocol. Mexico claims that the United States has committed breaches of the Vienna Convention in relation to the treatment of a number of Mexican nationals who have been tried, convicted and sentenced to death in criminal proceedings in the United States. The original claim related to 54 such persons, but as a result of subsequent adjustments to its claim made by Mexico (see paragraph 7 above), only 52 individual cases are involved. These criminal proceedings have been taking place in nine different States of the United States, namely California (28 cases), Texas (15 cases), Illinois (three cases), Arizona (one case), Arkansas (one case), Nevada (one case), Ohio (one case), Oklahoma (one case) and Oregon (one case), between 1979 and the present.

16. For convenience, the names of the 52 individuals, and the numbers by which their cases will be referred to, are set out below:

1. Carlos Avena Guillen
2. Héctor Juan Ayala
3. Vicente Benavides Figueroa
4. Constantino Carrera Montenegro
5. Jorge Contreras López
53. Osvaldo Netzahualcóyotl Torres Aguilera
54. Horacio Alberto Reyes Camarena

17. The provisions of the Vienna Convention of which Mexico alleges violations are contained in Article 36, Paragraphs 1 and 2 of this Article are set out respectively in paragraphs 50 and 108 below. Article 36 relates, according to its title, to “Communication and contact with nationals of the sending State”. Paragraph 1 of that Article provides that if a national of that State “is arrested or committed to prison or to custody pending trial or is detained in any other manner”, and he so requests, the local consular post of the sending State is to be notified. The Article goes on to provide that the “competent authorities of the receiving State” shall “inform the person concerned without delay of his rights” in this respect. Mexico claims that in the present case these provisions were not complied with by the United States authorities in respect of the 52 Mexican nationals the subject of its claims. As a result, the United States has according to Mexico committed breaches of paragraph 1; moreover, Mexico claims, for reasons to be explained below (see paragraphs 98 et seq.), that the United States is also in breach of paragraph 1 and (c) and of paragraph 2 of Article 36, in view of the relationship of these provisions with paragraph 1.

18. As regards the terminology employed to designate the obligations incumbent upon the receiving State under Article 36, paragraph 1 of the Court notes that the Parties have used the terms “inform” and “notify” in differing senses. For the sake of clarity, the Court, when speaking in its own name in the present Judgment, will use the word “inform” when referring to an individual being made aware of his rights under that subparagraph and the word “notify” when referring to the giving of notice to the consular post.

19. The underlying facts alleged by Mexico may be briefly described as follows: some are conceded by the United States, and some disputed. Mexico states that all the individuals the subject of its claims were Mexican nationals at the time of their arrest. It further contends that the United States authorities that arrested and interrogated these individuals had sufficient information at their disposal to be aware of the foreign nationality of those individuals. According to Mexico’s account, in 50 of the specified cases, Mexican nationals were never informed by the competent United States authorities of their rights under Article 36, paragraph 1 of the Vienna Convention and, in the two remaining cases, such information was not provided “without delay”, as required by that provision. Mexico has indicated that in 29 of the 52 cases its consular authorities learned of the detention of the Mexican nationals only after death sentences had been handed down. In the 23 remaining cases, Mexico contends that it learned of the cases through means other than notification to the consular post by the competent United States authorities under Article 36, paragraph 1. It explains that in five cases this was too late to affect the trials, that in 15 cases the defendants had already made incurring statements, and that it became aware of the other three cases only after considerable delay.

20. Of the 52 cases referred to in Mexico’s final submissions, 49 are currently at different stages of the proceedings before United States judicial authorities at state or federal level, and in three cases, those of Mr. Fierro (case No. 31), Mr. Moreno (case No. 39) and Mr. Torres (case No. 53), judicial remedies within the United States have already been exhausted. The Court has been informed of the variety of types of proceedings and forms of relief available in the criminal justice systems of the United States, which can differ from state to state. In very general terms, and according to the description offered by both Parties in their pleadings, it appears that the 52 cases may be classified into three categories: 24 cases which are currently in direct appeal; 25 cases in which means of direct appeal have been exhausted, but post-conviction relief (habeas corpus), either at state or at federal level, is still available; and 33 cases in which no judicial remedies remain. The Court also notes that, in at least 33 cases, the alleged breach of the Vienna Convention was raised by the defendant either during pre-trial, at trial, on appeal or in habeas corpus proceedings, and that some of these claims were dismissed on procedural or substantive grounds and others are still pending. To date, in none of the 52 cases have the defendants had recourse to the clemency process.

21. On 9 January 2003, the day on which Mexico filed its Application and a request for the indication of provisional measures, all 52 individuals the subject of the claims were on death row. However, two days later the Governor of the State of Illinois, exercising his power of clemency review, commuted the sentences of all convicted individuals awaiting execution in that State, including those of three individuals named in Mexico’s Application (Mr. Caballero (case No. 45), Mr. Flores (case No. 46) and Mr. Solache (case No. 47)). By a letter dated 20 January 2003, Mexico informed the Court that, further to that decision, it withdrew its request for the indication of provisional measures on behalf of these three individuals, but that its Application remained unchanged. In the Order of 5 February 2003, mentioned in paragraph 3 above, on the request by Mexico for the indication of provisional measures, the Court considered that it was apparent from the information before it that the three Mexican nationals named in the Application who had exhausted all judicial remedies in the United States (see paragraph 20 above) were at risk of execution in the following months, or even weeks. Consequently, it ordered by way of provisional measure that the United States take all measures necessary to ensure that these individuals would not be executed
pending final judgment in these proceedings. The Court notes that, at the date of the present Judgment, these three individuals have not been executed, but further notes with great concern that, by an Order dated 1 March 2004, the Oklahoma Court of Criminal Appeals has set an execution date of 18 May 2004 for Mr. Torres.

* * *

The Mexican Objection to the United States Objections to Jurisdiction and Admissibility

22. As noted above, the present dispute has been brought before the Court by Mexico on the basis of the Vienna Convention and the Optional Protocol to that Convention. Article I of the Optional Protocol provides:

“Disputes arising out of the interpretation or application of the [Vienna] Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by a written application made by any party to the dispute being a Party to the present Protocol.”

23. The United States has presented a number of objections to the jurisdiction of the Court, as well as a number of objections to the admissibility of the claims advanced by Mexico. It is however the contention of Mexico that all the objections raised by the United States are inadmissible as having been raised after the expiration of the time-limit laid down by the Rules of Court. Mexico draws attention to the text of Article 79, paragraph 1, of the Rules of Court as amended in 2000, which provides that

“Any objection by the respondent to the jurisdiction of the Court or to the admissibility of the application, or other objection the decision upon which is requested before any further proceedings on the merits, shall be made in writing as soon as possible, and not later than three months after the delivery of the Memorial.”

The previous text of this paragraph required objections to be made “within the time-limit fixed for delivery of the Counter-Memorial”. In the present case the Memorial of Mexico was filed on 23 June 2003; the objections of the United States to jurisdiction and admissibility were presented in its Counter-Memorial, filed on 3 November 2003, more than four months later.

24. The United States has observed that, during the proceedings on the request made by Mexico for the indication of provisional measures in this case, it specifically reserved its right to make jurisdictional arguments at the appropriate stage, and that subsequently the Parties agreed that there should be a single round of pleadings. The Court would however emphasize that parties to cases before it cannot, by purporting to “reserve their rights” to take some procedural action, exempt themselves from the application to such action of the provisions of the Statute and Rules of Court (cf. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Order of 13 September 1993, I.C.J. Reports 1993, p. 338, para. 28).

The Court notes, however, that Article 79 of the Rules applies only to preliminary objections, as is indicated by the title of the subsection of the Rules which it constitutes. As the Court observed in the Lockerbie cases, “if it is to be covered by Article 79, an objection must ... possess a 'preliminary' character”, and “Paragraph 1 of Article 79 of the Rules of Court characterizes as 'preliminary' an objection 'the decision upon which is requested before any further proceedings'” (Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom) (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, I.C.J. Reports 1998, p. 26, para. 47; p. 131, para. 46); and the effect of the timely presentation of such an objection is that the proceedings on the merits are suspended (paragraph 5 of Article 79). An objection that is not presented as a preliminary objection in accordance with paragraph 1 of Article 79 does not thereby become inadmissible. There are of course circumstances in which the party failing to put forward an objection to jurisdiction might be held to have acquiesced in jurisdiction (Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, I.C.J. Reports 1972, p. 52, para. 13). However, apart from such circumstances, a party failing to avail itself of the Article 79 procedure may forfeit the right to bring about a suspension of the proceedings on the merits, but can still argue the objection along with the merits. That is indeed what the United States has done in this case; and, for reasons to be indicated below, many of its objections are of such a nature that they would in any event probably have had to be heard along with the merits. The Court concludes that it should not exclude from consideration the objections of the United States to jurisdiction and admissibility by reason of the fact that they were not presented within three months from the date of filing of the Memorial.

25. The United States has submitted four objections to the jurisdiction of the Court, and five to the admissibility of the claims of Mexico. As noted above, these have not been submitted as preliminary objections under Article 79 of the Rules of Court; and they are not of such a nature that the Court would be required to examine and dispose of all of them in limine, before dealing with any aspect of the merits of the case. Some are expressed to be only addressed to certain claims; some are addressed to questions of the remedies to be indicated if the Court finds that breaches of the Vienna Convention have been committed; and some are of such a nature that they would have to be dealt with along with the merits. The Court will however now examine each of them in turn.

* * *
UNITED STATES OBJECTIONS TO JURISDICTION

26. The United States contends that the Court lacks jurisdiction to decide many of Mexico’s claims, inasmuch as Mexico’s submissions in the Memorial asked the Court to decide questions which do not arise out of the interpretation or application of the Vienna Convention, and which the United States has never agreed to submit to the Court.

27. By its first jurisdictional objection, the United States suggested that the Memorial is fundamentally addressed to the treatment of Mexican nationals in the federal and state criminal justice systems of the United States, and the operation of the United States criminal justice system as a whole. It suggested that Mexico’s invitation to the Court to make what the United States regards as “far-reaching and unsustainable findings concerning the United States criminal justice systems” would be an abuse of the Court’s jurisdiction. At the hearings, the United States contended that Mexico is asking the Court to interpret and apply the treaty as if it were intended principally to govern the operation of a State’s criminal justice system as it affects foreign nationals.

28. The Court would recall that its jurisdiction in the present case has been invoked under the Vienna Convention and Optional Protocol to determine the nature and extent of the obligations undertaken by the United States towards Mexico by becoming party to that Convention. If and so far as the Court may find that the obligations accepted by the parties to the Vienna Convention included commitments as to the conduct of their municipal courts in relation to the nationals of other parties, then in order to ascertain whether there have been breaches of the Convention, the Court must be able to examine the actions of those courts in the light of international law. The Court is unable to uphold the contention of the United States that, as a matter of jurisdiction, it is debarred from enquiring into the conduct of criminal proceedings in United States courts. How far it may do so in the present case is a matter for the merits. The first objection of the United States to jurisdiction cannot therefore be upheld.

29. The second jurisdictional objection presented by the United States was addressed to the first of the submissions presented by Mexico in its Memorial (see paragraph 13 above). The United States pointed out that Article 36 of the Vienna Convention “creates no obligations constraining the rights of the United States to arrest a foreign national”; and that similarly the “detaining, trying, convicting and sentencing” of Mexican nationals could not constitute breaches of Article 36, which merely lays down obligations of notification. The United States deduced from this that the matters raised in Mexico’s first submission are outside the jurisdiction of the Court under the Vienna Convention and the Optional Protocol, and it maintains this objection in response to the revised submission, presented by Mexico at the hearings, whereby it asks the Court to adjudge and declare:

“That the United States of America, in arresting, detaining, trying, convicting, and sentencing the 52 Mexican nationals on death row described in Mexico’s Memorial, violated its international legal obligations to Mexico, in its own right and in the exercise of its right to diplomatic protection of its nationals, by failing to inform, without delay, the 52 Mexican nationals after their arrest of their right to consular notification and access under Article 36 (1) (b) of the Vienna Convention on Consular Relations, and by depriving Mexico of its right to provide consular protection and the 52 nationals’ right to receive such protection as Mexico would provide under Article 36 (1) (a) and (c) of the Convention.”

30. This issue is a question of interpretation of the obligations imposed by the Vienna Convention. It is true that the only obligation of the receiving State toward a foreign national that is specifically enunciated by Article 36, paragraph 1 (b), of the Vienna Convention is to inform such foreign national of his rights, when he is “arrested or committed to prison or to custody pending trial or is detained in any other manner”; the text does not restrain the receiving State from “arresting, detaining, trying, convicting, and sentencing” the foreign national, or limit its power to do so. However, as regards the detention, trial, conviction and sentence of its nationals, Mexico argues that depriving a foreign national facing criminal proceedings of consular notification and assistance renders those proceedings fundamentally unfair. Mexico explains in this respect that:

“Consular notification constitutes a basic component of due process by ensuring both the procedural equality of a foreign national in the criminal process and the enforcement of other fundamental due process guarantees to which that national is entitled”,

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and that “It is therefore an essential requirement for fair criminal proceedings against foreign nationals.” In Mexico’s contention, “consular notification has been widely recognized as a fundamental due process right, and indeed, a human right”. On this basis it argues that the rights of the detained Mexican nationals have been violated by the authorities of the United States, and that those nationals have been “subjected to criminal proceedings without the fairness and dignity to which each person is entitled”. Consequently, in the contention of Mexico, “the integrity of these proceedings has been hopelessly undermined, their outcomes rendered irrevocably unjust”. For Mexico to contend, on this basis, that not merely the failure to notify, but the arrest, detention, trial and conviction of its nationals were unlawful is to argue in favour of a particular interpretation of the Vienna Convention. Such an interpretation may or may not be confirmed on the merits, but is not excluded from the jurisdiction conferred on the Court by the Optional Protocol to the Vienna Convention. The second objection of the United States to jurisdiction cannot therefore be upheld.

31. The third objection by the United States to the jurisdiction of the Court refers to the first of the submissions in the Mexican Memorial concerning remedies. By that submission, which was confirmed in substance in the final submissions, Mexico claimed that

“Mexico is entitled to restitutio in integrum, and the United States therefore is under an obligation to restore the status quo ante, that is, re-establish the situation that existed at the time of the detention and prior to the interrogation of, proceedings against, and convictions and sentences of, Mexico’s nationals in violation of the United States’ international legal obligations...”

On that basis, Mexico went on in its first submission to invite the Court to declare that the United States was bound to vacate the convictions and sentences of the Mexican nationals concerned, to exclude from any subsequent proceedings any statements and confessions obtained from them, to prevent the application of any procedural penalty for failure to raise a timely defence on the basis of the Convention, and to prevent the application of any municipal law rule preventing courts in the United States from providing a remedy for the violation of Article 36 rights.

32. The United States objects that so to require specific acts by the United States in its municipal criminal justice systems would intrude deeply into the independence of its courts; and that for the Court to

declare that the United States is under a specific obligation to vacate convictions and sentences would be beyond its jurisdiction. The Court, the United States claims, has no jurisdiction to review appropriateness of sentences in criminal cases, and even less to determine guilt or innocence, matters which only a court of criminal appeal could go into.

33. For its part, Mexico points out that the United States accepts that the Court has jurisdiction to interpret the Vienna Convention and to determine the appropriate form of reparation under international law. In Mexico’s view, these two considerations are sufficient to defeat the third objection to jurisdiction of the United States.

34. For the same reason as in respect of the second jurisdictional objection, the Court is unable to uphold the contention of the United States that, even if the Court were to find that breaches of the Vienna Convention have been committed by the United States of the kind alleged by Mexico, it would still be without jurisdiction to order restitutio in integrum as requested by Mexico. The Court would recall in this regard, as it did in the LaGrand case, that, where jurisdiction exists over a dispute on a particular matter, no separate basis for jurisdiction is required by the Court in order to consider the remedies a party has requested for the breach of the obligation (I.C.J. Reports 2001, p. 485, para. 48). Whether or how far the Court may order the remedy requested by Mexico are matters to be determined as part of the merits of the dispute. The third objection of the United States to jurisdiction cannot therefore be upheld.

35. The fourth and last jurisdictional objection of the United States is that “the Court lacks jurisdiction to determine whether or not consular notification is a ‘human right’, or to declare fundamental requirements of substantive or procedural due process”. As noted above, it is on the basis of Mexico’s contention that the right to consular notification has been widely recognized as a fundamental due process right, and indeed a human right, that it argues that the rights of the detained Mexican nationals have been violated by the authorities of the United States, and that they have been “subjected to criminal proceedings without the fairness and dignity to which each person is entitled”. The Court observes that Mexico has presented this argument as being a matter of interpretation of Article 36, paragraph 1 (b), and therefore belonging to the merits. The Court considers that this is indeed a question of interpretation of the Vienna Convention, for which it has jurisdiction; the fourth objection of the United States to jurisdiction cannot therefore be upheld.
36. In its Counter-Memorial, the United States has advanced a number of arguments presented as objections to the admissibility of Mexico’s claims. It argues that

“Before proceeding, the Court should weigh whether characteristics of the case before it today, or special circumstances related to particular claims, render either the entire case, or particular claims, inappropriate for further consideration and decision by the Court.”

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37. The first objection under this head is that “Mexico’s submissions should be found inadmissible because they seek to have this Court function as a court of criminal appeal”; there is, in the view of the United States, “no other apt characterization of Mexico’s two submissions in respect of remedies”. The Court notes that this contention is addressed solely to the question of remedies. The United States does not contend on this ground that the Court should decline jurisdiction to enquire into the question of breaches of the Vienna Convention at all, but simply that, if such breaches are shown, the Court should do no more than decide that the United States must provide “review and reconsideration” along the lines indicated in the Judgment in the LaGrand case (I.C.J. Reports 2001, pp. 513-514, para. 125). The Court notes that this is a matter of merits. The first objection of the United States to admissibility cannot therefore be upheld.

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38. The Court now turns to the objection of the United States based on the rule of exhaustion of local remedies. The United States contends that the Court “should find inadmissible Mexico’s claim to exercise its right of diplomatic protection on behalf of any Mexican national who has failed to meet the customary legal requirement of exhaustion of municipal remedies”. It asserts that in a number of the cases the subject of Mexico’s claims, the detained Mexican nationals, even with the benefit of the provision of Mexican consular assistance, failed to raise the alleged non-compliance with Article 36, paragraph 1, of the Vienna Convention at the trial. Furthermore, it contends that all of the claims relating to cases referred to in the Mexican Memorial are inadmissible because local remedies remain available in every case. It has drawn attention to the fact that litigation is pending before courts in the United States in a large number of the cases the subject of Mexico’s claims and that, in those cases where judicial remedies have been exhausted, the defendants have not had recourse to the clemency process available to them; from this it concludes that none of the cases “is in an appropriate posture for review by an international tribunal”.

39. Mexico responds that the rule of exhaustion of local remedies cannot preclude the admissibility of its claims. It first states that a majority of the Mexican nationals referred to in paragraph 16 above have sought judicial remedies in the United States based on the Vienna Convention and that their claims have been barred, notably on the basis of the procedural default doctrine. In this regard, it quotes the Court’s statement in the LaGrand case that

“the United States may not . . . rely before this Court on this fact in order to preclude the admissibility of Germany’s [claim] . . . . as it was the United States itself which had failed to carry out its obligation under the Convention to inform the LaGrand brothers” (I.C.J. Reports 2001, p. 488, para. 60).

Further, in respect of the other Mexican nationals, Mexico asserts that

“the courts of the United States have never granted a judicial remedy to any foreign national for a violation of Article 36. The United States courts hold either that Article 36 does not create an individual right, or that a foreign national who has been denied his Article 36 rights but given his constitutional and statutory rights, cannot establish prejudice and therefore cannot get relief.”

It concludes that the available judicial remedies are thus ineffective. As for clemency procedures, Mexico contends that they cannot count for purposes of the rule of exhaustion of local remedies, because they are not a judicial remedy.

40. In its final submissions Mexico asks the Court to adjudge and declare that the United States, in failing to comply with Article 36, paragraph 1, of the Vienna Convention, has “violated its international legal obligations to Mexico, in its own right and in the exercise of its right of diplomatic protection of its nationals”.

The Court would first observe that the individual rights of Mexican nationals under paragraph 1(b) of Article 36 of the Vienna Convention are rights which are to be asserted, at any rate in the first place, within the domestic legal system of the United States. Only when that process is completed and local remedies are exhausted would Mexico be entitled to espouse the individual claims of its nationals through the procedure of diplomatic protection.

In the present case Mexico does not, however, claim to be acting solely on that basis. It also asserts its own claims, basing them on the injury which it contends that it has itself suffered, directly and through its
nationals, as a result of the violation by the United States of the obligations incumbent upon it under Article 36, paragraph 1 (a), (b) and (c).

The Court would recall that, in the LaGrand case, it recognized that

"Article 36, paragraph 1 [of the Vienna Convention], creates individual rights [for the national concerned], which . . . may be invoked in this Court by the national State of the detained person" (I.C.J. Reports 2001, p. 494, para. 77).

It would further observe that violations of the rights of the individual under Article 36 may entail a violation of the rights of the sending State, and that violations of the rights of the latter may entail a violation of the rights of the individual. In these special circumstances of interdependence of the rights of the State and of individual rights, Mexico may, in submitting a claim in its own name, request the Court to rule on the violation of rights which it claims to have suffered both directly and through the violation of individual rights conferred on Mexican nationals under Article 36, paragraph 1 (b). The duty to exhaust local remedies does not apply to such a request. Further, for reasons just explained, the Court does not find it necessary to deal with Mexico's claims of violation under a distinct heading of diplomatic protection. Without needing to pronounce at this juncture on the issues raised by the procedural default rule, as explained by Mexico in paragraph 39 above, the Court accordingly finds that the second objection by the United States to admissibility cannot be upheld.

* *

41. The Court now turns to the question of the alleged dual nationality of certain of the Mexican nationals the subject of Mexico's claims. This question is raised by the United States by way of an objection to the admissibility of those claims: the United States contends that in its Memorial Mexico had failed to establish that it may exercise diplomatic protection based on breaches of Mexico's rights under the Vienna Convention with respect to those of its nationals who are also nationals of the United States. The United States regards it as an accepted principle that, when a person arrested or detained in the receiving State is a national of that State, then even if he is also a national of another State party to the Vienna Convention, Article 36 has no application, and the authorities of the receiving State are not required to proceed as laid down in that Article: and Mexico has indicated that, for the purposes of the present case it does not contest that dual nationals have no right to be advised of their rights under Article 36.

42. It has however to be recalled that Mexico, in addition to seeking to exercise diplomatic protection of its nationals, is making a claim in its own right on the basis of the alleged breaches by the United States of Article 36 of the Vienna Convention. Seen from this standpoint, the question of dual nationality is not one of admissibility, but of merits. A claim may be made by Mexico of breach of Article 36 of the Vienna Convention in relation to any of its nationals, and the United States is therefore free to show that, because the person concerned was also a United States national, Article 36 had no application to that person, so that no breach of treaty obligations could have occurred. Furthermore, as regards the claim to exercise diplomatic protection, the question whether Mexico is entitled to protect a person having dual Mexican and United States nationality is subordinated to the question whether, in relation to such a person, the United States was under any obligation in terms of Article 36 of the Vienna Convention. It is thus in the course of its examination of the merits that the Court will have to consider whether the individuals concerned, or some of them, were dual nationals in law. Without prejudice to the outcome of such examination, the third objection of the United States to admissibility cannot therefore be upheld.

* *

43. The Court now turns to the fourth objection advanced by the United States to the admissibility of Mexico's claims: the contention that

"The Court should not permit Mexico to pursue a claim against the United States with respect to any individual case where Mexico had actual knowledge of a breach of the [Vienna Convention] but failed to bring such breach to the attention of the United States or did so only after considerable delay."

In the Counter-Memorial, the United States advances two considerations in support of this contention: that if the cases had been mentioned promptly, corrective action might have been possible; and that by inaction Mexico created an impression that it considered that the United States was meeting its obligations under the Convention, as Mexico understood them. At the hearings, the United States suggested that Mexico had in effect waived its right to claim in respect of the alleged breaches of the Convention, and to seek reparation.

44. As the Court observed in the case of Certain Phosphate Lands in Nauru (Nauru v. Australia), "delay on the part of a claimant State may render an application inadmissible", but "international law does not lay down any specific time-limit in that regard" (I.C.J. Reports 1992, pp. 253-254, para. 32). In that case the Court recognized that delay might prejudice the respondent State "with regard to both the establishment of the facts and the determination of the content of the applicable law" (ibid., p. 255, para. 36), but it has not been suggested that there is any such risk of prejudice in the present case. So far as inadmissibility might be based on an implied waiver of rights, the Court considers that only a much
more prolonged and consistent inaction on the part of Mexico than any that the United States has alleged might be interpreted as implying such a waiver. Furthermore, Mexico indicated a number of ways in which it brought to the attention of the United States the breaches which it perceived of the Vienna Convention. The fourth objection of the United States to admissibility cannot therefore be upheld.

* * *

45. The Court has now to examine the objection of the United States that the claim of Mexico is inadmissible in that Mexico should not be allowed to invoke against the United States standards that Mexico does not follow in its own practice. The United States contends that, in accordance with basic principles of administration of justice and the equality of States, both litigants are to be held accountable to the same rules of international law. The objection in this regard was presented in terms of the interpretation of Article 36 of the Vienna Convention, in the sense that, according to the United States, a treaty may not be interpreted so as to impose a significantly greater burden on any one party than the other (Diversion of Water from the Mese, Judgment, 1937, P.C.I.J., Series A/B, No. 70, p. 20).

46. The Court would recall that the United States had already raised an objection of a similar nature before it in the LaGrand case; there, the Court held that it need not decide “whether this argument of the United States, if true, would result in the inadmissibility of Germany’s submissions”, since the United States had failed to prove that Germany’s own practice did not conform to the standards it was demanding from the United States (I.C.J. Reports 2001, p. 489, para. 63).

47. The Court would recall that it is in any event essential to have in mind the nature of the Vienna Convention. It lays down certain standards to be observed by all States parties, with a view to the “unimpeded conduct of consular relations”, which, as the Court observed in 1979, is important in present-day international law “in promoting the development of friendly relations among nations, and ensuring protection and assistance for aliens resident in the territories of other States” (United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Provisional Measures, Order of 15 December 1979, I.C.J. Reports 1979, pp. 19-20, para. 40). Even if it were shown, therefore, that Mexico’s practice as regards the application of Article 36 was not beyond reproach, this would not constitute a ground of objection to the admissibility of Mexico’s claim. The fifth objection of the United States to admissibility cannot therefore be upheld.

* * *

48. Having established that it has jurisdiction to entertain Mexico’s claims and that they are admissible, the Court will now turn to the merits of those claims.

* * *

Article 36, Paragraph 1

49. In its final submissions Mexico asks the Court to adjudge and declare that,

“the United States of America, in arresting, detaining, trying, convicting, and sentencing the 52 Mexican nationals on death row described in Mexico’s Memorial, violated its international legal obligations to Mexico, in its own right and in the exercise of its right to diplomatic protection of its nationals, by failing to inform, without delay, the 52 Mexican nationals after their arrest of their right to consular notification and access under Article 36 (1) (b) of the Vienna Convention on Consular Relations, and by depriving Mexico of its right to provide consular protection and the 52 nationals’ right to receive such protection as Mexico would provide under Article 36 (1) (a) and (c) of the Convention”.

50. The Court has already in its Judgment in the LaGrand case described Article 36, paragraph 1, as “an interrelated régime designed to facilitate the implementation of the system of consular protection” (I.C.J. Reports 2001, p. 492, para. 74). It is thus convenient to set out the entirety of that paragraph.

“With a view toward facilitating the exercise of consular functions relating to nationals of the sending State:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities
without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action."

51. The United States as the receiving State does not deny its duty to perform these obligations. However, it claims that the obligations apply only to individuals shown to be of Mexican nationality alone, and not to those of dual Mexican/United States nationality. The United States further contends *inter alia* that it has not committed any breach of Article 36, paragraph 1 (b), upon the proper interpretation of "without delay" as used in that subparagraph.

52. Thus two major issues under Article 36, paragraph 1 (b), that are in dispute between the Parties are, first, the question of the nationality of the individuals concerned; and second, the question of the meaning to be given to the expression "without delay". The Court will examine each of these in turn.

53. The Parties have advanced their contentions as to nationality in three different legal contexts. The United States has begun by making an objection to admissibility, which the Court has already dealt with (see paragraphs 41 and 42 above). The United States has further contended that a substantial number of the 52 persons listed in paragraph 16 above were United States nationals and that it thus had no obligation to these individuals under Article 36, paragraph 1 (b). The Court will address this aspect of the matter in the following paragraphs. Finally, the Parties disagree as to whether the requirement under Article 36, paragraph 1 (b), for the information to be given "without delay" becomes operative upon arrest or upon ascertainment of nationality. The Court will address this issue later (see paragraph 63 below).

54. The Parties disagree as to what each of them must show as regards nationality in connection with the applicability of the terms of Article 36, paragraph 1, and as to how the principles of evidence have been met on the facts of the cases.

55. Both Parties recognize the well-settled principle in international law that a litigant seeking to establish the existence of a fact bears the burden of proving it (cf. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 437, para. 101). Mexico acknowledges that it has the burden of proof to show that the 52 persons listed in paragraph 16 above were Mexican nationals to whom the provisions of Article 36, paragraph 1 (b), in principle apply. It claims it has met this burden by providing to the Court the birth certificates of these nationals, and declarations from 42 of them that they have not acquired United States nationality. Mexico further contends that the burden of proof lies on the United States should it wish to contend that particular arrested persons of Mexican nationality were, at the relevant time, also United States nationals.

56. The United States accepts that in such cases it has the burden of proof to demonstrate United States nationality, but contends that nonetheless the "burden of evidence" as to this remains with Mexico. This distinction is explained by the United States as arising out of the fact that persons of Mexican nationality may also have acquired United States citizenship by operation of law, depending on their parents' dates and places of birth, places of residency, marital status at time of birth and so forth. In the view of the United States "virtually all such information is in the hands of Mexico through the now 52 individuals it represents". The United States contends that it was the responsibility of Mexico to produce such information, which responsibility it has not discharged.

57. The Court finds that it is for Mexico to show that the 52 persons listed in paragraph 16 above held Mexican nationality at the time of their arrest. The Court notes that to this end Mexico has produced birth certificates and declarations of nationality, whose contents have not been challenged by the United States.

The Court observes further that the United States has, however, questioned whether some of these individuals were not also United States nationals. Thus, the United States has informed the Court that, "in the case of defendant Ayala (case No. 2) we are close to certain that Ayala is a United States citizen", and that this could be confirmed with absolute certainty if Mexico produced facts about this matter. Similarly Mr. Avena (case No. 1) was said to be "likely" to be a United States citizen, and there was "some possibility" that some 16 other defendants were United States citizens. As to six others, the United States said it "cannot rule out the possibility" of United States nationality. The Court takes the view that it was for the United States to demonstrate that this was so and to furnish the Court with all information on the matter in its possession. In so far as relevant data on that matter are said by the United States to lie within the knowledge of Mexico, it was for the United States to have
sought that information from the Mexican authorities. The Court cannot accept that, because such information may have been in part in the hands of Mexico, it was for Mexico to produce such information. It was for the United States to seek such information, with sufficient specificity, and to demonstrate both that this was done and that the Mexican authorities declined or failed to respond to such specific requests. At no stage, however, has the United States shown the Court that it made specific enquiries of those authorities about particular cases and that responses were not forthcoming. The Court accordingly concludes that the United States has not met its burden of proof in its attempt to show that persons of Mexican nationality were also United States nationals.

The Court therefore finds that, as regards the 52 persons listed in paragraph 16 above, the United States had obligations under Article 36, paragraph 1 (b).

58. Mexico asks the Court to find that

"the obligation in Article 36, paragraph 1, of the Vienna Convention requires notification of consular rights and a reasonable opportunity for consular access before the competent authorities of the receiving State take any action potentially detrimental to the foreign national’s rights”.

59. Mexico contends that, in each of the 52 cases before the Court, the United States failed to provide the arrested persons with information as to their rights under Article 36, paragraph 1 (b), “without delay”. It alleges that in one case, Mr. Esquivel (case No. 7), the arrested person was informed, but only some 18 months after the arrest, while in another, that of Mr. Juárez (case No. 10), information was given to the arrested person of his rights some 40 hours after arrest. Mexico contends that this still constituted a violation, because “without delay” is to be understood as meaning “immediately”, and in any event before any interrogation occurs. Mexico further draws the Court’s attention to the fact that in this case a United States court found that there had been a violation of Article 36, paragraph 1 (b), and claims that the United States cannot disavow such a determination by its own courts. In an Annex to its Memorial, Mexico mentions that, in a third case (Mr. Ayala, case No. 2), the accused was informed of his rights upon his arrival on death row, some four years after arrest. Mexico contends that in the remaining cases the Mexicans concerned were in fact never so informed by the United States authorities.

60. The United States disputes both the facts as presented by Mexico and the legal analysis of Article 36, paragraph 1 (b), of the Vienna Convention offered by Mexico. The United States claims that Mr. Solache (case No. 47) was informed of his rights under the Vienna Convention some seven months after his arrest. The United States further claims that many of the persons concerned were of United States nationality and that at least seven of these individuals “appear to have affirmatively claimed to be United States citizens at the time of their arrest”. These cases were said to be those of Avena (case No. 1), Ayala (case No. 2), Benavides (case No. 3), Ochoa (case No. 18), Salcido (case No. 22), Tafoya (case No. 24), and Alvarez (case No. 30). In the view of the United States no duty of consular information arose in these cases. Further, in the contention of the United States, in the cases of Mr. Ayala (case No. 2) and Mr. Salcido (case No. 22) there was no reason to believe that the arrested persons were Mexican nationals at any stage; the information in the case of Mr. Juárez (case No. 10) was given “without delay”.

61. The Court thus now turns to the interpretation of Article 36, paragraph 1 (b), having found in paragraph 57 above that it is applicable to the 52 persons listed in paragraph 16. It begins by noting that Article 36, paragraph 1 (b), contains three separate but interrelated elements: the right of the individual concerned to be informed without delay of his rights under Article 36, paragraph 1 (b); the right of the consular post to be notified without delay of the individual’s detention, if he so requests; and the obligation of the receiving State to forward without delay any communication addressed to the consular post by the detained person.

62. The third element of Article 36, paragraph 1 (b), has not been raised on the facts before the Court. The Court thus begins with the right of an arrested or detained individual to information.

63. The Court finds that the duty upon the detaining authorities to give the Article 36, paragraph 1 (b), information to the individual arises once it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national. Precisely when this may occur will vary with circumstances. The United States Department of State booklet, Consular Notification and Access — Instructions for Federal, State and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them, issued to federal, state and local authorities in order to promote compliance with Article 36 of the Vienna Convention points out in such cases that: “most, but not all, persons born outside the United States are not [citizens]. Unfamiliarity with English may also indicate foreign nationality.” The Court notes that when an arrested person himself claims to be of United States nationality, the realization by the authorities that he is not in fact a United States national, or grounds for that realization, is likely to come somewhat later in time.
64. The United States has told the Court that millions of aliens reside, either legally or illegally, on its territory, and moreover that its laws concerning citizenship are generous. The United States has also pointed out that it is a multicultural society, with citizenship being held by persons of diverse appearance, speaking many languages. The Court appreciates that in the United States the language that a person speaks, or his appearance, does not necessarily indicate that he is a foreign national. Nevertheless, and particularly in view of the large numbers of foreign nationals living in the United States, these very circumstances suggest that it would be desirable for enquire routinely to be made of the individual as to his nationality upon his detention, so that the obligations of the Vienna Convention may be complied with. The United States has informed the Court that some of its law enforcement authorities do routinely ask persons taken into detention whether they are United States citizens. Indeed, were each individual to be told at that time that, should he be a foreign national, he is entitled to ask for his consular post to be contacted, compliance with this requirement under Article 36, paragraph 1(b), would be greatly enhanced. The provision of such information could parallel the reading of those rights of which any person taken into custody in connection with a criminal offence must be informed prior to interrogation by virtue of what in the United States is known as the “Miranda rule”; these rights include, inter alia, the right to remain silent, the right to have an attorney present during questioning, and the right to have an attorney appointed at government expense if the person cannot afford one. The Court notes that, according to the United States, such a practice in respect of the Vienna Convention rights is already being followed in some local jurisdictions.

65. Bearing in mind the complexities explained by the United States, the Court now begins by examining the application of Article 36, paragraph 1(b), of the Vienna Convention to the 52 cases. In 45 of these cases, the Court has no evidence that the arrested persons claimed United States nationality, or were reasonably thought to be United States nationals, with specific enquiries being made in timely fashion to verify such dual nationality. The Court has explained in paragraph 57 above what enquiries it would have expected to have been made, within a short time period, and what information should have been provided to the Court.

66. Seven persons, however, are asserted by the United States to have stated at the time of arrest that they were United States citizens. Only in the case of Mr. Salcido (case No. 22) has the Court been provided by the United States with evidence of such a statement. This has been acknowledged by Mexico. Further, there has been no evidence before the Court to suggest that there were in this case at the same time also indications of Mexican nationality, which should have caused rapid enquiry by the arresting authorities and the providing of consular information “without delay”. Mexico has accordingly not shown that in the case of Mr. Salcido the United States violated its obligations under Article 36, paragraph 1(b).

67. In the case of Mr. Ayala (case No. 2), while he was identified in a court record in 1989 (three years after his arrest) as a United States citizen, there is no evidence to show this Court that the accused did indeed claim upon his arrest to be a United States citizen. The Court has not been informed of any enquiries made by the United States to confirm these assertions of United States nationality.

68. In the five other cases listed by the United States as cases where the individuals “appear to have affirmatively claimed to be United States citizens at the time of their arrest”, no evidence has been presented that such a statement was made at the time of arrest.

69. Mr. Avena (case No. 1) is listed in his arrest report as having been born in California. His prison records describe him as of Mexican nationality. The United States has not shown the Court that it was engaged in enquiries to confirm United States nationality.

70. Mr. Benavides (case No. 3) was carrying an Immigration and Naturalization Service immigration card at the time of arrest in 1991. The Court has not been made aware of any reason why the arresting authorities should nonetheless have believed at the time of arrest that he was a United States national. The evidence that his defence counsel in June 1993 informed the Court that Mr. Benavides had become a United States citizen is irrelevant to what was understood as to his nationality at time of arrest.

71. So far as Mr. Ochoa is concerned (case No. 18), the Court observes that his arrest report in 1990 refers to him as having been born in Mexico, an assertion that is repeated in a second police report. Some two years later details in his court record refer to him as a United States citizen born in Mexico. The Court is not provided with any further details. The United States has not shown this Court that it was aware of, or was engaged in active enquiry as to, alleged United States nationality at the time of his arrest.

72. Mr. Tafoya (case No. 24) was listed on the police booking sheet as having been born in Mexico. No further information is provided by the United States as to why this was done and what, if any, further enquiries were being made concerning the defendant’s nationality.

73. Finally, the last of the seven persons referred to by the United States in this group, Mr. Alvarez (case No. 30), was arrested in Texas on 20 June 1998. Texas records identified him as a United States citizen. Within three days of his arrest, however, the Texas authorities were
informed that the Immigration and Naturalization Service was holding investigations to determine whether, because of a previous conviction, Mr. Alvarez was subject to deportation as a foreign national. The Court has not been presented with evidence that rapid resolution was sought as to the question of Mr. Alvarez’s nationality.

74. The Court concludes that Mexico has failed to prove the violation by the United States of its obligations under Article 36, paragraph 1 (b), in the case of Mr. Salcido (case No. 22), and his case will not be further commented upon. On the other hand, as regards the other individuals who are alleged to have claimed United States nationality on arrest, whose cases have been considered in paragraphs 67 to 73 above, the argument of the United States cannot be upheld.

75. The question nonetheless remains as to whether, in each of the 45 cases referred to in paragraph 65 and of the six cases mentioned in paragraphs 67 to 73, the United States did provide the required information to the arrested persons “without delay”. It is to that question that the Court now turns.

76. The Court has been provided with declarations from a number of the Mexican nationals concerned that: attest to their never being informed of their rights under Article 36, paragraph 1 (b). The Court at the outset notes that, in 47 such cases, the United States nowhere challenges this fact of information not being given. Nevertheless, in the case of Mr. Hernández (case No. 34), the United States observes that

“Although the [arresting] officer did not ask Hernández Llanas whether he wanted them to inform the Mexican Consulate of his arrest, it was certainly not unreasonable for him to assume that an escaped convict would not want the Consulate of the country from which he escaped notified of his arrest.”

The Court notes that the clear duty to provide consular information under Article 36, paragraph 1 (b), does not invoke assumptions as to what the arrested person might prefer, as a ground for not informing him. It rather gives the arrested person, once informed, the right to say he nonetheless does not wish his consular post to be notified. It necessarily follows that in each of these 47 cases, the duty to inform “without delay” has been violated.

77. In four cases, namely Ayala (case No. 2), Esquivel (case No. 7), Juárez (case No. 10) and Solache (case No. 47), some doubts remain as to whether the information that was given was provided without delay. For these, some examination of the term is thus necessary.

78. This is a matter on which the Parties have very different views.

According to Mexico, the timing of the notice to the detained person “is critical to the exercise of the rights provided by Article 36” and the phrase “without delay” in paragraph 1 (b) requires “unqualified immediacy”. Mexico further contends that, in view of the object and purpose of Article 36, which is to enable “meaningful consular assistance” and the safeguarding of the vulnerability of foreign nationals in custody,

“consular notification . . . must occur immediately upon detention and prior to any interrogation of the foreign detainee, so that the consul may offer useful advice about the foreign legal system and provide assistance in obtaining counsel before the foreign national makes any ill-informed decisions or the State takes any action potentially prejudicial to his rights”.

79. Thus, in Mexico’s view, it would follow that in any case in which a foreign national was interrogated before being informed of his rights under Article 36, there would ipso facto be a breach of that Article, however rapidly after the interrogation the information was given to the foreign national. Mexico accordingly includes the case of Mr. Juárez among those where it claims violation of Article 36, paragraph 1 (b), as he was interrogated before being informed of his consular rights, some 40 hours after arrest.

80. Mexico has also invoked the travaux préparatoires of the Vienna Convention in support of its interpretation of the requirement that the arrested person be informed “without delay” of the right to ask that the consular post be notified. In particular, Mexico recalled that the phrase proposed to the Conference by the International Law Commission, “without undue delay”, was replaced by the United Kingdom proposal to delete the word “undue”. The United Kingdom representative had explained that this would avoid the implication that “some delay was permissible” and no delegate had expressed dissent with the USSR and Japanese statements that the result of the amendment would be to require information “immediately”.

81. The United States disputed this interpretation of the phrase “without delay”. In its view it did not mean “immediately, and before interrogation” and such an understanding was supported neither by the terminology, nor by the object and purpose of the Vienna Convention, nor by its travaux préparatoires. In the booklet referred to in paragraph 63 above, the State Department explains that “without delay” means “there should be no deliberate delay” and that the required action should be taken “as soon as reasonably possible under the circumstances”. It was normally to be expected that “notification to consular officers” would have been made “within 24 to 72 hours of the arrest or detention”. The United States further contended that such an interpretation of the words “without delay” would be reasonable in itself and also allow a consistent
interpretation of the phrase as it occurs in each of three different occasions in Article 36, paragraph 1 (b). As for the travaux préparatoires, they showed only that undue or deliberate delay had been rejected as unacceptable.

82. According to the United States, the purpose of Article 36 was to facilitate the exercise of consular functions by a consular officer:

"The significance of giving consular information to a national is thus limited . . . It is a procedural device that allows the foreign national to trigger the related process of notification . . . [It] cannot possibly be fundamental to the criminal justice process."

83. The Court now addresses the question of the proper interpretation of the expression "without delay" in the light of arguments put to it by the Parties. The Court begins by noting that the precise meaning of "without delay", as it is to be understood in Article 36, paragraph 1 (b), is not defined in the Convention. This phrase therefore requires interpretation according to the customary rules of treaty interpretation reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.

84. Article 1 of the Vienna Convention on Consular Relations, which defines certain of the terms used in the Convention, offers no definition of the phrase "without delay". Moreover, in the different language versions of the Convention various terms are employed to render the phrases "without delay" in Article 36 and "immediately" in Article 14. The Court observes that dictionary definitions, in the various languages of the Vienna Convention, offer diverse meanings of the term "without delay" (and also of "immediately"). It is therefore necessary to look elsewhere for an understanding of this term.

85. As for the object and purpose of the Convention, the Court observes that Article 36 provides for consular officers to be free to communicate with nationals of the sending State, to have access to them, to visit and speak with them and to arrange for their legal representation. It is not envisaged, either in Article 36, paragraph 1, or elsewhere in the Convention, that consular functions entail a consular officer himself or herself acting as the legal representative or more directly engaging in the criminal justice process. Indeed, this is confirmed by the wording of Article 36, paragraph 2, of the Convention. Thus, neither the terms of the Convention as normally understood, nor its object and purpose, suggest that "without delay" is to be understood as "immediately upon arrest and before interrogation".

86. The Court further notes that, notwithstanding the uncertainties in the travaux préparatoires, they too do not support such an interpreta-

tion. During the diplomatic conference, the conference's expert, former Special Rapporteur of the International Law Commission, explained to the delegates that the words "without undue delay" had been introduced by the Commission, after long discussion in both the plenary and drafting committee, to allow for special circumstances which might permit information as to consular notification not to be given at once. Germany, the only one of two States to present an amendment, proposed adding "but at latest within one month". There was an extended discussion by many different delegates as to what such outer time-limit would be acceptable. During that debate no delegate proposed "immediately". The shortest specific period suggested was by the United Kingdom, namely "promptly" and no later than "48 hours" afterwards. Eventually, in the absence of agreement on a precise time period, the United Kingdom's other proposal to delete the word "undue" was accepted as the position around which delegates could converge. It is also of interest that there is no suggestion in the travaux that the phrase "without delay" might have different meanings in each of the three sets of circumstances in which it is used in Article 36, paragraph 1 (b).

87. The Court thus finds that "without delay" is not necessarily to be interpreted as "immediately" upon arrest. It further observes that during the Conference debates on this term, no delegate made any connection with the issue of interrogation. The Court considers that the provision in Article 36, paragraph 1 (b), that the receiving State authorities "shall inform the person concerned without delay of his rights" cannot be interpreted to signify that the provision of such information must necessarily precede any interrogation, so that the commencement of interrogation before the information is given would be a breach of Article 36.

88. Although, by application of the usual rules of interpretation, "without delay" as regards the duty to inform an individual under Article 36, paragraph 1 (b), is not to be understood as necessarily meaning "immediately upon arrest", there is nonetheless a duty upon the arresting authorities to give that information to an arrested person as soon as it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national.

89. With one exception, no information as to entitlement to consular notification was given in any of the cases cited in paragraph 77 within any of the various time periods suggested by the delegates to the Conference on the Vienna Convention, or by the United States itself (see paragraphs 81 and 86 above). Indeed, the information was given either not at all or at periods very significantly removed from the time of arrest. In the case of Mr. Juárez (case No. 10), the defendant was informed of his
consular rights 40 hours after his arrest. The Court notes, however, that Mr. Juárez's arrest report stated that he had been born in Mexico; moreover, there had been indications of his Mexican nationality from the time of his initial interrogation by agents of the Federal Bureau of Investigation (FBI) following his arrest. It follows that Mr. Juárez's Mexican nationality was apparent from the outset of his detention by the United States authorities. In these circumstances, in accordance with its interpretation of the expression "without delay" (see paragraph 88 above), the Court concludes that the United States violated the obligation incumbent upon it under Article 36, paragraph 1 (b), to inform Mr. Juárez without delay of his consular rights. The Court notes that the same finding was reached by a California Superior Court, albeit on different grounds.

90. The Court accordingly concludes that, with respect to each of the individuals listed in paragraph 16, with the exception of Mr. Salcido (case No. 22; see paragraph 74 above), the United States has violated its obligations under Article 36, paragraph 1 (b), of the Vienna Convention to provide information to the arrested person.

91. As noted above, Article 36, paragraph 1 (b), contains three elements. Thus far, the Court has been dealing with the right of an arrested person to be informed that he may ask for his consular post to be notified. The Court now turns to another aspect of Article 36, paragraph 1 (b). The Court finds the United States is correct in observing that the fact that a Mexican consular post was not notified under Article 36, paragraph 1 (b), does not necessarily show that the arrested person was not informed of his rights under that provision. He may have been informed and declined to have his consular post notified. The giving of the information is relevant, however, for satisfying the element in Article 36, paragraph 1 (b), on which the other two elements therein depend.

92. In only two cases has the United States claimed that the arrested person was informed of his consular rights but asked for the consular post not to be notified. These are Mr. Juárez (case No. 10) and Mr. Solache (case No. 47).

93. The Court is satisfied that when Mr. Juárez (case No. 10) was informed of his consular rights 40 hours after his arrest (see paragraph 89) he chose not to have his consular post notified. As regards Mr. Solache (case No. 47), however, it is not sufficiently clear to the Court, on the evidence before it, that he requested that his consular post should not be notified. Indeed, the Court has not been provided with any reasons as to why, if a request of non-notification was made, the consular post was then notified some three months later.

94. In a further three cases, the United States alleges that the consular post was formally notified of the detention of one of its Mexican nationals without prior information to the individual as to his consular rights. These are Mr. Covarrubias (case No. 6), Mr. Hernández (case No. 34) and Mr. Reyes (case No. 54). The United States further contends that the Mexican authorities were contacted regarding the case of Mr. Loza (case No. 52).

95. The Court notes that, in the case of Mr. Covarrubias (case No. 6), the consular authorities learned from third parties of his arrest shortly after it occurred. Some 16 months later, a court-appointed interpreter requested that the consulate intervene in the case prior to trial. It would appear doubtful whether an interpreter can be considered a competent authority for triggering the interrelated provisions of Article 36, paragraph 1 (b), of the Vienna Convention. In the case of Mr. Reyes (case No. 54), the United States has simply told the Court that an Oregon Department of Justice attorney had advised United States authorities that both the District Attorney and the arresting detective had been apprised of the Mexican consular authorities of his arrest. No information is given as to when this occurred, in relation to the date of his arrest. Mr. Reyes did receive assistance before his trial. In these two cases, the Court considers that, even on the hypothesis that the conduct of the United States had no serious consequences for the individuals concerned, it did nonetheless constitute a violation of the obligations incumbent upon the United States under Article 36, paragraph 1 (b).

96. In the case of Mr. Loza (case No. 52), a United States Congressman from Ohio contacted the Mexican Embassy on behalf of Ohio prosecutors, some four months after the accused's arrest. "to enquire about the procedures for obtaining a certified copy of Loza's birth certificate". The Court has not been provided with a copy of the Congressman's letter and is therefore unable to ascertain whether it explained that Mr. Loza had been arrested. The response from the Embassy (which is also not included in the documentation provided to the Court) was passed by the Congressman to the prosecuting attorney, who then asked the Civil Registry of Guadalajara for a copy of the birth certificate. This request made no specific mention of Mr. Loza's arrest. Mexico contends that its consulate was never formally notified of Mr. Loza's arrest, of which it only became aware after he had been convicted and sentenced to death. Mexico includes the case of Mr. Loza among those in which the United States was in breach of its obligation of consular notification. Taking account of all these elements, and in particular of the fact that the Embassy was contacted four months after the arrest, and that the consular post became aware of the defendant's detention only after he had been convicted and sentenced, the Court concludes that in the case of Mr. Loza the United States violated the obligation of consular notification without delay incumbent upon it under Article 36, paragraph 1 (b).
97. Mr. Hernández (case No. 34) was arrested in Texas on Wednesday 15 October 1997. The United States authorities had no reason to believe he might have American citizenship. The consular post was notified the following Monday, that is five days (corresponding to only three working days) thereafter. The Court finds that, in the circumstances, the United States did notify the consular post without delay, in accordance with its obligation under Article 36, paragraph 1 (b).

98. In the first of its final submissions, Mexico also asks the Court to find that the violations it ascribes to the United States in respect of Article 36, paragraph 1 (b), have also deprived “Mexico of its right to provide consular protection and the 52 nationals’ right to receive such protection as Mexico would provide under Article 36 (1) (a) and (c) of the Convention”.

99. The relationship between the three subparagraphs of Article 36, paragraph 1, has been described by the Court in its Judgment in the LaGrand case (I.C.J. Reports 2001, p. 492, para. 74) as “an interrelated régime”. The legal conclusions to be drawn from that interrelationship necessarily depend upon the facts of each case. In the LaGrand case, the Court found that the failure for 16 years to inform the brothers of their right to have their consul notified effectively prevented the exercise of other rights that Germany might have chosen to exercise under subparagraphs (a) and (c).

100. It is necessary to revisit the interrelationship of the three subparagraphs of Article 36, paragraph 1, in the light of the particular facts and circumstances of the present case.

101. The Court would first recall that, in the case of Mr. Juárez (case No. 10) (see paragraph 93 above), when the defendant was informed of his rights, he declined to have his consular post notified. Thus in this case there was no violation of either subparagraph (a) or subparagraph (c) of Article 36, paragraph 1.

102. In the remaining cases, because of the failure of the United States to act in conformity with Article 36, paragraph 1 (b), Mexico was in effect precluded (in some cases totally, and in some cases for prolonged periods of time) from exercising its right under paragraph 1 (a) to communicate with its nationals and have access to them. As the Court has already had occasion to explain, it is immaterial whether Mexico would have offered consular assistance, “or whether a different verdict would have been rendered. It is sufficient that the Convention conferred these rights” (I.C.J. Reports 2001, p. 492, para. 74), which might have been acted upon.

103. The same is true, pari passu, of certain rights identified in subparagraph (c): “consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, and to converse and correspond with him...”.

104. On the other hand, and on the particular facts of this case, no such generalized answer can be given as regards a further entitlement mentioned in subparagraph (c), namely, the right of consular officers “to arrange for [the] legal representation” of the foreign national. Mexico has laid much emphasis in this litigation upon the importance of consular officers being able to arrange for such representation before and during trial, and especially at sentencing, in cases in which a severe penalty may be imposed. Mexico has further indicated the importance of any financial or other assistance that consular officers may provide to defence counsel, inter alia for investigation of the defendant’s family background and mental condition, when such information is relevant to the case. The Court observes that the exercise of the rights of the sending State under Article 36, paragraph 1 (c), depends upon notification by the authorities of the receiving State. It may be, however, that information drawn to the attention of the sending State by other means may still enable its consular officers to assist in arranging legal representation for its national. In the following cases, the Mexican consular authorities learned of their national’s detention in time to provide such assistance, either through notification by United States authorities (albeit belatedly in terms of Article 36, paragraph 1 (b)) or through other channels: Benavides (case No. 3); Covarrubias (case No. 6); Esquivel (case No. 7); Hoyos (case No. 9); Mendoza (case No. 17); Ramírez (case No. 20); Sánchez (case No. 23); Verano (case No. 27); Zamudio (case No. 29); Gómez (case No. 33); Hernández (case No. 34); Ramírez (case No. 41); Rocha (case No. 42); Solache (case No. 47); Camargo (case No. 49) and Reyes (case No. 54).

105. In relation to Mr. Manriquez (case No. 14), the Court lacks precise information as to when his consular post was notified. It is merely given to understand that it was two years prior to conviction, and that Mr. Manriquez himself had never been informed of his consular rights. There is also divergence between the Parties in regard to the case of Mr. Fuentes (case No. 15), where Mexico claims it became aware of his detention during trial and the United States says this occurred during jury selection, prior to the actual commencement of the trial. In the case of Mr. Arias (case No. 44), the Mexican authorities became aware of his detention less than one week before the commencement of the trial. In those three cases, the Court concludes that the United States violated its obligations under Article 36, paragraph 1 (c).

106. On this aspect of the case, the Court thus concludes:

(1) that the United States committed breaches of the obligation incumbent upon it under Article 36, paragraph 1 (b), of the Vienna Convention to inform detained Mexican nationals of their rights under
that paragraph, in the case of the following 51 individuals: Avena (case No. 1), Ayala (case No. 2), Benavides (case No. 3), Carrera (case No. 4), Contreras (case No. 5), Covarrubias (case No. 6), Esquivel (case No. 7), Gómez (case No. 8), Hoyos (case No. 9), Juárez (case No. 10), López (case No. 11), Lupercio (case No. 12), Maciel (case No. 13), Manriquez (case No. 14), Fuentes (case No. 15), Martínez (case No. 16), Mendoza (case No. 17), Ochoa (case No. 18), Parra (case No. 19), Ramírez (case No. 20), Salazar (case No. 21), Sánchez (case No. 23), Tafoya (case No. 24), Valdez (case No. 25), Vargas (case No. 26), Verano (case No. 27), Zamudio (case No. 29), Alvarez (case No. 30), Fierro (case No. 31), García (case No. 32), Gómez (case No. 33), Hernández (case No. 34), Ibarra (case No. 35), Leal (case No. 36), Maldonado (case No. 37), Medellín (case No. 38), Moreno (case No. 39), Plata (case No. 40), Ramírez (case No. 41), Roche (case No. 42), Regalado (case No. 43), Arias (case No. 44), Caballero (case No. 45), Flores (case No. 46), Solache (case No. 47), Fong (case No. 48), Camargo (case No. 49), Pérez (case No. 51), Loza (case No. 52), Torres (case No. 53) and Reyes (case No. 54);

2 that the United States committed breaches of the obligation incumbent upon it under Article 36, paragraph 1 (b), to notify the Mexican consular post of the detention of the Mexican nationals listed in subparagraph (1) above, except in the cases of Mr. Juárez (No. 10) and Mr. Hernández (No. 34);

3 that by virtue of its breaches of Article 36, paragraph 1 (b), as described in subparagraph (2) above, the United States also violated the obligation incumbent upon it under Article 36, paragraph 1 (a), of the Vienna Convention to enable Mexican consular officers to communicate with and have access to their nationals, as well as its obligation under paragraph 1 (c) of that Article regarding the right of consular officers to visit their detained nationals;

4 that the United States, by virtue of these breaches of Article 36, paragraph 1 (b), also violated the obligation incumbent upon it under paragraph 1 (c) of that Article to enable Mexican consular officers to arrange for legal representation of their nationals in the case of the following individuals: Avena (case No. 1), Ayala (case No. 2), Carrera (case No. 4), Contreras (case No. 5), Gómez (case No. 8), López (case No. 11), Lupercio (case No. 12), Maciel (case No. 13), Manriquez (case No. 14), Fuentes (case No. 15), Martínez (case No. 16), Ochoa (case No. 18), Parra (case No. 19), Salazar (case No. 21), Tafoya (case No. 24), Valdez (case No. 25), Vargas (case No. 26), Alvarez (case No. 30), Fierro (case No. 31), García (case No. 32), Ibarra (case No. 35), Leal (case No. 36), Maldonado (case No. 37), Medellín (case No. 38), Moreno (case No. 39), Plata (case No. 40), Regalado (case No. 43), Arias (case No. 44), Caballero (case No. 45),

Flores (case No. 46), Fong (case No. 48), Pérez (case No. 51), Loza (case No. 52) and Torres (case No. 53).

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ARTICLE 36, PARAGRAPH 2

107. In its third final submission Mexico asks the Court to adjudge and declare that

"the United States violated its obligations under Article 36 (2) of the Vienna Convention by failing to provide meaningful and effective review and reconsideration of convictions and sentences impaired by a violation of Article 36 (1)".

108. Article 36, paragraph 2, provides:

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

109. In this connection, Mexico has argued that the United States

"By applying provisions of its municipal law to defeat or foreclose remedies for the violation of rights conferred by Article 36 — thus failing to provide meaningful review and reconsideration of severe sentences imposed in proceedings that violated Article 36 — . . . has violated, and continues to violate, the Vienna Convention."

More specifically, Mexico contends that:

"The United States uses several municipal legal doctrines to prevent finding any legal effect from the violations of Article 36. First, despite this Court's clear analysis in LaGrand, US courts, at both the state and federal level, continue to invoke default doctrines to bar any review of Article 36 violations — even when the national had been unaware of his rights to consular notification and communication and thus his ability to raise their violation as an issue at trial, due to the competent authorities' failure to comply with Article 36."

110. Against this contention by Mexico, the United States argues that:

"the criminal justice systems of the United States address all errors
in process through both judicial and executive clemency proceedings, relying upon the latter when rules of default have closed out the possibility of the former. That is, the 'laws and regulations' of the United States provide for the correction of mistakes that may be relevant to a criminal defendant to occur through a combination of judicial review and clemency. These processes together, working with other competent authorities, give full effect to the purposes for which Article 36 (1) is intended, in conformity with Article 36 (2).

And, insofar as a breach of Article 36 (1) has occurred, these procedures satisfy the remedial function of Article 36 (2) by allowing the United States to provide review and reconsideration of convictions and sentences consistent with LaGrand."

111. The "procedural default" rule in United States law has already been brought to the attention of the Court in the LaGrand case. The following brief definition of the rule was provided by Mexico in its Memorial in this case and has not been challenged by the United States: "a defendant who could have raised, but fails to raise, a legal issue at trial will generally not be permitted to raise it in future proceedings, on appeal or in a petition for a writ of habeas corpus". The rule requires exhaustion of remedies, inter alia, at the state level and before a habeas corpus motion can be filed with federal courts. In the LaGrand case, the rule in question was applied by United States federal courts; in the present case, Mexico also complains of the application of the rule in certain state courts of criminal appeal.

112. The Court has already considered the application of the "procedural default" rule, alleged by Mexico to be a hindrance to the full implementation of the international obligations of the United States under Article 36, in the LaGrand case, when the Court addressed the issue of its implications for the application of Article 36, paragraph 2, of the Vienna Convention. The Court emphasized that "a distinction must be drawn between that rule as such and its specific application in the present case". The Court stated:

"In itself, the rule does not violate Article 36 of the Vienna Convention. The problem arises when the procedural default rule does not allow the detained individual to challenge a conviction and sentence by claiming, in reliance on Article 36, paragraph 1, of the Convention, that the competent national authorities failed to comply with their obligation to provide the requisite consular information 'without delay', thus preventing the person from seeking and obtaining consular assistance from the sending State." (I.C.J. Reports 2001, p. 497, para. 90.)

On this basis, the Court concluded that "the procedural default rule prevented counsel for the LaGrands to effectively challenge their convictions and sentences other than on United States constitutional grounds" (I.C.J. Reports 2001, p. 497, para. 91). This statement of the Court seems equally valid in relation to the present case, where a number of Mexican nationals have been placed exactly in such a situation.

113. The Court will return to this aspect below, in the context of Mexico's claims as to remedies. For the moment, the Court simply notes that the procedural default rule has not been revised, nor has any provision been made to prevent its application in cases where it has been the failure of the United States itself to inform that may have precluded counsel from being in a position to have raised the question of a violation of the Vienna Convention in the initial trial. It thus remains the case that the procedural default rule may continue to prevent courts from attaching legal significance to the fact, inter alia, that the violation of the rights set forth in Article 36, paragraph 1, prevented Mexico, in a timely fashion, from retaining private counsel for certain nationals and otherwise assisting in their defence. In such cases, application of the procedural default rule would have the effect of preventing "full effect [from being] given to the purposes for which the rights accorded under this article are intended", and thus violate paragraph 2 of Article 36. The Court notes moreover that in several of the cases cited in Mexico's final submissions the procedural default rule has already been applied, and that in others it could be applied at subsequent stages in the proceedings. However, in none of the cases, save for the three mentioned in paragraph 114 below, have the criminal proceedings against the Mexican nationals concerned already reached a stage at which there is no further possibility of judicial re-examination of those cases; that is to say, all possibility is not yet excluded of "review and reconsideration" of conviction and sentence, as called for in the LaGrand case, and as explained further in paragraphs 128 and following below. It would therefore be premature for the Court to conclude at this stage that, in those cases, there is already a violation of the obligations under Article 36, paragraph 2, of the Vienna Convention.

114. By contrast, the Court notes that in the case of three Mexican nationals, Mr. Fierro (case No. 31), Mr. Moreno (case No. 39), and Mr. Torres (case No. 53), conviction and sentence have become final. Moreover, in the case of Mr. Torres the Oklahoma Court of Criminal Appeals has set an execution date (see paragraph 21 above, in fine). The Court must therefore conclude that, in relation to these three individuals, the United States is in breach of the obligations incumbent upon it under Article 36, paragraph 2, of the Vienna Convention.

*  *  *
115. Having concluded that in most of the cases brought before the Court by Mexico in the 52 instances, there has been a failure to observe the obligations prescribed by Article 36, paragraph 1 (b), of the Vienna Convention, the Court now proceeds to the examination of the legal consequences of such a breach and of what legal remedies should be considered for the breach.

116. Mexico in its fourth, fifth and sixth submissions asks the Court to adjudicate and declare:

“(4) that pursuant to the injuries suffered by Mexico in its own right and in the exercise of diplomatic protection of its nationals, Mexico is entitled to full reparation for these injuries in the form of restitutio in integrum;

(5) that this restitution consists of the obligation to restore the status quo ante by annulling or otherwise depriving of full force or effect the conviction and sentences of all 52 Mexican nationals; [and]

(6) that this restitution also includes the obligation to take all measures necessary to ensure that a prior violation of Article 36 shall not affect the subsequent proceedings.”

117. In support of its fourth and fifth submissions, Mexico argues that "It is well-established that the primary form of reparation available to a State injured by an internationally wrongful act is restitutio in integrum", and that "The United States is therefore obliged to take the necessary action to restore the status quo ante in respect of Mexico’s nationals detained, tried, convicted and sentenced in violation of their internationally recognized rights." To restore the status quo ante, Mexico contends that "restitution here must take the form of annulment of the convictions and sentences that resulted from the proceedings tainted by the Article 36 violations", and that "It follows from the very nature of restitutio that, when a violation of an international obligation is manifested in a judicial act, that act must be annulled and thereby deprived of any force or effect in the national legal system." Mexico therefore asks in its submissions that the convictions and sentences of the 52 Mexican nationals be annulled, and that, in any future criminal proceedings against these 52 Mexican nationals, evidence obtained in breach of Article 36 of the Vienna Convention be excluded.

118. The United States on the other hand argues:

"LaGrand’s holding calls for the United States to provide, in each case, ‘review and reconsideration’ that ‘takes account of’ the violation, not ‘review and reversal’, not across-the-board exclusions of evidence or nullification of convictions simply because a breach of Article 36 (1) occurred and without regard to its effect upon the conviction and sentence and, not . . . ‘a precise, concrete, stated result: to re-establish the status quo ante’.”

119. The general principle on the legal consequences of the commission of an internationally wrongful act was stated by the Permanent Court of International Justice in the Factory at Chorzów case as follows: “It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form.” (Factory at Chorzów, Jurisdiction, 1927, P.C.I.J., Series A. No. 9, p. 21.) What constitutes “reparation in an adequate form” clearly varies depending upon the concrete circumstances surrounding each case and the precise nature and scope of the injury, since the question has to be examined from the viewpoint of what is the “reparation in an adequate form” that corresponds to the injury. In a subsequent phase of the same case, the Permanent Court went on to elaborate on this point as follows:

“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.” (Factory at Chorzów, Merits, 1928, P.C.I.J., Series A. No. 17, p. 47.)

120. In the LaGrand case the Court made a general statement on the principle involved as follows:

“The Court considers in this respect that if the United States, notwithstanding its commitment to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1 (b), should fail in its obligation of consular notification to the detriment of German nationals, an apology would not suffice in cases where the individuals concerned have been subjected to prolonged detention or convicted and sentenced to severe penalties. In the case of such a conviction and sentence, it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention. This obligation can be carried out in various ways. The choice of means must be left to the United States.” (I.C.J. Reports 2001, pp. 513-514, para. 125.)

121. Similarly, in the present case the Court’s task is to determine what would be adequate reparation for the violations of Article 36. It should be clear from what has been observed above that the internationally wrongful acts committed by the United States were the failure of its
122. The Court reaffirms that the case before it concerns Article 36 of the Vienna Convention and not the correctness as such of any conviction or sentencing. The question of whether the violations of Article 36, paragraph 1, are to be regarded as having, in the causal sequence of events, ultimately led to convictions and severe penalties is an integral part of criminal proceedings before the courts of the United States and is for them to determine in the process of review and reconsideration. In so doing, it is for the courts of the United States to examine the facts, and in particular the prejudice and its causes, taking account of the violation of the rights set forth in the Convention.

123. It is not to be presumed, as Mexico asserts, that partial or total annulment of conviction or sentence provides the necessary and sole remedy. In this regard, Mexico cites the recent Judgment of this Court in the case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), in which the “Court ordered the cancellation of an arrest warrant issued by a Belgian judicial official in violation of the international immunity of the Congo Minister for Foreign Affairs”. However, the present case has clearly to be distinguished from the Arrest Warrant case. In that case, the question of the legality under international law of the act of issuing the arrest warrant against the Congolese Minister for Foreign Affairs by the Belgian judicial authorities was itself the subject-matter of the dispute. Since the Court found that act to be in violation of international law relating to immunity, the proper legal consequence was for the Court to order the cancellation of the arrest warrant in question (I.C.J. Reports 2002, p. 33). By contrast, in the present case it is not the convictions and sentences of the Mexican nationals which are to be regarded as a violation of international law, but solely certain breaches of treaty obligations which preceded them.

124. Mexico has further contended that the right to consular notification and consular communication under the Vienna Convention is a fundamental human right that constitutes part of due process in criminal proceedings and should be guaranteed in the territory of each of the Contracting Parties to the Vienna Convention; according to Mexico, this right, as such, is so fundamental that its infringement will ipso facto produce the effect of vitiating the entire process of the criminal proceedings conducted in violation of this fundamental right. Whether or not the Vienna Convention rights are human rights is not a matter that this Court need decide. The Court would, however, observe that neither the text nor the object and purpose of the Convention, nor any indication in the travaux préparatoires, support the conclusion that Mexico draws from its contention in that regard.

125. For these reasons, Mexico’s fourth and fifth submissions cannot be upheld.

126. The reasoning of the Court on the fifth submission of Mexico is equally valid in relation to the sixth submission of Mexico. In elaboration of its sixth submission, Mexico contends that,

“As an aspect of restitutio in integrum, Mexico is also entitled to an order that in any subsequent criminal proceedings against the nationals, statements and confessions obtained prior to notification to the national of his right to consular assistance be excluded.”

Mexico argues that “The exclusionary rule applies in both common law and civil law jurisdictions and requires the exclusion of evidence that is obtained in a manner that violates due process obligations”, and on this basis concludes that

“The status of the exclusionary rule as a general principle of law permits the Court to order that the United States is obligated to apply this principle in respect of statements and confessions given to United States law enforcement officials prior to the accused Mexican nationals being advised of their consular rights in any subsequent criminal proceedings against them.”

127. The Court does not consider that it is necessary to enter into an examination of the merits of the contention advanced by Mexico that the “exclusionary rule” is “a general principle of law under Article 38 (1) (c) of the . . . Statute” of the Court. The issue raised by Mexico in its sixth submission relates to the question of what legal consequences flow from the breach of the obligations under Article 36, paragraph 1 — a question which the Court has already sufficiently discussed above in relation to the fourth and the fifth submissions of Mexico. The Court is of the view that this question is one which has to be examined under the concrete circumstances of each case by the United States courts concerned in the process of their review and reconsideration. For this reason, the sixth submission of Mexico cannot be upheld.

128. While the Court has rejected the fourth, fifth and sixth submissions of Mexico relating to the remedies for the breaches by the United
States of its international obligations under Article 36 of the Vienna Convention, the fact remains that such breaches have been committed, as the Court has found, and it is thus incumbent upon the Court to specify what remedies are required in order to redress the injury done to Mexico and to its nationals by the United States through non-compliance with those international obligations. As has already been observed in paragraph 129, the Court in the LaGrand Judgment stated the general principle to be applied in such cases by way of a remedy to redress an injury of this kind (I.C.J. Reports 2001, pp. 513-514, para. 125).

129. In this regard, Mexico’s seventh submission also asks the Court to adjudge and declare:

“That to the extent that any of the 52 convictions or sentences are not annulled, the United States shall provide, by means of its own choosing, meaningful and effective review and reconsideration of the convictions and sentences of the 52 nationals, and that this obligation cannot be satisfied by means of clemency proceedings or if any municipal law rule or doctrine [that fails to attach legal significance to an Article 36 (1) violation] is applied.”

130. On this question of “review and reconsideration”, the United States takes the position that it has indeed conformed its conduct to the LaGrand Judgment. In a further elaboration of this point, the United States argues that “[t]he Court said in LaGrand that the choice of means for allowing the review and reconsideration it called for ‘must be left’ to the United States”, but that “Mexico would not leave this choice to the United States but have the Court undertake the review instead and decide at once that the breach requires the conviction and sentence to be set aside in each case”.

131. In stating in its Judgment in the LaGrand case that “the United States of America, by means of its own choosing, shall allow the review and reconsideration of the conviction and sentence” (I.C.J. Reports 2001, p. 516, para. 128 (7); emphasis added), the Court acknowledged that the concrete modalities for such review and reconsideration should be left primarily to the United States. It should be underlined, however, that this freedom in the choice of means for such review and reconsideration is not without qualification: as the passage of the Judgment quoted above makes abundantly clear, such review and reconsideration has to be carried out “by taking account of the violation of the rights set forth in the Convention” (I.C.J. Reports 2001, p. 514, para. 125), including, in particular, the question of the legal consequences of the violation upon the criminal proceedings that have followed the violation.

132. The United States argues (1) “that the Court’s decision in LaGrand in calling for review and reconsideration called for a process to re-examine a conviction and sentence in light of a breach of Article 36”; (2) that, “in calling for a process of review, the Court necessarily implied that one legitimate result of that process might be a conclusion that the conviction and sentence should stand”; and (3) “that the relief Mexico seeks in this case is flatly inconsistent with the Judgment in LaGrand: it seeks precisely the award of a substantive outcome that the LaGrand Court declined to provide”.

133. However, the Court wishes to point out that the current situation in the United States criminal procedure, as explained by the Agent at the hearings, is that

“If the defendant alleged at trial that a failure of consular information resulted in harm to a particular right essential to a fair trial, an appeals court can review how the lower court handled that claim of prejudice”;

but that

“If the foreign national did not raise his Article 36 claim at trial, he may face procedural constraints [i.e., the application of the procedural default rule] on raising that particular claim in direct or collateral judicial appeals” (emphasis added).

As a result, a claim based on the violation of Article 36, paragraph 1, of the Vienna Convention, however meritorious in itself, could be barred in the courts of the United States by the operation of the procedural default rule (see paragraph 111 above).

134. It is not sufficient for the United States to argue that “[w]hatever label [the Mexican defendant] places on his claim, his right . . . must and will be vindicated if it is raised in some form at trial” (emphasis added), and that

“In that way, even though a failure to label the complaint as a breach of the Vienna Convention may mean that he has technically speaking forfeited his right to raise this issue as a Vienna Convention claim, on appeal that failure would not bar him from independently asserting a claim that he was prejudiced because he lacked this critical protection needed for a fair trial.” (Emphasis added.)

The crucial point in this situation is that, by the operation of the procedural default rule as it is applied at present, the defendant is effectively barred from raising the issue of the violation of his rights under Article 36 of the Vienna Convention and is limited to seeking the vindication of his rights under the United States Constitution.

135. Mexico, in the latter part of its seventh submission, has stated that “this obligation [of providing review and reconsideration] cannot be
satisfied by means of clemency proceedings". Mexico elaborates this point by arguing first of all that "the United States's reliance on clemency proceedings is wholly inconsistent with its obligation to provide a remedy, as that obligation was found by this Court in LaGrand". More specifically, Mexico contends:

"First, it is clear that the Court's direction to the United States in LaGrand clearly contemplated that ‘review and reconsideration’ would be carried out by judicial procedures . . . . Second, the Court was fully aware that the LaGrand brothers had received a clemency hearing, during which the Arizona Pardons Board took into account the violation of their consular rights. Accordingly, the Court determined in LaGrand that clemency review alone did not constitute the required ‘review and reconsideration’ . . . .

Finally, the Court specified that the United States must ‘allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention’ . . . it is a basic matter of U.S. criminal procedural law that courts review convictions; clemency panels do not. With the rare exception of pardons based on actual innocence, the focus of capital clemency review is on the propriety of the sentence and not on the underlying conviction.”

Furthermore, Mexico argues that the clemency process is in itself an ineffective remedy to satisfy the international obligations of the United States. It concludes: "clemency review is standardless, secretive, and immune from judicial oversight”.

Finally, in support of its contention, Mexico argues that

"the failure of state clemency authorities to pay heed to the intervention of the US Department of State in cases of death-sentenced Mexican nationals refutes the [United States] contention that clemency review will provide meaningful consideration of the violations of rights conferred under Article 36”.

136. Against this contention of Mexico, the United States claims that it "gives 'full effect' to the 'purposes for which the rights accorded under [Article 36, paragraph 1] are intended" through executive clemency". It argues that "[t]he clemency process . . . is well suited to the task of providing review and reconsideration”. The United States explains that "Clemency . . . is more than a matter of grace; it is part of the overall scheme for ensuring justice and fairness in the legal process” and that

"Clemency procedures are an integral part of the existing ‘laws and regulations’ of the United States through which errors are addressed”.

137. Specifically in the context of the present case, the United States contends that the following two points are particularly noteworthy:

"First, these clemency procedures allow for broad participation by advocates of clemency, including an inmate’s attorney and the sending state’s consular officer . . . Second, these clemency officials are not bound by principles of procedural default, finality, prejudice standards, or any other limitations on judicial review. They may consider any facts and circumstances that they deem appropriate and relevant, including specifically Vienna Convention claims.”

138. The Court would emphasize that the “review and reconsideration” prescribed by it in the LaGrand case should be effective. Thus it should "take[n] account of the violation of the rights set forth in [the] Convention” (I.C.J. Reports 2001, p. 516, para. 128 (7)) and guarantee that the violation and the possible prejudice caused by that violation will be fully examined and taken into account in the review and reconsideration process. Lastly, review and reconsideration should be both of the sentence and of the conviction.

139. Accordingly, in a situation of the violation of rights under Article 36, paragraph 1, of the Vienna Convention, the defendant raises his claim in this respect not as a case of "harm to a particular right essential to a fair trial" — a concept relevant to the enjoyment of due process rights under the United States Constitution — but as a case involving the infringement of his rights under Article 36, paragraph 1. The rights guaranteed under the Vienna Convention are treaty rights which the United States has undertaken to comply with in relation to the individual concerned, irrespective of the due process rights under United States constitutional law. In this regard, the Court would point out that what is crucial in the review and reconsideration process is the existence of a procedure which guarantees that full weight is given to the violation of the rights set forth in the Vienna Convention, whatever may be the actual outcome of such review and reconsideration.

140. As has been explained in paragraphs 128 to 134 above, the Court is of the view that, in cases where the breach of the individual rights of Mexican nationals under Article 36, paragraph 1 (b), of the Convention has resulted, in the sequence of judicial proceedings that has followed, in the individuals concerned being subjected to prolonged detention or convicted and sentenced to severe penalties, the legal consequences of this breach must be examined and taken into account in the course of
review and reconsideration. The Court considers that it is the judicial process that is suited to this task.

141. The Court in the *LaGrand* case left to the United States the choice of means as to how review and reconsideration should be achieved, especially in the light of the procedural default rule. Nevertheless, the premise on which the Court proceeded in that case was that the process of review and reconsideration should occur within the overall judicial proceedings relating to the individual defendant concerned.

142. As regards the clemency procedure, the Court notes that this performs an important function in the administration of criminal justice in the United States and is "the historic remedy for preventing miscarriages of justice where judicial process has been exhausted" (*Herrera v. Collins*, 506 US 390 (1993) at pp. 411-412). The Court accepts that executive clemency, while not judicial, is an integral part of the overall scheme for ensuring justice and fairness in the legal process within the United States criminal justice system. It must, however, point out that what is at issue in the present case is not whether executive clemency as an institution is or is not an integral part of the "existing laws and regulations of the United States", but whether the clemency process as practised within the criminal justice systems of different states in the United States can, in and of itself, qualify as an appropriate means for undertaking the effective "review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention", as the Court prescribed in the *LaGrand* Judgment (*I.C.J. Reports 2001*, p. 514, para. 125).

143. It may be true, as the United States argues, that in a number of cases "clemency in fact results in pardons of convictions as well as commutations of sentences". In that sense and to that extent, it might be argued that the facts demonstrated by the United States testify to a degree of effectiveness of the clemency procedures as a means of relieving defendants on death row from execution. The Court notes, however, that the clemency process, as currently practised within the United States criminal justice system, does not appear to meet the requirements described in paragraph 138 above and that it is therefore not sufficient in itself to serve as an appropriate means of "review and reconsideration" as envisaged by the Court in the *LaGrand* case. The Court considers nevertheless that appropriate clemency procedures can supplement judicial review and reconsideration, in particular where the judicial system has failed to take due account of the violation of the rights set forth in the Vienna Convention, as has occurred in the case of the three Mexican nationals referred to in paragraph 114 above.

144. Finally, the Court will consider the eighth submission of Mexico, in which it asks the Court to adjudge and declare:

"That the [United States] shall cease its violations of Article 36 of the Vienna Convention with regard to Mexico and its 52 nationals and shall provide appropriate guarantees and assurances that it shall take measures sufficient to achieve increased compliance with Article 36 (1) and to ensure compliance with Article 36 (2)."

145. In this respect, Mexico recognizes the efforts by the United States to raise awareness of consular assistance rights, through the distribution of pamphlets and pocket cards and by the conduct of training programmes, and that the measures adopted by the United States to that end were noted by the Court in its decision in the *LaGrand* case (*I.C.J. Reports 2001*, pp. 511-513, paras. 121, 123-124). Mexico, however, notes with regret that

"the United States programme, whatever its components, has proven ineffective to prevent the regular and continuing violation by its competent authorities of consular notification and assistance rights guaranteed by Article 36".

146. In particular, Mexico claims in relation to the violation of the obligations under Article 36, paragraph 1, of the Vienna Convention:

"First, competent authorities of the United States regularly fail to provide the timely notification required by Article 36 (1) (b) and thereby to /sic/ frustrate the communication and access contemplated by Article 36 (1) (a) and the assistance contemplated by Article 36 (1) (c). These violations continue notwithstanding the Court's judgment in *LaGrand* and the programme described there.

Mexico has demonstrated, moreover, that the pattern of regular non-compliance continues. During the first half of 2003, Mexico has identified at least one hundred cases in which Mexican nationals have been arrested by competent authorities of the United States for serious felonies but not timely notified of their consular notification rights."

Furthermore, in relation to the violation of the obligations under Article 36, paragraph 2, of the Vienna Convention, Mexico claims:

"Second, courts in the United States continue to apply doctrines of procedural default and non-retroactivity that prevent those courts from reaching the merits of Vienna Convention claims, and those courts that have addressed the merits of those claims (because no procedural bar applies) have repeatedly held that no remedy is avail-
able for a breach of the obligations of Article 36 . . . Likewise, the United States’ reliance on clemency proceedings to meet LaGrand’s requirement of review and reconsideration represents a deliberate decision to allow these legal rules and doctrines to continue to have their inevitable effect. Hence, the United States continues to breach Article 36 (2) by failing to give full effect to the purposes for which the rights accorded under Article 36 are intended.”

147. The United States contradicts this contention of Mexico by claiming that “its efforts to improve the conveyance of information about consular notification are continuing unabated and are achieving tangible results”. It contends that Mexico “fails to establish a ‘regular and continuing’ pattern of breaches of Article 36 in the wake of LaGrand”.

148. Mexico emphasizes the necessity of requiring the cessation of the wrongful acts because, it alleges, the violation of Article 36 with regard to Mexico and its 52 nationals still continues. The Court considers, however, that Mexico has not established a continuing violation of Article 36 of the Vienna Convention with respect to the 52 individuals referred to in its final submissions; it cannot therefore uphold Mexico’s claim seeking cessation. The Court would moreover point out that, inasmuch as these 52 individual cases are at various stages of criminal proceedings before the United States courts, they are in the state of pendente lite; and the Court has already indicated in respect of them what it regards as the appropriate remedy, namely review and reconsideration by reference to the breach of the Vienna Convention.

149. The Mexican request for guarantees of non-repetition is based on its contention that beyond these 52 cases there is a “regular and continuing” pattern of breaches by the United States of Article 36. In this respect, the Court observes that there is no evidence properly before it that would establish a general pattern. While it is a matter of concern that, even in the wake of the LaGrand Judgment, there remain a substantial number of cases of failure to carry out the obligation to furnish consular information to Mexican nationals, the Court notes that the United States has been making considerable efforts to ensure that its law enforcement authorities provide consular information to every arrested person they know or have reason to believe is a foreign national. Especially at the stage of pre-trial consular information, it is noteworthy that the United States has been making good faith efforts to implement the obligations incumbent upon it under Article 36, paragraph 1, of the Vienna Convention, through such measures as a new outreach programme launched in 1998, including the dissemination to federal, state and local authorities of the State Department booklet mentioned above in para-

graph 63. The Court wishes to recall in this context what it has said in paragraph 64 about efforts in some jurisdictions to provide the information under Article 36, paragraph 1 (b), in parallel with the reading of the “Miranda rights”.

150. The Court would further note in this regard that in the LaGrand case Germany sought, inter alia, “a straightforward assurance that the United States will not repeat its unlawful acts” (I.C.J. Reports 2001, p. 511, para. 120). With regard to this general demand for an assurance of non-repetition, the Court stated:

“If a State, in proceedings before this Court, repeatedly refers to substantial activities which it is carrying out in order to achieve compliance with certain obligations under a treaty, then this expresses a commitment to follow through with the efforts in this regard. The programme in question certainly cannot provide an assurance that there will never again be a failure by the United States to observe the obligations of notification under Article 36 of the Vienna Convention. But no State could give such a guarantee and Germany does not seek it. The Court considers that the commitment expressed by the United States to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1 (b), must be regarded as meeting Germany’s request for a general assurance of non-repetition.” (I.C.J. Reports 2001, pp. 512-513, para. 124.)

The Court believes that as far as the request of Mexico for guarantees and assurances of non-repetition is concerned, what the Court stated in this passage of the LaGrand Judgment remains applicable, and therefore meets that request.

* * *

151. The Court would now re-emphasize a point of importance. In the present case, it has had occasion to examine the obligations of the United States under Article 36 of the Vienna Convention in relation to Mexican nationals sentenced to death in the United States. Its findings as to the duty of review and reconsideration of convictions and sentences have been directed to the circumstance of severe penalties being imposed on foreign nationals who happen to be of Mexican nationality. To avoid any ambiguity, it should be made clear that, while what the Court has stated concerns the Mexican nationals whose cases have been brought before it by Mexico, the Court has been addressing the issues of principle raised in
the course of the present proceedings from the viewpoint of the general application of the Vienna Convention, and there can be no question of making an a contrario argument in respect of any of the Court’s findings in the present Judgment. In other words, the fact that in this case the Court’s ruling has concerned only Mexican nationals cannot be taken to imply that the conclusions reached by it in the present Judgment do not apply to other foreign nationals finding themselves in similar situations in the United States.

* * *

152. By its Order of 5 February 2003 the Court, acting on a request by Mexico, indicated by way of provisional measure that

"The United States of America shall take all measures necessary to ensure that Mr. César Roberto Fierro Reyna, Mr. Roberto Moreno Ramos and Mr. Osvaldo Torres Aguilera are not executed pending final judgment in these proceedings" (I.C.J. Reports 2003, pp. 91-92, para. 59 (I)) (see paragraph 21 above).

The Order of 5 February 2003, according to its terms and to Article 41 of the Statute, was effective pending final judgment, and the obligations of the United States in that respect are, with effect from the date of the present Judgment, replaced by those declared in this Judgment. The Court has rejected Mexico’s submission that, by way of restitution in integrum, the United States is obliged to annul the convictions and sentences of all of the Mexican nationals the subject of its claims (see above, paragraphs 115-125). The Court has found that, in relation to these three persons (among others), the United States has committed breaches of its obligations under Article 36, paragraph 1 (b), of the Vienna Convention and Article 36, paragraphs 1 (a) and (c), of that Convention; moreover, in respect of those three persons alone, the United States has also committed breaches of Article 36, paragraph 2, of the said Convention. The review and reconsideration of conviction and sentence required by Article 36, paragraph 2, which is the appropriate remedy for breaches of Article 36, paragraph 1, has not been carried out. The Court considers that in these three cases it is for the United States to find an appropriate remedy having the nature of review and reconsideration according to the criteria indicated in paragraphs 138 et seq. of the present Judgment.

* * *

153. For these reasons,

THE COURT,

(1) By thirteen votes to two,

Rejects the objection by the United Mexican States to the admissibility of the objections presented by the United States of America to the jurisdiction of the Court and the admissibility of the Mexican claims;

IN FAVOUR: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchegin, Higgins, Kooijmans, Resek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Tomka;

AGAINST: Judge Parra-Aranguren; Judge ad hoc Sepúlveda;

(2) Unanimously,

Rejects the four objections by the United States of America to the jurisdiction of the Court;

(3) Unanimously,

Rejects the five objections by the United States of America to the admissibility of the claims of the United Mexican States;

(4) By fourteen votes to one,

Finds that, by not informing, without delay upon their detention, the 51 Mexican nationals referred to in paragraph 106 (1) above of their rights under Article 36, paragraph 1 (b), of the Vienna Convention on Consular Relations of 24 April 1963, the United States of America breached the obligations incumbent upon it under that subparagraph;

IN FAVOUR: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchegin, Higgins, Kooijmans, Resek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Tomka; Judge ad hoc Sepúlveda;

AGAINST: Judge Parra-Aranguren;

(5) By fourteen votes to one,

Finds that, by not notifying the appropriate Mexican consular post without delay of the detention of the 49 Mexican nationals referred to in paragraph 106 (2) above and thereby depriving the United Mexican States of the right, in a timely fashion, to render the assistance provided for by the Vienna Convention to the individuals concerned, the United States of America breached the obligations incumbent upon it under Article 36, paragraph 1 (b);

IN FAVOUR: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchegin, Higgins, Kooijmans, Resek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Tomka; Judge ad hoc Sepúlveda;

AGAINST: Judge Parra-Aranguren;

(6) By fourteen votes to one,

Finds that, in relation to the 49 Mexican nationals referred to in paragraph 106 (3) above, the United States of America deprived the United Mexican States of the right, in a timely fashion, to communicate with and have access to those nationals and to visit them in detention, and thereby
breached the obligations incumbent upon it under Article 36, paragraph 1 (a) and (c), of the Convention;

IN FAVOUR: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Tomka; Judge *ad hoc* Sepúlveda;

AGAINST: Judge Parra-Aranguren;

(7) By fourteen votes to one,

Finds that, in relation to the 34 Mexican nationals referred to in paragraph 106 (4) above, the United States of America deprived the United Mexican States of the right, in a timely fashion, to arrange for legal representation of those nationals, and thereby breached the obligations incumbent upon it under Article 36, paragraph 1 (c), of the Convention;

IN FAVOUR: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Tomka; Judge *ad hoc* Sepúlveda;

AGAINST: Judge Parra-Aranguren;

(8) By fourteen votes to one,

Finds that, by not permitting the review and reconsideration, in the light of the rights set forth in the Convention, of the conviction and sentences of Mr. César Roberto Fierro Reyna, Mr. Roberto Moreno Ramos and Mr. Osvaldo Torres Aguillera, after the violations referred to in subparagraph (4) above had been established in respect of those individuals, the United States of America breached the obligations incumbent upon it under Article 36, paragraph 2, of the Convention;

IN FAVOUR: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Tomka; Judge *ad hoc* Sepúlveda;

AGAINST: Judge Parra-Aranguren;

(9) By fourteen votes to one,

Finds that the appropriate reparation in this case consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals referred to in subparagraphs (4), (5), (6) and (7) above, by taking account both of the violation of the rights set forth in Article 36 of the Convention and of paragraphs 138 to 141 of this Judgment;

IN FAVOUR: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Tomka; Judge *ad hoc* Sepúlveda;

AGAINST: Judge Parra-Aranguren;

(10) Unanimously,

Takes note of the commitment undertaken by the United States of America to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1 (b), of the Vienna Convention; and finds that this commitment must be regarded as meeting the request by the United Mexican States for guarantees and assurances of non-repetition;

(11) Unanimously,

Finds that, should Mexican nationals nonetheless be sentenced to severe penalties, without their rights under Article 36, paragraph 1 (b), of the Convention having been respected, the United States of America shall provide, by means of its own choosing, review and reconsideration of the conviction and sentence, so as to allow full weight to be given to the violation of the rights set forth in the Convention, taking account of paragraphs 138 to 141 of this Judgment.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this thirty-first day of March, two thousand and four, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the United Mexican States and the Government of the United States of America, respectively.

(Signed) Shi Jiuyong,
President.

(Signed) Philippe Courreure,
Registrar.

President Shi and Vice-President Ranjeva append declarations to the Judgment of the Court; Judges Vereshchetin, Parra-Aranguren and Tomka and Judge *ad hoc* Sepúlveda append separate opinions to the Judgment of the Court.

(Initialled) J.Y.S.
(Initialled) Ph.C.
International Court of Justice

Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America) (Mexico v. United States of America) Judgment

I.C.J. Reports 2009
REQUEST FOR INTERPRETATION
OF THE JUDGMENT OF 31 MARCH 2004
IN THE CASE CONCERNING
AVENA AND OTHER MEXICAN NATIONALS
(MEXICO v. UNITED STATES OF AMERICA)
(MEXICO v. UNITED STATES OF AMERICA)
JUDGMENT OF 19 JANUARY 2009

Official citation:
Request for Interpretation of the Judgment of 31 March 2004
in the Case concerning Avena and Other Mexican Nationals
(Mexico v. United States of America), Judgment, I.C.J. Reports 2009, p. 3

Mode officiel de citation:
Demande en interprétation de l’arrêt du 31 mars 2004
en l’affaire Avena et autres ressortissants mexicains
(Mexique c. États-Unis d’Amérique), arrêt, C.I.J. Recueil 2009, p. 3

2009
INTERNATIONAL COURT OF JUSTICE

YEAR 2009

19 January 2009

REQUEST FOR INTERPRETATION
OF THE JUDGMENT OF 31 MARCH 2004
IN THE CASE CONCERNING
AVENA AND OTHER MEXICAN NATIONALS
(MEXICO v. UNITED STATES OF AMERICA)

(MEXICO v. UNITED STATES OF AMERICA)

Article 60 of the Statute of the Court — Independent basis of jurisdiction.
Conditions on the exercise of jurisdiction to entertain a request for interpretation — Question of the existence of a dispute as to the meaning or scope of paragraph 153 (9) of the Judgment of 31 March 2004 — For the Court to determine whether a dispute exists — No dispute as to whether paragraph 153 (9) lays down an obligation of result.

Question of the existence of a dispute as to those upon whom the obligation of result specifically falls — Two possible approaches based on the Parties' positions — Possible existence of a dispute as to those upon whom the obligation specifically falls — Possible absence of a dispute on this point failing a sufficiently precise indication.

Question of the direct effect of the obligation established in paragraph 153 (9) — No decision in the Judgment of 31 March 2004 as to the direct effect of the obligation — Question of direct effect therefore cannot be the subject of a request for interpretation — Reiteration of the principle that considerations of domestic law cannot in any event relieve the Parties of obligations deriving from judgments of the Court.

* 

Question of breach by the United States of its legal obligation to comply with the Order indicating provisional measures of 16 July 2008 — Court's jurisdiction to rule on this question in proceedings on a request for interpretation.
Observations by the United States on Mexico’s Request for interpretation.

5. By a letter dated 1 August 2008 and received in the Registry the same day, the Agent of the United States, referring to paragraph 80 (II) (b) of the Order of 16 July 2008, informed the Court of the measures which the United States “had taken and continued to take” to implement that Order.

6. By a letter dated 28 August 2008 and received in the Registry the same day, the Agent of Mexico, informing the Court of the execution on 5 August 2008 of Mr. José Ernesto Medellín Rojas in the State of Texas, United States of America, and referring to Article 98, paragraph 4 of the Rules of Court, requested the Court to afford Mexico the opportunity of furnishing further written explanations for the purpose, on the one hand, of elaborating on the merits of the Request for interpretation in the light of the Written Observations which the United States was due to file, and, on the other, of “amending its pleading to state a claim based on the violation of the Order of 16 July 2008”.

7. On 29 August 2008, within the time-limit fixed, the United States filed its Written Observations on Mexico’s Request for interpretation.

8. By letters dated 2 September 2008, the Registrar informed the Parties that the Court had decided to afford each of them the opportunity of furnishing further written explanations, pursuant to Article 98, paragraph 4, of the Rules of Court, and had fixed 17 September and 6 October 2008 as the time-limits for the filing by Mexico and the United States respectively of such further explanations. These were filed by each Party within the time-limits thus fixed.

9. In the Application, the following requests were made by Mexico:
   “The Government of Mexico asks the Court to adjudge and declare that the obligation incumbent upon the United States under paragraph 153 (9) of the Avena Judgment constitutes an obligation of result as it is clearly stated in the Judgment by the indication that the United States must provide ‘review and reconsideration of the convictions and sentences’ but leaving it the ‘means of its own choosing’; and that, pursuant to the foregoing obligation of result,
   1. the United States must take any and all steps necessary to provide the reparation of review and reconsideration mandated by the Avena Judgment; and
   2. the United States must take any and all steps necessary to ensure that no Mexican national entitled to review and reconsideration under the Avena Judgment is executed unless and until that review and reconsideration is completed and it is determined that no prejudice resulted from the violation.”

10. In the course of the proceedings, the following submissions were presented by the Parties:
   On behalf of Mexico,
   in the further written explanations submitted to the Court on 17 September 2008:

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REQUEST FOR INTERPRETATION (JUDGMENT)
“Based on the foregoing, the Government of Mexico asks the Court to adjudge and declare as follows:

(a) That the correct interpretation of the obligation incumbent upon the United States under paragraph 153 (9) of the Avena Judgment is that it is an obligation of result as it is clearly stated in the Judgment by the indication that the United States must provide ‘review and reconsideration of the convictions and sentences’; and that, pursuant to the interpretation of the foregoing obligation of result,

(1) the United States, acting through all of its competent organs and all its constituent subdivisions, including all branches of government and any official, state or federal, exercising government authority, must take all measures necessary to provide the repARATION of review and reconsideration mandated by the Avena Judgment in paragraph 153 (9); and

(2) the United States, acting through all its competent organs and all its constituent subdivisions, including all branches of government and any official, state or federal, exercising government authority, must take all measures necessary to ensure that no Mexican national entitled to review and reconsideration under the Avena Judgment is executed unless and until that review and reconsideration is completed and it is determined that no prejudice resulted from the violation;

(b) That the United States breached the Court’s Order of 16 July 2008 and the Avena Judgment by executing José Ernesto Medellín Rojas without having provided him review and reconsideration consistent with the terms of the Avena Judgment; and

(c) That the United States is required to guarantee that no other Mexican national entitled to review and reconsideration under the Avena Judgment is executed unless and until that review and reconsideration is completed and it is determined that no prejudice resulted from the violation.

On behalf of the United States,
in its Written Observations submitted on 29 August 2008:

“On the basis of the facts and arguments set out above, the Government of the United States of America requests that the Court adjudge and declare that the application of the United Mexican States is dismissed, but if the Court shall decline to dismiss the application, that the Court adjudge and declare an interpretation of the Avena Judgment in accordance with paragraph 62 above.” (Para. 63.)

Paragraph 60 of the Written Observations of the United States includes the following:

“And the United States agrees with Mexico’s requested interpretation; it agrees that the Avena Judgment imposes an ‘obligation of result’. There is thus nothing for the Court to adjudge, and Mexico’s application must be dismissed.”

On behalf of the United States,
in its Written Observations submitted on 29 August 2008:

“On the basis of the facts and arguments set out above, the Government of the United States of America requests that the Court adjudge and declare that the application of the United Mexican States is dismissed, but if the Court shall decline to dismiss the application, that the Court adjudge and declare an interpretation of the Avena Judgment in accordance with paragraph 62 above.” (Para. 63.)

Paragraph 60 of the Written Observations of the United States includes the following:

And the United States agrees with Mexico’s requested interpretation; it agrees that the Avena Judgment imposes an ‘obligation of result’. There is thus nothing for the Court to adjudge, and Mexico’s application must be dismissed.”

Paragraph 62 of the Written Observations of the United States includes the following:

“the United States requests that the Court interpret the Judgment as Mexico has requested — that is, as follows:

“[T]he obligation incumbent upon the United States under paragraph 153 (9) of the Avena Judgment constitutes an obligation of result as it is clearly stated in the Judgment by the indication that the United States must provide ‘review and reconsideration of the convictions and sentences’ but leaving it the ‘means of its own choosing’.”

in the further written explanations submitted to the Court on 6 October 2008:

“On the basis of the facts and arguments set out above and in the United States’ initial Written Observations on the Application for Interpretation, the Government of the United States of America requests that the Court adjudge and declare that the application of the United Mexican States for interpretation of the Avena Judgment is dismissed. In the alternative and as subsidiary submissions in the event that the Court should decline to dismiss the application in its entirety, the United States requests that the Court adjudge and declare:

(a) that the following supplemental requests by Mexico are dismissed:

(1) that the Court declare that the United States breached the Court’s Order of 16 July 2008;
(2) that the Court declare that the United States breached the Avena Judgment; and
(3) that the Court order the United States to issue a guarantee of non-repetition;

(b) an interpretation of the Avena Judgment in accordance with paragraph 86 (a) of Mexico’s Response to the Written Observations of the United States.”

* * *

11. The Court recalls that in paragraph 153 (9) of the Avena Judgment the Court had found that:

“the appropriate reparation in this case consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals referred to in subparagraphs (4), (5), (6) and (7) above, by taking account both of the violation of the rights set forth in Article 36 of the [Vienna] Convention [on Consular Relations] and of paragraphs 138 to 141 of this Judgment”.

12. Mexico asked for an interpretation as to whether paragraph 153 (9) expresses an obligation of result and requested that the Court should so state, as well as issue certain orders to the United States “pursuant to the foregoing obligation of result” (see paragraph 9 above).
13. Mexico’s Request for interpretation of paragraph 153 (9) of the Court’s Judgment of 31 March 2004 was made by reference to Article 60 of the Statute. That Article provides that “[t]he judgment is final and without appeal. In the event of dispute ['contestation' in the French version] as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.”

14. The United States informed the Court that it agreed that the obligation in paragraph 153 (9) was an obligation of result and, there being no dispute between the Parties as to the meaning or scope of the words of which Mexico requested an interpretation, Article 60 of the Statute did not confer jurisdiction on the Court to make the interpretation (Order, p. 322, para. 41). In its Written Observations of 29 August 2008, the United States also contended that the absence of a dispute about the meaning or scope of paragraph 153 (9) rendered Mexico’s Application inadmissible.

15. The Court notes that its Order of 16 July 2008 on provisional measures was not made on the basis of prima facie jurisdiction. Rather, the Court stated that “the Court’s jurisdiction on the basis of Article 60 of the Statute is not preconditioned by the existence of any other basis of jurisdiction as between the parties to the original case” (ibid., p. 323, para. 44).

The Court also affirmed that the withdrawal by the United States from the Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes since the rendering of the Avena Judgment had no bearing on the Court’s jurisdiction under Article 60 of the Statute (ibid., p. 323, para. 44).

16. In its Order of 16 July 2008, the Court had addressed whether the conditions laid down in Article 60 “for the Court to entertain a request for interpretation appeared to be satisfied” (ibid., p. 323, para. 45), observing that “the Court may entertain a request for interpretation of any judgment rendered by it provided that there is a ‘dispute as to the meaning or scope of [the said] judgment’” (ibid., p. 323, para. 46).

17. In the same Order, the Court pointed out that “the French and English versions of Article 60 of the Statute are not in total harmony” and that the existence of a dispute/“contestation” under Article 60 was not subject to satisfaction of the same criteria as that of a dispute (“différend” in the French text) as referred to in Article 36, paragraph 2, of the Statute (ibid., p. 325, para. 53). The Court nonetheless observed that “it seems both Parties regard paragraph 153 (9) of the Avena Judgment as an international obligation of result” (ibid., p. 326, para. 55).

18. However, the Court also observed that “the Parties nonetheless apparently hold different views as to the meaning and scope of that obligation of result, namely, whether that understanding is shared by all United States federal and state authori-
“the operative language of the Avena Judgment establishes an obligation of result reaching all organs of the United States, including the federal and state judiciaries, that must be discharged irrespective of domestic law impediments.”

Mexico maintains that the United States Government’s narrow reading of the Avena Judgment fails to take all the steps necessary to bring about compliance by the States parties to the Charter. In Mexico’s view, the United States has neither carried out the obligations set out in the Avena Judgment nor has it made any domestic legislative measures relating to that obligation issued by the Court on 16 July 2008. The Court observes that this obligation of result is one which must be met within a reasonable period of time. Even serious efforts of the United States, should they fall short of providing review and reconsideration consistent with paragraphs 138 to 141 of the Avena Judgment, would not be regarded as fulfilling this obligation of result.

28. The United States has insisted that it fully accepts that paragraph 153 (9) of the Avena Judgment creates an international obligation of result. It therefore continues to assert that there is no dispute over whether paragraph 153 (9) expresses an obligation of result as opposed to an obligation of means. Mexico contends, making reference to certain omissions of the federal government and certain actions and statements of organs of government at the federal and state levels, that the United States does not accept that it is under an obligation of result; and that therefore there is indeed a dispute within the meaning of Article 60 of the Statute. Mexico further argues that even if the United States has taken some steps towards providing review and reconsideration, this does not constitute a substantive fulfillment of its international obligation. This is borne out by the fact that Mr. Medellín’s petition for a stay of execution before the United States Supreme Court was not granted.

29. It is for the Court itself to decide whether a dispute within the meaning of Article 60 of the Statute does indeed exist (see Interpretation (Judgment) 139).
of Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J., Series A, No. 13, p. 12).

To this end, the Court has in particular examined the Written Observations and further written explanations of the Parties to ascertain their views in the light of the comments of the Court in paragraph 55 of the Order that they apparently hold different views as to the meaning and scope of that obligation of result, namely, whether that understanding is shared by all United States federal and state authorities and whether that obligation falls upon those authorities”.

30. The Court observes that whether, by reference to the elements described above, there is a dispute under Article 60 of the Statute, the resolution of which requires an interpretation of the provisions of paragraph 153 (9) of the Avena Judgment, can be perceived in two ways.

31. On the one hand, it could be said that a variety of factors suggest that there is a difference of perception that would constitute a dispute under Article 60 of the Statute.

Mexico observes that, in Medellín v. Texas (Supreme Court Reporter, Vol. 128, 2008, p. 1346), “the Federal Executive argued [in the United States Supreme Court] that Article 94 (1) [of the United Nations Charter] was directed only to the political branches of States Party . . . rather than to the State Party as a whole”, and adds that “[t]here is no support for that reading of Article 94 (1) in either its text, its object and purpose, or principles of general international law”. Mexico maintains that it was on the basis of this “erroneous interpretation” that

“the [Supreme] Court found that the expression of the obligation to comply in Article 94 (1) . . . precluded the judicial branch — the authority best suited to implement the obligation imposed by Avena — from taking steps to comply”,

the Supreme Court being of the view that the Charter provision referred to “a commitment on the part of U.N. Members to take future action through their political branches to comply with an ICJ decision” (ibid., p. 1358). In Mexico’s contention, it thus follows that the highest judicial authority in the United States has understood the Judgment in Avena as not laying down an obligation of result binding on all constituent organs of the United States, including the federal and state judicial authorities. From this perspective, not only is the obligation in paragraph 153 (9) not really regarded as an obligation of result, but, argues Mexico, such an interpretation puts to one side the finding in the Avena Judgment that:

“in cases where the breach of the individual rights of Mexican nationals under Article 36, paragraph 1 (b), of the [Vienna Convention on Consular Relations] has resulted, in the sequence of judicial proceedings that has followed, in the individuals being subjected to prolonged detention or convicted and sentenced to severe penalties, the legal consequences of this breach have to be examined and taken into account in the course of review and reconsideration. The Court considers that it is the judicial process that is suited to this task.” (Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004 (I), pp. 65-66, para. 140.)

Further, Mexico contends that this understanding by the Supreme Court is inconsistent with the interpretation of the Avena Judgment as imposing an obligation of result incumbent on all constituent organs of the United States, including the judiciary.

32. From this viewpoint, the wording in Mexico’s concluding submissions — wording introduced in its further written explanations of 17 September 2008 — was directed to affirming that the obligation in paragraph 153 (9) of the Avena Judgment is incumbent on all the constituent organs to be seen as comprising the United States (see paragraph 10 above).

Mexico moreover rejects the argument of the State of Texas that Mr. Medellín had, prior to his execution, received the review and reconsideration required by paragraph 153 (9) of the Avena Judgment from state and federal courts.

33. According to Mexico, the United States, by word and deed, has contradicted its avowed acceptance of review and reconsideration as an obligation of result. Reference is made to the choice of the United States Government not to appear at the Supreme Court hearings on Mr. Medellín’s petition for a stay of execution. Mexico also points to the very tardy attempts to engage Congress in ensuring that all constituent elements do indeed act upon this obligation.

34. Further, Mexico contends that the Supreme Court found that the obligation within paragraph 153 (9) could not be directly enforced by the judiciary on the basis of a Presidential memorandum nor otherwise without intervention of the legislature. In Mexico’s view, this necessarily means that the obligation is not really regarded as one of result — a viewpoint not shared by the United States.

35. The Court observes that these elements could suggest a dispute between the Parties within the sense of Article 60 of the Statute.

36. On the other hand, there are factors that suggest, on the contrary,
that there is no dispute between the Parties. The Court notes — without necessarily agreeing with certain points made by the Supreme Court in its reasoning regarding international law — that the Supreme Court has stated that the Avena Judgment creates an obligation that is binding on the United States. This is so notwithstanding that it has said that the obligation has no direct effect in domestic law, and that it cannot be given effect by a Presidential Memorandum.

37. Referring to the Court’s statement in its Order of 16 July 2008 that there seemed to be a dispute as to the scope of the obligation in paragraph 153 (9), and upon whom precisely it fell, the United States reiterated in its Written Observations of 29 August 2008 that the federal government both “spoke for” and had responsibility for all organs and constituent elements of governmental authority. While that statement seems to be directed at matters different from what the Court perceived as the possible dispute in paragraph 55 of its Order of 16 July 2008, it could be said that Mexico addressed this question only somewhat indirectly in its further written explanations of 17 September 2008.

38. The Court notes that Article 98 (2) of the Rules of Court stipulates that when a party makes a request for interpretation of a judgment, “the precise point or points in dispute as to the meaning or scope of the judgment shall be indicated”.

Mexico has had the opportunity to indicate the precise points in dispute as to the meaning or scope of the Avena Judgment, first in its Application of 5 June 2008 and then in the submissions made at the conclusion of its further written explanations of 17 September 2008.

The Application made reference to a dispute about whether the obligation in paragraph 153 (9) of the Avena Judgment was one of result; the United States rapidly signalled its agreement that the obligation incumbent upon it was an obligation of result. The matters emphasized by Mexico seemed particularly directed to the question of implementation by the United States of the obligations incumbent upon it as a consequence of the Avena Judgment. The various passages in the further written explanations of Mexico of 17 September 2008, while referring to certain actions and statements of the constituent organs of the United States and perceived failures to act in certain regards by the federal government, nonetheless remain very non-specific as to what the claimed dispute precisely is. Further, it is difficult to discern, save by inference, Mexico’s position regarding the existence of a dispute as to whether the obligation of result falls upon all state and federal authorities and as to whether they share an understanding that it does so fall.

39. The Court observes that, in its Application of 5 June 2008, Mexico simply asked that the Court affirm that the obligation incumbent upon the United States paragraph 153 (9) constitutes an obligation of result.

When Mexico formulated its submissions in the oral hearings on the request for the indication of provisional measures, it submitted:

“(a) that the United States, acting through all its competent organs and all its constituent subdivisions, including all branches of government and any official, state or federal, exercising government authority, take all measures necessary to ensure that José Ernesto Medellin, César Roberto Fierro Reyna, Rubén Ramirez Cárdenas, Humberto Leal García, and Roberto Moreno Ramos are not executed pending the conclusion of the proceedings instituted by Mexico on 5 June 2008, unless and until the five Mexican nationals have received review and reconsideration consistent with paragraphs 138 through 141 of this Court’s Avena Judgment;”

40. Mexico had a further opportunity to indicate the precise points it regarded as in dispute when it reformulated its concluding submissions in paragraphs 86 (a) (1) and (2) of its further written explanations of 17 September 2008 (see paragraph 32 above).

41. The Court observes it could be argued that the claim in paragraph 86 (a) (1) that the United States “acting through all its competent organs . . . must take all measures necessary to provide the reparation of review and reconsideration” does not say that there is an obligation of result falling upon the various competent organs, constituent subdivisions and public authorities, but only that the United States will act through these in itself fulfilling the obligations incumbent on it under paragraph 153 (9).

The same wording of “the United States, acting through all its competent organs and all its constituent subdivisions” appears in paragraph 86 (a) (2) of Mexico’s concluding submissions. Whether in terms of meeting the requirements of Article 98 (2) of the Rules, or more generally, it could be argued that in the end Mexico has not established the existence of any dispute between itself and the United States. Moreover, the United States has made clear that it can agree with the first concluding submission (point (a)) of Mexico, requesting in its own concluding submissions, as a subsidiary submission, that the Court adjudge and declare “(b) an interpretation of the Avena Judgment in accordance with paragraph 86 (a) of Mexico’s Response to the Written Observations of the United States”.

Mexico did not specify that the obligation of the United States under the Avena Judgment was directly binding upon its organs, subdivisions or
officials, although this might be inferred from the arguments it presented, in particular in its further written explanations.

* *

42. The Court notes that, having regard to all these elements, two views may be discerned as to whether or not there is a dispute within the meaning of Article 60 of the Statute.

* *

43. Be that as it may, the Court considers that there would be a further obstacle to granting the request of Mexico even if a dispute in the present case were ultimately found to exist within the meaning of Article 60 of the Statute. The Parties' different stated perspectives on the existence of a dispute reveal also different contentions as to whether paragraph 153 (9) of the *Avena* Judgment envisages that a direct effect is to be given to the obligation contained therein.

44. The *Avena* Judgment nowhere lays down or implies that the courts in the United States are required to give direct effect to paragraph 153 (9). The obligation laid down in that paragraph is indeed an obligation of result which clearly must be performed unconditionally; non-performance of it constitutes internationally wrongful conduct. However, the Judgment leaves it to the United States to choose the means of implementation, not excluding the introduction within a reasonable time of appropriate legislation, if deemed necessary under domestic constitutional law. Nor moreover does the *Avena* Judgment prevent direct enforceability of the obligation in question, if such an effect is permitted by domestic law. In short, the question is not decided in the Court's original Judgment and thus cannot be submitted to it for interpretation under Article 60 of the Statute (Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case (*Colombia v. Peru*), Judgment, *I.C.J. Reports* 1950, p. 402).

45. Mexico's argument, as described in paragraph 31 above, concerns the general question of the effects of a judgment of the Court in the domestic legal order of the States parties to the case in which the judgment was delivered, not the "meaning or scope" of the *Avena* Judgment, as Article 60 of the Court's Statute requires. By virtue of its general nature, the question underlying Mexico's Request for interpretation is outside the jurisdiction specifically conferred upon the Court by Article 60. Whether or not there is a dispute, it does not bear on the interpretation of the *Avena* Judgment, in particular of paragraph 153 (9).

46. For these reasons, the Court cannot accede to Mexico's Request for interpretation.

* *

47. Before proceeding to the additional requests of Mexico, the Court observes that considerations of domestic law which have so far hindered the implementation of the obligation incumbent upon the United States, cannot relieve it of its obligation. A choice of means was allowed to the United States in the implementation of its obligation and, failing success within a reasonable period of time through the means chosen, it must rapidly turn to alternative and effective means of attaining that result.

* *

48. In the context of the proceedings instituted by the Application requesting interpretation, Mexico has presented three additional claims to the Court. First, Mexico asks the Court to adjudge and declare that the United States breached the Order indicating provisional measures of 16 July 2008 by executing Mr. Medellín on 5 August 2008 without having provided him with the review and reconsideration required under the *Avena* Judgment. Second, Mexico also regards that execution as having constituted a breach of the *Avena* Judgment itself. Third, Mexico requests the Court to order the United States to provide guarantees of non-repetition.

49. The United States argues that the Court lacks jurisdiction to entertain the supplemental requests made by Mexico. As regards Mexico's claim concerning the alleged breach of the Order of 16 July 2008, the United States is of the opinion, first, that the lack of a basis of jurisdiction for the Court to adjudicate Mexico's Request for interpretation extends to this ancillary claim. Second, and in the alternative, the United States suggests that such a claim, in any event, goes beyond the jurisdiction of the Court under Article 60 of the Statute. Similarly, the United States submits that there is no basis of jurisdiction for the Court to entertain Mexico's claim relating to an alleged violation of the *Avena* Judgment. Finally, the United States disputes the Court's jurisdiction to order guarantees of non-repetition.

* *

50. Concerning Mexico's claim that the United States breached the Court's Order indicating provisional measures of 16 July 2008 by executing Mr. Medellín, the Court observes that in that Order it found that "it appears that the Court may, under Article 60 of the Statute, deal with the Request for interpretation" (Order, p. 326, para. 57). The Court then indicated in its Order that:

"The United States of America shall take all measures necessary to ensure that Messrs. José Ernesto Medellín Rojas, César Roberto Fierro Reyna, Rubén Ramírez Cárdenas, Humberto Leal García, and Roberto Moreno Ramos are not executed pending judgment on
the Request for interpretation submitted by the United Mexican States, unless and until these five Mexican nationals receive review and reconsideration consistent with paragraphs 138 to 141 of the Court’s Judgment delivered on 31 March 2004 in the case concerning Avena and Other Mexican Nationals (Mexico v. United States of America).” (Order, p. 331, para. 80 (II) (a).)

51. There is no reason for the Court to seek any further basis of jurisdiction than Article 60 of the Statute to deal with this alleged breach of its Order indicating provisional measures issued in the same proceedings. The Court’s competence under Article 60 necessarily entails its incidental jurisdiction to make findings about alleged breaches of the Order indicating provisional measures. That is still so even when the Court decides, upon examination of the Request for interpretation, as it has done in the present case, not to exercise its jurisdiction to proceed under Article 60.

52. Mr. Medellín was executed in the State of Texas on 5 August 2008 after having unsuccessfully filed an application for a writ of habeas corpus and applications for stay of execution and after having been refused a stay of execution through the clemency process. Mr. Medellín was executed without being afforded the review and reconsideration provided for by paragraphs 138 to 141 of the Avena Judgment, contrary to what was directed by the Court in its Order indicating provisional measures of 16 July 2008.

53. The Court thus finds that the United States did not discharge its obligation under the Court’s Order of 16 July 2008, in the case of Mr. José Ernesto Medellín Rojas.

54. The Court further notes that the Order of 16 July 2008 stipulated that five named persons were to be protected from execution until they received review and reconsideration or until the Court had rendered its Judgment upon Mexico’s Request for interpretation. The Court recalls that the obligation upon the United States not to execute Messrs. César Roberto Fierro Reyna, Rubén Ramírez Cárdenas, Humberto Leal García, and Roberto Moreno Ramos pending review and reconsideration being afforded to them is fully intact by virtue of subparagraphs (4), (5), (6), (7) and (9) of paragraph 153 of the Avena Judgment itself. The Court further notes that the other persons named in the Avena Judgment are also to be afforded review and reconsideration in the terms there specified.

55. The Court finally recalls that, as the United States has itself acknowledged, until all of the Mexican nationals referred to in subparagraphs (4), (5), (6) and (7) of paragraph 153 of the Avena Judgment have had their convictions and sentences reviewed and reconsidered, by taking account of Article 36 of the Vienna Convention on Consular Relations and paragraphs 138 to 141 of the Avena Judgment, the United States has not complied with the obligation incumbent upon it.

* * *

56. As regards the additional claim by Mexico asking the Court to declare that the United States breached the Avena Judgment by executing José Ernesto Medellín Rojas without having provided him review and reconsideration consistent with the terms of that Judgment, the Court notes that the only basis of jurisdiction relied upon for this claim in the present proceedings is Article 60 of the Statute, and that that Article does not allow it to consider possible violations of the Judgment which it is called upon to interpret.

57. In view of the above, the Court finds that the additional claim by Mexico concerning alleged violations of the Avena Judgment must be dismissed.

* * *

58. Lastly, Mexico requests the Court to order the United States to provide guarantees of non-repetition (point (2) (c) of Mexico’s submissions) so that none of the Mexican nationals mentioned in the Avena Judgment is executed without having benefited from the review and reconsideration provided for by the operative part of that Judgment.

59. The United States disputes the jurisdiction of the Court to order it to furnish guarantees of non-repetition, principally inasmuch as the Court lacks jurisdiction under Article 60 of the Statute to entertain Mexico’s Request for interpretation or, in the alternative, since the Court cannot, in any event, order the provision of such guarantees within the context of interpretation proceedings.

60. The Court finds it sufficient to reiterate that its Avena Judgment remains binding and that the United States continues to be under an obligation fully to implement it.

* * *

61. For these reasons,

THE COURT,

(1) By eleven votes to one,

Finds that the matters claimed by the United Mexican States to be in issue between the Parties, requiring an interpretation under Article 60 of the Statute, are not matters which have been decided by the Court in its
Judgment of 31 March 2004 in the case concerning Avena and Other Mexican Nationals (Mexico v. United States of America), including paragraph 153 (9), and thus cannot give rise to the interpretation requested by the United Mexican States;

IN FAVOUR: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Koroma, Buergenthal, Owada, Tomka, Abraham, Keith, Bennouna, Skotnikov;
AGAINST: Judge Sepúlveda-Amor;

(2) Unanimously,

Finds that the United States of America has breached the obligation incumbent upon it under the Order indicating provisional measures of 16 July 2008, in the case of Mr. José Ernesto Medellín Rojas;

(3) By eleven votes to one,

Reaffirms the continuing binding character of the obligations of the United States of America under paragraph 153 (9) of the Avena Judgment and takes note of the undertakings given by the United States of America in these proceedings;

IN FAVOUR: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Koroma, Buergenthal, Owada, Tomka, Keith, Sepúlveda-Amor, Bennouna, Skotnikov;
AGAINST: Judge Abraham;

(4) By eleven votes to one,

Declines, in these circumstances, the request of the United Mexican States for the Court to order the United States of America to provide guarantees of non-repetition;

IN FAVOUR: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Koroma, Buergenthal, Owada, Tomka, Abraham, Keith, Bennouna, Skotnikov;
AGAINST: Judge Sepúlveda-Amor;

(5) By eleven votes to one,

Rejects all further submissions of the United Mexican States.

IN FAVOUR: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Koroma, Buergenthal, Owada, Tomka, Abraham, Keith, Bennouna, Skotnikov;
AGAINST: Judge Sepúlveda-Amor.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this nineteenth day of January, two thousand and nine, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the United Mexican States and the Government of the United States of America, respectively.

(Signed) Rosalyn Higgins,
President.

(Signed) Philippe Couvreur,
Registrar.

Judges Koroma and Abraham append declarations to the Judgment of the Court; Judge Sepúlveda-Amor appends a dissenting opinion to the Judgment of the Court.

(Initialled) R.H.
(Initialled) Ph.C.
United States Court of Appeals, Ninth Circuit

MOL Inc. v. The People’s Republic of Bangladesh
3 July 1984
Bangladesh announced on January 3, 1979, that it was terminating the agreement because MOL had not constructed the breeding farm in 1978 and had breached the requirement that the monkeys be used only for humanitarian purposes. It claimed that MOL sold the monkeys to the armed services for “neutron bomb radiation experiments.

When MOL sought arbitration, Bangladesh refused, asserting its right to terminate for breach by MOL. Apparently MOL asked the State Department to intervene. Despite these efforts and MOL’s reassurances that monkeys would not be used for radiation experiments, Bangladesh did not reinstate the licensing agreement.


Because we decide that the district court lacked jurisdiction under the FSIA, we do not reach the issue whether the act of state doctrine prevented the district court from exercising its jurisdiction.

Sovereign immunity
MOL argues that Bangladesh does not enjoy sovereign immunity because its acts fall under the commercial activity exception of the FSIA. That Act denies immunity in case in which the action is based “upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.” 28 U.S.C. Sec. 1605(a)(2). The exception turns on whether the act is commercial:

A “commercial activity” means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose. 28 U.S.C. Sec. 1603(d).

As section 1330(a) indicates, sovereign immunity is not merely a defense under the FSIA. Its absence is a jurisdictional requirement. See Verlinden B.V. v. Centr. Bank of Nigeria, --- U.S. ----, 103 S.Ct. 1962, 1971, 76 L.Ed.2d 81 (1983). This jurisdictional aspect means that if the foreign state does not appear to assert an immunity defense, the court must satisfy itself on the question of immunity. Id. at 1971 & n. 20.

The district court here recognized its duty in view of Bangladesh’s default, and considered carefully whether the commercial activity exception applies.

A crucial step in determining whether the basis of this suit was a commercial activity is defining the “act complained of here.” IAM v. OPEC, 649 F.2d 1354, at 1357-58; Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 308 (2d Cir.1981), cert. denied, 454 U.S. 1148, 102 S.Ct. 1012, 71 L.Ed.2d 301 (1982) (act of state cases). The court must then decide whether that act is commercial or sovereign.

MOL asserts that the activity here relates to Bangladesh’s contracting to sell monkeys. It admits that licensing the exploitation of natural resources is a sovereign activity. Cf. Clayco Petroleum Corp. v. Occidental Petroleum Corp., 712 F.2d 404, 408

Facts
In 1977, a division of the Bangldesh Ministry of Agriculture granted MOL, Inc., an Oregon corporation, a ten-year license to export rhesus monkeys. The licensing agreement specified quantities and prices and required MOL to build in Bangladesh in 1978 a breeding farm for rhesus monkeys.

By its terms, the agreement was granted “on the grounds and sole condition that the primates exported by [MOL] from Bangladesh shall be used exclusively for the purposes of medical and other scientific research by highly skilled and competent personnel for the general benefit of all peoples of the world.” To enable Bangladesh to monitor uses of the monkeys, it required MOL to keep available records on each monkey and arrange for duplicate records in Bangladesh.

The agreement provided for arbitration of disputes, each party selecting one arbitrator. Bangladesh reserved the right to terminate the agreement “without notice if [MOL] has failed to fulfill its obligations under this Agreement.”

In November 1977, India banned the export of its rhesus monkeys. As India had been the major exporter of these animals, which are valuable for research because of their anatomical and behavioral similarity to humans, Bangladesh became an important supplier. Although world monkey prices rose while MOL’s payments to Bangladesh remained fixed, Bangladesh complied with the licensing agreement through the spring of 1978.

Bangladesh threatened to cancel the agreement in May 1978 because MOL had not built the breeding farm or exported agreed quantities. MOL denied any departure from the agreement. In September 1978, it delivered some Bangladesh monkeys to the United States armed services for radiobiological research.
It argues, however, that this suit arises not from license revocation but from termination of a contract. In essence, Bangladesh lost its sovereign status when it contracted and then terminated pursuant to contract terms.

The argument seems persuasive because, in breaking the agreement, Bangladesh itself spoke in commercial terms, basing its termination on MOL's alleged breaches. The true nature of the action, however, does not depend on terminology.

Bangladesh was terminating an agreement that only a sovereign could have made. This was not just a contract for trade of monkeys. It concerned Bangladesh's right to regulate imports and exports, a sovereign prerogative. See Bokkelen v. Grumman Aerospace Corp., 432 F.Supp. 329, 333 (E.D.N.Y.1977). It concerned Bangladesh's right to regulate its natural resources, also a uniquely sovereign function. See IAM v. OPEC, 477 F.Supp. 553, 567-68 (C.D.Cal.1979) (citing United States and international authority), aff'd on other grounds, 649 F.2d 1354 (9th Cir.1981). A private party could not have made such an agreement. See Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 704, 96 S.Ct. 1854, 1866, 48 L.Ed.2d 301 (1976); Clayco, 712 F.2d at 408.

MOL complains that this conclusion relies on the purpose of the agreement, in contradiction of the FSIA. See 28 U.S.C. Sec. 1603(d). But consideration of the special elements of export license and natural resource looks only to the nature of the agreement and does not require examination of the government's motives.

In short, the licensing agreement was a sovereign act, not just a commercial transaction. Its revocation was sovereign by nature, not commercial. Bangladesh has sovereign immunity from this suit.

Because the act complained of was not a commercial activity and Bangladesh has sovereign immunity, effect in the United States is irrelevant. See 28 U.S.C. Sec. 1605(a)(2).

AFFIRMED.
Kuwait Airways Corporation v. Iraqi Airways Company and
the Republic of Iraq

England, High Court, Queen’s Bench Division, 16 April 1992;
Court of Appeal, 21 October 1993;
House of Lords, 24 July 1995
Iraq invaded Kuwait on the 2nd August 1990. Kuwait airport was occupied by the Iraqi military forces during the morning. Among the aircraft at the airport were 15 owned by the Plaintiffs, KAC, and 4 operated by other airlines which were in transit at Kuwait. There appears to have been no ... Kuwait later being designated as a Governate forming part of Iraq (Presidential Decree No 248 dated 26th August 1990).

Of the 15 KAC aircraft, five were removed from Kuwait by the Iraqi Air Force.

The remaining ten KAC aircraft were civilian airliners, two Boeing 767’s and eight Airbuses. They are the subject matter of the present action, with control of the Plaintiffs’ possession and deprived by the use of armed force. The alleged wrongfull interference and have continued to interfere with the said aircraft.

On 2nd August 1990 the Second Defendant invaded Kuwait, took control of the airport and deprived the Plaintiffs of possession of, inter alia, the aircraft particularised above.

C. On a date or dates between 9th August and 17th September the Second Defendants unlawfully transferred possession of the aircraft to the First Defendants. The stated intention of the First Defendants was to incorporate the aircraft within the First Defendants’ fleet and to use them for commercial purposes.

The Plaintiffs subsequently entered judgment in default of appearance against both Defendants on the 11th February and the 24th May 1991 respectively. Damages were assessed at $489,455,380 plus interest against the First Defendants, and $80,000,000 against the Second Defendants.

C. Damages were recovered against the Second Defendants, and a number of steps were taken to enforce this judgment. Mr. Isaac duly gave evidence before an examiner on the 4th March 1991. The examination of him and an Assessor and from the records of the First Defendants. Mr. Isaac’s evidence was taken in the same manner as the examination of the Second Defendants.

In line with the acceptance of the Government of Iraq of the Security Council Resolution (686) of 1991, ... the Second Defendants, are hereby declared to be entitled to all the remaining rights and benefits belonging to the Second Defendants under this Act.

First. All Resolutions of the R.C.C. enacting the 2nd August 1990 and referred to in (First) above are repealed and all consequences resulting therefrom are annulled...

Other matters were raised in the same manner, which concluded as follows.
Finally, we would draw your attention to the fact that Iraq appears to be still in a state of almost complete paralysis following the recent hostilities and that there are no direct communications by it. We have sought to proceed as quickly as we can, it has not proved possible to act any more quickly than we have done.

Summons were then issued on the 8th and 9th July 1991 in which the Defendants claimed extensions of time within which to give notice of their intention to defend. This was a necessary preliminary before seeking to challenge the Court's jurisdiction, and the Plaintiffs... at the hearing before Webster J on July 26th. He ordered a stay of execution but upon conditions set out in his Order.

There was pending at that date a further Summons by the Second Defendants dated the 23rd July 1991. This challenges the validity of service of the Writ upon them, and in the alternative seeks leave to give notice of their intention to defend the action out of time pursuant to O 12 R 6. On the 2nd August 1991, the First Defendants issued their Summons which so far as relevant for present purposes raised four issues:

1. The validity of service of the Writ upon them
2. State immunity under section 14 of the State Immunity Act 1978
3. Whether the Plaintiffs' claim is justiciable in these Courts,
4. Forum non conveniens by reference to various factors that would make adjudication in any other State more appropriate, including the interest of the United Nations Organisation.

These four issues were the subject of a full hearing before Webster J on 26th July 1992. The Defendants' application was refused and the Court found in favour of the Plaintiffs on all four issues.

The affidavits of KAC1 and KAC 2 were directed principally towards establishing that after about August 13th, when KAC1 returned to Kuwait from holidaying in Amman, representatives of IAC were directly involved in the winning of the contract. On the 17th September 1990 the Line Maintenance Manager, and Sabah Shaucet Abbo (“Mr Abbo”) the Assistant Director General (Technical).

The Defendants applied for leave to cross-examine the Plaintiff’s witnesses and undertook to produce their own for cross-examination if leave was granted. The affidavit was produced for cross-examination if leave was granted. The Defendants applied for leave to cross-examine the Plaintiff’s witnesses and undertook to produce their own for cross-examination if leave was granted. The Defendant’s application was refused.
had told him about that visit when the affidavit was being prepared. This correction
naturally casts great doubt upon the accuracy of the rest of his affidavit evidence.

The Defendants’ witnesses in their affidavits disputed much of what the KAC
engineers said. They said that the 10 disputed KAC aircraft were removed by IAC pilots
soon after the 6th August pursuant to instructions given by the Minister of Transport and
they said an IAC pilot operated the aircraft. The Minister in effect took that date. This was in no sense,
the 6th August pursuant to instructions given by the Minister of Transport and
the IAC pilots were unable to fly the Airbuses and Boeing 767s in particular.

The KAC Engineers’ evidence that they were recruited by IAC was challenged.
All the KAC personnel, they said, were anxious for their jobs and were pressing IAC to
employ them demanding high salaries and, in one case (ex-KAC), an ex-KAC pilot was
removed from Kuwait and others, including Mr. Sabri, said they were not employed.
Negotiations took place in Kuwait with Mr. Sabri and others, including Mr. Albo, at
which the KAC engineers used their own aircraft, as IAC had employed their aircraft
in the past. Negotiations took place in Kuwait with IAC, but Mr. Albo and others
remained there until they were transferred to IAC by Decree No 369 on
17th August. The KAC engineers were unable to fly the Airbuses and Boeing
767s in particular.

The KAC Engineers’ evidence that spare parts or ground equipment were
removed from Kuwait or used by IAC before September 17th and that any of the ex-KAC aircraft was overpainted by IAC before September 17th was wholly denied.

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17th August. The KAC engineers were unable to fly the Airbuses and Boeing
767s in particular.
IAC was refused landing and overflying permission by other States from August 2nd, except only for a limited number of flights carrying "hostages" out of Iraq and Kuwait and returning eg. from London with those hostages. As Mr Saffi put it, for the Airbuses he had no pilots, no engineers and no passengers. He did not need them – then.

But he was reticent and his evidence was contradictory regarding his relations with the Minister during the period from August 8th until September 9th or 12th when he knew of the Decree No 369 which banned IAC from operating international flights. The evidence shows that, after the Decree took effect, at least two of the aircraft were repainted in the IAC livery and that at least one of the ex-KAC aircraft was used on internal flights.

The evidence is compelling, in my judgment, that when the occupation of Kuwait was regarded as complete the Iraqi Government arranged for the removal by the Iraqi Air Force of the 5 KAC aircraft which IAC had taken on lease. IAC was engaged, on the Minister's instructions, in the preliminary stages of establishing an Airbus operation and to look after them until such time as commercial operations could resume. This was the object of the "safe-keeping" which Mr Saffi was instructed to achieve. The decision to implement this decision from mid-August onwards confirms that IAC was not a separate entity. The evidence which became available during the hearing of the enquirers made by IAC during August 1990 with regard to commercial transactions engaged in by IAC (see evidence of Mr Saffi) show that IAC was acting as an agent for the Iraqi Air Force, akin to a foreign registration of the aircraft, which gave them the appearance of "commercial" transactions.

There is no definition of "sovereign authority" in the Act, however, a sharp division of opinion as to the correct interpretation of the rule in the case of the Marble Islands, whilst the majority held that the pleas of immunity failed, Lords Diplock and Simon (the majority) held that the plea of immunity was good. The case was argued before me on the basis that the "familiar doctrine" had to be applied to the acts of IAC of which the Plaintiffs complained. The distinction was finally recognised as part of the common law by the House of Lords' judgment in Congresso del Partido [1983] 1 AC 244, [1981] 2 All ER 1064, where there was, however a sharp division of opinion as to the correct interpretation of the rule in the case of the Marble Islands, whilst the majority held that the plea of immunity failed, Lords Diplock and Simon (the majority) held that the plea of immunity was good. The case has been argued before me on the basis that the "familiar doctrine" has to be applied to the acts of IAC of which the Plaintiffs complained. The distinction was finally recognised as part of the common law by the House of Lords' judgment in Congresso del Partido [1983] 1 AC 244, [1981] 2 All ER 1064, where there was, however a sharp division of opinion as to the correct interpretation of the rule in the case of the Marble Islands, whilst the majority held that the plea of immunity failed, Lords Diplock and Simon (the majority) held that the plea of immunity was good.

The scheme of the Act is such that a State has general immunity from jurisdiction by virtue of section 1 - except as provided in the following provisions of Part 1 (section 11).

(1) A State is not immune as respects proceedings relating to -
(a) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority;
(b) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority.

(2) A separate entity is immune from the jurisdiction of the courts if, and only if -
(a) the proceedings relate to anything done by it in the exercise of sovereign authority;
(b) the circumstances are such that a State would have been so immune.

(3) In this section, "commercial transaction" means -
(a) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority;
(b) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority.

(4) The Act is such that a State has general immunity from jurisdiction by virtue of section 1 except as provided in the following provisions of Part 1 (section 11).

(5) A separate entity is immune from the jurisdiction of the courts if, and only if -
(a) the proceedings relate to anything done by it in the exercise of sovereign authority;
(b) the circumstances are such that a State would have been so immune.

(6) In this section, "commercial transaction" means -
(a) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority;
(b) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority.
Wilberforce and Edmund-Davies dissented and would have upheld the judge (Mr Justice Robert Goff, as he then was) on this issue. Lord Bridge of Harwich, however, who formed part of the majority, said this:

"Your Lordships appear to be radically divided rather upon the interpretation of the evidence and the significance of the particular facts than upon any question of legal principle" (p 279).

I am grateful for the extensive citation of authority in the present case, but I cannot help feeling, with Lord Bridge, that the correct legal principle is not in issue. Mr Plender QC submits for the Defendants that “the proper test is to ask whether the acts in question were done by Defendant in a commercial capacity invoking no governmental powers”.

Mr Clarke QC on behalf of the Plaintiffs – “an actus jure imperii is an act which can only be done by a State such as declaring war and making treaties”. It is common ground that the purpose or motive of the Defendant is not decisive, though the Defendants submit that the purpose of the Act can illuminate its nature. This submission acknowledges, however, that the categorisation of the act is determined by its nature.

Of the authorities cited, there were many which show a government acting as a private citizen or commercial party to a transaction or activity might, such as I Congresso del Partido itself, and one at least shows a national airline performing an actum jure imperii on behalf of its government, notwithstanding that its commercial activities were clearly actus jure gestionis (Arango v Guzman (1980) 621 F 2d 1371 where the airline implemented immigration regulations on behalf of its Government).

It would be idle to deny that the acts of the Government of Iraq and those carried out on its behalf in invading Kuwaiti territory were acta jure imperii: Similarly, if Kuwait’s property was appropriated for governmental purposes in the course of the invasion and occupation of Kuwait then I should have little difficulty in holding that that too was what I will call a governmental act.

Whether it follows from this that any appropriation of Kuwait’s property which took place during or by reason of the invasion is necessarily a governmental act is more debatable and is a question which I need not decide. Mr Plender’s submission that “only a State could appropriate the airline of another State” may be true, and if the present case was limited to a complaint that the Government of Iraq took possession of the 10 KAC aircraft by reason of its occupation of the airport, then I am prepared to assume that the same immunity would be available to a “separate entity” including IAC which performed that act on its behalf.

But the complaint in the present case is not merely that the defendants took possession or control of the aircraft by reason of the Second Defendants’ occupation of the airport by force of arms. It includes the allegations which I have already quoted from the Point of Claim, including “between 2nd August and 9th August the aircraft were removed from the airport.”

The circumstances of that removal have been made amply clear by the evidence which I have summarised above. The Defendants’ assertion that it was for their safekeeping has to be seen in the light of the facts that (a) the Government through the Iraqi Air Force had already removed 5 KAC aircraft which it required for its other purposes and which was, I assume, a governmental act and therefore immune, and (b) neither the Government nor IAC attempted to remove four other aircraft being operated by foreign airlines which were stranded at Kuwait and were equally vulnerable to whatever form of danger the Government and IAC feared for the KAC aircraft which they removed. The fact is that the Government of Iraq identified these 10 aircraft as ones which were required for civilian operation by IAC and the Minister of Transport on its behalf instructed IAC to take the aircraft into its possession and control and to remove them to Iraq.

There is no evidence which would justify a finding that the government relied upon IAC merely to provide pilots and engineers so that the aircraft could be removed to Iraq for some other purpose or that any other such purpose was governmental rather than commercial (for example, that the aircraft were required as troop carriers). Nor was there any other organisation within Iraq which could implement the decision to use the aircraft for commercial purposes. The fact that they could not be so used immediately was due to other factors, and meanwhile the Minister instructed IAC to “look after” the aircraft, meaning to keep them in such condition that they could be used with the minimum of delay and expense as soon as such use became possible.

It was contended, somewhat faintly, that the present is a dispute “between States” so that immunity is precluded by section 3(2). Neither the Plaintiffs nor IAC is a “State” and I hold that section 3(2) does not apply.

For these reasons, I hold that the First Defendants are not immune from the Court’s jurisdiction by reason of section 14(2) of the State Immunity Act 1978, save possibly with regard to any separate allegation which is contained in paragraph (a) of the Particulars to Paragraph 2 of the Points of Claim. I reach this conclusion with regard to the Points of Claim in their original (and present) form and I need say no more about the proposed draft amendments to the Particulars given under paragraph 2 which were produced during the hearing.

An alternative submission by the Plaintiffs is that the First Defendants have lost their immunity in any event by reason of their submission to the Court’s jurisdiction under section 2 of the Act. This applies to IAC as a separate entity because, if there has been a submission under section 2, the circumstances are not “such that a State would have been immune” and the condition in section 14(2)(b) would not be satisfied. The issue turns on section 2(3) and (4):

“(3) A State is deemed to have submitted—

(b) … if it has taken any step in the proceedings.

(4) Sub-section 3(b) above does not apply to … any step taken for the purpose only of--

(a) claiming immunity …”

The Plaintiffs assert that the First Defendants have taken steps beyond those taken for the purpose “only” of claiming immunity, because in summary:

(1) they issued a Summons and applied for a stay of execution, obtaining an Order for a stay and complying with the conditions of that Order by swearing an affidavit, as to their assets, as ordered by Webster J, and
(2) including in their present application grounds other than State immunity, i.e.
their objections to service and to the exercise of jurisdiction on the grounds of Act of
State (non-justiciability) and forum non conveniens.

In my judgment, there are two answers to this submission. First, the application
for a stay was for an order made in the exercise of the Court’s enforcement jurisdiction,
and which arose in the present case before the question of the Court’s adjectival or
substantial jurisdiction was decided. This situation arose because the Plaintiffs obtained
judgment in default before the First Defendants appeared or took any step in the
proceedings. I take the terms ‘enforcement’ and ‘adjectival’ (jurisdiction) from Lord
Diplock’s analysis of the State Immunity Act in Alcom v Republic of Columbia (above).

Secondly, the question raised by (2) is whether the present application is a step
taken for the purpose “only” of claiming immunity, or alternatively, whether apart from
this application the First Defendants have taken “any step in the proceedings” which
constitutes a submission by reason of section 2(3)(b). It is clear in my judgment that the
First Defendants’ applications with regard to service, Act of State and forum non
conveniens are in substance objections to the exercise of jurisdiction and are made in the
alternative to the claim for State immunity. I cannot accept that the section was intended
to make it compulsory that the claim for immunity could not be heard at the same time
and in conjunction with other objections to jurisdiction, and whilst I recognise the support
which the Plaintiffs gain from a strict and literal interpretation of the word “only” in
section 2(4) I am not prepared to hold that their submission is correct.

Non-justiciability

The defendants rely upon the principle of law which Lord Wilberforce stated in Buttes
Gas & Oil Co v Hammer [1982] AC 888, [1981] 3 All ER 616, in the following terms:

“So I think that the central question is whether ... there exists in English law a
more general principle that the courts will not adjudicate upon the transactions of
foreign sovereign States. Though I would prefer to avoid argument on
terminology, it seems desirable to consider this principle, if existing, not as a
variety of ‘act of State’ but one for judicial restraint or abstention ... in my opinion
there is, and for long has been, such a general principle, ... which is effective and
compelling in English Courts. This principle is not one of discretion, but is
inherent in the very nature of the judicial process.”

Later, Lord Wilberforce says:

“But the ultimate question what issues are capable, and what are incapable, of
judicial determination must be answered in closely similar terms in whatever
country they arise, depending, as they must, upon an appreciation of the nature
and limits of the judicial function.”

That was a reference to judgments of the United States Courts, including ones relating to
the same dispute between the two oil companies, Buttes Gas and Occidental, which were
concerned to establish the limits of the “judicial no-man’s land” (p 938B) or, it may be
suggested, “judicial no-go area”. The principle was applied in Buttes for the reasons
given by Lord Wilberforce at pp 937-8: “The proceedings, if they are to go on, inevitably
would involve determination of the following issues ...”, and he then selected (1) the
territorial issues, arising between the States of Sharjah, UAE and Iran, regarding
sovereignty over and the right to explore for oil in the disputed area, and (2) whether the
actions of four sovereign States (Sharjah, Iran, Her Majesty’s Government and UAQ) were
brought about by what was alleged as a fraudulent conspiracy between Buttes and the
Ruler of Sharjah and which were themselves alleged in some respects to be unlawful
under international law. Lord Wilberforce concluded:

“[These issues] have only to be stated to compel the conclusion that these are not
issues upon which a municipal court can pass. Leaving aside all possibility of
embarrassment in our foreign relations ... there are ... no judicial or manageable
standards by which to judge these issues, ... the court would be asked to review
transactions in which four sovereign States were involved, which they had
brought to a precarious settlement, after diplomacy and the use of force, and to
say that at least part of these were “unlawful” under international law.”

In my judgment, the authorities show that certain issues cannot be made the subject
of adjudication by the Court, because the process of investigation and judgment
would take the Court into areas which the law recognises as the proper and sole concern
of Her Majesty’s Government and of foreign sovereign States. There is need for such a
rule only when the proceedings raise an issue of this kind for decision. If there is no
issue, e.g. as regards the boundary of foreign territory then that can be acknowledged as a
fact. But to a limited extent, if the boundary is disputed, and the issue is not central to the
proper determination of the proceedings before the Court, (Attorney General v Buck
[1965] Ch 745), the Court can receive evidence and make findings accordingly even
when these involve questions of international law (e.g. where conquest and annexation
of territory have occurred).

The Defendants’ submissions in the present case upon their contention that the
acts of which the Plaintiffs complain were committed by or with the authority of the State
of Iraq in the course of its dealings with another State, Kuwait. Reference was also made
to other difficult questions of international and of constitutional law, including (1) should
the Courts recognise the efficacy of laws passed by Iraq which purported to apply within
the territory of Kuwait? (2) what effect should be given to the various UN Security
Council Resolutions which condemned the invasion and the misappropriation of Kuwait
property by Iraq? and (3) is an ‘Act of State’ defence available to IAC insofar as its
possession and operation of the KAC aircraft was authorised by Iraqi law at times when they
were within Iraqi territory (cf. Luther v Sagar [1923] KB)?

The Plaintiffs submit, correctly in my view, that these issues taken in isolation
raise matters of defence and so are inconsistent with the question of jurisdiction with
which I am concerned at this stage of the proceedings. But I have already held that the
Defendants’ submissions are concerned essentially with jurisdiction only and I am
prepared to treat them on that basis.

So regarded, it seems to me that the submission based on Buttes must necessarily fail in respect of proceedings where the Court has jurisdiction under the State Immunity
Act because their subject-matter is a commercial transaction. The common-law rule has
many applications not least where issues of State are raised in proceedings where neither of the parties is entitled to State immunity, as was the case in Buttes. But I cannot see any reason for its application so as to preclude jurisdiction where the nature of the issues is such that the Act expressly withholds immunity from jurisdiction because they arise out of a commercial transaction.

This conclusion seems entirely consistent with principle. Lord Wilberforce preferred to regard the requirement for judicial abstention as a free-standing rule but he recognised the analogy which may be drawn with other rules which apply when issues arise regarding the activities of sovereign States or on a foreign territory. These include the common law rules as to sovereign immunity, and so it is no coincidence that the area of judicial abstention has the same limits as the scope of sovereign immunity when the doctrine of restrictive immunity applies.

I hold, therefore, that there is no bar to the Court exercising subject-matter jurisdiction over issues arising in the present case in respect of which the First Defendants are not entitled to State immunity.

Forum non conveniens

The United Nations Organisation has established a Compensation Commission for the purpose of considering claims against Iraq for damage and loss caused by its invasion of Kuwait. Resolution No 687 of the Security Council dated 3 April 1991 includes the following:

15. Requests the Secretary General to report to the Security Council on the steps taken to facilitate the return of all Kuwait’s property seized by Iraq ...

16. Reaffirms that Iraq ... is liable under international law for any direct loss, damage ... or injury to foreign Governments, nationals and corporations, as a result of Iraq’s unlawful invasion and occupation of Kuwait ...

18. Decides also to create a fund to pay compensation for claims that fall within paragraph 16 above and to establish a Commission that will administer the funds”

Article 19 provides for establishing a fund out of inter alia the proceeds of petroleum and petroleum products exported by Iraq.

Kuwait’s claims against Iraq which preceded this Resolution included demands for the return of the KAC aircraft, and for compensation for those destroyed, which KAC claims in the present proceedings. The Defendants submit that by analogy with the principle forum non conveniens underlying the Spiliada decision [1987] 1 AC 460, 3 All ER 843, the Court should refuse jurisdiction in favour of the UN Compensation Commission in the present case.

I can limit this plea for present purposes to the adjudicative jurisdiction as defined by Lord Diplock in Alcon’s case. Again, the Spiliada principle is strictly one which acknowledges the jurisdiction of the English Court, but I accept the Defendants’ submission on the basis that the analogy which they seek to draw here is directed to jurisdiction only and does not involve a submission in this case.

So viewed, the submission in my judgment must clearly fail. There is no suggestion in the Security Council Resolution that the jurisdiction of any municipal Courts is excluded by the Resolution, and even if there was, it would be doubtful to say the least whether that could be effective to preclude the jurisdiction of the English Court properly established in accordance with English law.

The Defendants rely upon Dallal v Bank Mellat [1986] QB 441, [1986] 1 All ER 239 where Hobhouse J held that the Court should recognise the competence of an arbitration tribunal, established by treaty agreement between the United States and Iran and duly authorised by the municipal laws of both States as regards their nationals. The US Presidential Decree expressly provided that the relevant claims were “suspended, except as they may be presented to the Tribunal” (page 244f).

In the present case, there is no international forum equivalent to an arbitration panel; there is no relevant municipal legislation; and as stated above there is no exclusion of municipal law remedies. Moreover, the proposed fund will be limited to the proceeds of petroleum etc exports by Iraq and there is no indication that either the Security Council or Kuwait itself intended to limit the amount of claims against Iraq to a proportionate share of whatever fund might be established.

In these circumstances, I must reject the First Defendants’ objection to the jurisdiction of the Court.

Service

On the First Defendants IAC

Evidence

Before the 2nd August 1992 IAC carried on business at premises at 4 Lower Regent Street, London W1. The business was the usual kind carried on by the London offices of a foreign airline. The manager until July 1990 was Omar Latif and then Fouad Ismail Ibrahim until October 1990 when he was transferred to Baghdad after being, it seems, deported by order of the British Government. When he left, he said to Mr Dinha Isaac who was an accountant employed at the office “You are the old man in the office and you can take [charge]” meaning that he should “do the office job” and look after the office. Mr Isaac had lived in England since 1985 and worked for IAC at the office from the 1st September 1989.

The Manager of the London office reported to the Out Station Manager at IAC’s headquarters in Baghdad.

All IAC’s scheduled flights into and out of London ceased during the first week of August 1990. Thereafter there were occasional flights for which specific permission was granted by HM Government, and when other travel was required by Iraqi nationals wishing to return to Iraq the arrangements were made with Royal Jordanian Airways. Naturally the business of the Regent Street office was much reduced but it was never extinguished. When Isaac gave evidence in March 1991 there were four other employees in London, three in London and one at the associated office at Heathrow.

The Writ was served on Mr Isaac at the Regent Street premises on the 11th January 1991. An articled clerk employed by the Plaintiff’s solicitors, Justin Lawrence Draeger, described what he did as follows:  

... by handing a true copy of the Writ of Summons in this action to a person I was informed was and believe to be Mr Isaacs (sic), the Managing Director of Iraqi Airways in London and leaving it at the above-mentioned address being a place of business established by Iraqi Airways in Great Britain for the purposes of section 695(2) of the Companies Act 1985”.

When Mr Saffi swore his first affidavit on behalf of the Defendant he described Mr Isaac as “the accountants clerk and acting manager employed by IAC in London” (10th July 1991 para. 5).

The Plaintiffs contend that this service on Mr Isaac was effective as service on IAC on two separate grounds.

First, section 695 of the Companies Act 1985. This provides for service of documents on an “oversea company” at the address which has been registered, by leaving the documents at “any place of business established by the company in Great Britain”.

The dispute is whether IAC is an “oversea company” for the purposes of this section. The definition in section 744 of the same Act is:

“oversea company” means—
(a) a company incorporated elsewhere than in Great Britain which ... establishes a place of business in Great Britain, and
(b) [continues to have such a place of business]”.

The second provision relied upon by the Plaintiffs is RSC Order 65 Rule 3:

“3(1) Personal service of a document on a body corporate may, in cases for which provision is not otherwise made by any enactment, be effected by serving it ... on the mayor, chairman or president of the body, or the town clerk, clerk, secretary, treasurer or other similar officer thereof”.

Here, the issue is whether Mr Isaac, on whom the service was effected, was a person of the kind described in Rule 3(1).

Though not directly relevant to these questions as to the validity of service, I should record that the fact of service on Mr Isaac in London on January 11th became known to the First Defendant in Baghdad by January 13th. This was despite the lack of direct flights and other difficulties of communications between London and Baghdad and it was before the United Nations deadline for the use of force, which expired on January 15th. Mr Saffi said in his affidavit that a letter enclosing the Writ was received from the acting manager of the London office. He explained in evidence that this referred to Mr Isaac and that the letter came through Amman by a Royal Jordanian plane.

Is IAC an “oversea company”? IAC was established by Law No 108 dated the 26th September 1988. Article (1) is translated as follows:

“Iraqi Airways Company is a State owned entity having a judicial personality and operated on profit and loss basis. The Council of Ministers shall supervise its work as well as order the auditing of its accounts should the circumstances require that, to ensure it remains within the government programme, and will provide the requirements for it to operate as an economic organisation pursuing and basing its activity on profit and loss. It shall thereafter in this Law be referred to as “The Company”.

There is a Board of Directors (Art 2) and a nominal capital of 350 million dinars which, however, is not divided into shares (Article 4). The Board consists of the Director General and seven ex officio or representative members from government departments, and the legal adviser (Art 6). The objectives of the Company are the commercial ones appropriate for a national carrier (Art 3) and the Board is given the necessary powers to operate on a commercial basis (Art 9). Accounts are submitted to the Council of Ministers for approval (Art 12).

It is common ground that IAC is not a “company” within the meaning of Iraqi Companies Law No 36 of 1983. On the other hand, the Arabic word translated as “Company” in its title and in Law No 108 (“şarıkā”) distinguished it from another word which means “establishment” (“moa’ssassa”). IAC calls itself and operates as a “company” in all its English-language dealings e.g. on the writing paper used by its London office.

I was referred to the judgment of Millett J in In re ITC [1987] 2 WLR 1299 and to his valuable analysis of the meaning of “unregistered company” under section 665 of the Act. He held that the ITC was not subject to the winding-up jurisdiction of the English Court. He stressed that the matter depends on the presumed intention of Parliament (p 1239) and held that it was “inconceivable” (p 1241) that the winding-up jurisdiction was intended to apply to an international organisation created by treaty with the attributes of the ITC (p 1244).

The First Defendants submit that essentially a “company” is an association of natural or legal persons, created by contract rather than by statute and having a capital structure which may be transferred from one shareholder to another, citing In Re Stanley [1906] 1 Ch 131 at p 134.

Reference was made to the immediate precursors of IAC who were, at an earlier stage, first registered under the Companies Acts and later de-registered, on the ground that the organisation was a government department, not an overseas company. I do not find this helpful in determining whether or not IAC is within the statutory definition. Similarly, two United Kingdom bodies are not “companies” although they have many of the attributes of such and are comparable, the Defendants submit, with IAC. These are the National Bus Company, created by the Transport Act 1968, and the BBC created by Royal Charter in 1981.

The Plaintiffs submit that a “company” may have only one shareholder, that person being the state, and that the organisation and objectives and method of operation of IAC are consistent with it being a “company” as its name (in English translation) implies.

Mr Saffi in his evidence described how IAC operates, he and his senior managers being responsible for day-to-day business under the supervision of the Board which meets infrequently during normal times. In August/September 1990, when conditions
As Her Majesty's Government has no representative in Iraq at present, the Writ is effective on the Ministry of Foreign Affairs in Baghdad.

A ‘Certificate of Service’ dated the 22nd January 1991 certifies that copies of the Writ and other documents were ‘served upon the Ministry of Foreign Affairs in Baghdad at the request of the Kuwait Airways Corporation’. The letter continued:

On the 14th January the FCO wrote to the Iraqi Embassy enclosing the Writ ‘as far from normal, he said, surprisingly, that there were few, if any, formal Board meetings though he was in frequent informal consultation with the other directors.

I am left in no doubt that IAC is and was at all material times a “company” incorporated by statute in Iraq and that service of the Writ upon it was effective on January 11th 1991.

Order 65 Rule 3

My conclusion (above) makes it unnecessary for me to decide whether the Plaintiffs can rely in the alternative on the provisions of Order 65 Rule 3, which I have quoted above. The essential facts are that, at the time of service, the service was effective in the present case, and in the circumstances it is unnecessary for me to say more.

Evidence

Service on the Republic of Iraq

The FCO was advised by the Ministry of Foreign Affairs in Baghdad that it had received the Writ. The FCO then sent a ‘Certificate of Service’ to the Plaintiffs’ solicitors certifying that the Writ was served upon the Ministry of Foreign Affairs in Baghdad.

Ex parte leave to serve concurrent Writs on the Second Defendant was granted on the 11th January 1992. Service was to be effected in accordance with section 12(1) of the State Immunity Act 1978 and RSC Order 11 Rule 7. Section 12(1) requires that a Writ shall be served by being transmitted through the FCO to the Ministry of Foreign Affairs in Baghdad.

On the 12th January 1991, however, the FCO closed the British Embassy in Baghdad. Iraq broke off diplomatic relations with the United Kingdom as of the 6th February. Quoting from a letter dated 15th January 1991 from the Deputy Legal Adviser:

“There was thus no British diplomatic presence in Baghdad at the time of the break in relations, or, since, nor have British interests in Iraq been represented by any other diplomatic representation. The Foreign Office, which had no representative in Baghdad at the time of the break in relations, or, since, was simply unable to provide for service within the jurisdiction on the Ministry of Foreign Affairs in Baghdad.

Their submission that an embassy is regarded as the “emanation” of the sending State is supported by the evidence of a distinguished former diplomat, Sir John Graham. He describes how diplomatic relations between the United Kingdom and Iraq were maintained through the embassies of the United Kingdom and the United States of America.

The Plaintiffs’ solicitors then applied for service on the Embassy of Iraq in London in accordance with Order 65 Rule 3. The FCO advised that the Ministry of Foreign Affairs in Baghdad was effectively closed due to the presence of United States forces in Baghdad.

The Ministry of Foreign Affairs in Baghdad continued functioning as such from its premises at 21 Queen’s Gate, London SW7, although there were difficulties of communication between London and Baghdad during the period of military action. However, it was no doubt considered more diplomatic that the foreign sovereign should not, by reason of its own presence, be deemed to have a legal presence within the jurisdiction (State and Diplomatic Immunity C Lewis (3rd ed. 1990)).
In my judgment, the requirement of service at, not merely “on”, the foreign Ministry of the defendant State is no more and no less than the plain words of section 12(1) demand. Service is effected by transmission to the Ministry and takes effect when the document is received at the Ministry. This submission is in contradiction with the assumption made by Peter Gibson J in Westminster City Council v Iran [1986] 3 All ER 284 that service in the foreign capital could only be effected by the British Embassy or by some other representatives of the British Government there. The London embassy of the foreign State which, subject only to a legal fiction, is situated within the jurisdiction, is the correct analysis is a request by the FCO to forward the documents to the Ministry of Foreign Affairs in Iraq; in the circumstances, it is permissible to refer to Article 3 of the European Convention on State Immunity, to which the 1978 Act gave effect. It refers to “taking any step in the proceedings relating to the merits”.

In my judgment, an equivalent meaning can properly be given to section 12. The right to object to the validity of service is not lost by taking a step which is not concerned with the merits. That includes both the objection to service and the various steps taken by the Second Defendants in relation to the stay of execution of the default judgment. The meaning of “appearance” in section 12(3) is not easy to determine when it is read in conjunction with the existing Rules of Court, in particular Order 12 Rule 8 which replaced the previous procedures under which a distinction was drawn between conditional and unconditional appearances (Order 12 Rules 6 and 8). The new procedures are defined in Order 12 Rules 1, 6 and 8, and Order 10 provides for statutory requirements relating to the “entry in the record of appearance”. Clearly, the reference to “appearance” in section 12(3) of the 1978 Act has to be read in the light of these procedural changes in the circumstances, it is necessary for me to consider further the detailed submission made with respect to the inviolability of diplomatic missions so far as the service of process is concerned.

Finally, the Plaintiffs rely on section 12(5) of the 1978 Act:

“A State which appears in proceedings cannot thereafter object that subsection (1) has not been complied with...”
By August 6, the Iraqi authorities regarded the occupation as complete, having made what use of the aircraft possible in the prevailing circumstances, but that use was limited by the almost complete cessation of international flights to and from Iraq. Two of the aircraft were overpainted in IAC livery and one was used for certain internal flights.

The material facts found by the judge are as follows. After 17 September IAC was dissolved and all of its movable and immovable assets, rights and obligations were transferred to IAC. The Iraqi Ministry of Transport and Communications, arranged for IAC personnel to fly ten civilian aircraft owned by Kuwait Airways Corporation ('KAC') from Kuwait airport to Iraq, six of them later being flown to Iran, where they were interned until August 1992, and the other four being later destroyed in Iraq by United Nations aircraft. On 11 January 1991 KAC issued the writ in this action against IAC and Iraq claiming, pursuant to section 3(2)(a) and (c) of the Torts (Interference with Goods) Act 1977 and at common law, delivery of the surviving aircraft with consequential damages and, in respect of those other KAC aircraft which were not removed from Kuwait Airport; to the kind of maintenance required; and to the recruitment by Mr Saffi of five KAC qualified Airbus engineers. The judge continued:

A separate entity is immune from the jurisdiction of the courts of the United Kingdom if, and only if—

(a) the proceedings relate to anything done by it in the exercise of sovereign authority;

(b) the circumstances are such that a state... it has lost its immunity.

The facts on which the questions of immunity depend are in part matters of record about which there has been no dispute and in part facts found by the learned judge after hearing oral evidence. The matters in the first category are these. The military occupation of Kuwait airport was completed by 5 August at the latest. Among the aircraft there were 15 owned by KAC, five of which were removed from Kuwait to Iraq by the Iraqi Air Force. The remaining ten, being those removed between 6 and 8 August, consisted of two Boeing 767s and eight Airbuses. On 8 and 9 August the Revolutionary Command Council of Iraq ('the RCC') published Decrees numbered 313 and 312 respectively described his earlier attempts to have IAC integrate the aircraft and recruiting the ex-KAC personnel with a view to operating the aircraft as part of its fleet at some future date, or whether it would be available to the Government for some other kind of operation at some future date.
In this section, 'commercial transaction' means—
(a) any contract for the supply of goods or services;
(b) any loan or other transaction for the provision of finance and any financial obligation or guarantee in respect of any such transaction or of any other transaction entered into by the state in the exercise of sovereign authority.

Subject to the question whether the transaction or activity must be entered into or engaged in the United Kingdom, section 3(1)(a) and (3)(c) are capable of applying to independent proceedings in tort in respect of damage to or loss of tangible property and to an action for unlawful interference with goods. He also accepted that the acts of which KAC complains can be said to have amounted to an "activity" engaged in by IAC within section 3(3)(c). Those two questions having been removed from our decision, I express no view on either. The position then is that if the two requirements come to this: Do the acts relate to acts done by IAC in the exercise of sovereign authority? It being clear that if the acts were done by IAC in the exercise of sovereign authority, they would necessarily have been done by Iraq in the like capacity, the question can be reduced still further: does the action relate to acts done by IAC in the exercise of sovereign authority?

On those findings Evans J. held that IAC was not immune from the jurisdiction of the English courts under section 14(2) of the Act and thus the first question was argued at length and with much citation of authority and international and academic material. It is, as I see it, both short and relatively simple. Its solution depends on the application to the particular facts of the material provisions of the Act and the well-recognized distinction between acts jure imperii and acts jure gestionis.

Before a separate entity can be immune under section 14(2) two requirements must be satisfied: (a) the proceedings must relate to something done by it in the exercise of sovereign authority and (b) the circumstances must be such that a State would have been so immune. Here it is agreed that the question whether the second requirement was satisfied depends on whether the entity engaged in activities of the kind of sovereign authority within section 13(1)(b) of the Act. In this case the Act extends the immunity conferred upon "independent proceedings in tort in respect of damage to or loss of tangible property and to an action for unlawful interference with goods..." to independent proceedings in tort in respect of damage to or loss of tangible property and to an action for unlawful interference with goods acted upon by an independent entity. IAC was not immune from the jurisdiction of the English courts in respect of actions of the kind found by Evans J. It follows, therefore, that IAC was not immune from the jurisdiction of the United Kingdom courts under the Act, said at page 600C-D:

"But although comprehensive, the Act in its approach to these two aspects of the jurisdiction exercised by courts of law does not adopt the straightforward dichotomy between acts jure imperii and acts jure gestionis that had become so familiar doctrine in public international law, except that it comes close to doing so in section 14(2) in relation to the immunity conferred upon [separate entities]."

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On and/or after 2 August 1990 the first and second defendants wrongfully interfered with the aircraft by their unlawful possession and control of the aircraft and refusal and/or failure to deliver up the aircraft to the plaintiffs.

As I read them, the only allegations not made, either expressly or impliedly, against IAC are those made in paragraph (a) of the particulars. The allegations which are made against IAC are that they wrongfully interfered with the aircraft by refusing to deliver up the aircraft to the plaintiffs.

The fact is that the Government of Iraq identified these ten aircraft as ones which were required for civilian operation by IAC and the Minister of Transport on its behalf instructed IAC to take the aircraft into its possession and control and to remove them to Iraq.

On 2 August 1990 the second defendants invaded Kuwait, took control of the airport and deprived the plaintiffs of possession and control of, inter alia, the aircraft particularised above. The stated intention of the defendants was to incorporate the aircraft within the first defendants' fleet and to use them for commercial purposes.

Although the judge had earlier stated that it was common ground that the purpose or motive of IAC was not decisive, both this and other passages in his judgment, especially perhaps his statement of 'the underlying issue' at p. 35 (see above), suggest that his decision was influenced by the consideration of the nature of the act and not its purpose. Thus in *Crewe v. Bristol Aeroplane Company* [1931] A.C. 244, at p. 263H, Lord Wilberforce quoted with approval the following passage in the judgment of the Federal Constitutional Court of the German Federal Republic in the *Claim against the Empire of Iran*:

As a means for determining the distinction between acts *jure imperii* and *jure gestionis*, one should rather refer to the nature of the state transaction or the resulting legal relationships, and not to the motive or purpose of the state activity. It thus depends upon whether the foreign state has acted in exercise of its sovereign authority, that is in public law, or like a private person, that is in private law.

As far as I can see, there is nothing in the judgment which suggests that any decision was made against IAC on the basis of the concept of 'the underlying issue'. Evans J., while accepting that the acts of Iraq and those carried out on its behalf in the invasion of Kuwait were *jure imperii* and, similarly, the appropriation of Kuwait's property by Iraq was *jure imperii*, was nevertheless held that no governmental authority had been involved. In my view, the challenge to the commercial activity of IAC's in removing the aircraft and looking after them was that they should be used for commercial purposes and not governmental (for example, that the aircraft were required for governmental rather than commercial purposes).

Although no evidence was produced to show that any such purpose had been intended, the facts of the case were that on 2 August 1990 the second defendants invaded Kuwait, took control of the airport and deprived the plaintiffs of possession and control of, inter alia, the aircraft particularised above. The stated intention of the defendants was to incorporate the aircraft within the first defendants' fleet and to use them for commercial purposes. The fact that they could not be so used immediately was due to other factors, and meanwhile the aircraft were maintained in a condition that they could be used with the minimum of delay and expense as soon as such use became possible. Such usage was however that which would be lawful as a matter of public law, and not private law.

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There is no evidence which would justify a finding that the government intended that the acts of IAC were conducted as a means of removing the aircraft for governmental purposes in the course of the invasion and occupation, nevertheless holding that the acts of IAC were *jure gestionis*. At page 43, he said:

Evans J., while accepting that the acts of Iraq and those carried out on its behalf in the invasion of Kuwait were *jure imperii* and, similarly, the appropriation of Kuwait's property by Iraq was *jure imperii*, was nevertheless held that no governmental authority had been involved. In my view, the challenge to the commercial activity of IAC's in removing the aircraft and looking after them was that they should be used for commercial purposes and not governmental (for example, that the aircraft were required for governmental rather than commercial purposes).

Although no evidence was produced to show that any such purpose had been intended, the facts of the case were that on 2 August 1990 the second defendants invaded Kuwait, took control of the airport and deprived the plaintiffs of possession and control of, inter alia, the aircraft particularised above. The stated intention of the defendants was to incorporate the aircraft within the first defendants' fleet and to use them for commercial purposes. The fact that they could not be so used immediately was due to other factors, and meanwhile the aircraft were maintained in a condition that they could be used with the minimum of delay and expense as soon as such use became possible. Such usage was however that which would be lawful as a matter of public law, and not private law.
behest of a sovereign state in exercise of its sovereign authority. The intention to use them for commercial purposes, as and when practicable, and to keep them safe meanwhile could not and did not transform the essential nature of that act.

While Mr Chambers Q.C., who has appeared for KAC in this court but did not appear below, accepted that it is the nature of the act and not its purpose that is decisive, he stressed the judge’s view that the purpose may nevertheless illuminate the nature of the act. However, recognising the implications of IAC’s role in the removal of the aircraft from Kuwait, he was forced to concentrate on what happened to them thereafter. That was a novel approach not adopted below. Mr Chambers said that it was enough that once the aircraft had got to Iraq their use became indubitably commercial; they were all available for that use and were no doubt registered as part of IAC’s fleet; the livery of two of them was changed to that of IAC; and they were used as part of the fleet to the limited extent that was possible. The essence of the argument, as expressed in exchanges with the court, was that the substance of the case against IAC was that it was unlawfully using KAC’s aircraft as part of its commercial fleet.

This argument is unsound. In order to decide whether proceedings ‘relate to’ a commercial activity the claims made in them must be carefully scrutinised. Here it is impossible to detach events subsequent to 8 August from those that took place beforehand; and, even if they are detached, it is impossible to view them in some different light. When IAC’s pilots and engineers removed the aircraft from Kuwait IAC wrongfully interfered with them. Everything else flowed from that. Although, as a matter of strict legal analysis, it may be correct to say that there was a fresh interference die in diem (in point not explored in argument), the continuing detention of the aircraft in Iraq and the purported acquisition of title to them under Iraqi law were merely extensions or embellishments of the original removal and, moreover, extensions or embellishments that took place, and could only have taken place, like the removal itself, on the sovereign authority of Iraq. No doubt IAC did do acts which can be said to have been part of a commercial activity. But that is not the point. The action relates to the acts or omissions of which it makes complaint. The complaints here made against IAC are of its removal and detention of the aircraft and its purported acquisition of title to them.

Many decisions on the distinction between acts jure imperii and acts jure gestionis were cited. Inevitably, the facts were always different from those that confronted us, so that reference to them is generally unhelpful. The most useful, I thought, was Arango v. Guzman Travel Advisors Corporation and Others, (1980) 621 F.2d 1371, a decision of the United States Court of Appeals, Fifth Circuit, where, at pages 1379–80, a distinction was made between various claims made in proceedings against the national airline of the Dominican Republic, some of them being held to relate to acts jure imperii and others to acts jure gestionis. The plaintiffs’ claims for false imprisonment and battery arising out of their ‘involuntary re-routing’ from Santo Domingo airport by state immigration officers with the aid of airline employees were held to fall into the former category; their claims for breach of warranty and contract based on the miscarriage and non-performance of the vacation tour and the failure to refund the money into the latter. The first group of claims related to tortious governmental acts; the second to breaches of a commercial contract. No such distinction can be made in the present case, where all the acts complained of fall into the first category.

I would also record my indebtedness to the views expressed in an article (to be published in (1994) 43 I.C.L.Q. 193) by Lady Fox Q.C. entitled ‘A “commercial transaction” under the State Immunity Act 1978’; views which were adopted by Mr Beloff as part of his argument.

Other questions on immunity

Two further questions on immunity must be briefly mentioned. First, Mr Beloff based an argument on section 3(2) of the Act, which provides, amongst other things, that the section does not apply ‘if the parties to the dispute are States.’ He submitted that the parties to the dispute, as distinct from the parties to the proceedings, were Kuwait and Iraq. Evans J. rejected that submission. Since, on the views I have expressed, this has become an academic question, I say no more than that I too would reject it.

Secondly, Mr Beloff referred us to section 5 of the Act, which provides, amongst other things, that a State is not immune as respects proceedings in respect of ‘damage or loss of tangible property caused by an act or omission in the United Kingdom.’ The existence of that provision is said to compel the view that sections 3(1)(a) and (3)(c) only apply to proceedings in tort if they arise out of a transaction or activity entered into, or engaged in, in the United Kingdom, a view which Lady Fox, in her article, argues is correct. Again this has become an academic question, on which, in this instance, I prefer to express no view at all.

Submission to the jurisdiction

Having decided that IAC was not immune from the jurisdiction of the English courts under section 14(2), Evans J. did not have to decide whether it had lost its immunity by reason of a submission to the jurisdiction. However, he did consider this question and he decided it in favour of IAC. It has again been put in issue by the respondent’s notice served by KAC. I am in no doubt that the judge arrived at a correct conclusion on this question, albeit by a somewhat different route from that which I myself would follow.

At this point a brief reference to the procedural history of the action is necessary. On 11 February 1991 KAC obtained judgment against IAC in default of notice of intention to defend, with damages to be assessed. Later they were assessed at something under US $490m, with interest running at US $20,000 odd per day. On 26 and 21 July 1991 Webster J. made orders staying execution on the judgment, subject to conditions which IAC has duly performed.

On 2 August 1991 IAC issued a summons claiming, so far as material:

(3) A declaration that the Court has no jurisdiction over [IAC] in respect of the plaintiff’s claim and that the plaintiff’s claim is not justiciable in the Courts of England and Wales;

(4) An order setting aside:

(a) the judgment against [IAC]…

The grounds of the application were stated to be:

(1) …
(2) The plaintiff's claim is not justiciable in the Courts of England and Wales;
(3) The High Court of Justice has no jurisdiction over [IAC] in respect of the plaintiff's claim:
(4) Forum non conveniens.

Affidavits in support of the summons were duly sworn and filed.

The provision of the Act on which the submission question mainly depends is section 2, to which the marginal note is 'Submission to the jurisdiction'. So far as material, it provides:

(1) A state is not immune as respects proceedings in respect of which it has submitted to the jurisdiction of the courts of the United Kingdom.
(2) A state may submit after the dispute giving rise to the proceedings has arisen...
(3) A state is deemed to have submitted—
   (a) subject to subsection[s] (4) ... below, if it has intervened or taken any step in the proceedings.
(4) Subsection (3)(b) above does not apply to intervention or any step taken for the purpose only of—
   (a) claiming immunity...

Although section 2 is expressed to apply only to states, KAC contends that it is effectively applied to separate entities by section 14(2)(b), which, as has been seen, requires that the circumstances are such that a state would have been immune. That was the view of the judge.

In this court Mr Beloff relief in the first instance on section 14(3), which provides, so far as material:

If a separate entity … submits to the jurisdiction in respect of proceedings in the case of which it is entitled to immunity by virtue of subsection (2) above, subsections (1) to (4) of section 13 above shall apply to it in respect of those proceedings as if references to a State were references to that entity.

Mr Beloff submitted that the language of section 14(3) shows that the question whether a separate entity has submitted to the jurisdiction must be judged independently of section 2. I cannot accept that submission. I think that the view of sections 2 and 14(2)(b) put forward by KAC and accepted by the judge is correct. The words ‘by virtue of subsection (2) above’ in section 14(3) necessarily allude to the test prescribed by section 14(2)(b). Thus, so far as concerns submission to the jurisdiction by a state entity, they point inevitably to section 2 as being the determinative provision.

What then is the effect of section 2? Subsection (3)(b) provides that a state (or state entity) is deemed to have submitted if it has intervened or taken any step in the proceedings. But that provision is expressed to be subject to subsection (4) which, by paragraph (a), states that it does not apply to intervention or any step taken for the purpose ‘only’ of claiming immunity. The joint effect of those provisions is to presuppose an intervention or step in the proceedings; the prima facie result of that is a deemed submission to the jurisdiction; but if the intervention or step is made or taken for the purpose only of claiming immunity, there is no submission. Moreover, and this is very important, there is no submission if what is done by the State or state entity does not amount to an intervention or step in the proceedings.

This last point does not seem to have been firmly grasped in the court below, or indeed in some of the argument in this court; it being thought, so it appears, that the word ‘only’ in section 2(4) causes a difficulty where, as here, the defendant objects to the continuation of the action against it both on the grounds of immunity and, at the same time, on other grounds as well. I see no such difficulty. In my view section 2(4) is a relieving provision. It would apply if, for example, a defendant served a defence in which the only claim made was one of immunity. Usually the service of a defence would be the taking of a step in the proceedings. But if it was confined as in the example suggested, section 2(4)(a) would relieve the defendant from the usual consequences.

Here there has been no ‘intervention’ by IAC. So the first, and in my view the only, question is whether it has taken a step in the proceedings. That question must be judged on ordinary principles. It is well recognised that the authorities on what is or is not such a step, most if not all of which arise under section 4(1) of the Arbitration Act 1950 or its predecessors, are difficult to reconcile; see Mustill and Boyd's Commercial Arbitration, 2nd ed., pp. 472–73. As a general test, I would respectfully adopt that suggested by Lord Denning M.R. in Eagle Star Insurance Co. Ltd. v. Yuval Insurance Co. Ltd., [1978] 1 Lloyd's Rep. 357, at p. 361:

What then is a 'step in the proceedings'? It has been discussed in several cases. On principle it is a step by which the defendant evinces an election to abide by the Court proceedings and waives his right to ask for an arbitration. Like any election, it must be an unequivocal act done with knowledge of the material circumstances.

After considering several authorities, the Master of the Rolls continued:

On those authorities, it seems to me that in order to deprive a defendant of his recourse to arbitration a 'step in the proceedings' must be one which impliedly affirms the correctness of the proceedings and the willingness of the defendant to go along with a determination by the Courts of law instead of arbitration.

It is clear that a defendant who does no more than claim immunity takes no step in the proceedings. But here Mr Chambers submitted that IAC has taken other such steps, first, by seeking a stay on the ground of forum non conveniens, secondly, by claiming non-justiciability on the ground of act of foreign state (see Buttes Gas and Oil Co. v. Hammer, [1982] A.C. 888) and, thirdly, by applying under R.S.C. Order 45, rule 11 for a stay of the default judgment against it and by performing the conditions subject to which Webster J. granted a stay.

No doubt a defendant who seeks a stay on the ground of forum non conveniens will usually take a step in the proceedings. But it is not correct to say that IAC has sought a stay on that ground here. If regard is had to the summons of 2 August 1991 and the affidavits in support, it is seen that the only material relief claimed is a declaration that
the court has no jurisdiction over IAC in respect of KAC's claim and that the claim is not justiciable in the courts of England and Wales. The only reference to forum non conveniens is in the statement of the grounds of the application. Nowhere is the action sought to be stayed. Reading the summons and the affidavits as a whole, I think it clear that 'forum non conveniens' is advanced only as a ground for holding that there is no jurisdiction. No doubt what is actually said, correctly as I think, is that a municipal court has no jurisdiction to determine what is in reality a dispute of international law. In any event, it cannot possibly be maintained that IAC, by making such a case, is affirming the correctness of the proceedings or its willingness to go along with their determination by the English courts. It is doing exactly the opposite.

Turning to act of foreign state, I would accept that that is a doctrine which can be relied on, and, in the opposite way of defence. But once again it is clear that here it is being advanced only as a further ground for holding that there is no jurisdiction. That is a plea which might succeed. But the mere making of it does not constitute an affirmation of the kind required for a stay.

Applying this principle, the defendants here were presented with a writ endorsed with a statement of claim which was very defective. They applied, quite properly, to strike it out. That was not an affirmation of the correctness of the proceedings. Quite the contrary. It was a disaffirmation of them. It was not a 'step in the proceedings' such as to debar them from applying for a stay.

These observations apply equally to an application to stay the enforcement of a judgment and the performance of conditions on which the stay has been granted. Again IAC has acted only so as to disaffirm the correctness of the proceedings and its willingness to go along with their determination by the English courts. It is doing exactly the opposite.

For these reasons, I am satisfied that IAC has not taken a step in the proceedings within section 2(3)(b) of the Act. It is not submitted, nor is it deemed to have submitted, too the jurisdiction of the English courts. Its immunity remains intact.

Lord Wilberforce, with approval of the ultimate test propounded by Lord Goff in

In this court, though not before the judge, Mr. Chambers argued that IAC can look to each successive act of conversion independently, and if any such act was carried out by the Iraqi authorities, the act was done jure imperii. Those acts were done, and could only have been done, by the military authorities of the Iraqi State. The acts were done out of, and in furtherance of, the war and the invasion of Kuwait.

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...it is just that the purpose or motive of the act is to serve the purposes of the State, but that the act itself is performed by an instrumentality which is not a State organ.

Napier v. Pender (1904) 1 Ch. 82, 143, at p. 83: 'An act of a state which is done by its government and is in pursuance of its policy or intended to be in pursuance of its policy is done jure imperii.' As Lord Denning M.R. said in Eagle Star Insurance Co. Ltd. v. Yuval Insurance Co. Ltd. (1936) 1 Ch. 361, at page 369, by which the title to the aircraft was ostensibly transferred to IAC. Thereafter though it may have been treated as part of its civil airline fleet, its ability to do so stemmed solely from the exercise of sovereign authority by the Republic of Iraq, IAC, like the aircraft it was treated as part of its civil airline fleet, its ability to do so stemmed solely from the exercise of sovereign authority by the Republic of Iraq, IAC, like the

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bank in *United States of America v. Dollfus Mieq* [1952] AC 582, was dependent for such title as it enjoyed to the aircraft upon sovereign acts that rendered its possession of the aircraft immune from proceedings.

It is a tribute to the pertinacity of Mr Chambers that his argument did not founder sooner. That may have been because it had been given a fair wind by the judge. He assumed (at page 20 of the transcript of his judgment) that the government's removal through the Iraqi Air Force of five KAC aircraft which it required for its other purposes was a governmental act and therefore immune. He contrasted what was done with those aircraft with the fate of the aircraft the subject of the action, saying,

"The fact is that the Government of Iraq identified these ten aircraft as ones which were required for civilian operation by IAC and the Minister of Transport on its behalf instructed IAC to take the aircraft into its possession and control to remove them from Iraq.

The only distinction drawn is between the military and civilian uses to which the Government intended to put the two groups of aircraft respectively. The judge emphasised this by saying:

"There is no evidence which would justify a finding that the Government relied upon IAC merely to provide pilots and engineers so that the aircraft could be removed to Iraq for some other purpose or that any other such purpose was governmental rather than commercial (for example, that the aircraft were required as troop carriers). Nor was there any other organisation within Iraq which could implement the decision to use the aircraft for commercial purposes.

In *I Congreso (ibid)* Lord Wilberforce at page 263H adopted the following passage from the judgment of the Federal Constitutional Court of the German Federal Republic in *Claim Against the Empire of Iran Case* (1963), 45 ILR 57 at page 80:

"As a means for determining the distinction between acts *jure imperii* and *jure gestionis* one should rather refer to the nature of the State transaction or the resulting legal relationships, and not the motive or purpose of the State activity. It thus depends upon whether the foreign State has acted in exercise of its sovereign authority, that is in public law, or like a private person, that is in private law.

Because the judge founded his approach exclusively upon his assessment of the purpose for which the aircraft were to be used, he was in my judgment led to the wrong conclusion. Since I agree with my Lords and also with the judge that IAC did not submit to the jurisdiction, there is little that I need say about it. The essential reason why in the circumstances of such a case as this there is no submission was explained by Lord Russell of Killowen in *Evans v. Bartlam* [1937] AC 473 at page 482-3 when he said:

"My Lords, I confess to a feeling of some bewilderment at the theory that a man (who so long as it stands must perforce acknowledge and bow to a judgment of the Court regularly obtained) by seeking and obtaining a temporary suspension of its execution is thereby binding himself never to dispute its validity or its correctness, and never to seek to have it set aside or reversed.

The acknowledgement of service did not necessarily entail any more than a willingness to participate in the action for the purpose of contesting the jurisdiction; and the stay constituted no more than resistance to enforcement. Neither could sensibly be construed as an indication of readiness on the part of KAC to have the merits of the dispute determined by the English court. As Lord Fraser said in *Williams and Glyn's Bank v. Astro Dinamico* [1984] 1 WLR 438 at page 443E:

"By entertaining the application for a stay in this case, the court would be assuming (rightly) that it has jurisdiction to decide whether or not it has jurisdiction to deal with the merits, but would not be making any assumptions about its jurisdiction to deal with the merits.

So I would allow the appeal; and, since the Republic of Iraq is involved in the action only as a necessary party to the claim against IAC, I would dismiss the cross-appeal.

SIMON BROWN L.J.;

The first defendant, IAC, is the national civil airline of Iraq, a legal entity wholly owned by the State. In circumstances already sufficiently outlined by Nourse L.J., IAC came, as a result of Iraq's invasion of Kuwait, to incorporate within its fleet ten aircraft then owned by the plaintiffs, KAC. By these proceedings KAC seek to recover from both IAC and the second defendant, the Republic of Iraq, damages for their unlawful interference with those ten aircraft as particularised in paragraph 2 of the Points of Claim, a paragraph which my Lord has already set out in full. KAC complain in essence of a series of acts of interference each of which I have no doubt is capable in law of amounting to an act of conversion.

The central issue raised upon the appeal is whether the courts of the United Kingdom have jurisdiction over KAC's claim in so far as it is advanced against IAC. IAC is an "entity... which is distinct from the executive organs of the government of the State and capable of suing or being sued", and thus "a separate entity" within the meaning of Section 14 of the State Immunity Act 1978, for present purposes the ruling provision. Section 14(2) provides as follows:

(2) A separate entity is immune from the jurisdiction of the courts of the United Kingdom if, and only if--
   a. The proceedings relate to anything done by it in the exercise of sovereign authority; and
   b. The circumstances are such that a State... would have been so immune.

The following two questions accordingly arise:

I
(a) Does KAC’s claim against IAC relate to anything done by IAC in the
eexercise of sovereign authority?
(b) Are the circumstances such that had IAC been a State it would have been
immune?

On the particular facts of this case question (b) raises in turn two further questions:

1. Are the circumstances such that had IAC been a State it would—although
prima facie immune under Section 1(1) of the Act—have been denied such immunity by
reason of Section 3 of the Act. Most materially for present purposes Section 3 provides that:

(1) A State is not immune as respects proceedings relating to—
   (a) A commercial transaction, entered by the State…
(3) in this Section “commercial transaction” means – …
   (c) Any transaction or activity (of a commercial character) into which a State
      enters or in which it engages otherwise that in the exercise of sovereign
      authority…

This question can accordingly be re-formulated in this way—does KAC’s claim against
IAC relate to a commercial transaction entered into by IAC, i.e. an activity of a
commercial character engaged in by IAC otherwise than in the exercise of sovereign
authority? Formulated thus, it will readily be seen that in the particular circumstances of
this case the question adds nothing of materiality to question (a) above (i.e. that raised
directly by Section 14(2)(a). Both invite an answer to the same basic question: was IAC,
when acting in the manner complained of in respect of KAC’s aircraft, engaged in the
exercise of sovereign authority? Evans, J (as he then was) held that it was not. Upon the
first question (which I shall call the issue of sovereign authority) IAC submits that the judge was wrong.

2. Are the circumstances such that had IAC been a State it would—even
assuming that it were otherwise entitled to immunity—have lost that immunity through having submitted to the courts’ adjudicative jurisdiction within the meaning of Section 2
of the Act? The material parts of Section 2 are these:

(1) A State is not immune as respects proceedings in respect of which it has
    submitted to the jurisdiction of the courts of the United Kingdom.
(3) A State is deemed to have submitted—
    (b) subject to Subsections (4) … below, if it has intervened or taken any step
        in the proceedings.
(4) Subsection 3(b) above does not apply to intervention or any step taken for the
    purpose only of—
    (a) Claiming immunity…

KAC argue that IAC has taken steps in the proceedings other than “for the purpose only
of claiming immunity”; and accordingly that it has lost whatever immunity it would
otherwise have enjoyed. This contention Evans, J rejected. Upon this second question,
therefore, (which I shall call the issue of submission to jurisdiction) it is KAC who
submit that the judge was wrong.

At the risk of reiterating much of what Nourse, LJ has already said on both issues, I
propose to indicate as shortly as may be my own views on each.

1. Sovereign authority

As stated, the critical question raised in this regard is whether IAC, when “interfering”
with KAC’s aircraft in the manner complained of in these proceedings, was acting in the
exercise of sovereign authority.

Mr Beloff QC argues that that is the same question as asking whether IAC’s acts
of interference can properly be characterised as commercial. Subject to one qualification
which I shall mention later, the argument is surely well founded. As Lord Diplock
explained in Alcom v. Republic of Colombia [1984] AC 580 at page 600, public
international law recognises a “straightforward dichotomy” between acta jure imperii
(activities undertaken in the exercise of sovereign authority) and acta jure gestionis
(transactions of a commercial or private law character which might appropriately be
undertaken by private individuals instead of sovereign States). That dichotomy crucially
informs not only an understanding of the developing jurisprudence upon the restrictive
theory of immunity but also the proper application of Section 3 of the 1978 Act which
now substantially supersedes the earlier case-law. In short, the court is bound in the
majority of sovereign immunity cases to focus upon the central antithesis between
sovereign or governmental action on the one hand and trading or commercial activity on
the other.

So far so good. But how is any given claim to be characterised? By what
touchstones should one decide into which of the two categories (not always self-evidently
discrete) it falls? That is where the difficulty invariably arises. It was a difficulty
recognised and explored by Lord Wilberforce in I Congreso Del Partido [1983] AC 244
(and which eventually divided the House in respect of one of the two vessels there under
consideration). Lord Wilberforce’s conclusion upon the authorities was this:

The conclusion which emerges is that in considering, under the “restrictive”
theory whether State immunity should be granted or not, the court must consider
the whole context in which the claim against the State is made, with a view to
deciding whether the relevant act(s) upon which the claim is based, should, in that
context, be considered as fairly within an area of activity, trading or commercial,
or otherwise of a private law character, in which the State has chosen to engage,
or whether the relevant act(s) should be considered as having been done outside
that area, and within the sphere of governmental or sovereign activity.

I do not understand that conclusion (as opposed to its application on the facts) to be put in
question by any of the other speeches, nor do I doubt its relevance to the similar issue
raised in statutory form by Section 3 of the 1978 Act.

One further basic principle also emerges clearly from the jurisprudence:
As a means for determining the distinction between acts jure imperii and jure
gestionis one should rather refer to the nature of the State transaction or the
resulting legal relationships, and not to the motive or purpose of the State activity. It thus depends on whether the foreign State has acted in exercise of its sovereign authority, that is in public law, or like a private person, that is in private law. (The Empire of Iran case, 45 ILR 57, approved in I Congreso.)

With those governing principles in mind I turn to the judgment under appeal, the determinative passages in which appear to me to be these:

[IAC's] submission that “only a State could appropriate the airline of another State” may well be true, and if the ... that the same immunity would be available to a separate entity, including IAC which performed that act on its behalf.

But the complaint in the present case is not merely that the defendants took possession or control of the aircraft by reason of [Iraq’s] occupation of the airport by force of arms. It includes the allegation that ... “between 2nd August and 9th August aircraft were removed from the airport”.

There is no evidence... that the aircraft were removed to Iraq for any purpose that was governmental rather than commercial (for example, that the aircraft were required as troop carriers). Nor was there any other organisation within Iraq which could implement the decision to use the aircraft for commercial purposes.

Evans J accordingly held IAC not to be immune from the court’s jurisdiction save possibly in respect of KAC’s loss of possession of the aircraft on 2nd August 1990 when Iraq first invaded Kuwait and took control of the airport. Although at an earlier stage of his judgment Evans J had recorded as common ground the defendant’s purpose or motive is not decisive; it is the act itself that counts, IAC was no more and no less than Iraq’s tool and partner in the adventure. To characterize as a commercial activity what in reality was IAC’s willing participation in naked acts of forcible seizure and expropriation, sanitised although within its sovereign authority, that is in public law, or like a private person, that is in private law. (The Empire of Iran case, 45 ILR 57, approved in I Congreso.)

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tortious or even criminal conduct which, although affording immunity to a State, will not avail a separate entity.) Assume that IAC had sold these aircraft on to some other airline who then, having refused KAC’s claim to their return, found themselves sued in conversion. Surely no one would suggest that this successor amine could invoke the doctrine of sovereign immunity. Why then should IAC be more advantageously placed?

The answer is, I believe, this: that on the particular facts of this case, it is unreal and impermissible to seek to separate out IAC’s eventual use of the disputed aircraft pursuant to the State’s Decree from the circumstances of their initial acquisition. The reality is, as already indicated, that IAC was intimately involved throughout the entire expropriatory process: the planes were spoils of war and IAC was party to their taking. In the result IAC cannot now be implored: having acted in concert with the State in what was par excellence an act of sovereign authority—the exercise of militaristic power—it too is entitled to immunity from the jurisdiction of domestic courts.

I would accordingly overrule the trial judge on this first issue.

2. Submission to Jurisdiction

Mr Chambers for KAC fixes upon the word “only” in Section 2(4) of the Act and argues that by necessary implication any step taken for a purpose other than that of claiming immunity must be a step in the proceedings such as amounts by virtue of subsection (3)(b) to a deemed submission on IAC’s part. A number of other such steps, Mr Chambers submits, have been taken by IAC, most conspicuously that of inviting the court to deny KAC jurisdiction on the ground of forum non conveniens.

In reply, Mr Beloff submits first that Section 2 has no application at all to claims for immunity asserted by a separate entity under Section 14: Section 2 in terms is confined to submissions to jurisdiction by States and, he points out, Section 14(3), as if to highlight the point, expressly deals with submission by the separate entity itself. That argument I would reject. Section 14(2)(b), in asking, as I believe it does, whether the separate entity would have been immune had it fallen within the Section 14(1) definition of a State, is necessarily asking whether the separate entity is to be regarded as having submitted by reference to the test of submission laid down for States in Section 2. That is why Section 14(3) is silent as to what actually amounts to submission on the part of a separate entity; its function is rather to preserve for separate entities who have submitted to the jurisdiction the immunity from execution provided by Section 13.

Mr Beloff’s second submission is that Section 2(4) is no authority for the converse proposition that any step not taken only for the purpose of claiming immunity is a submission to jurisdiction. This argument too I would reject. The word “step” in subsection (4) must, I think, be understood to mean “step in the proceedings”, precisely as in subsection (3).

But Mr Beloff’s third argument I do accept. That is that Section 2 as a whole, so far from imposing on States a more rigorous than usual test of submission to jurisdiction (i.e. a test more likely to be inadvertently failed), should be construed rather as affirming that a State will not be held unintentionally to have submitted to jurisdiction merely for having required the court to determine whether or not its claim to immunity is well founded—for invoking, in other words, the court’s “jurisdiction jurisdiction”.

In short, Section 2(4) in my judgment exists only for the avoidance of doubt and leaves untouched the need in the ordinary way to determine whether anything else done by the State (or separate entity) should on general principles be held to constitute a step in the proceedings.

These general principles have for the most part evolved in the context of the Arbitration Acts and are conveniently to be found stated in Mustill & Boyd on Commercial Arbitration, 2nd edition at 272 as follows:

The reported cases are difficult to reconcile, and they give no clear guidance on the nature of a step in the proceedings. It appears, however, that two requirements must be satisfied. First, the conduct of the applicant must be such as to demonstrate an election to abandon his right to stay, in favour of allowing the action to proceed. Second, the act in question must have the effect of invoking the jurisdiction of the court… The circumstances which accompany an act may be looked at to see whether the act amounts to an election to give up the right to a stay. Thus, an application to the court which might otherwise amount to a step in the proceedings is deprived of this characteristic if the applicant makes it clear—by stating that his application is without prejudice to a subsequent request for a stay; or by simultaneously taking out a summons to stay—that he intends to insist on a reference to arbitration. An act carried out as a preliminary to proceedings is not a step in proceedings.

Even allowing for the stated uncertainty of the law, applying those principles in the present case it seems to me quite impossible to hold that IAC here did anything that could properly be said to amount to taking a step in the proceedings. So far from conducting itself so as to “demonstrate an election to abandon (its) right” (here to immunity rather than a stay for arbitration), IAC through its advisors from first to last repeatedly emphasised its intention not submit to the courts’ jurisdiction. In the face of such protestations I would be loath to find that it had nevertheless done so.

Whilst accepting entirely the correctness of Saville J’s unreported decision in A Company Ltd v. B Company Ltd & Republic of Z (1 April 1993)—that for a State expressly and formally to invoke and submit to courts’ jurisdiction to determine an application for a stay on the grounds of forum non conveniens before inviting the court to determine its claim to immunity does indeed involve that State’s submission to the jurisdiction for the purposes of Section 2 of the 1978 Act—I regard that case as readily distinguishable from the present one. To my mind, indeed, it lies at the very opposite end of the spectrum. Consider the differences. In the first place, the plea of forum non conveniens raised here by IAC was by no means a conventional one. On the contrary, the summons before the court sought not a stay but rather a declaration that the United Kingdom courts have no jurisdiction over IAC in respect of KAC’s claim, and that such a claim is not justiciable. IAC was not suggesting that the claim against it could and should more appropriately be dealt with in some other competent and more convenient municipal forum. Its contention was rather that the dispute was clearly of an international character—intrinsically a plea directed to immunity and merely ancillary to the main argument. And that, indeed, was clearly how
the matter was perceived by the various judges hitherto seised of the case: that IAC's sole pilots and engineers were at Kuwait Airport at the time of the invasion, and were seized and removed to Iraq. On arrival, the engineers carried out the basic checks necessary before the aircraft could be flown. Between 6 and 8 August, the pilots flew the aircraft to other airports in Iraq and the other remained in Iraq. Mr. Saffi instructed to "maintain" or "look after" the aircraft. IAC, however, carried out no more than basic maintenance.

On 17 September there came into effect R.C.C. Resolution 369 which purported to dissolve K.A.C., and to transfer all its assets to I.A.C. Until then, although the K.A.C. carriers were subject to the jurisdiction of the court, the latter had no jurisdiction to entertain the claim. After R.C.C. Resolution 369 had come into effect, although such use was very limited because of the almost complete cessation of international flights to and from Iraq, at least one of the K.A.C. aircraft was used by I.A.C. for its own purposes.

In January 1991, shortly before the Coalition air attack began, an instruction of the Iraqi Government directed Mr. Saffi, the Director-General of Iraqi Airways Co. ("I.A.C."), the first defendants in the action, and the first respondents before this House, to arrange for the 10 aircraft to be returned to K.A.C. In July 1991, the United Nations Security Council passed Resolution 55, under which the aircraft were falsely described as "in good repair".

Mr. Saffi, on 2 August 1990, Iraq notified the United Nations of its formal claims to Kuwait. On 12 August, the occupation forces launched a successful offensive against the Coalition forces in Kuwait between 24 and 28 January 1991. On 2 March 1991, Iraq agreed to return all property seized by it. On the following day, the United Nations Security Council passed Resolution 55, under which all decisions made by the R.C.C. were rescinded, and all their resulting effects were annulled. The United Nations Security Council, after 2 March 1991, Iraq agreed to return all property seized by it.
Before Evans J., I.A.C. challenged the jurisdiction of the English Court on four grounds. (1) The service of the writ, dated 10 March 1991, was ineffective, either under Ord. 65, r. 3, or under section 695 of the Companies Act 1985. (2) I.A.C., as a "separate entity," was entitled to immunity from suit in this country, under section 14(2) of the State Immunity Act 1978, because the proceedings related to things in this country. Evans J. decided all these issues in accordance with rule 2 on the mayor, chairman, or president of the body, or the secretary or treasurer, as the case may be. Accordingly I.A.C.'s appeal to your Lordships' House on this issue is effectively an appeal from the decision of Evans J., a decision which I.A.C. was entitled to claim state immunity. (3) Alternatively, if I.A.C. was not an "oversea company" as so defined by Ord. 65, r. 3, the writ was effectively served on I.A.C. by leaving it at I.A.C.'s premises in Lower Regent Street, London W.1, on 11 January 1991. K.A.C. has claimed that this service was ineffective on two alternative grounds. (1) Under Ord. 65, r. 3, the writ was not "personal service of a document on a body corporate," as that phrase was defined in Dunlop Pneumatic Tyre Co. Ltd v. Butts Gas and Oil Co. v. Hawes [1902] 1 K.B. 342, decided under R.S.C., Ord. 9, r. 8, the predecessor of the present rule. That rule, so far as material, provided:

"Personal service of a document on a body corporate may, in cases for which provision is not otherwise made by any enactment, be effected by serving it in accordance with rule 2 on the mayor, clerk, secretary, or similar officer thereof."

(2) Alternatively, the writ was effectively served on I.A.C. by leaving it at I.A.C.'s premises in Lower Regent Street, London W.1, on 11 January 1991. K.A.C. has claimed that this service was ineffective. Against the decision of the Court of Appeal K.A.C. now appeals to your Lordships' House.

I am of course assuming for present purposes that section 695(2) of the Act of 1985 does not apply in this case.

The question arises whether, on the facts of the present case, Mr. Isaac was a "similar officer" of I.A.C. Some assistance as to the meaning of this expression may be derived from the decision of the Court of Appeal in Action Gesellschaft fuer Motor und Motorenfahrzeug v. Cudell & Co. Ltd v. [1902] 1 K.B. 342, decided under R.S.C., Ord. 9, r. 8, the predecessor of the present rule. That rule, so far as material, provided:

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I.A.C. is an "oversea company" within the statutory definition. I.A.C.'s appeal to your Lordships' House is a separate event. Evans J. decided all these issues in accordance with rule 2 on the mayor, chairman, or president of the body, or the secretary or treasurer, as the case may be. Accordingly I.A.C.'s appeal to your Lordships' House on this issue is effectively an appeal from the decision of Evans J.

Service on I.A.C.

The writ was served on Mr. Isaac at I.A.C.'s premises at 4, Lower Regent Street, London W.1, on 11 January 1991. K.A.C. has alleged that the service was ineffective on two alternative grounds. (1) I.A.C. is an "oversea company," within the statutory definition. I.A.C.'s appeal to your Lordships' House is a separate event. Evans J. decided all these issues in accordance with rule 2 on the mayor, chairman, or president of the body, or the secretary or treasurer, as the case may be. Accordingly I.A.C.'s appeal to your Lordships' House on this issue is effectively an appeal from the decision of Evans J.
Section 12(1) of the State Immunity Act 1978 provides:

"Any writ or other document required to be served for instituting proceedings against a State shall be served on the State, and not on any officer or agent of the State." 

The question therefore arises whether the provisions of this subsection were complied with in the present proceedings. As the Court of Appeal held, the writ was not served on the Ministry of Foreign Affairs, being transmitted through the Foreign and Commonwealth Office in London. The Court of Appeal therefore held that the proper party to the proceedings was I.A.C., and service of the writ on I.A.C. was therefore ineffective. The court therefore held that the writ was served on I.A.C. by the Foreign and Commonwealth Office, and that service was effective.

The question therefore arises whether the provisions of this subsection were complied with in respect of the present proceedings brought by I.A.C. against Iraq. The defendant referred to by the court in its judgment was I.A.C., not Iraq. The court therefore held that the writ was served on I.A.C. by the Foreign and Commonwealth Office, and that service was effective.

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He cited a passage from Lewis, State and Diplomatic Immunity, 3rd ed. (1990), pp. 78–79, which reads as follows:

"It is to be noted that the principle of immunity of states, under the so-called ‘restrictive theory’, arises from two main sources: (1) the willingness of states to enter into commercial or other private law transactions with individuals. It appears to have two main functions: (a) to require a state to answer a claim based upon such transactions before the courts of the sending state, and (b) to require a state to answer a claim based upon any act of sovereignty or governmental function of that state, not any interference with its diplomatic functions.

I entirely agree. The delivery of the writ by the Foreign and Commonwealth Office to the Iraqi Ministry of Foreign Affairs on behalf of the Foreign and Commonwealth Office to the Iraqi Embassy was at best a request to the Iraqi Embassy to forward the writ on behalf of the Foreign and Commonwealth Office to the Iraqi Ministry of Foreign Affairs. On the evidence, that was not done. It follows that the service of the writ on Iraq was never effected in accordance with section 12(1), and that the appeal of K.A.C. on this basis of the claim: is this, under the old terminology, an act ‘jure gestionis’ or is it an act ‘jure imperii’? Is it (a) under the old terminology, an act ‘jus publicum’ or (b) under the new terminology, an act ‘jus privatum’? A private act meaning in this context an act of a private law character such as a private citizen might have entered into?"

Later he said at p. 267:

"A separate entity is immune from the jurisdiction of the courts of the United Kingdom if, and only if —

(a) the proceedings relate to anything done by it in the exercise of sovereign authority; and

(b) the circumstances are such that a State... would have been so immune."
Part II of the Act (Part I of the Act, which is the relevant part for the purposes of this section). Section 1 of the Act, within which section 14 falls, is concerned with the provisions of the Convention which are in force in the United Kingdom. The provisions of the Convention which are in force in the United Kingdom are set out in section 1 of the Act.

I interpolate that it seems probable that the expressions "any entity" and "separate entity" in section 1 of the Act are intended to refer to entities or separate entities of a state, as had by then been recognised both in the exercise of sovereign authority and in the exercise of commercial transactions. The latter subsection of section 14(1) of the Act, which states that the provisions of the Convention must be interpreted in accordance with the principles of public international law, is therefore necessary.

The puzzle arises from the fact that commercial transactions, which are not covered by the Convention, and as a case in which (by virtue of section 3) a state would not have immunity in respect of acts performed in the exercise of sovereign authority. This tautology appears to be the effect of the introduction into section 3 of the Act of the exception relating to commercial transactions, which the latter subsection of section 14(1) of the Act, which states that the provisions of the Convention must be interpreted in accordance with the principles of public international law, is therefore necessary.

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considered acta jure gestionis to be acts “within an area of activity, trading or commercial, or otherwise of a private law character ...” However, having regard to the very broad definition of “commercial transactions” in section 3(3) of the Act, it is probable that most, if not all, of the actions of a private law character in which a separate entity of a state is likely to engage will fall within that definition. At all events I do not consider that these differences (such as they are) should require us to construe the words “in the exercise of sovereign authority” in section 14(2)(a) otherwise than in accordance with the accepted meaning of acta jure imperii, especially as that is plainly in accordance with article 27(2) of the Convention, which is reflected in section 14(2) of the Act.

It is apparent from Lord Wilberforce’s statement of principle that the ultimate test of what constitutes an act jure imperii is whether the act in question is of its own character a governmental act, as opposed to an act which any private citizen can perform. It follows that, in the case of acts done by a separate entity, it is not enough that the entity should have acted on the directions of the state, because such an act need not possess the character of a governmental act. To attract immunity under section 14(2), therefore, what is done by the separate entity must be something which possesses that character. An example of such an act performed by a separate entity is to be found in Arango v. Guzman Travel Advisors Corporation (1980) 621 F.2d 1371 in which Dominicana (the national airline of the Dominican Republic), faced with a claim by a passenger in respect of inconvenience suffered in “involuntary rerouting,” was held entitled to plead sovereign immunity under the United States Foreign Sovereign Immunities Act 1976, on the ground that it was impressed into service, by Dominican immigration officials acting pursuant to the country’s laws, to perform the functions which led to the rerouting of the plaintiff. Reavley J., delivering the judgment of the court, said, at p. 1379:

“Dominicana acted merely as an arm or agent of the Dominican government in carrying out this assigned role, and, as such, is entitled to the same immunity from any liability arising from that governmental function as would inure to the government, itself.” (Emphasis supplied.)

But where an act done by a separate entity of the state on the directions of the state does not possess the character of a governmental act, the entity will not be entitled to state immunity, though it may be able to invoke a substantive defence such as force majeure despite the fact that it is an entity of the state: see, e.g., C. Czarnikow Ltd. v. Centrala Handlu Zagranicznego Rolimpex [1979] A.C. 351. Likewise, in the absence of such character, the mere fact that the purpose or motive of the act was to serve the purposes of the state will not be sufficient to enable the separate entity to claim immunity under section 14(2) of the Act.

The things done by I.A.C. to which the proceedings relate

The action was commenced by a specially endorsed writ. In the points of claim endorsed on the writ, K.A.C. claimed that the two defendants (I.A.C. and Iraq) on and/or after 2 August 1990 wrongfully interfered and had continued so to interfere with the aircraft in question, and they claimed an order for delivery of the aircraft and damages consequential on the defendants’ wrongful interference, or alternatively damages to the amount of the value of the aircraft, viz. $630m. This pleading reflects the provisions of the Torts (Interference with Goods) Act 1977. By section 2 of that Act, the tort of detinue was abolished, leaving the tort of conversion as the principal vehicle for the protection of proprietary rights in chattels. Section 3 however provides for the form of judgment where goods are detained; and the prayer in the points of claim reflects the provisions of subsection (2) of that section.

The particulars of the alleged wrongful interference with the aircraft are set out in paragraph 2 of the points of claim, which reads as follows:

“(a) On 2 August 1990 the second defendants invaded Kuwait, took control of the airport and deprived the plaintiffs of possession and control of, inter alia, the aircraft particularised above. (b) Between 2 August and 9 August the aircraft were removed from the airport. (c) On a date or dates between 9 August and 17 September the second defendants unlawfully transferred possession and control of the aircraft to the first defendants. The stated intention of the defendants was to incorporate the aircraft within the First Defendants’ fleet and to use them for commercial purposes. (d) The first and second defendants have continued wrongfully to interfere with the aircraft by their unlawful possession and control of the aircraft and refusal and/or failure to deliver up the aircraft to the plaintiffs.”

It was suggested in argument that the allegation in sub-paragraph (d) can only be read as an allegation of joint liability on the part of I.A.C. and Iraq. I do not accept this submission. In my opinion, it is capable of being read as an allegation of several liability and, having regard to the allegation in sub-paragraph (c) that possession and control had been transferred to I.A.C., it should be read as embracing several liability on the part of I.A.C.

It will be seen that the only specific allegation against I.A.C. relates to the period after the transfer of possession and control of the aircraft to I.A.C. on a date or dates between 9 August and 17 September. The former date evidently marks the last date on which the aircraft are alleged to have been removed from Kuwait Airport. The latter date was that on which R.C.C. Resolution 369, which purported to dissolve K.A.C. and to vest all of its assets (including the aircraft in question) in I.A.C., came into effect. However since the onus rests on the state entity to establish that it is entitled to state immunity within section 14(2), it is likely that evidence will be called for that purpose, and such evidence may be taken into account in considering whether the claim to state immunity has been established. Here evidence given before Evans J. showed (as I have already recorded) that, on the directions of the Iraqi Minister of Transport and Communications, I.A.C. sent engineers and pilots to Kuwait who there prepared the aircraft for flying and then flew them to Iraqi airports. Thereafter I.A.C., on the directions of the minister, looked after the aircraft by carrying out basic maintenance on them, until after the coming into effect of R.C.C. Resolution 369 when I.A.C. treated the aircraft as part of its fleet and made what use of them it could in the prevailing circumstances. In particular, I.A.C. used at least one of the aircraft for internal flights, and repainted at least two of the aircraft in the I.A.C. livery. These matters throw light (inter alia) on the nature of the interference with the aircraft alleged by K.A.C. in the points of claim.

Of these events, the basic maintenance carried out after the aircraft had been removed from Kuwait Airport seems to be of little or no significance. The essential
Before the Appellate Committee Mr. Chambers repeated the same argument which he had unsuccessfully advanced before the Court of Appeal. He argued that the ownership of the aircraft had not been transferred to Iraq, and that the acts performed by I.A.C. in relation to the aircraft could not therefore be considered to be governmental acts. He submitted that the acts performed by I.A.C. were not governmental acts because they were not done in the exercise of sovereign authority. He argued that the acts performed by I.A.C. were not acts of appropriation because they were not done in the exercise of sovereign authority. He argued that the acts performed by I.A.C. were not acts of appropriation because they were not done in the exercise of sovereign authority. He argued that the acts performed by I.A.C. were not acts of appropriation because they were not done in the exercise of sovereign authority. He argued that the acts performed by I.A.C. were not acts of appropriation because they were not done in the exercise of sovereign authority. He argued that the acts performed by I.A.C. were not acts of appropriation because they were not done in the exercise of sovereign authority.

Evans J. concluded that I.A.C. was not immune from the court’s jurisdiction under section 14(2) of the Act. He recognised that the acts of the Government of Iraq in invading Kuwait were acta jure imperii and that, to the extent that Kuwaiti property was appropriated for governmental purposes, such acts too would have been governmental acts. He pointed out that the Foreign States Act 1978 (c.38) was intended to confer immunity on a state entity in respect of a claim by the former owner, though it may be said, as Mr. Beloff submitted, that the acts done by I.A.C. after 17 September 1990 were not acta jure imperii.

The conclusion and reasoning of Evans J. was the subject of criticism by Lady Fox in "A 'Commercial Transaction' under the State Immunity Act 1978" (1994) 43 I.C.L.Q. 193, 198–199, in particular on the ground that he found the commerciality of the acts of I.A.C. to derive from the future intention to operate the aircraft as part of its civil fleet. However, as she pointed out, it is a cardinal feature of the restrictive approach to the ultimate objective of the appropriation over and above what for my part I regard as the dominant circumstance—the act of appropriation itself. The plain fact is that Iraq invaded and occupied Kuwait by force of arms; here subsequent exploitation of Kuwait assets being the action of a victorious military conqueror. So far as the seizure of K.A.C.’s 10 aircraft was concerned, I.A.C. was no more and no less than Iraq’s tool and partner in the adventure.

Accordingly, the Court of Appeal rejected the reasoning of Evans J. as unsound. However, they were faced with a new argument advanced on behalf of K.A.C. by Mrs. Chambers, who had not appeared below. This was that, following the implementation of R.C.C. Resolution 369, the acts performed by I.A.C. in relation to the aircraft could not be said to have been done in the exercise of sovereign authority. This argument was not accepted by the Court of Appeal. Nourse and Leggatt L.J.J. gave it short shrift. Simon Brown L.J. regarded it with greater respect, but still dismissed it on the basis that Resolution 369 was itself a governmental act by the State of Iraq could not of itself make any difference that, in the present case, the state entity was at an earlier stage of an enterprise which entailed both the seizure of the aircraft and their removal to Iraq to be used for such purposes as the Government of Iraq should direct, which in point of fact I.A.C. was, so to say, in so acting, was acting in the exercise of sovereign authority. In the Court of Appeal [1995] 1 Lloyd’s Rep. 25 this criticism was accepted as sound. As Simon Brown L.J. said the judge’s reasoning, at p. 36:

"The difficulty I have with that reasoning is this: it seems to me inevitably to accredit precedent to the ultimate objective of the appropriation over and above what for my part I regard as the dominant circumstance—the act of appropriation itself. The plain fact is that Iraq invaded and occupied Kuwait by force of arms; here subsequent exploitation of Kuwait assets being the action of a victorious military conqueror. So far as the seizure of K.A.C.’s 10 aircraft was concerned, I.A.C. was no more and no less than Iraq’s tool and partner in the adventure."
Immunity in the case of a claim by the former owner for damages for wrongful

taking of the aircraft from Kuwait. It was not open to the English court to rule that

Iraq was bound to respect the independency of other sovereign states, and the courts of one country will not sit in judgment on the acts of government of another done within its own territory. Here reliance was placed in particular on the statement of principle by the Lord Chancellor in Duke of Brunswick v. King of Hanover (1848) 2 H.L.Cas. 1, 21–22, and on the much quoted statement of Fuller C.J. in Underwood v. Hernandez (1897) 166 U.S. 290, 325 when he said:

"Every sovereign state is bound to respect the independency of every other

sovereign state, and the courts of one country will not sit in judgment on the acts

of government of another done within its own territory."

In the course of judgment, these submissions were developed by Mr. Plender on

behalf of I.A.C. He invited the English court to adjudicate on (1) sovereign acts of Iraq in respect of

take possession of the aircraft by Iraq, (2) the lawfulness of sovereign acts of Iraq in respect of transfer of control

of the aircraft to I.A.C. I have to observe that both these points appear to have been

pleaded, primarily at least, as part of K.A.C.'s case against Iraq and are no longer

relevant as such. Mr. Plender however also submitted that, if I.A.C. had been able to

enter a defence, this would inevitably have raised further aspects of the dispute before the English court,

because he could not see any reason for the fact that State immunity

raised the issue of justiciability. Everything must, as I see it, depend upon the issues

raised by K.A.C.'s claim against I.A.C. and I.A.C.'s defence to that claim, and whether

such issues do or do not raise a question of justiciability. I have however already expressed the opinion that K.A.C.'s

claim against I.A.C. in respect of its interference with K.A.C.'s aircraft pursuant to

R.C.C. Resolution 369 could not be the subject of a claim to state immunity by I.A.C.

Turn finally to the submission that K.A.C.'s appeal should in any event be

dismissed because of the English court's failure to rule under section 14(2).

Submission to the jurisdiction

Before Evans J., K.A.C. submitted in the alternative that I.A.C. had submitted to

the jurisdiction and so was precluded from claiming state immunity by reason of the

decision of the Court of Appeal [1995] 1 Lloyd's Rep. 25, though on rather different grounds, for the reasons stated in the judgment of Nourse and Simon Brown L.JJ. Before the Appellate Committee Mr. Chambers for K.A.C., while not sharing the view of Lord Justice Denning that the English court had jurisdiction in respect of acts done by Iraq, I shall treat this submission as having been advanced on behalf of I.A.C. alone.

The submission of I.A.C. was founded upon a general principle that the English courts, as foreign courts, do not have jurisdiction to sit in judgment on the acts of foreign states, or on sovereign acts done by foreign states in respect of persons or property

within their jurisdiction. This submission was derived from the speech of Lord Justice Denning in the case of Buttes Gas and Oil Co. v. Hammer [1982] A.C. 888. The principle is, it was submitted, one which limits the jurisdiction of the English courts, rather than

Wilberforce in Buttes Gas and Oil Co. v. Hammer [1982] A.C. 888. The principle is, it was submitted, one which limits the jurisdiction of the English courts, rather than
I have to confess that, so far as I am concerned, these are matters of considerable importance, and more particularly so in the circumstances in which the issues have not been precisely identified and moreover, for the reasons given by Lord Wilberforce in the present case, where the issues could be identified with some precision by reference to the pleadings, the resolution by the Appellate Committee, where the identity of the issues in the present case has come before the Appellate Committee, where the identity of the issues in the present case has come into clearer focus, and the resolution by the English courts, may be effective as such; indeed, the same result may be achieved by the application of the ordinary principles of question of fact, as I understand the position to be, as a matter of public policy, the courts may be required to do so.
default judgment against I.A.C. must be set aside, as must also the ruling of Evans J. on
the issue of justiciability. Second, the action should now be remitted to the Commercial
Court, so that it may now proceed against I.A.C. in relation to those parts of K.A.C.’s
claim in respect of which I.A.C. cannot rely upon state immunity. The matter can then be
fully pleaded, in the ordinary way. When this has taken place, it will be for the judge to
decide, in the light of the submissions of the parties, how he should deal with the point on
justiciability raised by I.A.C., having regard to the limited context in which that point is
now set following I.A.C.’s partially successful plea of state immunity. In particular it will
be open to him, if he thinks fit, to order that any points of justiciability as identified on
the pleadings should be disposed of on the trial of a preliminary issue in the action, such a
course not being precluded in the present case by any submission to the jurisdiction on
the part of I.A.C.

Conclusion

It follows from what I have said that the appeal by K.A.C. against Iraq should
be dismissed with costs, since the proceedings were not effectively served on Iraq. With
regard to K.A.C.’s claim against I.A.C., proceedings were effectively served upon I.A.C.,
and K.A.C.’s appeal on the issue of state immunity should be allowed to the extent I have
indicated. The order of the Court of Appeal setting aside both the default judgment
entered by K.A.C. against I.A.C. and the orders consequential upon the default judgment
will stand, and the action should now proceed in the Commercial Court.

LORD JAUNCEY OF TULLICHETTLE:

I have had the advantage of reading in draft the speech of my noble and learned
friend, Lord Goff of Chieveley. I agree that an order should be made in the terms
proposed by him.

LORD MUSTILL:

My Lords, my noble and learned friend, Lord Goff of Chieveley, has identified four
issues for consideration. On those labelled A, B and D I agree in all respects with the
orders proposed and the reasons given by my Lords, and need add nothing. Regarding
issue C, I also agree that the claims against I.A.C. comprised in paragraphs (a) and (b) of
the particulars under paragraph 2 of the points of claim are the subject of sovereign
immunity. With regret, however, I must differ from the conclusion that I.A.C. is not
immune in respect of the claims in paragraphs (c) and (d). My reasons can be stated quite
briefly.

For this purpose it is necessary to summarise the course of the action against
I.A.C. Although more than one writ was issued by the plaintiffs the one from which the
present appeal derives was addressed to both Iraq and I.A.C. and was endorsed with
points of claim which I must set out in full, except for the particulars of the value of the
aircraft.

“The plaintiffs’ claim is for:

“Points of Claim

“1. The plaintiffs are and were at all material times the registered and
beneficial owners of inter alia, eight Airbus 300–310 aircraft and two Boeing 767
aircraft, the insured value of which was $630m.

[Particulars of the values of the aircraft]

“2. On and/or after 2 August 1990 the first and second defendants
wrongfully interfered and have continued to interfere with the said aircraft.

“Particulars

“(a) On 2 August 1990 the second defendants invaded Kuwait, took
control of the aircraft and deprived the plaintiffs of possession and control of,
inter alia, the aircraft particularised above. (b) Between 2 August and 9 August
the aircraft were removed from the airport. (c) On a date or dates between 9
August and 17 September the second defendants unlawfully transferred
possession and control of the aircraft to the first defendants. The stated intention
of the defendants was to incorporate the aircraft within the first defendants’
fleet and to use them for commercial purposes. (d) The first and second defendants
have continued wrongfully to interfere with the aircraft by their unlawful
possession and control of the aircraft and refusal and/or failure to deliver up the
aircraft to the plaintiffs.

“3. By reason of the said interference the plaintiffs have suffered loss and
damage.

“4. In the premises the plaintiffs are entitled to and claim against the first
and/or second defendants an order for delivery of the aircraft with consequential
damages alternatively payment of the value of the aircraft (being U.S. $630m.) by
way of damages pursuant to section 3 [of the] (Torts Interference with Goods) Act
1977 and at common law.

“5. The plaintiffs further claim interest pursuant to section 35A of the
Supreme Court Act 1981.

“And the plaintiffs claim:

“(1) An order that the first and/or second defendants deliver to the
plaintiffs the aircraft particularised in paragraph 1 above;
“(2) Damages consequential on the defendants’ wrongful interference;
“(3) Alternatively damages in the amount of the value of the aircraft,
being $630m.
“(4) Interest pursuant to section 35A of the Supreme Court Act 1981;
“(5) Further or other relief;
“(6) Costs.”
A separate entity is immune from the jurisdiction of the courts of the United Kingdom if, and only if —

(a) the proceedings relate to anything done by it in the exercise of sovereign authority; and
(b) the circumstances are such that a State or, in the case of proceedings to which section 10 above applies, a State which is not a party to the Brussels Convention, would have been immune.

My Lords, it is clear that sections 3 and 14(2) read together call for an inquiry in three stages, which in the context of the present case may be stated as follows.

First, what things, or to which things, I.A.C. claims to be immune? Secondly, did these things amount to a "commercial transaction" within the extended definition in section 3(3)? Finally, were these things done by I.A.C. in the exercise of sovereign authority?

As to the first question, although it may in some cases be difficult to be sure precisely what things alleged to have been done by the defendant are the subject of the proceedings, particularly in the absence of a precise description of the claim, it is important to identify and limit the matters constituting the cause of action in respect of which the plaintiffs sought a money judgment. I do not however rest simply on the formulation of the pleading, but rather on the fact that this is what the claim itself. The plaintiffs allege a proprietary tort which I.A.C. committed by wrongfully retaining and refusing to give them back, thus causing the plaintiffs to lose their entire value of the aircraft

The propriety of this action is open to question, and moving from my Lord's statement of the facts, it is not the plaintiffs' money judgment. It is true that the plaintiffs can point to activities, such as working on the aircraft and moving them from one place to another, which may, subject to any available defences, have been wrong

These things done by I.A.C. in the exercise of sovereign authority?

I turn to the State Immunity Act 1978. Although the whole of Part I of the Act forms the context to section 3 it is necessary to quote only the following provisions:

1. (1) A State is immune from the jurisdiction of the courts of the United Kingdom.

2. This section does not apply if the parties to the dispute are States or non-States which in the territory of the United Kingdom.

3. (1) A State is not immune as respects proceedings relating to—

(a) a commercial transaction, entered into by the State; or
(b) an obligation of the State which falls to be performed wholly or partly in the United Kingdom.

(2) This section does not apply if the parties to the dispute are States or non-States which in the territory of the United Kingdom.

(3) In this section "commercial transaction" means —

(a) any contract for the supply of goods or services; or
(b) any transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction; or
(c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which the State enters or in respect of which the State provides a guarantee or indemnity.

14. (1) The immunities and privileges conferred by this Part of the Act apply to any foreign or Commonwealth State other than the United Kingdom, and to the government of that State and to any department of that government, whether or not to any entity (hereafter referred to as "a separate entity") which is distinct from the executive organs of the government of the State and capable of suing or being sued.
The rationale of the common law doctrine of the restricted immunity, of which section 3 is the counterpart, is that where the sovereign chooses to doff his robes and descend into the market place he must take the rough with the smooth, and, having condescended to engage in mundane commercial activities he must also condescend to submit himself to an adjudication in a foreign court on whether he has in the course of those activities undertaken obligations which he has failed to fulfil. A claim of the present kind falls entirely outside this reasoning. Equally, although the meaning of “commercial transactions” is broadened by section 3(3)(c) to embrace an “activity” as well as a “transaction,” the word is qualified by the parenthesis “(whether of a commercial, industrial, financial, professional or other similar character),” which conforms with the general policy which I have suggested. In my opinion the plaintiffs’ claim for wrongful misappropriation is within neither the letter nor the spirit of the commercial exception to the general immunity of the state.

There remains the third stage of the inquiry, which is whether the retention of the aircraft was “done by [I.A.C.] in the exercise of sovereign authority.” This is much more difficult, since a separate entity is not sovereign and has no authority. For my part, I do not think that section 14(2)(a) can simply be an echo of section 3, or Part I of the Act as a whole, for otherwise it would duplicate section 14(2)(b): and section 14 as a whole assumes that the state may be immune in circumstances where an entity is not. The immunities of the sovereign and of the entity are of an entirely different character. The former is a matter of status, inherent in the nature of the person or body claiming it, and all-embracing except where specifically excluded by the Act. By contrast the separate entity has no status entitling it to a general immunity, and is endowed by section 14 only with a case-by-case immunity in the situations there described. Moreover, the immunities differ in extent as well as kind, for there must be many activities of separate entities which could not on any view be described as done under sovereign authority for the purposes of section 14(2)(a), but which if done by the sovereign would lie outside the “commercial transaction” exception, and all the other exceptions in Part I of the Act, and hence would attract the general immunity under section 1.

Assuming, therefore, that section 14(2)(a) is intended to create an additional requirement for immunity, one must ask again what is meant by the reference to things done by the entity in the exercise of a sovereign authority which the entity does not possess. The best I can do, to convey what I believe to be the flavour of section 14(2)(a), is to assert that the entity is immune only if in some sense the act, although not done by the sovereign, is a manifestation of the sovereign’s authority. Looking at the matter in this way, it is not enough to show that a sovereign act was an essential preliminary to the conduct by the entity of which the plaintiff complains, for the sovereign quality of the train of events may have died away by the time that the entity comes to play its part; so it is not in my opinion sufficient for I.A.C. to claim immunity in respect of items c. and d. of the particulars just because the conduct of Iraq in the early stages, which put I.A.C. in a position where the acts in question could be done, may for the sake of argument be assumed to have had a sovereign character. But in the present case I cannot detect any change in the character of the successive events. Put at its bluntest and most colourful, the plaintiffs’ complaint is that the Republic of Iraq stole the aircraft and that I.A.C. is unlawfully in possession of them. It is not an accident that when this complaint was clothed in the language of a civil pleading the same cause of action founded on the same allegations of fact, and leading to the same monetary claim, was asserted against both defendants alike: and it appears to me that in this respect the pleader’s instinct was right. In my opinion I.A.C. was not acting autonomously, but in harness with the Republic of Iraq, and under the shadow of the sovereign authority by which the latter itself was acting, so that its acts were a manifestation of that authority.

For these reasons I would for my part hold that all three conditions for the immunity of I.A.C. are satisfied in relation to the whole of the claim advanced in the writ. I would therefore propose that the writ and all subsequent proceedings, including the judgment and the various steps taken by way of execution should be set aside.

Since however I understand that the majority of your Lordships are of a different opinion on this aspect of the appeal, I concur in the order proposed by my noble and learned friend, Lord Goff of Chieveley.

LORD SLYNN OF HADLEY:

My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Goff of Chieveley. I agree with his conclusions as to the issues raised in this case save as to one where I consider, contrary to his view, that all the Lords Justices in the Court of Appeal came to the right result. That issue arises out of the objection by I.A.C. to the jurisdiction on the ground of sovereign immunity.

I.A.C. is, by virtue of Iraqi Law No. (108) of 1988 a state owned entity, supervised by the Council of Ministers of Iraq, and having only State officials on its Board of Directors. Its properties are deemed public property.

By section 14(2) of the State Immunity Act 1978 a “separate entity” (which it is common ground that I.A.C. is):

“is immune from the jurisdiction of the courts of the United Kingdom if, and only if —

(a) the proceedings relate to anything done by it in the exercise of sovereign authority; and
(b) the circumstances are such that a State (or, in the case of proceedings to which section 10 above applies, a State which is not a party to the Brussels Convention) would have been so immune.”

For the purposes of section 14(2)(b) it is relevant to note that by section 3(1)(b) a state is not immune as respects proceedings relating to a commercial transaction entered into by the state. By subsection (3)(c) “commercial transaction” means:

“any other transaction or activity [than a contract of loan of the type specified in (a) and (b)] (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority; ...”

In I Congreso del Partido [1983] 1 A.C. 244, 267 Lord Wilberforce gave guidance as to the way in which the distinction between acts which are and acts which are not covered by state immunity has to be drawn:
The conclusion which emerges is that in considering, under the ‘restrictive’ meaning of section 14(1) of the Act of 1978 and, subject to the provisions of section 3(3)(c), Iraq was entitled to claim sovereign immunity pursuant to section 1 of that Act.

On the facts of the present case, it seems to me clear that when the Minister of the Empire of Iran approved the requisition of the aircraft by Iraq, the Minister was acting in the exercise of sovereign authority vested in Iraq. The maintenance of the aircraft was done under the same authority. When Resolution 369 on 9 September vested those aircraft in I.A.C. on 17 September, that was the act of a sovereign authority. The seizure and detention for that purpose was, however, wholly done pursuant to the exercise of sovereign authority.

On the facts found by the judge I do not consider that I.A.C. played at any time an independent role. It flew the aircraft out of Kuwait and it used them because Iraq in the exercise of its sovereign authority decided upon and carried out its planned attacks on K.A.C., whose aircraft it had seized and used for civil aviation purposes in and from Iraq. The acts of the second defendant were done at the instance of the first defendant, and the acts of the first defendant for the purpose of which the acts of the second defendant were done could not be done without the grant of sovereign immunity. The nature of I.A.C.’s acts remained the same throughout. I do not accept the suggestion that in other situations there may arise a change in the characterisation of the acts of the defendant so as to make them “private law” in character. The difficulty arises in relation to the third and fourth particulars of claim alleged viz.:
one—i.e. the seizure, removal and use of the aircraft—then it is plain that it was being done under sovereign authority and not otherwise. I take the same view if the various stages have to be separated. If Iraq had used Resolution 369 to vest the title to the aircraft in the Minister of Transport and his department had flown the aircraft on civil routes that would have been done as an act of sovereign authority. When the aircraft are vested in I.A.C. and flown by them that is done in the exercise of sovereign authority.

The provision of the Act of 1978 excluding commercial transactions from acts properly seen as the exercise of sovereign authority is derived from decisions of the courts which introduced into the concept of sovereign immunity an exception in order to prevent sovereigns or sovereign states from avoiding foreign courts investigating their activities in what were plainly the sort of commercial transactions which could equally be carried out by other persons. What happened here was totally different. Iraq is not being sued for carelessly flying an aircraft or running a commercial airline in such a way as to cause damage to people or property. It is being sued because of the direct consequences of its act of aggression towards Kuwait, the seizure of K.A.C.’s aircraft and their subsequent detention and use. That is not in any sense the kind of commercial transaction contemplated by the restricted immunity doctrine; it is certainly not within the words in section 3(3)(c) “(whether of a commercial, industrial, financial, professional or other similar character).” I would therefore for my part uphold I.A.C.’s objection to the jurisdiction on this basis.

LORD NICHOLLS OF BIRKENHEAD:

My Lords, for the reasons set out in the speech of my noble and learned friend, Lord Goff of Chieveley, I agree that an order should be made in the terms proposed by him.
International Court of Justice

Jurisdictional Immunities of the State
(Germany v. Italy: Greece intervening)
Judgment of 3 February 2012
JURISDICTIONAL IMMUNITIES OF THE STATE (GERMANY v. ITALY: GREECE INTERVENING)
INTERNATIONAL COURT OF JUSTICE

YEAR 2012

3 February 2012

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

Historical and factual background.


* *

Subject-matter of dispute and jurisdiction of the Court.

Subject-matter of dispute delimited by claims of Germany and Italy — No objection to jurisdiction of the Court or admissibility of Application raised by Italy — Article 1 of the European Convention for the Peaceful Settlement of Disputes as basis of jurisdiction — Limitation ratione temporis not applicable — The Court has jurisdiction — The Court is not called upon to rule on questions of reparation — Relationship between duty of reparation and State immunity — No other question with regard to the Court’s jurisdiction.

* *

Alleged violation of Germany’s jurisdictional immunity in proceedings brought by Italian claimants.

Issues before the Court — Origins of proceedings in Italian courts — Existence of customary rule of international law conferring immunity on States — Sources of State practice and opinio juris — State practice and opinio juris generally recognize State immunity — Rule of State immunity derives from principle of sovereign equality of States — Need to distinguish between relevant acts of Germany and those of Italy — Procedural nature of law of immunity — The Court must examine and apply the law on State immunity as it existed at time of Italian proceedings — Acta jure gestionis and acta jure imperii — Acts of armed forces of German Reich were acta jure imperii — State immunity in respect of acta jure imperii — Contention by Italy that Germany not entitled to immunity in respect of cases before Italian courts.


Italy’s second argument: subject-matter and circumstances of claims in Italian courts — Gravity of violations — Contention that international law does not accord immunity to a State for serious violations of law of armed conflict — National court is required to determine entitlement to immunity before it can hear merits of case — No State practice to support proposition that a State is deprived of immunity in cases of serious violations of international humanitarian law — Neither has proposition been accepted by European Court of Human Rights — State not deprived of immunity because it is accused of serious violations of international humanitarian law.

Relationship between jus cogens and rule of State immunity — Alleged conflict between jus cogens rules and immunity of Germany — No conflict exists between jus cogens and immunity of a State — Argument about jus cogens displacing State immunity has been rejected by national courts — State immunity not affected by violation of jus cogens.

The “last resort” argument — Contention that Italian courts were justified in denying Germany immunity because of failure of all other attempts to secure compensation — State immunity not dependent upon existence of effective alternative means of redress — Italy’s argument rejected — Further negotiation between Germany and Italy.
Combined effect of circumstances relied upon by Italy — None of three strands justify action of Italian courts — No effect if taken together — State practice — Balancing different factors would disregard nature of State immunity — Immunity cannot be dependent upon outcome of balancing exercise by national court.

Action of Italian courts in denying Germany immunity constitutes a breach of obligations owed by Italy to Germany — No need to consider other questions raised by the Parties.

* * *

Measures of constraint taken against property belonging to Germany located on Italian territory.

Legal charge against Villa Vigoni — Charge in question suspended by Italy to take account of proceedings before the Court — Distinction between rules of customary international law governing immunity from enforcement and those governing jurisdictional immunity — No need to determine whether decisions of Greek courts awarding pecuniary damages against Germany were in breach of that State's jurisdictional immunity — Article 19 of United Nations Convention on the Jurisdictional Immunities of States and their Property — Property which was subject of measure of constraint being used for non-commercial governmental purposes — Germany not having expressly consented to taking of legal charge in question or allocated Villa Vigoni for satisfaction of judicial claims against it — Registration of legal charge on Villa Vigoni constitutes a violation by Italy of its obligation to respect immunity owed to Germany.

* * *

Decisions of Italian courts declaring enforceable in Italy decisions of Greek courts upholding civil claims against Germany.

Germany's contention that its jurisdictional immunity was violated by these decisions — Request for exequatur — Whether Italian courts respected Germany's immunity from jurisdiction in upholding request for exequatur — Purpose of exequatur proceedings — Exequatur proceedings must be regarded as being directed against State which was subject of foreign judgment — Question of immunity precedes consideration of request for exequatur — No need to rule on question whether Greek courts violated Germany's immunity — Decisions of Florence Court of Appeal constitute violation by Italy of its obligation to respect jurisdictional immunity of Germany.

* * *

Germany's final submissions and the remedies sought.

Germany's six requests presented to the Court — First three submissions upheld — Violation by Italy of Germany's jurisdictional immunity — Fourth submission — Request for declaration that Italy's international responsibility is engaged — No need for express declaration — Responsibility automatically inferred from finding that certain obligations have been violated — Fourth submission not upheld — Fifth submission — Request that Italy be ordered to take, by means of its own choosing, any and all steps to ensure that all decisions of its courts and other judicial authorities infringing Germany's sovereign immunity cease to have effect — Fifth submission upheld — Result to be achieved by enacting appropriate legislation or by other methods having the same effect — Sixth submission — Request that Italy be ordered to provide assurances of non-repetition — No reason to suppose that a State whose conduct has been declared wrongful by the Court will repeat that conduct in future — No circumstances justifying assurances of non-repetition — Sixth submission not upheld.

JUDGMENT

Present: President Owada; Vice-President Tomka; Judges Koroma, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue, Judge ad hoc Gaja; Registrar Couveur.

In the case concerning jurisdictional immunities of the State,

between

the Federal Republic of Germany,

represented by

H.E. Ms Susanne Wasum-Rainer, Ambassador, Director-General for Legal Affairs and Legal Adviser, Federal Foreign Office,

H.E. Mr. Heinz-Peter Behr, Ambassador of the Federal Republic of Germany to the Kingdom of the Netherlands,

Mr. Christian Tomuschat, former Member and Chairman of the International Law Commission, Professor emeritus of Public International Law at the Humboldt University of Berlin,

as Agents;
Mr. Andrea Gattini, Professor of Public International Law at the University of Padua,
Mr. Robert Kolb, Professor of Public International Law at the University of Geneva,
as Counsel and Advocates;
Mr. Guido Hildner, Head of the Public International Law Division, Federal Foreign Office,
Mr. Götz Schmidt-Bremme, Head of the International Civil, Trade and Tax Law Division, Federal Foreign Office,
Mr. Felix Neumann, Embassy of the Federal Republic of Germany in the Kingdom of the Netherlands,
Mr. Gregor Schotten, Federal Foreign Office,
Mr. Klaus Keller, Embassy of the Federal Republic of Germany in the Kingdom of the Netherlands,
Ms Susanne Achilles, Embassy of the Federal Republic of Germany in the Kingdom of the Netherlands,
Ms Donate Arz von Straussenburg, Embassy of the Federal Republic of Germany in the Kingdom of the Netherlands,
as Advisers;
Ms Fiona Kaltenborn,
as Assistant,

the Italian Republic,

represented by

H.E. Mr. Paolo Pucci di Benisichi, Ambassador and State Counsellor,
as Agent;
Mr. Giacomo Aiello, State Advocate,
H.E. Mr. Franco Giordano, Ambassador of the Italian Republic to the Kingdom of the Netherlands,
as Co-Agents;
Mr. Luigi Condorelli, Professor of International Law, University of Florence,

Mr. Pierre-Marie Dupuy, Professor of International Law, Graduate Institute of International and Development Studies, Geneva, and University of Paris II (Panthéon-Assas),
Mr. Paolo Palchetti, Associate Professor of International Law, University of Macerata,
Mr. Salvatore Zappalà, Professor of International Law, University of Catania, Legal Adviser, Permanent Mission of Italy to the United Nations,
as Counsel and Advocates;
Mr. Giorgio Marrapodi, Minister Plenipotentiary, Head of the Service for Legal Affairs, Ministry of Foreign Affairs,
Mr. Guido Cerboni, Minister Plenipotentiary, Co-ordinator for the countries of Central and Western Europe, Directorate-General for the European Union, Ministry of Foreign Affairs,
Mr. Roberto Bellelli, Legal Adviser, Embassy of Italy in the Kingdom of the Netherlands,
Ms Sarah Negro, First Secretary, Embassy of Italy in the Kingdom of the Netherlands,
Ms Francesca De Vittor, International Law Researcher, University of Macerata,
as Advisers,

with, as State permitted to intervene in the case,

the Hellenic Republic,

represented by

Mr. Stelios Perrakis, Professor of International and European Institutions, Panteion University of Athens,
as Agent;
H.E. Mr. Ioannis Economides, Ambassador of the Hellenic Republic to the Kingdom of the Netherlands,
as Deputy-Agent;
Mr. Antonis Bredimas, Professor of International Law, National and Kapodistrian University of Athens,
as Counsel and Advocate;
Ms Maria-Daniella Marouda, Lecturer in International Law, Panteion University of Athens,
as Counsel,
In accordance with Article 83, paragraph 1, of the Rules of Court, the Registrar, by letters dated 13 January 2011, transmitted certified copies of the Application for permission to intervene to the Government of Germany and the Government of Italy, which were informed that the Court had fixed 1 April 2011 as the time-limit for the submission of their written observations on that Application. The Registrar also transmitted, under paragraph 2 of the same Article, a copy of the Application to the Secretary-General of the United Nations.

Germany and Italy each submitted written observations on Greece’s Application for permission to intervene within the time-limit thus fixed. The Registry transmitted to each Party a copy of the other’s observations, and copies of the observations of both Parties to Greece.

In light of Article 84, paragraph 2, of the Rules of Court, and taking into account the fact that neither Party filed an objection, the Court decided that it was not necessary to hold hearings on the question whether Greece’s Application for permission to intervene should be granted. The Court nevertheless decided that Greece should be given an opportunity to comment on the observations of the Parties and that the latter should be allowed to submit additional written observations on the question. The Court fixed 6 May 2011 as the time-limit for the submission by Greece of its own written observations on those of the Parties, and 6 June 2011 as the time-limit for the submission by the Parties of additional observations on Greece’s written observations. The observations of Greece and the additional observations of the Parties were submitted within the time-limits thus fixed. The Registry duly transmitted to the Parties a copy of the observations of Greece; it transmitted to each of the Parties a copy of the other’s additional observations and to Greece copies of the additional observations of both Parties.

The written statement of Greece and the written observations of Germany were duly filed within the time-limits so fixed. By a letter dated 1 September 2011, the Agent of Italy indicated that the Italian Republic would not be presenting observations on the written statement of Greece at that stage of the proceedings, but reserved “its position and right to address certain points raised in the written statement, as necessary, in the course of the oral proceedings”. The Registry duly transmitted to the Parties a copy of the written statement of Greece; it transmitted to Italy and Greece a copy of the written observations of Germany.

Under Article 53, paragraph 2, of its Rules, the Court, after ascertaining the views of the Parties, decided that copies of the pleadings and documents annexed would be made available to the public at the opening of the oral proceedings. After consulting the Parties and Greece, the Court decided that the same should apply to the written statement of the intervening State and the written observations of Germany on that statement.
13. Public hearings were held from 12 to 16 September 2011, at which the Court heard the oral arguments and replies of:

For Germany: Ms Susanne Wasum-Rainer, Mr. Christian Tomuschat, Mr. Andrea Gattini, Mr. Robert Kolb.

For Italy: Mr. Giacomo Aiello, Mr. Luigi Condorelli, Mr. Salvatore Zappalà, Mr. Paolo Palchetti, Mr. Pierre-Marie Dupuy.

For Greece: Mr. Stelios Perrakis, Mr. Antonis Bredimas.

14. At the hearings questions were put by Members of the Court to the Parties and to Greece, as intervening State, to which replies were given in writing. The Parties submitted written comments on those written replies.

15. In its Application, Germany made the following requests:

“Germany prays the Court to adjudge and declare that
(1) by allowing civil claims based on violations of international humanitarian law by the German Reich during World War II from September 1943 to May 1945, to be brought against the Federal Republic of Germany, committed violations of obligations under international law in that it has failed to respect the jurisdictional immunity which the Federal Republic of Germany enjoys under international law;

(2) by taking measures of constraint against ‘Villa Vigoni’, German State property used for government non-commercial purposes, also committed violations of Germany’s jurisdictional immunity;

(3) by declaring Greek judgments based on occurrences similar to those defined above in request No. 1 enforceable in Italy, committed a further breach of Germany’s jurisdictional immunity.

Accordingly, the Federal Republic of Germany prays the Court to adjudge and declare that
(4) the Italian Republic’s international responsibility is engaged;

(5) the Italian Republic must, by means of its own choosing, take any and all steps to ensure that all the decisions of its courts and other judicial authorities infringing Germany’s sovereign immunity become unenforceable;

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

On behalf of the Government of Germany,
in the Memorial and in the Reply:

“Germany prays the Court to adjudge and declare that the Italian Republic:

(1) by allowing civil claims based on violations of international humanitarian law by the German Reich during World War II from September 1943 to May 1945, to be brought against the Federal Republic of Germany, committed violations of obligations under international law in that it has failed to respect the jurisdictional immunity which the Federal Republic of Germany enjoys under international law;

(2) by taking measures of constraint against ‘Villa Vigoni’, German State property used for government non-commercial purposes, also committed violations of Germany’s jurisdictional immunity;

(3) by declaring Greek judgments based on occurrences similar to those defined above in request No. 1 enforceable in Italy, committed a further breach of Germany’s jurisdictional immunity.

Accordingly, the Federal Republic of Germany prays the Court to adjudge and declare that
(4) the Italian Republic’s international responsibility is engaged;

(5) the Italian Republic must, by means of its own choosing, take any and all steps to ensure that all the decisions of its courts and other judicial authorities infringing Germany’s sovereign immunity become unenforceable;
(6) the Italian Republic must take any and all steps to ensure that in the future Italian courts do not entertain legal actions against Germany founded on the occurrences described in request No. 1 above; “

On behalf of the Government of Italy,

in the Counter-Memorial and in the Rejoinder:

“On the basis of the facts and arguments set out [in Italy’s Counter-Memorial and Rejoinder], and reserving its right to supplement or amend these Submissions, Italy respectfully requests that the Court adjudge and declare that all the claims of Germany are rejected.”

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

On behalf of the Government of Germany,

“Germany respectfully requests the Court to adjudge and declare that the Italian Republic:

(1) by allowing civil claims based on violations of international humanitarian law by the German Reich during World War II between September 1943 and May 1945 to be brought against the Federal Republic of Germany, committed violations of obligations under international law in that it has failed to respect the jurisdictional immunity which the Federal Republic of Germany enjoys under international law;

(2) by taking measures of constraint against ‘Villa Vigoni’, German State property used for government non-commercial purposes, also committed violations of Germany’s jurisdictional immunity;

(3) by declaring Greek judgments based on occurrences similar to those defined above in request No. 1 enforceable in Italy, committed a further breach of Germany’s jurisdictional immunity.

Accordingly, the Federal Republic of Germany respectfully requests the Court to adjudge and declare that:

(4) the Italian Republic’s international responsibility is engaged;

(5) the Italian Republic must, by means of its own choosing, take any and all steps to ensure that all the decisions of its courts and other judicial authorities infringing Germany’s sovereign immunity become unenforceable; and

(6) the Italian Republic must take any and all steps to ensure that in the future Italian courts do not entertain legal actions against Germany founded on the occurrences described in request No. 1 above.”

On behalf of the Government of Italy.

“[F]or the reasons given in [its] written and oral pleadings, [Italy requests] that the Court adjudge and hold the claims of the Applicant to be unfounded. This request is subject to the qualification that . . . Italy has no objection to any decision by the Court obliging Italy to ensure that the mortgage on Villa Vigoni inscribed at the land registry is cancelled.”

* * *

18. At the end of the written statement submitted by it in accordance with Article 85, paragraph 1, of the Rules of Court, Greece stated inter alia:

“that the effect of the judgment that the ICJ will hand down in this case concerning the jurisdictional immunity of the State will be of major importance to the Italian legal order and certainly to the Greek legal order.

Further, an ICJ decision on the effects of the principle of jurisdictional immunity of States when faced with a jurecognitum rule of international law—such as the prohibition on violation of fundamental rules of humanitarian law—will guide the Greek courts in this regard. It will thus have a significant effect on pending and potential lawsuits brought by individuals before those courts.”

19. At the end of the oral observations submitted by it with respect to the subject-matter of the intervention in accordance with Article 85, paragraph 3, of the Rules of Court, Greece stated inter alia:

“A decision of the International Court of Justice on the effects of the principle of jurisdictional immunity of States when faced with a jurecognitum rule of international law—such as the prohibition on violation of fundamental rules of humanitarian law—will guide the Greek courts . . . It will thus have a significant effect on pending and potential lawsuits brought by individuals before those courts.

The Greek Government considers that the effect of the judgment that [the] Court will hand down in this case concerning jurisdictional immunity will be of major importance, primarily to the Italian legal order and certainly to the Greek legal order.”

* * *
I. HISTORICAL AND FACTUAL BACKGROUND

20. The Court finds it useful at the outset to describe briefly the historical and factual background of the case which is largely uncontested between the Parties.

21. In June 1940, Italy entered the Second World War as an ally of the German Reich. In September 1943, following the removal of Mussolini from power, Italy surrendered to the Allies and, the following month, declared war on Germany. German forces, however, occupied much of Italian territory and, between October 1943 and the end of the War, perpetrated many atrocities against the population of that territory, including massacres of civilians and the deportation of large numbers of civilians for use as forced labour. In addition, German forces took prisoner, both inside Italy and elsewhere in Europe, several hundred thousand members of the Italian armed forces. Most of these prisoners (hereinafter the “Italian military internees”) were denied the status of prisoner of war and deported to Germany and German-occupied territories for use as forced labour.

1. The Peace Treaty of 1947

22. On 10 February 1947, in the aftermath of the Second World War, the Allied Powers concluded a Peace Treaty with Italy, regulating, in particular, the legal and economic consequences of the war with Italy. Article 77 of the Peace Treaty reads as follows:

“1. From the coming into force of the present Treaty property in Germany of Italy and of Italian nationals shall no longer be treated as enemy property and all restrictions based on such treatment shall be removed.

2. Identifiable property of Italy and of Italian nationals removed by force or duress from Italian territory to Germany by German forces or authorities after September 3, 1943, shall be eligible for restitution.

3. The restoration and restitution of Italian property in Germany shall be effected in accordance with measures which will be determined by the Powers in occupation of Germany.

4. Without prejudice to these and to any other dispositions in favour of Italy and Italian nationals by the Powers occupying Germany, Italy waives on its own behalf and on behalf of Italian nationals all claims against Germany and German nationals outstanding on May 8, 1945, except those arising out of contracts and other obligations entered into, and rights acquired, before September 1, 1939. This waiver shall be deemed to include debts, all inter-governmental claims in respect of arrangements entered into in the course of the war, and all claims for loss or damage arising during the war.”

2. The Federal Compensation Law of 1953

23. In 1953, the Federal Republic of Germany adopted the Federal Compensation Law Concerning Victims of National Socialist Persecution (Bundesentschädigungsgesetz (BEG)) in order to compensate certain categories of victims of Nazi persecution. Many claims by Italian nationals under the Federal Compensation Law were unsuccessful, either because the claimants were not considered victims of national Socialist persecution within the definition of the Federal Compensation Law, or because they had no domicile or permanent residence in Germany, as required by that Law. The Federal Compensation Law was amended in 1965 to cover claims by persons persecuted because of their nationality or their membership in a non-German ethnic group, while requiring that the persons in question had refugee status on 1 October 1953. Even after the Law was amended in 1965, many Italian claimants still did not qualify for compensation because they did not have refugee status on 1 October 1953. Because of the specific terms of the Federal Compensation Law as originally adopted and as amended in 1965, claims brought by victims having foreign nationality were generally dismissed by the German courts.

3. The 1961 Agreements

24. On 2 June 1961, two Agreements were concluded between the Federal Republic of Germany and Italy. The first Agreement, which entered into force on 16 September 1963, concerned the “Settlement of certain property-related, economic and financial questions”. Under Article 1 of that Agreement, Germany paid compensation to Italy for “outstanding questions of an economic nature”. Article 2 of the Agreement provided as follows:

“(1) The Italian Government declares all outstanding claims on the part of the Italian Republic or Italian natural or legal persons against the Federal Republic of Germany or German natural or legal persons to be settled to the extent that they are based on rights and circumstances which arose during the period from 1 September 1939 to 8 May 1945.

(2) The Italian Government shall indemnify the Federal Republic of Germany and German natural or legal persons for any possible judicial proceedings or other legal action by Italian natural or legal persons in relation to the abovementioned claims.”

25. The second Agreement, which entered into force on 31 July 1963, concerned “Compensation for Italian nationals subjected to National-Socialist measures of persecution”. By virtue of this Agreement, the Federal Republic of Germany undertook to pay compensation to Italian nationals affected by those measures. Under Article 1 of that Agreement, Germany agreed to pay Italy forty million Deutsche marks

“for the benefit of Italian nationals who, on grounds of their race, faith or ideology were subjected to National-Socialist measures of persecution and who, as a result of those persecution measures, suffered loss of liberty or damage to their health, and for the benefit of the dependents of those who died in consequence of such measures”.
Article 3 of that Agreement provided as follows:

“Without prejudice to any rights of Italian nationals based on German compensation legislation, the payment provided for in Article 1 shall constitute final settlement between the Federal Republic of Germany and the Italian Republic of all questions governed by the present Treaty.”

4. Law establishing the “Remembrance, Responsibility and Future” Foundation

26. On 2 August 2000, a Federal Law was adopted in Germany, establishing a “Remembrance, Responsibility and Future” Foundation (hereinafter the “2000 Federal Law”) to make funds available to individuals who had been subjected to forced labour and “other injustices from the National Socialist period” (Sec. 2, para. 1). The Foundation did not provide money directly to eligible individuals under the 2000 Federal Law but instead to “partner organizations”, including the International Organization for Migration in Geneva. Article 11 of the 2000 Federal Law placed certain limits on entitlement to compensation. One effect of this provision was to exclude from the right to compensation those who had had the status of prisoner of war, unless they had been detained in concentration camps or came within other specified categories. The reason given in the official commentary to this provision, which accompanied the draft Law, was that prisoners of war “may, according to the rules of international law, be put to work by the detaining power” [translation by the Registry] (Bundestagsdrucksache 14/3206, 13 April 2000).

Thousands of former Italian military internees, who, as noted above, had been denied the status of prisoner of war by the German Reich (see paragraph 21), applied for compensation under the 2000 Federal Law. In 2001, the German authorities took the view that, under the rules of international law, the German Reich had not been able unilaterally to change the status of the Italian military internees from prisoners of war to that of civilian workers. Therefore, according to the German authorities, the Italian military internees had never lost their prisoner-of-war status, with the result that they were excluded from the benefits provided under the 2000 Federal Law. On this basis, an overwhelming majority of requests for compensation lodged by Italian military internees was rejected. Attempts by former Italian military internees to challenge that decision and seek redress in the German courts were unsuccessful. In a number of decisions, German courts ruled that the individuals in question were not entitled to compensation under the 2000 Federal Law because they had been prisoners of war. On 28 June 2004, a Chamber of the German Constitutional Court (Bundesverfassungsgericht) held that Article 11, paragraph 3, of the 2000 Federal Law, which excluded reparation for prisoners of war, did not violate the right to equality before the law guaranteed by the German Constitution, and that public international law did not establish an individual right to compensation for forced labour.

A group of former Italian military internees filed an application against Germany before the European Court of Human Rights on 20 December 2004. On 4 September 2007, a Chamber of that Court declared that the application was “incompatible ratione materiae” with the provisions of the Convention on the Protection of Human Rights and Fundamental Freedoms and its protocols and therefore was declared inadmissible (Associazione Nazionale Reduci and 275 others v. Germany, decision of 4 September 2007, Application No. 45563/04).

5. Proceedings before Italian courts

A. Cases involving Italian nationals

27. On 23 September 1998, Mr. Luigi Ferrini, an Italian national who had been arrested in August 1944 and deported to Germany, where he was detained and forced to work in a munitions factory until the end of the war, instituted proceedings against the Federal Republic of Germany in the Court of Arezzo (Tribunale di Arezzo) in Italy. On 3 November 2000, the Court of Arezzo decided that Mr. Luigi Ferrini’s claim was inadmissible because Germany, as a sovereign State, was protected by jurisdictional immunity. By a judgment of 16 November 2001, registered on 14 January 2002, the Court of Appeal of Florence (Corte di Appello di Firenze) dismissed the appeal of the claimant on the same grounds. On 11 March 2004, the Italian Court of Cassation (Corte di Cassazione) held that Italian courts had jurisdiction over the claims for compensation brought against Germany by Mr. Luigi Ferrini on the ground that immunity does not apply in circumstances in which the act complained of constitutes an international crime (Ferrini v. Federal Republic of Germany, Decision No. 5044/2004 (Rivista di diritto internazionale, Vol. 87, 2004, p. 539; International Law Reports (ILR), Vol. 128, p. 658)). The case was then referred back to the Court of Arezzo, which held in a judgment dated 12 April 2007 that, although it had jurisdiction to entertain the case, the claim to reparation was time-barred. The judgment of the Court of Arezzo was reversed on appeal by the Court of Appeal of Florence, which held in a judgment dated 17 February 2011 that Germany should pay damages to Mr. Luigi Ferrini as well as his case-related legal costs incurred in the course of the judicial proceedings in Italy. In particular, the Court of Appeal of Florence held that jurisdictional immunity is not absolute and cannot be invoked by a State in the face of acts by that State which constitute crimes under international law.

28. Following the Ferrini Judgment of the Italian Court of Cassation dated 11 March 2004, twelve claimants brought proceedings against Germany in the Court of Turin (Tribunale di Torino) on 13 April 2004 in the case concerning Giovanni Mantelli and others. On 28 April 2004, Liberato Maietta filed a case against Germany before the Court of Sciacca (Tribunale di Sciacca). In both cases, which relate to acts of deportation to, and forced labour in, Germany which took place between 1943 and 1945, an interlocutory appeal requesting a declaration of lack of jurisdiction (“regolamento preventivo di giurisdizione”) was filed by Germany before the Italian Court of Cassation. By two Orders of 29 May 2008 issued in the Giovanni Mantelli and others and the Liberato Maietta cases (Italian Court of Cassation, Order No. 14201 (Mantelli) Foro italiano, Vol. 134, 2009, I, p. 1568); Order No. 14209 (Maietta) Rivista di diritto internazionale, Vol. 91, 2008, p. 896), the Italian Court of Cassation confirmed that the Italian courts had jurisdiction over the claims against Germany. A number of similar claims against Germany are currently pending before Italian courts.

29. The Italian Court of Cassation also confirmed the reasoning of the Ferrini Judgment in a different context in proceedings brought against Mr. Max Josef Milde, a member of the “Herrmann Göring” division of the German armed forces, who was charged with participation in massacres committed on 29 June 1944 in Civitella in Val di Chiana, Comia and San Pancrazio in Italy. The Military Court of La Spezia (Tribunale Militare di La Spezia) sentenced Mr. Milde in absentia to life imprisonment and ordered Mr. Milde and Germany, jointly and severally, to pay reparation to the successors in title of the victims of the massacre who appeared as civil parties in the proceedings (judgment of 10 October 2006 (registered on 2 February 2007))). Germany appealed to
the Military Court of Appeals in Rome (Corte Militare di Appello di Roma) against that part of the decision, which condemned it. On 18 December 2007 the Military Court of Appeals dismissed the appeal. In a judgment of 21 October 2008 (registered on 13 January 2009), the Italian Court of Cassation rejected Germany’s argument of lack of jurisdiction and confirmed its reasoning in the Ferrini judgment that in cases of crimes under international law, the jurisdictional immunity of States should be set aside (Rivista di diritto internazionale, Vol. 92, 2009, p. 618).

B. Cases involving Greek nationals

30. On 10 June 1944, during the German occupation of Greece, German armed forces committed a massacre in the Greek village of Distomo, involving many civilians. In 1995, relatives of the victims of the massacre who claimed compensation for loss of life and property commenced proceedings against Germany. The Greek Court of First Instance (Protostoleto) of Livadia rendered a judgment in default on 25 September 1997 (and read out in court on 30 October 1997) against Germany and awarded damages to the successors in title of the victims of the massacre. Germany’s appeal of that judgment was dismissed by the Hellenic Supreme Court (Areos Pagos) on 4 May 2000 (Prefecture of Volotia v. Federal Republic of Germany, case No. 11/2000 (ILR, Vol. 129, p. 513) (the Distomo case)). Article 923 of the Greek Code of Civil Procedure requires authorization from the Ministry for Justice to enforce a judgment against a foreign State in Greece. That authorization was requested by the claimants in the Distomo case but was not granted. As a result, the judgments against Germany have remained unexecuted in Greece.

31. The claimants in the Distomo case brought proceedings against Greece and Germany before the European Court of Human Rights alleging that Germany and Greece had violated Article 6, paragraph 1, of the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 1 of Protocol No. 1 to that Convention by refusing to comply with the decision of the Court of First Instance of Livadia dated 25 September 1997 (as to Germany) and failing to permit execution of that decision (as to Greece). In its decision of 12 December 2002, the European Court of Human Rights, referring to the rule of State immunity, held that the claimants’ application was inadmissible (Kalogeropoulos and others v. Greece and Germany, Application No. 59021/00, Decision of 12 December 2002, ECHR Reports 2002-X, p. 417; ILR, Vol. 129, p. 537).

32. The Greek claimants brought proceedings before the German courts in order to enforce in Germany the judgment rendered on 25 September 1997 by the Greek Court of First Instance of Livadia, as confirmed on 4 May 2000 by the Hellenic Supreme Court. In its judgment of 26 June 2003, the German Federal Supreme Court (Bundesgerichtshof) held that those Greek judicial decisions could not be recognized within the German legal order because they had been given in breach of Germany’s entitlement to State immunity (Greek citizens v. Federal Republic of Germany, case No. III ZR 245/98, Neue Juristische Wochenschrift (NJW), 2003, p. 3488; ILR, Vol. 129, p. 556).

33. The Greek claimants then sought to enforce the judgments of the Greek courts in the Distomo case in Italy. The Court of Appeal of Florence held in a decision dated 2 May 2005 (registered on 5 May 2005) that the order contained in the judgment of the Hellenic Supreme Court, imposing an obligation on Germany to reimburse the legal expenses for the judicial proceedings before that Court, was enforceable in Italy. In a decision dated 6 February 2007 (registered on 22 March 2007), the Court of Appeal of Florence rejected the objection raised by Germany against the decision of 2 May 2005 (Foro Italiano, Vol. 133, 2008, I, p. 1308). The Italian Court of Cassation, in a judgment dated 6 May 2008 (registered on 29 May 2008), confirmed the ruling of the Court of Appeal of Florence (Rivista di diritto internazionale, Vol. 92, 2009, p. 594).

34. Concerning the question of reparations to be paid to Greek claimants by Germany, the Court of Appeal of Florence declared, by a decision dated 13 June 2006 (registered on 16 June 2006), that the judgment of the Court of First Instance of Livadia dated 25 September 1997 was enforceable in Italy. In a judgment dated 21 October 2008 (registered on 25 November 2008), the Court of Appeal of Florence rejected the objection by the German Government against the decision of 13 June 2006. The Italian Court of Cassation, in a judgment dated 12 January 2011 (registered on 20 May 2011), confirmed the ruling of the Court of Appeal of Florence.

35. On 7 June 2007, the Greek claimants, pursuant to the decision by the Court of Appeal of Florence of 13 June 2006, registered with the Como provincial office of the Italian Land Registry (Agenzia del Territorio) a legal charge (ipoteca giudiziale) over Villa Vigoni, a property of the German State near Lake Como. The State Legal Service for the District of Milan (Avvocatura Distrettuale dello Stato di Milano), in a submission dated 6 June 2008 and made before the Court of Como (Tribunale di Como), maintained that the charge should be cancelled. Under Decree-Law No. 63 of 28 April 2010, Law No. 98 of 23 June 2010 and Decree-Law No. 216 of 29 December 2011, the legal charge was suspended pending the decision of the International Court of Justice in the present case.

36. Following the institution of proceedings in the Distomo case in 1995, another case was brought against Germany by Greek nationals before Greek courts — referred to as the Margellos case — involving claims for compensation for acts committed by German forces in the Greek village of Lidoriki in 1944. In 2001, the Hellenic Supreme Court referred that case to the Special Supreme Court (Anotato Eidiko Dikastirio), which, in accordance with Article 100 of the Constitution of Greece, has jurisdiction in relation to “the settlement of controversies regarding the determination of generally recognized rules of international law” [translation by the Registry], requesting it to decide whether the rules on State immunity covered acts referred to in the Margellos case. By a decision of 17 September 2002, the Special Supreme Court found that, in the present state of development of international law, Germany was entitled to State immunity (Margellos v. Federal Republic of Germany, case No. 6/2002, ILR, Vol. 129, p. 525).

II. THE SUBJECT-MATTER OF THE DISPUTE AND THE JURISDICTION OF THE COURT

37. The submissions presented to the Court by Germany have remained unchanged throughout the proceedings (see paragraphs 15, 16 and 17 above).

Germany requests the Court, in substance, to find that Italy has failed to respect the jurisdictional immunity which Germany enjoys under international law by allowing civil claims to be brought against it in the Italian courts, seeking reparations for injuries caused by violations of international humanitarian law committed by the German Reich during the Second World War;
that Italy has also violated Germany’s immunity by taking measures of constraint against Villa Vigoni, German State property situated in Italian territory; and that it has further breached any question of international law;

the existence of any fact which, if established, would constitute a breach of an international obligation.

Article 27, subparagraph (a), of the same Convention limits the scope of that instrument ratione temporis by stating that it shall not apply to "disputes relating to facts or situations prior to the entry into force of that Convention in Italy and as of 18 April 1941". The Convention entered into force on 18 April 1941.

The claims submitted to the Court by Germany certainly relate to "international legal disputes" within the meaning of Article 1 as cited above, between two States which, as has just been said, were both parties to the Convention on the date when the Application was filed, and indeed continue to be so.

38. Italy, for its part, requests the Court to adjudge Germany’s claims to be unfounded and therefore to reject them, apart from the submission regarding the measures of constraint taken against Villa Vigoni, on which point the Respondent indicates to the Court that it would have no objection to the latter ordering it to bring the said measures to an end.

In its Counter-Memorial, Italy submitted a counter-claim "with respect to the question of the existence of any fact which, if established, would constitute a breach of an international responsibility is engaged and to order the Respondent to take various steps by way of reparation.

37. Italy, however, is not about the treatment of that subject-matter in the judgments of the Italian courts; it is in respect of those claims that delimit the subject-matter of the dispute which the Court is called upon to settle. It is in respect of those claims that the Court must determine whether it has jurisdiction to entertain the case.

It is in respect of those claims that the Court must determine whether it has jurisdiction to deal with the dispute.

40. Italy has raised no objection of any kind regarding the jurisdiction of the Court or the admittance of the Application. Nevertheless, according to well-established jurisprudence, the Court “must . . . always be satisfied that it has jurisdiction, and must if necessary go into the matter on its own initiative if the case so requires” (see judgment in the I.C.J. Reports 1972, p. 52, para. 13).

41. Germany’s Application was filed on the basis of the jurisdiction conferred on the Court by Article 27 of the European Convention for the Peaceful Settlement of Disputes, under the terms of which:

"The High Contracting Parties shall submit to the judgement of the International Court of Justice all international legal disputes which may arise between them including in particular those concerning:

- the interpretation of a treaty;
- any question of international law;
- the existence of any fact which, if established, would constitute a breach of an international obligation.

42. Article 27, subparagraph (a), of the same Convention limits the scope of that instrument ratione temporis by stating that it shall not apply to "disputes relating to facts or situations prior to the entry into force of that Convention in Italy and as of 18 April 1941". The Convention entered into force on 18 April 1941.

The claims submitted to the Court by Germany certainly relate to "international legal disputes" within the meaning of Article 1 as cited above, between two States which, as has just been said, were both parties to the Convention on the date when the Application was filed, and indeed continue to be so.

44. The Parties, who have not disagreed on the analysis set out above, have on the other hand debated the extent of the jurisdiction of the Court, in the context, that of some of the arguments put forward by Italy in its defence and relating to the alleged non-performance by Germany of its obligation to make reparation to the victims of home violations of international humanitarian law.

43. The claims submitted to the Court by Germany are constituted by Italian judicial decisions that deny Germany the jurisdictional immunity which it claimed, and by measures of constraint adopted by them, to which the German armed forces were subjected. It is true that the Court is not entitled to make a decision in respect of the claims that Germany may rely on before the foreign courts to which those victims apply, in the sense that a State which fails to perform its obligation to make reparation to the victims of grave violations of international humanitarian law, and which offers those victims no effective means of claiming the reparation to which they may be entitled, would be deprived of the right to invoke its jurisdictional immunity. It is the function of the High Contracting Parties to submit such claims to the Court after the expiry of any applicable limitation period. Nevertheless, according to well-established jurisprudence, the Court “must . . . always be satisfied that it has jurisdiction, and must if necessary go into the matter on its own initiative if the case so requires” (see judgment in the I.C.J. Reports 1972, p. 52, para. 13).

45. The Parties, who have not disagreed on the analysis set out above, have on the other hand debated the extent of the jurisdiction of the Court, in the context, that of some of the arguments put forward by Italy in its defence and relating to the alleged non-performance by Germany of its obligation to make reparation to the victims of home violations of international humanitarian law.

According to Italy, a link exists between the question of jurisdictional immunity which Germany might rely on before the foreign courts to which those victims apply, in the sense that a State which fails to perform its obligation to make reparation to the victims of grave violations of international humanitarian law, and which offers those victims no effective means of claiming the right to invoke its jurisdictional immunity, would be deprived of the right to do so. In the present case, since there is no longer any counter-claim before the Court and Italy has requested the Court to "adjudge Germany’s claims to be unfounded", it is, in the first place, for the Court to determine whether it has jurisdiction to entertain the case.

46. According to Italy, a link exists between the question of jurisdictional immunity which Germany might rely on before the foreign courts to which those victims apply, in the sense that a State which fails to perform its obligation to make reparation to the victims of grave violations of international humanitarian law, and which offers those victims no effective means of claiming the right to invoke its jurisdictional immunity, would be deprived of the right to do so. In the present case, since there is no longer any counter-claim before the Court and Italy has requested the Court to "adjudge Germany’s claims to be unfounded", it is, in the first place, for the Court to determine whether it has jurisdiction to entertain the case.

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51. The Court will first address the issues raised by Germany’s first submission, namely whether, by exercising jurisdiction over Germany with regard to claims brought before it in the various Italian courts, the Italian courts acted in breach of the obligations of constraint adopted by the various international instruments to which the Italian courts have referred. It will then turn, in Section IV, to the decisions of the Italian courts declaring enforceable in Italy the judgments of the German courts. 

52. The Court begins by observing that the proceedings in the Italian courts have their origins in the events which occurred between the entry into force of the European Convention for the Peaceful Settlement of Disputes, the question of reparation claims resulting directly from the acts committed in 1943-1945.

53. Italy has responded to this objection that, while the Order of 6 July 2010 certainly prevents it from pursuing its counter-claim in the present case, it does not on the other hand prevent it from using the arguments on which it based that counter-claim in its defence against Germany’s rejoinder. It will then turn, in Section IV, to the decisions of the Italian courts declaring enforceable in Italy the judgments of the German courts.

54. Germany has contended that the Court could not rule on such an argument, on the basis of the Court’s Order of 6 July 2010. Italy contends that the Court cannot rule on such an argument, on the basis of the Court’s Order of 6 July 2010.

55. The Court considers that, at this stage, no other question arises with regard to the existence or scope of its jurisdiction.

The Court considers that, at this stage, no other question arises with regard to the existence or scope of its jurisdiction.
In the present context, State practice of particular significance is to be found in the judgments of national courts faced with the question whether a foreign State is immune, the States which have enacted statutes dealing with immunity, the claims to immunity advanced by foreign States, and the assertion by foreign States that international law accords them a right to immunity from the jurisdiction of other States; in the acknowledgment, by States granting immunity, that international law imposes upon them an obligation to do so; and, conversely, in the assertion by States in other cases of a right to exercise jurisdiction over foreign States. While it may be true that States sometimes decide to accord an immunity more extensive than that required by international law, for present purposes, the point is that the grant of immunity in such a case is not accompanied by the requisite opinio juris and therefore sheds no light upon the issue currently under consideration.

53. However, the Court is not called upon to decide whether these acts were illegal, a point which is not contested. The question for the Court is whether or not, in proceeding regarding the claim for compensation arising out of these acts, there is a considerable measure of agreement between the Parties regarding the applicable law. In particular, both Parties agree that the present immunity is governed by international law and not a mere matter of comity.

54. As between the countries of Western Europe, the question is whether the immunity claimed by Italy is accorded by international law. The United Nations Convention on State Immunity of 16 May 1972 (European Treaty Series 1980, Vol. II (2), p. 147, para. 26) that conclusion was based upon an extensive survey of national legislation and practice, the United Nations Convention, the fundamental principles of the international law, is clear, is one of the eight States, which, as Article 2, paragraph 1, of the Charter of the United Nations makes clear, is one of the eight States, which, as a general rule, has been "adopted as a general rule of customary international law solidly rooted in the current practice of States" (International Law Commission, Report of 1980, Vol. II (2), p. 147, para. 26). That conclusion has been confirmed by the record of national legislations, the United Nations Convention, and the practice of States on what became the United Nations Convention. The practice shows on the basis that there is a right to immunity under international law, together with a corresponding obligation on the part of States to respect and give effect to that immunity.

55. It follows that the Court must determine, in accordance with Article 38(1)(b) of its Statute, the existence of "international custom, as evidence of a general practice accepted as law". To do so, it must apply the criteria which have been laid down for the identification of international custom in the past. The International Law Commission concluded in 1970 that the Rules of State immunity "are solidly rooted in the current practice of States". Moreover, the Court noted that the immunities conferred on States by the United Nations Convention, as interpreted by the International Law Commission, have been "adapted to the requirements of the present day and the current practice of States". The same conclusion was reached by the International Law Commission in the course of the adoption of the United Nations Convention. Accordingly, the question now is whether the immunity claimed by Italy is accorded by international law as a general rule, as a result of the current practice of States, and whether or not, in proceedings regarding the claim for compensation arising out of these acts, there is a considerable measure of agreement between the Parties regarding the applicable law.

56. Although there has been much debate regarding the origins of State immunity and the nature of its legal basis, the position of the Court is that where a State is accorded immunity, it is not derived from any particular source or practice, but is a general rule of international law. It follows that the Court is not called upon to decide whether these acts were illegal, a point which is not contested. The question is whether or not, in proceeding regarding the claim for compensation arising out of these acts, there is a considerable measure of agreement between the Parties regarding the applicable law. In particular, both Parties agree that the present immunity is governed by international law and not a mere matter of comity.
61. Both Parties agree that States are generally entitled to immunity in respect of *acta jure imperii*. That is the approach taken in the United Nations, European and draft Inter-American Conventions, the national legislation in those States which have adopted statutes on the subject and the jurisprudence of national courts. It is against that background that the Court must approach the question raised by the present proceedings, namely whether that immunity is applicable to acts committed by the armed forces of a State (and other organs of that State acting in co-operation with the armed forces) in the course of conducting an armed conflict. Germany maintains that immunity is applicable and that there is no relevant limitation on the immunity to which a State is entitled in respect of *acta jure imperii*. Italy, in its pleadings before the Court, maintains that Germany is not entitled to immunity in respect of the cases before the Italian courts for two reasons: first, that immunity as to *acta jure imperii* does not extend to torts or delicts occasioning death, personal injury or damage to property committed on the territory of the forum State, and, secondly, that, irrespective of where the relevant acts took place, Germany was not entitled to immunity because those acts involved the most serious violations of rules of international law of a peremptory character for which no alternative means of redress was available. The Court will consider each of Italy’s arguments in turn.

2. Italy’s first argument: the territorial tort principle

62. The essence of the first Italian argument is that customary international law has developed to the point where a State is no longer entitled to immunity in respect of acts occasioning death, personal injury or damage to property on the territory of the forum State, even if the act in question was performed *jure imperii*. Italy recognizes that this argument is applicable only to those of the claims brought before the Italian courts which concern acts that occurred in Italy and not to the cases of Italian military internees taken prisoner outside Italy and transferred to Germany or other territories outside Italy as forced labour. In support of its argument Italy points to the adoption of Article 11 of the European Convention and Article 12 of the United Nations Convention and to the fact that nine of the ten States it identified which have adopted legislation specifically dealing with State immunity (the exception being Pakistan) have enacted provisions similar to those in the two Conventions. Italy acknowledges that the European Convention contains a provision to the effect that the Convention is not applicable to the acts of foreign armed forces (Article 31) but maintains that this provision is merely a saving clause aimed primarily at avoiding conflicts between the Convention and instruments regulating the status of visiting forces present with the consent of the territorial sovereign and that it does not show that States are entitled to immunity in respect of the acts of their armed forces in another State. Italy dismisses the significance of certain statements (discussed in paragraph 69 below) made during the process of adoption of the United Nations Convention suggesting that that Convention did not apply to the acts of armed forces. Italy also notes that two of the national statutes (those of the United Kingdom and Singapore) are not applicable to the acts of foreign armed forces but argues that the other seven (those of Argentina, Australia, Canada, Israel, Japan, South Africa and the United States of America) amount to significant State practice asserting jurisdiction over torts occasioned by foreign armed forces.
63. Germany maintains that, in so far as they deny a State immunity in respect of *acta jure imperii*, neither Article 11 of the European Convention, nor Article 12 of the United Nations Convention reflects customary international law. It contends that, in any event, they are irrelevant to the present proceedings, because neither provision was intended to apply to the acts of armed forces. Germany also points to the fact that, with the exception of the Italian cases and the Distomo case in Greece, no national court has ever held that a State was not entitled to immunity in respect of acts of its armed forces, in the context of an armed conflict and that, by contrast, the courts in several States have expressly declined jurisdiction in such cases on the ground that the respondent State was entitled to immunity.

64. The Court begins by observing that the notion that State immunity does not extend to civil proceedings in respect of acts committed on the territory of the forum State causing death, personal injury or damage to property originated in cases concerning road traffic accidents and other “insurable risks”. The limitation of immunity recognized by some national courts in such cases was treated as confined to *acta jure gestionis* (see, e.g., the judgment of the Supreme Court of Austria in Holubeck v. Government of the United States of America (Juristische Blätter (Wien), Vol. 84, 1962, p. 43; ILR, Vol. 40, p. 73)). The Court notes, however, that none of the national legislation which provides for a “territorial tort exception” to immunity expressly distinguishes between *acta jure gestionis* and *acta jure imperii*. The Supreme Court of Canada expressly rejected the suggestion that the exception in the Canadian legislation was subject to such a distinction (Schreiber v. Federal Republic of Germany, [2002] Supreme Court Reports (SCR), Vol. 3, p. 269, paras. 33-36). Nor is such a distinction featured in either Article 11 of the European Convention or Article 12 of the United Nations Convention. The International Law Commission’s commentary on the text of what became Article 12 of the United Nations Convention makes clear that this was a deliberate choice and that the provision was not intended to be restricted to *acta jure gestionis* (Yearbook of the International Law Commission, 1991, Vol. II (2), p. 45, para. 8). Germany has not, however, been alone in suggesting that, in so far as it was intended to apply to *acta jure imperii*, Article 12 was not representative of customary international law. In criticizing the International Law Commission’s draft of what became Article 12, China commented in 1990 that “the article had gone even further than the restrictive doctrine, for it made no distinction between sovereign acts and private law acts” (United Nations doc. A/C.6/45/SR.25, p. 2) and the United States, commenting in 2004 on the draft United Nations Convention, stated that Article 12 “must be interpreted and applied consistently with the time-honoured distinction between acts *jure imperii* and acts *jure gestionis*” since to extend jurisdiction without regard to that distinction “would be contrary to the existing principles of international law” (United Nations doc. A/C.6/59/SR.13, p. 10, para. 63).

65. The Court considers that it is not called upon in the present proceedings to resolve the question whether there is in customary international law a “tort exception” to State immunity applicable to *acta jure imperii* in general. The issue before the Court is confined to acts committed on the territory of the forum State by the armed forces of a foreign State, and other organs of State working in co-operation with those armed forces, in the course of conducting an armed conflict.

66. The Court will first consider whether the adoption of Article 11 of the European Convention or Article 12 of the United Nations Convention affords any support to Italy’s contention that States are no longer entitled to immunity in respect of the type of acts specified in the preceding paragraph. As the Court has already explained (see paragraph 54 above), neither Convention is in force between the Parties to the present case. The provisions of these Conventions are, therefore, relevant only in so far as their provisions and the process of their adoption and implementation shed light on the content of customary international law.

67. Article 11 of the European Convention states the territorial tort principle in broad terms, “A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State in proceedings which relate to redress for injury to the person or damage to tangible property, if the facts which occasioned the injury or damage occurred in the territory of the State of the forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred.” That provision must, however, be read in the light of Article 31, which provides, “Nothing in this Convention shall affect any immunities or privileges enjoyed by a Contracting State in respect of anything done or omitted to be done by, or in relation to, its armed forces when on the territory of another Contracting State.” Although one of the concerns which Article 31 was intended to address was the relationship between the Convention and the various agreements on the status of visiting forces, the language of Article 31 makes clear that it is not confined to that matter and excludes from the scope of the Convention all proceedings relating to acts of foreign armed forces, irrespective of whether those forces are present in the territory of the forum with the consent of the forum State and whether their acts take place in peacetime or in conditions of armed conflict. The Explanatory Report on the Convention, which contains a detailed commentary prepared as part of the negotiating process, states in respect of Article 31, “The Convention is not intended to govern situations which may arise in the event of armed conflict; nor can it be invoked to resolve problems which may arise between allied States as a result of the stationing of forces. These problems are generally dealt with by special agreements (cf. Article 33).

[Article 31] prevents the Convention being interpreted as having any influence upon these matters.” (Paragraph 116; emphasis added.)

68. The Court agrees with Italy that Article 31 takes effect as a “saving clause”, with the result that the immunity of a State for the acts of its armed forces falls entirely outside the Convention and has to be determined by reference to customary international law. The consequence, however, is that the inclusion of the “territorial tort principle” in Article 11 of the Convention cannot be treated as support for the argument that a State is not entitled to immunity...
The United Nations Convention on Jurisdictional Immunities of States and Their Property, approved by the General Assembly on 18 December 1970, Conf. of Plen. Members, A/6 (1971), p. 38, entered into force on 1 January 1974. This instrument is intended to clarify the jurisdictional immunity of States against suit and execution in the courts of other States. It provides that a State may invoke its jurisdictional immunity to avoid proceedings concerning acts of military forces and associated organs of a foreign State in the exercise of their official duties. The Convention aims to prevent States from being forced to recognize the jurisdiction of foreign courts over State immunities or to be subject to foreign court judgments on issues of State immunities.

According to Article 31, the immunity of a State from legal proceedings or execution is not affected by Article 11 of the Convention, which concerns the activities of military forces. This means that the immunity of a State for torts committed by its armed forces is unaffected by Article 11 of the Convention.

Turning to State practice in the form of national legislation, the Court notes that nine of the ten States referred to by the Parties which have legislated specifically for the subject of State immunity have adopted death, personal injury or damage to property occurring on the territory of the forum State (United States of America Foreign Sovereign Immunities Act 1976, 28 USC, Section 1605 (judgment of the Supreme Court in Letelier v. Republic of Chile, 1983, [1983] 3 ILR 691), Ireland (International Jurisdiction Act 1967, Section 36; Canadian State Immunity Act 1985, Section 13; Singapore State Immunity Act 1985, Section 7; Argentina Law No. 24.488 (Statute on the Immunity of Foreign States before Argentine Tribunals) 1995, Article 2 (c); Israel Foreign State Immunity Law 2008, Section 22). The legislation of nine of these statutes (the United Kingdom State Immunity Act 1978, Section 16 (2) and the Singapore State Immunity Act 1985, Section 19 (2)) contain provisions that exclude proceedings relating to the acts of foreign armed forces from their application. The corresponding provisions in the Canadian, Australian and Japanese statutes exclude only the acts of visiting forces present with the consent of the host State or matters covered by legislation regarding such visiting forces (Canada State Immunity Act 1985, Section 6; Australia Foreign States Immunities Act 1981, Section 6; Israel Foreign State Immunity Law 2008, Section 22). The legislation of Argentina, South Africa and Japan contains no comparable provision. Only Pakistan’s State Immunity Ordinance 1981 contains no comparable provision.

In Article 12, the United Nations Convention provides:

"Unless otherwise agreed between the States concerned, a State cannot invoke the jurisdiction of another State to which it is not subject under the terms of Article 11, as a reason for submitting a matter to the jurisdiction of a court of the other State on the basis of the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, any claim based upon the exercise or performance of the function or the failure to exercise or perform the function is in respect of acts committed in the exercise or performance of the function, or of acts directly connected therewith or preparatory or subsequent thereto, or in respect of acts performed by the armed forces and associated organs of foreign States in the course of an armed conflict. No State questioned this interpretation. Moreover, the Court notes that two of the States which have so far ratified the Convention, namely Norway and Sweden, made declarations in identical terms stating their understanding that military activities were not covered by the Convention and that the distinction between military and civil activities is relevant for the purposes of Article 12. The Convention has also been prepared on the basis of a general understanding that military activities were not covered by the Convention.

The Court concludes that the inclusion in the Convention of Article 12 cannot be taken as affording any support to the contention that customary international law or the law of State immunities, as interpreted in the light of the Convention, does not confer on States the right to immunity in respect of acts occasioning death, personal injury or damage to property committed in the territory of the forum State by the armed forces and associated organs of another State in the context of an armed conflict. No State questioned this interpretation.
which are often very similar to those of the cases before the Italian courts, concern the events of the Second World War. In this context, the Court of cassation in France has consistently held that immunity in respect of acts committed in the context of an armed conflict involving the armed forces of a foreign State, and associated organs of State, acting in the context of an armed conflict. Germany was entitled to immunity in a series of cases brought by claimants who had been deported from occupied French territory during the Second World War (Application No. 03-41851, 2 June 2004, Bull civ. No. 158, p. 132 (the "Bucheron" case); Application No. 03-41852, 8 July 2004, Bull civ. No. 158, p. 135 (the "Paulet" case); Application No. 03-41853, 8 July 2004, Bull civ. No. 158, p. 136 (the "Guyon" case)); Application No. 03-41854, 8 July 2004, Bull civ. No. 158, p. 137 (the "Arguello" case) and Application No. 03-41855, 15 July 2004, Bull civ. No. 158, p. 138 (the "Grenier" case)).

72. The Court next turns to State practice in the form of the judgments of national courts concerning the events of the Second World War. In 2001 the Constitutional Court of Slovenia ruled that Germany was entitled to immunity in an action brought by a claimant who in 1944 had suffered injuries when German forces burned his village in occupied Poland and the decisions of the United Nations Convention and a range of other international law in respect of acts committed on or visiting the territory of another State, with the consent of the latter, has been considered by national courts on a number of occasions. Decisions of the courts of Egypt (Annual Digest, Vol. 7, p. 187), Belgium ("Johannes" (1934), p. 108; Annual Digest, Vol. 9, p. 260) and Germany ("Johannes" (1934), 2nd ed., 2nd part, p. 38; I.R., Vol. 127, p. 225; "Allianz Via" (1999), Court of Cassation, 2nd Chamber, judgment of 3 September 1999, I.R., Vol. 127, p. 226; "Allianz Via" (1999), Court of Cassation, 2nd Chamber, judgment of 3 September 1999, I.R., Vol. 127, p. 227) are earlier examples of national courts reaching similar conclusions. Since then, the courts of a number of States have also held that States were entitled to immunity in respect of acts committed by their armed forces even when on the territory of the forum State or of another State in which those acts were committed. Supreme Court of Cassation, 2nd Chamber, judgment of 12 September 2001, I.R., Vol. 128, p. 644). The United Kingdom courts have also held that customary international law required immunity in proceedings for acts committed by foreign armed forces in the course of an armed conflict. British Council of Legal Advisers, "Acta jure imperii: immunity and jurisdiction with respect to acts of war committed on the territory of another State" (2001), International Law Reports, Vol. 2, p. 399. The United Kingdom Courts have consistently held that customary international law required immunity in proceedings for acts committed by foreign armed forces in the course of an armed conflict. British Council of Legal Advisers, "Acta jure imperii: immunity and jurisdiction with respect to acts of war committed on the territory of another State" (2001), International Law Reports, Vol. 2, p. 399.

74. The highest courts in Slovenia and Poland have also held that Germany was entitled to immunity in respect of acts committed in the course of an armed conflict. Judgments of 26 June 2009 (Application No. 14717/06, Decision of 16 June 2009, Bull civ. No. 158, p. 132 (the "Bucheron" case); Application No. 03-41851, 2 June 2004, Bull civ. No. 158, p. 132 (the "Bucheron" case)); Application No. 03-41852, 8 July 2004, Bull civ. No. 158, p. 135 (the "Paulet" case); Application No. 03-41853, 8 July 2004, Bull civ. No. 158, p. 136 (the "Guyon" case)); Application No. 03-41854, 8 July 2004, Bull civ. No. 158, p. 137 (the "Arguello" case) and Application No. 03-41855, 15 July 2004, Bull civ. No. 158, p. 138 (the "Grenier" case)).

75. Finally, the Court notes that the German courts have also concluded that the territorial tort principle did not apply in respect of acts committed in the course of an armed conflict. Judgments of the Federal Supreme Court of 26 June 2003 ("Bartes" v. Federal Republic of Germany, case No. III ZR 258/01, W.V. 2003, p. 1488; I.R., Vol. 129, p. 550), declining to give effect in Germany to the Greek decision in the "Distomo" case on the ground that it had been given in breach of Germany’s entitlement to immunity.

73. The Court considers, however, that for the purposes of the present case the most pertinent State practice is to be found in those national judicial decisions which concerned the acts of the armed forces of a foreign State and associated organs of State, acting in the context of an armed conflict.
76. The only State in which there is any judicial practice which appears to support the Italian argument, apart from the judgments of the Italian courts which are the subject of the present proceedings, is Greece. The judgment of the Hellenic Supreme Court in the Distomo case in 2000 contains an extensive discussion of the territorial tort principle without any suggestion that it does not extend to the acts of armed forces during an armed conflict. However, the Greek Special Supreme Court, in its judgment in Margellos v. Federal Republic of Germany (case No. 62/2002) (ILR, Vol. 129, p. 525), repudiated the reasoning of the Supreme Court in Distomo and held that Germany was entitled to immunity. In particular, the Special Supreme Court held that the territorial tort principle was not applicable to the acts of the armed forces of a State in the conduct of armed conflict. While that judgment does not alter the outcome in the Distomo case, a matter considered below, Greece has informed the Court that courts and other bodies in Greece faced with the same issue of whether immunity is applicable to torts allegedly committed by foreign armed forces in Greece are required to follow the stance taken by the Special Supreme Court in its decision in Margellos unless they consider that customary international law has changed since the Margellos judgment. Germany has pointed out that, since the judgment in Margellos was given, no Greek court has denied immunity in proceedings brought against Germany in respect of torts allegedly committed by German armed forces during the Second World War and in a 2009 decision (Decision 853/2009), the Supreme Court, although deciding the case on a different ground, approved the reasoning in Margellos. In view of the judgment in Margellos and the dictum in the 2009 case, as well as the decision of the Greek Government not to permit enforcement of the Distomo judgment in Greece itself and the Government’s defence of that decision before the European Court of Human Rights in Kalogeropoulos and others v. Greece and Germany (Application No. 59021/00, Decision of 12 December 2002, ECHR Reports 2002-X, p. 417; ILR, Vol. 129, p. 537), the Court concludes that Greek State practice taken as a whole actually contradicts, rather than supports, Italy’s argument.

77. In the Court’s opinion, State practice in the form of judicial decisions supports the proposition that State immunity for acta jure imperii continues to extend to civil proceedings for acts occasioning death, personal injury or damage to property committed by the armed forces and other organs of a State in the conduct of armed conflict, even if the relevant acts take place on the territory of the forum State. That practice is accompanied by opinio juris, as demonstrated by the positions taken by States and the jurisprudence of a number of national courts which have made clear that they considered that customary international law required immunity. The almost complete absence of contrary jurisprudence is also significant, as is the absence of any statements by States in connection with the work of the International Law Commission regarding State immunity and the adoption of the United Nations Convention or, so far as the Court has been able to discover, in any other context asserting that customary international law does not require immunity in such cases.

78. In light of the foregoing, the Court considers that customary international law continues to require that a State be accorded immunity in proceedings for torts allegedly committed on the territory of another State by its armed forces and other organs of State in the course of conducting an armed conflict. That conclusion is confirmed by the judgments of the European Court of Human Rights to which the Court has referred (see paragraphs 72, 73 and 76).

79. The Court therefore concludes that, contrary to what had been argued by Italy in the present proceedings, the decision of the Italian courts to deny immunity to Germany cannot be justified on the basis of the territorial tort principle.

3. Italy’s second argument: the subject-matter and circumstances of the claims in the Italian courts

80. Italy’s second argument, which, unlike its first argument, applies to all of the claims brought before the Italian courts, is that the denial of immunity was justified on account of the particular nature of the acts forming the subject-matter of the claims before the Italian courts and the circumstances in which those claims were made. There are three strands to this argument. First, Italy contends that the acts which gave rise to the claims constituted serious violations of the principles of international law applicable to the conduct of armed conflict, amounting to war crimes and crimes against humanity. Secondly, Italy maintains that the rules of international law thus contravened were peremptory norms (jus cogens). Thirdly, Italy argues that the claimants having been denied all other forms of redress, the exercise of jurisdiction by the Italian courts was necessary as a matter of last resort. The Court will consider each of these strands in turn, while recognizing that, in the oral proceedings, Italy also contended that its courts had been entitled to deny State immunity because of the combined effect of these three strands.

A. The gravity of the violations

81. The first strand is based upon the proposition that international law does not accord immunity to a State, or at least restricts its right to immunity, when that State has committed serious violations of the law of armed conflict (international humanitarian law as it is more commonly termed today, although the term was not used in 1943-1945). In the present case, the Court has already made clear (see paragraph 52 above) that the actions of the German armed forces and other organs of the German Reich giving rise to the proceedings before the Italian courts were serious violations of the law of armed conflict which amounted to crimes under international law. The question is whether that fact operates to deprive Germany of an entitlement to immunity.

82. At the outset, however, the Court must observe that the proposition that the availability of immunity will be to some extent dependent upon the gravity of the unlawful act presents a logical problem. Immunity from jurisdiction is an immunity not merely from being subjected to an adverse judgment but from being subjected to the trial process. It is, therefore, necessarily preliminary in nature. Consequently, a national court is required to determine whether or not a foreign State is entitled to immunity as a matter of international law before it can hear the merits of the case brought before it and before the facts have been established. If immunity were to be dependent upon the State actually having committed a serious violation of international human rights law or the law of armed conflict, then it would become necessary for the national court to hold an enquiry into the merits in order to determine whether it had jurisdiction. If, on the other hand, the mere allegation that the State had committed such wrongful acts were to be sufficient to deprive the State of its entitlement to immunity, immunity could, in effect be negated simply by skilful construction of the claim.
83. That said, the Court must nevertheless inquire whether customary international law has developed to the point where a State is not entitled to immunity in the case of serious violations of human rights law or the law of armed conflict. Apart from the decisions of the Italian courts which are the subject of the present proceedings, there is almost no State practice which might be considered to support the proposition that a State is deprived of its entitlement to immunity in such a case. Although the Hellenic Supreme Court in the Distomo case adopted a form of that proposition, the Special Supreme Court in Margellos repudiated that approach two years later. As the Court has noted in paragraph 76 above, under Greek law it is the stance adopted in Margellos which must be followed in later cases unless the Greek courts find that there has been a change in customary international law since 2002, which they have not done. As with the territorial tort principle, the Court considers that Greek practice, taken as a whole, tends to deny that the proposition advanced by Italy has become part of customary international law.

84. In addition, there is a substantial body of State practice from other countries which demonstrates that customary international law does not treat a State’s entitlement to immunity as dependent upon the gravity of the act of which it is accused or the peremptory nature of the rule which it is alleged to have violated.


86. The Court notes that, in its response to a question posed by a Member of the Court, Italy itself appeared to demonstrate uncertainty about this aspect of its case. Italy commented, “Italy is aware of the view according to which war crimes and crimes against humanity could not be considered to be sovereign acts for which the State is entitled to invoke the defence of sovereign immunity … While Italy acknowledges that in this area the law of State immunity is undergoing a process of change, it also recognizes that it is not clear at this stage whether this process will result in a new general exception to immunity — namely a rule denying immunity with respect to every claim for compensation arising out of [of] international crimes.”

A similar uncertainty is evident in the orders of the Italian Court of Cassation in Mantelli and Maietta (Orders of 29 May 2008).

87. The Court does not consider that the United Kingdom judgment in Pinochet (No. 3) ([2000] 1 AC 147; ILR, Vol. 119, p. 136) is relevant, notwithstanding the reliance placed on that judgment by the Italian Court of Cassation in Ferrini. Pinochet concerned the immunity of a former Head of State from the criminal jurisdiction of another State, not the immunity of the State itself in proceedings designed to establish its liability to damages. The distinction between the immunity of the official in the former type of case and that of the State in the latter case was emphasized by several of the judges in Pinochet (Lord Hutton at pp. 254 and 264, Lord Millett at p. 278 and Lord Phillips at pp. 280-281). In its later judgment in Jones v. Saudi Arabia ([2007] 1 AC 270; ILR, Vol. 129, p. 629), the House of Lords further clarified this distinction, Lord Bingham describing the distinction between criminal and civil proceedings as “fundamental to the decision” in Pinochet (para. 32). Moreover, the rationale for the judgment in Pinochet was based upon the specific language of the 1984 United Nations Convention against Torture, which has no bearing on the present case.

88. With reference to national legislation, Italy referred to an amendment to the United States Foreign Sovereign Immunities Act, first adopted in 1996. That amendment withdraws immunity for certain specified acts (for example, torture and extra-judicial killings) if allegedly performed by a State which the United States Government has “designated as a State sponsor of terrorism” (28 USC 1605A). The Court notes that this amendment has no counterpart in the legislation of other States. None of the States which has enacted legislation on the subject of State immunity has made provision for the limitation of immunity on the grounds of the gravity of the acts alleged.

89. It is also noticeable that there is no limitation of State immunity by reference to the gravity of the violation or the peremptory character of the rule breached in the European Convention, the United Nations Convention or the draft Inter-American Convention. The absence of any such provision from the United Nations Convention is particularly significant, because the question whether such a provision was necessary was raised at the time that the text of what became the Convention was under consideration. In 1999 the International Law Commission established a Working Group which considered certain developments in practice regarding some issues of State immunity which had been identified by the Sixth Committee of the General Assembly. In an appendix to its report, the Working Group referred, as an additional matter, to developments regarding claims “in the case of death or personal injury resulting from acts of a State in violation of human rights norms having the character of jus cogens” and stated that this issue was one which should not be ignored, although it did not recommend any amendment to the text of the International Law Commission Articles (Yearbook of the International Law Commission, 1999, Vol. II (2), pp. 171-172). The matter was then considered by the Working Group established by the Sixth Committee of the General Assembly, which reported later in 1999 that it had decided not to take up the matter as “it did not seem to be ripe enough for the Working Group to engage in a codification exercise over it” and commented that it was for the Sixth...
Committee to decide what course of action, if any, should be taken (United Nations doc. A/C.6/54/L.12, p. 7, para. 47). During the subsequent debates in the Sixth Committee no State suggested that a _jus cogens_ limitation to immunity should be included in the Convention. The Court considers that this history indicates that, at the time of adoption of the United Nations Convention in 2004, States did not consider that customary international law limited immunity in the manner now suggested by Italy.

90. The European Court of Human Rights has not accepted the proposition that States are no longer entitled to immunity in cases regarding serious violations of international humanitarian law or human rights law. In 2001, the Grand Chamber of that Court, by the admittedly narrow majority of nine to eight, concluded that,

> “Notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged.” (Al-Adwani v. United Kingdom [GC], Application No. 35763/97, Judgment of 21 November 2001, _ECHR_ Reports 2001-XI, p. 101, para. 61; _ILR_, Vol. 123, p. 24.)

The following year, in _Kalogeropoulou and others v. Greece and Germany_, the European Court of Human Rights rejected an application relating to the refusal of the Greek Government to permit enforcement of the _Distomo_ judgment and said that,

> “The Court does not find it established, however, that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages brought against them in another State for crimes against humanity.” (Application No. 59021/00, Decision of 12 December 2002, _ECHR_ Reports 2002-X, p. 417; _ILR_, Vol. 129, p. 537.)

91. The Court concludes that, under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict. In reaching that conclusion, the Court must emphasize that it is addressing only the immunity of the State itself from the jurisdiction of the courts of other States; the question of whether, and if so to what extent, immunity might apply in criminal proceedings against an official of the State is not in issue in the present case.

B. The relationship between _jus cogens_ and the rule of State immunity

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

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

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

95. To the extent that it is argued that no rule which is not of the status of _jus cogens_ may be applied if to do so would hinder the enforcement of a _jus cogens_ rule, even in the absence of a direct conflict, the Court sees no basis for such a proposition. A _jus cogens_ rule is one from which
C. The “last resort” argument

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

99. The Court notes that Germany has taken significant steps to ensure that a measure of reparation was made to Italian victims of war crimes and crimes against humanity. Nevertheless, Germany decided to exclude from the scope of its national compensation scheme most of the claims by Italian military internees on the ground that prisoners of war were not entitled to compensation for forced labour (see paragraph 26 above). The overwhelming majority of Italian military internees were, in fact, denied treatment as prisoners of war by the Nazi authorities. Notwithstanding that history, in 2001 the German Government determined that those internees were ineligible for compensation because they had had a legal entitlement to prisoner-of-war status. The Court considers that it is a matter of surprise — and regret — that Germany decided to deny compensation to a group of victims on the ground that they had been entitled to a status which, at the relevant time, Germany had refused to recognize, particularly since those victims had thereby been denied the legal protection to which that status entitled them.

100. Moreover, as the Court has said, albeit in the different context of the immunity of State officials from criminal proceedings, the fact that immunity may bar the exercise of jurisdiction in a particular case does not alter the applicability of the substantive rules of international law (Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 25, para. 60; see also Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment, I.C.J. Reports 2008, p. 244, para. 196). In that context, the Court would point out that whether a State is entitled to immunity before the courts of another State is a question entirely separate from whether the international responsibility of that State is engaged and whether it has an obligation to make reparation.

no derogation is permitted but the rules which determine the scope and extent of jurisdiction and when that jurisdiction may be exercised do not derogate from those substantive rules which possess jus cogens status, nor is there anything inherent in the concept of jus cogens which would require their modification or would displace their application. The Court has taken that approach in two cases, notwithstanding that the effect was that a means by which a jus cogens rule might be enforced was rendered unavailable. In Armed Activities, it held that the fact that a rule has the status of jus cogens does not confer upon the Court a jurisdiction which it would not otherwise possess (Armed Activities on the Territory of the Congo (New Application: 2002), Judgment, I.C.J. Reports 2006, p. 6, paras. 64 and 125). In Arrest Warrant, the Court held, albeit without express reference to the concept of jus cogens, that the fact that a Minister for Foreign Affairs was accused of criminal violations of rules which undoubtedly possess the character of jus cogens did not deprive the Democratic Republic of the Congo of the entitlement which it possessed as a matter of customary international law to demand immunity on his behalf (Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 3, paras. 58 and 78). The Court considers that the same reasoning is applicable to the application of the customary international law regarding the immunity of one State from proceedings in the courts of another.

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

97. Accordingly, the Court concludes that even on the assumption that the proceedings in the Italian courts involved violations of jus cogens rules, the applicability of the customary international law on State immunity was not affected.
D. The combined effect of the circumstances relied upon by Italy

101. That notwithstanding, the Court cannot accept Italy's contention that the alleged shortcomings in Germany's provisions for reparation to Italian victims, entitled the Italian courts to

102. Moreover, the Court cannot fail to observe that the application of any such condition, if

103. The Court therefore rejects Italy's argument that Germany could be refused immunity

104. In coming to this conclusion, the Court is most aware that the immunity from jurisdiction accorded to a State in accordance with international law may preclude judicial redress for the

105. In the course of the oral proceedings, counsel for Italy maintained that the three strands

106. The Court has already held that none of the three strands of the second Italian argument

107. The Court therefore holds that the action of the Italian courts in denying Germany the

108. It is, therefore, unnecessary for the Court to consider a number of questions which were

109. It considers, however, that the claims arising from the treatment of the Italian military

110. In so far as the argument based on the combined effect of the circumstances is to be

111. In the examination of State practice, the Court was of the view that the practice of the States

112. As explained in paragraph 56 above, according to international law, State immunity, where it

113. The immunity of a State is not dependent upon the fact that that State has transferred funds to

114. It is not persuaded that they would have that

115. In the oral proceedings, counsel for Italy maintained that the three strands of Italy's second argument had to be viewed together. Nothing in the examination of State practice lends support to the

116. Nothing in the examination of State practice leads to the proposition that a national court is entitled to accord to a respondent State immunity which would otherwise be denied. In so far as the argument based on the combined effect of the circumstances is to be understood as meaning that the national court should balance the different factors, assessing the

117. States also did not include any such condition in

118. In conclusion, the Court is of the opinion that the combined effect of the circumstances does not

119. The Court finds that none of the three strands of the second Italian argument would, of itself, justify the action of the Italian courts. It is not persuaded that they would have that

120. In the aftermath of an armed conflict, the national courts of the States concerned are unlikely to be well placed to determine whether a claimant is entitled to claim compensation. Not only are the States likely to be in a position to determine the

121. Nevertheless, the Court is of the view that the practice of the States which have been faced with objections based on immunity is there evidence that entitlement to

122. As explained in paragraph 82 of this Judgment, before consideration of the merits, questions of immunity at the outset of the proceedings, before decision is reached. Moreover, if a lump sum settlement has been made

123. If a lump sum settlement has been made, it could be the

124. If any such condition, if indeed existed, would be exceptionally difficult to be distinguished in a context such as that

125. Neither in the national legislation on the subject, nor in the jurisprudence of the national courts

126. That is not to say, of course, that these are unimportant questions, only that they are not ones which fall for decision within the limits of the present case. The question whether Germany still has a responsibility towards Italy, or individual Italians, in respect of war crimes and

127. It considers however that the claims arising from the treatment of the Italian military

128. It is not aware that the immunity from jurisdiction of Germany in accordance with international law may preclude judicial redress for the

129. In coming to this conclusion, the Court is not unaware that the immunity from jurisdiction of Germany, in accordance with international law may preclude judicial redress for the

130. The Court therefore rejects Italy's argument that Germany could be refused immunity
IV. THE MEASURES OF CONSTRAINT TAKEN AGAINST PROPERTY BELONGING TO GERMAN LOCATED IN ITALIAN TERRITORY

109. On 7 June 2007, certain Greek claimants, in reliance on a decision of the Florence Court of Appeal of 13 June 2006, declaring enforceable in Italy the judgment rendered by the Court of First Instance of Livadia, in Greece, which had ordered Germany to pay them compensation, entered in the Land Registry of the Province of Como a legal charge against Villa Vigoni, a property of the German State located near Lake Como (see above, paragraph 35).

110. Germany argued before the Court that such a measure of constraint violates the immunity from enforcement enjoyed by States in regard to their property situated on foreign territory. Italy has not sought to justify that measure, on the contrary, it indicated to the Court that it "has no objection to any account of the pending proceedings before the Court in the present case. It has not, however, been justified that measure, on the contrary, it indicated to the Court that it "has no objection to any account of the pending proceedings before the Court in the present case. It has not, however, been justified that measure, on the contrary, it indicated to the Court that it "has no objection to any account of the pending proceedings before the Court in the present case. It has not, however, been justified that measure, on the contrary, it indicated to the Court that it "has no objection to any account of the pending proceedings before the Court in the present case. It has not, however, been justified that measure, on the contrary, it indicated to the Court that it "has no objection to any account of the pending proceedings before the Court in the present case. It has not, however, been justified that measure, on the contrary, it indicated to the Court that it "has no objection to any account of the pending proceedings before the Court in the present case.

111. As a result of Decree-Law No. 63 of 28 April 2010, Law No. 98 of 23 June 2010 and Decree-Law No. 216 of 29 December 2011, the charge in question was suspended in order to take account of the pending proceedings before the Court in the present case. It has not, however, been justified that measure, on the contrary, it indicated to the Court that it "has no objection to any account of the pending proceedings before the Court in the present case. It has not, however, been justified that measure, on the contrary, it indicated to the Court that it "has no objection to any account of the pending proceedings before the Court in the present case. It has not, however, been justified that measure, on the contrary, it indicated to the Court that it "has no objection to any account of the pending proceedings before the Court in the present case. It has not, however, been justified that measure, on the contrary, it indicated to the Court that it "has no objection to any account of the pending proceedings before the Court in the present case. It has not, however, been justified that measure, on the contrary, it indicated to the Court that it "has no objection to any account of the pending proceedings before the Court in the present case. It has not, however, been justified that measure, on the contrary, it indicated to the Court that it "has no objection to any account of the pending proceedings before the Court in the present case. It has not, however, been justified that measure, on the contrary, it indicated to the Court that it "has no objection to any account of the pending proceedings before the Court in the present case. It has not, however, been justified that measure, on the contrary, it indicated to the Court that it "has no objection to any account of the pending proceedings before the Court in the present case.

112. The Court considers that the above mentioned suspension, and the decision of the Court dismissing the charge. The Court has jurisdiction to decide whether the measure of constraint taken against Villa Vigoni is in accordance with the rules of customary international law governing immunity from enforcement and those governing jurisdictional immunity (understood as the right of a State not to be the subject of judicial proceedings in the courts of another State) are distinct, and must be applied separately.

113. Before considering whether the claims of the Applicant on this point are well-founded, the Court observes that immunity from enforcement enjoyed by States in regard to their property situated on foreign territory is further than the jurisdictional immunity enjoyed by States in regard to the exercise of their rights or functions in the courts of another State.

114. In the present case, it means that the Court may rule on the issue of whether the measure of constraint taken against Villa Vigoni constitutes a measure of constraint in violation of the immunity from enforcement enjoyed by Germany, for purposes of whose enforcement neither the decisions of the Italian courts which declared the legal charge against Villa Vigoni enforceable, nor the proceedings before the Court in the present case are in breach of Germany’s immunity from enforcement.  Likewise, the issue of the international legality of the measure of constraint, is separate — and must be applied separately — from that of the international legality, under the rules applicable to jurisdictional immunity, of the Greek judgments against Germany, which is the subject of the measures of constraint against Villa Vigoni in Italy (see above, paragraph 17).

115. In support of its claim on this point, Germany cited the rules set out in Article 19 of the United Nations Convention.  That Convention has not entered into force, but in Germany’s view it codified, in relation to the issue of immunity from enforcement, existing rules under general international law.  In terms are therefore said to be binding, as much as they reflect customary law on the matter.
117. When the United Nations Convention was being drafted, these provisions gave rise to long and difficult discussions. The Court considers that it is unnecessary for purposes of the present case for it to decide whether all aspects of Article 19 reflect current customary international law.

118. Indeed, it suffices for the Court to find that there is at least one condition that has to be satisfied before any measure of constraint may be taken against property belonging to a foreign State: that the property in question must be in use for an activity not pursuing governmental non-commercial purposes, or that the State which owns the property has expressly consented to the taking of a measure of constraint, or that that State has allocated the property in question for the satisfaction of a judicial claim (an illustration of this well-established practice is provided by the decision of the German Constitutional Court (Bundesverfassungsgericht) of 14 December 1977 (BVerfGE, Vol. 46, p. 342; ILR, Vol. 65, p. 146), by the judgment of the Swiss Federal Tribunal of 30 April 1986 in Kingdom of Spain v. Société X (Annuaire suisse de droit international, Vol. 43, 1987, p. 158; ILR, Vol. 82, p. 44), as well as the judgment of the House of Lords of 12 April 1984 in Alcom Ltd v. Republic of Colombia ([1984] 1 AC 580; ILR, Vol. 74, p. 170) and the judgment of the Spanish Constitutional Court of 1 July 1992 in Abbott v. Republic of South Africa (Revista española de derecho internacional, Vol. 44, 1992, p. 565; ILR, Vol. 113, p. 414)).

119. It is clear in the present case that the property which was the subject of the measure of constraint at issue is being used for governmental purposes that are entirely non-commercial, and hence for purposes falling within Germany’s sovereign functions. Villa Vigoni is in fact the seat of a cultural centre intended to promote cultural exchanges between Germany and Italy. This cultural centre is organized and administered on the basis of an agreement between the two Governments concluded in the form of an exchange of notes dated 21 April 1986. Before the Court, Italy described the activities in question as a “centre of excellence for the Italian-German co-operation in the fields of research, culture and education”, and recognized that Italy was directly involved in “its peculiar bi-national . . . managing structure”. Nor has Germany in any way expressly consented to the taking of a measure such as the legal charge in question, or allocated Villa Vigoni for the satisfaction of the judgment of the Court of First Instance of Livadia.

120. In these circumstances, the Court finds that the registration of a legal charge on Villa Vigoni constitutes a violation by Italy of its obligation to respect the immunity owed to Germany.

V. THE DECISIONS OF THE ITALIAN COURTS DECLARING ENFORCEABLE IN ITALY DECISIONS OF GREEK COURTS UPHOLDING CIVIL CLAIMS AGAINST GERMANY

121. In its third submission, Germany complains that its jurisdictional immunity was also violated by decisions of the Italian courts declaring enforceable in Italy judgments rendered by Greek courts against Germany in proceedings arising out of the Distomo massacre. In 1995, successors in title of the victims of that massacre, committed by the German armed forces in a Greek village in June 1944, brought proceedings for compensation against Germany before the Greek courts. By a judgment of 25 September 1997, the Court of First Instance of Livadia, which had territorial jurisdiction, ordered Germany to pay compensation to the claimants. The appeal by Germany against that judgment was dismissed by a decision of the Hellenic Supreme Court of 4 May 2000, which rendered final the judgment of the Court of First Instance, and at the same time ordered Germany to pay the costs of the appeal proceedings. The successful Greek claimants under the first-instance and Supreme Court judgments applied to the Italian courts for exequatur of those judgments, so as to be able to have them enforced in Italy, since it was impossible to enforce them in Greece or in Germany (see above, paragraphs 30 and 32). It was on those applications that the Florence Court of Appeal ruled, allowing them by a decision of 13 June 2006, which was confirmed, following an objection by Germany, on 21 October 2008 as regards the pecuniary damages awarded by the Court of First Instance of Livadia, and by a decision of 2 May 2005, confirmed, following an objection by Germany, on 6 February 2007 as regards the award of costs made by the Hellenic Supreme Court. This latter decision was confirmed by the Italian Court of Cassation on 6 May 2008. As regards the decision confirming the exequatur granted in respect of the judgment of the Court of First Instance of Livadia, it has also been appealed to the Italian Court of Cassation, which dismissed that appeal on 12 January 2011.

122. According to Germany, the decisions of the Florence Court of Appeal declaring enforceable the judgments of the Livadia court and the Hellenic Supreme Court constitute violations of its jurisdictional immunity, since, for the same reasons as those invoked by Germany in relation to the Italian proceedings concerning war crimes committed in Italy between 1943 and 1945, the decisions of the Greek courts were themselves rendered in violation of that jurisdictional immunity.

123. According to Italy, on the contrary, and for the same reasons as those set out and discussed in Section III of the present Judgment, there was no violation of Germany’s jurisdictional immunity, either by the decisions of the Greek courts or by those of the Italian courts which declared them enforceable in Italy.

124. It should first be noted that the claim in Germany’s third submission is entirely separate and distinct from that set out in the preceding one, which has been discussed in Section IV above (paragraphs 109 to 120). The Court is no longer concerned here to determine whether a measure of constraint — such as the legal charge on Villa Vigoni — violated Germany’s immunity from enforcement, but to decide whether the Italian judgments declaring enforceable in Italy the pecuniary awards pronounced in Greece did themselves — independently of any subsequent measure of enforcement — constitute a violation of the Applicant’s immunity from jurisdiction. While there is a link between these two aspects — since the measure of constraint against Villa Vigoni could only have been imposed on the basis of the judgment of the Florence Court of Appeal according exequatur in respect of the judgment of the Greek court in Livadia — the two issues nonetheless remain clearly distinct. That discussed in the preceding section related to immunity from enforcement: that which the Court will now consider addresses immunity from jurisdiction. As recalled above, these two forms of immunity are governed by different sets of rules.
125. The Court will then explain how it views the issue of jurisdictional immunity in relation to a judgment which rules not on the merits of a claim brought against a foreign State, but on an application to have a judgment rendered by a foreign court against a third State declared enforceable on the territory of the State of the court where that application is brought (a request for exequatur). The difficulty arises from the fact that, in such cases, the court is not being asked to give judgment directly against a foreign State invoking jurisdictional immunity, but to enforce a decision already rendered by a court of another State, which is deemed to have itself examined and applied the rules governing the jurisdictional immunity of the respondent State.

126. In the present case, the two Parties appear to have argued on the basis that, in such a situation, the question whether the court seised of the application for exequatur had respected the jurisdictional immunity of the third State depended simply on whether that immunity had been respected by the foreign court having rendered the judgment on the merits against the third State. In other words, both Parties appeared to make the question whether or not the Florence Court of Appeal had violated Germany’s jurisdictional immunity in declaring enforceable the Livadia and Hellenic Supreme Court decisions dependent on whether those decisions had themselves violated the jurisdictional immunity on which Germany had relied in its defence against the proceedings brought against it in Greece.

127. There is nothing to prevent national courts from ascertaining, before granting exequatur, that the foreign judgment was not rendered in breach of the immunity of the respondent State. However, for the purposes of the present case, the Court considers that it must address the issue from a significantly different viewpoint. In its view, it is unnecessary, in order to determine whether the Florence Court of Appeal violated Germany’s jurisdictional immunity, to rule on the question of whether the decisions of the Greek courts did themselves violate that immunity—something, moreover, which it could not do, since that would be to rule on the rights and obligations of a State, Greece, which does not have the status of party to the present proceedings (see Monetary Gold Removed from Rome in 1943 (Italy v. France: United Kingdom and United States of America), Preliminary Question, Judgment, I.C.J. Reports 1954, p. 32; East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995, p. 105, para. 34).

The relevant question, from the Court’s point of view and for the purposes of the present case, is whether the Italian courts did themselves respect Germany’s immunity from jurisdiction in allowing the application for exequatur, and not whether the Greek court having rendered the judgment of which exequatur is sought had respected Germany’s jurisdictional immunity. In a situation of this kind, the replies to these two questions may not necessarily be the same; it is only the first question which the Court needs to address here.

128. Where a court is seised, as in the present case, of an application for exequatur of a foreign judgment against a third State, it is itself being called upon to exercise its jurisdiction in respect of the third State in question. It is true that the purpose of exequatur proceedings is not to decide on the merits of a dispute, but simply to render an existing judgment enforceable on the territory of a State other than that of the court which ruled on the merits. It is thus not the role of the exequatur court to re-examine in all its aspects the substance of the case which has been decided. The fact nonetheless remains that, in granting or refusing exequatur, the court exercises a jurisdictional power which results in the foreign judgment being given effects corresponding to those of a judgment rendered on the merits in the requested State. The proceedings brought before that court must therefore be regarded as being conducted against the third State which was the subject of the foreign judgment.

129. In this regard, the Court notes that, under the terms of Article 6, paragraph 2, of the United Nations Convention:

“A proceeding before a court of a State shall be considered to have been instituted against another State if that other State:

(a) is named as a party to that proceeding; or

(b) is not named as a party to the proceeding but the proceeding in effect seeks to affect the property, rights, interests or activities of that other State.”

When applied to exequatur proceedings, that definition means that such proceedings must be regarded as being directed against the State which was the subject of the foreign judgment. That is indeed why Germany was entitled to object to the decisions of the Florence Court of Appeal granting exequatur—although it did so without success—and to appeal to the Italian Court of Cassation against the judgments confirming those decisions.

130. It follows from the foregoing that the court seised of an application for exequatur of a foreign judgment rendered against a third State has to ask itself whether the respondent State enjoys immunity from jurisdiction—having regard to the nature of the case in which that judgment was given—before the courts of the State in which exequatur proceedings have been instituted. In other words, it has to ask itself whether, in the event that it had itself been seised of the merits of a dispute identical to that which was the subject of the foreign judgment, it would have been obliged under international law to accord immunity to the respondent State (see to this effect the judgment of the Supreme Court of Canada in Kuwait Airways Corp. v. Iraq [2010] SCR, Vol. 2, p. 571, and the judgment of the United Kingdom Supreme Court in NML Capital Limited v. Republic of Argentina [2011] UKSC 31).

131. In light of this reasoning, it follows that the Italian courts which declared enforceable in Italy the decisions of Greek courts rendered against Germany have violated the latter’s immunity. For the reasons set out in Section III above of the present Judgment, the Italian courts would have been obliged under international law to accord immunity to the respondent State (see to this effect the judgment of the Supreme Court of Canada in Kuwait Airways Corp. v. Iraq [2010] SCR, Vol. 2, p. 571, and the judgment of the United Kingdom Supreme Court in NML Capital Limited v. Republic of Argentina [2011] UKSC 31).

132. In order to reach such a decision, it is unnecessary to rule on the question whether the Greek courts did themselves violate Germany’s immunity, a question which is not before the Court, and on which, moreover, it cannot rule, for the reasons recalled earlier. The Court will confine itself to noting, in general terms, that it may perfectly well happen, in certain circumstances, that the judgment rendered on the merits did not violate the jurisdictional immunity of the respondent State, for example because the latter had waived its immunity before the courts hearing the case on the merits, but that the exequatur proceedings instituted in another State are barred by the respondent’s immunity. That is why the two issues are distinct, and why it is not for this Judgment to rule on the legality of the decisions of the Greek courts.
133. The Court accordingly concludes that the above-mentioned decisions of the Florence Court of Appeal constitute a violation by Italy of its obligation to respect the jurisdictional immunity of Germany.

V. GERMANY’S FINAL SUBMISSIONS AND THE REMEDIES SOUGHT

134. In its final submissions at the close of the oral proceedings, Germany presented six requests to the Court, of which the first three were declaratory and the final three sought to draw the consequences, in terms of reparation, of the established violations (see paragraph 17 above). It is on those requests that the Court is required to rule in the operative part of this Judgment.

135. For the reasons set out in Sections III, IV and V above, the Court will uphold Germany’s first three requests, which ask it to declare, in turn, that Italy has violated the jurisdictional immunity which Germany enjoys under international law by allowing civil claims based on violations of international humanitarian law by the German Reich between 1943 and 1945; that Italy has also committed violations of the immunity owed to Germany by taking enforcement measures against Villa Vigoni; and, lastly, that Italy has violated Germany’s immunity by declaring enforceable in Italy Greek judgments based on occurrences similar to those referred to above.

136. In its fourth submission, Germany asks the Court to adjudge and declare that, in view of the above, Italy’s international responsibility is engaged.

There is no doubt that the violation by Italy of certain of its international legal obligations entails its international responsibility and places upon it, by virtue of general international law, an obligation to make full reparation for the injury caused by the wrongful acts committed. The substance, in the present case, of that obligation to make reparation will be considered below, in connection with Germany’s fifth and sixth submissions. The Court’s ruling thereon will be set out in the operative clause. On the other hand, the Court does not consider it necessary to include an express declaration in the operative clause that Italy’s international responsibility is engaged; to do so would be entirely redundant, since that responsibility is automatically inferred from the finding that certain obligations have been violated.

137. In its fifth submission, Germany asks the Court to order Italy to take, by means of its own choosing, any and all steps to ensure that all the decisions of its courts and other judicial authorities infringing Germany’s sovereign immunity become unenforceable. This is to be understood as implying that the relevant decisions should cease to have effect.

According to general international law on the responsibility of States for internationally wrongful acts, as expressed in this respect by Article 30 (a) of the International Law Commission’s Articles on the subject, the State responsible for an internationally wrongful act is under an obligation to cease that act, if it is continuing. Furthermore, even if the act in question has ended, the State responsible is under an obligation to re-establish, by way of reparation, the situation which existed before the wrongful act was committed, provided that re-establishment is not materially impossible and that it does not involve a burden for that State out of all proportion to the benefit deriving from restitution instead of compensation. This rule is reflected in Article 35 of the International Law Commission’s Articles.

It follows accordingly that the Court must uphold Germany’s fifth submission. The decisions and measures infringing Germany’s jurisdictional immunity which are still in force must cease to have effect, and the effects which have already been produced by those decisions and measures must be reversed, in such a way that the situation which existed before the wrongful acts were committed is re-established. It has not been alleged or demonstrated that restitution would be materially impossible in this case, or that it would involve a burden for Italy out of all proportion to the benefit deriving from it. In particular, the fact that some of the violations may have been committed by judicial organs, and some of the legal decisions in question have become final in Italian domestic law, does not lift the obligation incumbent upon Italy to make restitution. On the other hand, the Respondent has the right to choose the means it considers best suited to achieve the required result. Thus, the Respondent is under an obligation to achieve this result by enacting appropriate legislation or by resorting to other methods of its choosing having the same effect.

138. Finally, in its sixth submission, Germany asks the Court to order Italy to take any and all steps to ensure that in the future Italian courts do not entertain legal actions against Germany founded on the occurrences described in its first submission (namely violations of international humanitarian law committed by the German Reich between 1943 and 1945).

As the Court has stated in previous cases (see, in particular, Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009, p. 267, para. 150), as a general rule, there is no reason to suppose that a State whose act or conduct has been declared wrongful by the Court will repeat that act or conduct in the future, since its good faith must be presumed. Accordingly, while the Court may order the State responsible for an internationally wrongful act to offer assurances of non-repetition to the injured State, or to take specific measures to ensure that the wrongful act is not repeated, it may only do so when there are special circumstances which justify this, which the Court must assess on a case-by-case basis.

In the present case, the Court has no reason to believe that such circumstances exist. Therefore, it will not uphold the last of Germany’s final submissions.

* * *

139. The Court accordingly concludes that the above-mentioned decisions of the Florence Court of Appeal constitute a violation by Italy of its obligation to respect the jurisdictional immunity of Germany.

V. GERMANY’S FINAL SUBMISSIONS AND THE REMEDIES SOUGHT

140. In its final submissions at the close of the oral proceedings, Germany presented six requests to the Court, of which the first three were declaratory and the final three sought to draw the consequences, in terms of reparation, of the established violations (see paragraph 17 above). It is on those requests that the Court is required to rule in the operative part of this Judgment.

141. For the reasons set out in Sections III, IV and V above, the Court will uphold Germany’s first three requests, which ask it to declare, in turn, that Italy has violated the jurisdictional immunity which Germany enjoys under international law by allowing civil claims based on violations of international humanitarian law by the German Reich between 1943 and 1945; that Italy has also committed violations of the immunity owed to Germany by taking enforcement measures against Villa Vigoni; and, lastly, that Italy has violated Germany’s immunity by declaring enforceable in Italy Greek judgments based on occurrences similar to those referred to above.

142. In its fourth submission, Germany asks the Court to adjudge and declare that, in view of the above, Italy’s international responsibility is engaged.

There is no doubt that the violation by Italy of certain of its international legal obligations entails its international responsibility and places upon it, by virtue of general international law, an obligation to make full reparation for the injury caused by the wrongful acts committed. The substance, in the present case, of that obligation to make reparation will be considered below, in connection with Germany’s fifth and sixth submissions. The Court’s ruling thereon will be set out in the operative clause. On the other hand, the Court does not consider it necessary to include an express declaration in the operative clause that Italy’s international responsibility is engaged; to do so would be entirely redundant, since that responsibility is automatically inferred from the finding that certain obligations have been violated.

143. In its fifth submission, Germany asks the Court to order Italy to take, by means of its own choosing, any and all steps to ensure that all the decisions of its courts and other judicial authorities infringing Germany’s sovereign immunity become unenforceable. This is to be understood as implying that the relevant decisions should cease to have effect.

According to general international law on the responsibility of States for internationally wrongful acts, as expressed in this respect by Article 30 (a) of the International Law Commission’s Articles on the subject, the State responsible for an internationally wrongful act is under an obligation to cease that act, if it is continuing. Furthermore, even if the act in question has ended, the State responsible is under an obligation to re-establish, by way of reparation, the situation which existed before the wrongful act was committed, provided that re-establishment is not materially impossible and that it does not involve a burden for that State out of all proportion to the benefit deriving from restitution instead of compensation. This rule is reflected in Article 35 of the International Law Commission’s Articles.

It follows accordingly that the Court must uphold Germany’s fifth submission. The decisions and measures infringing Germany’s jurisdictional immunities which are still in force must cease to have effect, and the effects which have already been produced by those decisions and measures must be reversed, in such a way that the situation which existed before the wrongful acts were committed is re-established. It has not been alleged or demonstrated that restitution would be materially impossible in this case, or that it would involve a burden for Italy out of all proportion to the benefit deriving from it. In particular, the fact that some of the violations may have been committed by judicial organs, and some of the legal decisions in question have become final in Italian domestic law, does not lift the obligation incumbent upon Italy to make restitution. On the other hand, the Respondent has the right to choose the means it considers best suited to achieve the required result. Thus, the Respondent is under an obligation to achieve this result by enacting appropriate legislation or by resorting to other methods of its choosing having the same effect.

144. Finally, in its sixth submission, Germany asks the Court to order Italy to take any and all steps to ensure that in the future Italian courts do not entertain legal actions against Germany founded on the occurrences described in its first submission (namely violations of international humanitarian law committed by the German Reich between 1943 and 1945).

As the Court has stated in previous cases (see, in particular, Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009, p. 267, para. 150), as a general rule, there is no reason to suppose that a State whose act or conduct has been declared wrongful by the Court will repeat that act or conduct in the future, since its good faith must be presumed. Accordingly, while the Court may order the State responsible for an internationally wrongful act to offer assurances of non-repetition to the injured State, or to take specific measures to ensure that the wrongful act is not repeated, it may only do so when there are special circumstances which justify this, which the Court must assess on a case-by-case basis.

In the present case, the Court has no reason to believe that such circumstances exist. Therefore, it will not uphold the last of Germany’s final submissions.
139. For these reasons, the Court,

(1) By twelve votes to three,

Finds that the Italian Republic has violated its obligation to respect the immunity which the Federal Republic of Germany enjoys under international law by allowing civil claims to be brought against it based on violations of international humanitarian law committed by the German Reich between 1943 and 1945;

IN FAVOUR: President Owada; Vice-President Tomka; Judges Koroma, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Greenwood, Xue, Donoghue;

AGAINST: Judges Cançado Trindade, Yusuf; Judge ad hoc Gaja;

(2) By fourteen votes to one,

Finds that the Italian Republic has violated its obligation to respect the immunity which the Federal Republic of Germany enjoys under international law by taking measures of constraint against Villa Vigoni;

IN FAVOUR: President Owada; Vice-President Tomka; Judges Koroma, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Yusuf, Greenwood, Xue, Donoghue; Judge ad hoc Gaja;

AGAINST: Judge Cançado Trindade;

(3) By fourteen votes to one,

Finds that the Italian Republic has violated its obligation to respect the immunity which the Federal Republic of Germany enjoys under international law by declaring enforceable in Italy decisions of Greek courts based on violations of international humanitarian law committed in Greece by the German Reich;

IN FAVOUR: President Owada; Vice-President Tomka; Judges Koroma, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Yusuf, Greenwood, Xue, Donoghue; Judge ad hoc Gaja;

AGAINST: Judge Cançado Trindade;

(4) By fourteen votes to one,

Finds that the Italian Republic must, by enacting appropriate legislation, or by resorting to other methods of its choosing, ensure that the decisions of its courts and those of other judicial authorities infringing the immunity which the Federal Republic of Germany enjoys under international law cease to have effect;

IN FAVOUR: President Owada; Vice-President Tomka; Judges Koroma, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Yusuf, Greenwood, Xue, Donoghue; Judge ad hoc Gaja;

AGAINST: Judge Cançado Trindade;

(5) Unanimously,

Rejects all other submissions made by the Federal Republic of Germany.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this third day of February, two thousand and twelve, in four copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Federal Republic of Germany, the Government of the Italian Republic and the Government of the Hellenic Republic, respectively.

(Signed) Hisashi OWADA,
President.

(Signed) Philippe COUVREUR,
Registrar.

Judges KOROMA, KEITH and BENNOUNA append separate opinions to the Judgment of the Court; Judges CANÇADO TRINDADE and YUSUF append dissenting opinions to the Judgment of the Court; Judge ad hoc GAJA appends a dissenting opinion to the Judgment of the Court.

(Initialled) H. O.

(Initialled) Ph. C.
International Court of Justice

Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947

Advisory Opinion

*I.C.J. Reports 1988*
COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARÈTS,
AVIS CONSULTATIFS ET ORDONNANCES

APPLICABILITÉ DE L'OBLIGATION D'ARBITRAGE
EN VERTU DE LA SECTION 21 DE L'ACCORD
DU 26 JUIN 1947 RELATIF AU SIÈGE
DE L'ORGANISATION DES NATIONS UNIES

AVIS CONSULTATIF DU 26 AVRIL 1988

1988

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

APPLICABILITY OF THE OBLIGATION
TO ARBITRATE UNDER SECTION 21 OF THE
UNITED NATIONS HEADQUARTERS
AGREEMENT OF 26 JUNE 1947

ADVISORY OPINION OF 26 APRIL 1988

Mode officiel de citation :
Applicabilité de l'obligation d'arbitrage en vertu de la section 21 de l'accord
du 26 juin 1947 relatif au siège de l'Organisation des Nations Unies,

Official citation :
Applicability of the Obligation to Arbitrate
under Section 21 of the United Nations Headquarters Agreement
INTERNATIONAL COURT OF JUSTICE

YEAR 1988

26 April 1988

APPLICABILITY OF THE OBLIGATION TO ARBITRATE UNDER SECTION 21 OF THE UNITED NATIONS HEADQUARTERS AGREEMENT OF 26 JUNE 1947

Headquarters Agreement between the United Nations and the United States of America — Dispute settlement clause — Existence of a dispute — Alleged breach of treaty — Significance of behaviour or decision of party in absence of any argument by that party to justify its conduct under international law — Implementation of contested decision and existence of a dispute — Whether dispute concerns "the interpretation or application" of the Agreement — Whether dispute one "not settled by negotiation or other agreed mode of settlement" — Principle that international law prevails over national law.

ADVISORY OPINION

Present: President RUDA; Vice-President Mbaye; Judges LACHS, NAGENDRA SINGH, ELIAS, ODA, AGO, SCHWEBEL, Sir ROBERT JENNINGS, BEDAJAOU, NI, EVENSEN, TARASSOV, GUILLAUME, SHAHABUDDIN; Registrar VALENCIA-OSPINA.

Concerning the applicability of the obligation to arbitrate under section 21 of the United Nations Headquarters Agreement of 26 June 1947,

The Court, composed as above, after deliberation,
gives the following Advisory Opinion:

1. The question upon which the advisory opinion of the Court has been asked was contained in resolution 42/229 B of the United Nations General Assembly, adopted on 2 March 1988. On the same day, the text of that resolution in English and French was transmitted to the Court, by facsimile, by the United Nations Legal Counsel. By a letter dated 2 March 1988, addressed by the Secretary-General of the United Nations to the President of the Court (received by facsimile on 4 March 1988, and received by post and filed in the Registry on 7 March 1988) the Secretary-General formally communicated to the Court the decision of the General Assembly to submit to the Court for advisory opinion the question set out in that resolution. The resolution, certified true copies of the English and French texts of which were enclosed with the letter and included in the facsimile transmission, was in the following terms:

"The General Assembly,

Recalling its resolution 42/210 B of 17 December 1987 and bearing in mind its resolution 42/229 A above,

Having considered the reports of the Secretary-General of 10 and 25 February 1988 [A/42/915 and Add.1],

Affirming the position of the Secretary-General that a dispute exists between the United Nations and the host country concerning the interpretation or application of the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations, dated 26 June 1947 [see resolution 169 (II)], and noting his conclusions that attempts at amicable settlement were deadlocked and that he had invoked the arbitration procedure provided for in section 21 of the Agreement by nominating an arbitrator and requesting the host country to nominate its own arbitrator,

Bearing in mind the constraints of time that require the immediate implementation of the dispute settlement procedure in accordance with section 21 of the Agreement,

Noting from the report of the Secretary-General of 10 February 1988 [A/42/915] that the United States of America was not in a position and was not willing to enter formally into the dispute settlement procedure under section 21 of the Headquarters Agreement and that the United States was still evaluating the situation,

Taking into account the provisions of the Statute of the International Court of Justice, in particular Articles 41 and 68 thereof,

Decides, in accordance with Article 96 of the Charter of the United Nations, to request the International Court of Justice, in pursuance of Article 65 of the Statute of the Court, for an advisory opinion on the following question, taking into account the time constraint:

"In the light of facts reflected in the reports of the Secretary-General [A/42/915 and Add.1], is the United States of America, as a party to the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations [see resolution 169 (II)], under an obligation to enter into arbitration in accordance with section 21 of the Agreement?"

A copy of resolution 42/229 A, referred to in the above resolution, was also enclosed with the Secretary-General's letter.

2. The notice of the request for an advisory opinion prescribed by Article 66, paragraph 1, of the Statute of the Court, was given on 3 March 1988 by telegram from the Registrar to all States entitled to appear before the Court.
3. By an Order dated 9 March 1988 the Court found that an early answer to the request for advisory opinion would be desirable, as contemplated by Article 102 of the Rules of Court. By that Order the Court decided that the United Nations and the United States of America were considered likely to be able to furnish information on the question, in accordance with Article 66, paragraph 2, of the Statute, and fixed 25 March 1988 as the time-limit within which the Court would be prepared to receive written statements from them on the question; and that any other State party to the Statute which desired to do so might submit to the Court a written statement on the question not later than 25 March 1988. Written statements were submitted, within the time-limit so fixed, by the Secretary-General of the United Nations, by the United States of America, and by the German Democratic Republic and by the Syrian Arab Republic.

4. By the same Order the Court decided further to hold hearings, opening on 11 April 1988, at which oral comments on written statements might be submitted to the Court by the United Nations, the United States and such other States as should have presented written statements.

5. The Secretary-General of the United Nations transmitted to the Court, pursuant to Article 65, paragraph 2, of the Statute, a dossier of documents likely to throw light upon the question; these documents were received in the Registry in instalments between 11 and 29 March 1988.

6. At a public sitting held on 11 April 1988, an oral statement was made to the Court by Mr. Carl-August Fleischhauer, the United Nations Legal Counsel, on behalf of the Secretary-General. None of the States having presented written statements expressed a desire to be heard. Certain Members of the Court put questions to Mr. Fleischhauer, which were answered at a further public sitting held on 12 April 1988.

* * *

7. The question upon which the opinion of the Court has been requested is whether the United States of America (hereafter referred to as "the United States"), as a party to the United Nations Headquarters Agreement, is under an obligation to enter into arbitration. The Headquarters Agreement of 26 June 1947 came into force in accordance with its terms on 21 November 1947 by exchange of letters between the Secretary-General and the United States Permanent Representative. The Agreement was registered the same day with the United Nations Secretariat, in accordance with Article 102 of the Charter. In section 21, paragraph (a), it provides as follows:

"Any dispute between the United Nations and the United States concerning the interpretation or application of this agreement or of any supplemental agreement, which is not settled by negotiation or other agreed mode of settlement, shall be referred for final decision to a tribunal of three arbitrators, one to be named by the Secretary-General, one to be named by the Secretary of State of the United States, and the third to be chosen by the two, or, if they should fail to agree upon a third, then by the President of the International Court of Justice."

There is no question but that the Headquarters Agreement is a treaty in force binding the parties thereto. What the Court has therefore to determine, in order to answer the question put to it, is whether there exists a dispute between the United Nations and the United States of the kind contemplated by section 21 of the Agreement. For this purpose the Court will first set out the sequence of events, preceding the adoption of resolutions 42/229A and 42/229B, which led first the Secretary-General and subsequently the General Assembly of the United Nations to conclude that such a dispute existed.

8. The events in question centred round the Permanent Observer Mission of the Palestine Liberation Organization (referred to hereafter as "the PLO") to the United Nations in New York. The PLO has enjoyed in relation to the United Nations the status of an observer since 1974; by General Assembly resolution 3237 (XXIX) of 22 November 1974, the Organization was invited to "participate in the sessions and the work of the General Assembly in the capacity of observer". Following this invitation, the PLO established an Observer Mission in 1974, and maintains an office, entitled office of the PLO Observer Mission, at 115 East 65th Street, in New York City, outside the United Nations Headquarters District. Recognized observers are listed as such in official United Nations publications: the PLO appears in such publications in a category of "organizations which have received a standing invitation from the General Assembly to participate in the sessions and the work of the General Assembly as observers".

9. In May 1987 a bill (S.1203) was introduced into the Senate of the United States, the purpose of which was stated in its title to be "to make unlawful the establishment or maintenance within the United States of an office of the Palestine Liberation Organization". Section 3 of the bill provided that

"It shall be unlawful, if the purpose be to further the interests of the Palestine Liberation Organization or any of its constituent groups, any successor to any of those, or any agents thereof, on or after the effective date of this Act —

(1) to receive anything of value except informational material from the PLO or any of its constituent groups, any successor thereto, or any agents thereof;

(2) to expend funds from the PLO or any of its constituent groups, any successor thereto, or any agents thereof; or

(3) notwithstanding any provision of the law to the contrary, to establish or maintain an office, headquarters, premises, or other facilities or establishments within the jurisdiction of the United States
at the behest or direction of, or with funds provided by the Palestine Liberation Organization or any of its constituent groups, any successor to any of those, or any agents thereof."

10. The text of this bill was repeated in the form of an amendment, presented in the United States Senate in the autumn of 1987, to the "Foreign Relations Authorization Act, Fiscal Years 1988 and 1989". From the terms of this amendment it appeared that the United States Government would, if the bill were passed into law, seek to close the office of the PLO Observer Mission. The Secretary-General therefore explained his point of view to that Government, by a letter to the United States Permanent Representative dated 13 October 1987. In that letter he emphasized that the legislation contemplated "runs counter to obligations arising from the Headquarters Agreement". On 14 October 1987 the PLO Observer brought the matter to the attention of the United Nations Committee on Relations with the Host Country.

11. On 22 October 1987, the view of the Secretary-General was summed up in the following statement made by the Spokesman for the Secretary-General (subsequently endorsed by the General Assembly in resolution 42/210 B):

"The members of the PLO Observer Mission are, by virtue of resolution 3237 (XXIX), invitees to the United Nations. As such, they are covered by sections 11, 12 and 13 of the Headquarters Agreement of 26 June 1947. There is therefore a treaty obligation on the host country to permit PLO personnel to enter and remain in the United States to carry out their official functions at United Nations Headquarters."

In this respect, it may be noted that section 11 of the Headquarters Agreement provides that

"The federal, state or local authorities of the United States shall not impose any impediments to transit to or from the headquarters district of: (1) representatives of Members . . . or the families of such representatives . . .; (5) other persons invited to the headquarters district by the United Nations . . . on official business . . ."

Section 12 provides that

"The provisions of section 11 shall be applicable irrespective of the relations existing between the Governments of the persons referred to in that section and the Government of the United States."

Section 13 provides (inter alia) that

"Laws and regulations in force in the United States regarding the entry of aliens shall not be applied in such manner as to interfere with the privileges referred to in section 11."

12. When the report of the Committee on Relations with the Host Country was placed before the Sixth Committee of the General Assembly on 25 November 1987, the representative of the United States noted:

"that the United States Secretary of State had stated that the closing of that mission would constitute a violation of United States obligations under the Headquarters Agreement, and that the United States Government was strongly opposed to it; moreover the United States representative to the United Nations had given the Secretary-General the same assurances" (A/C.6/42/SR.58).

When the draft resolution which subsequently became General Assembly resolution 42/210 B was put to the vote in the Sixth Committee on 11 December 1987, the United States delegation did not participate in the voting because in its opinion: "it was unnecessary and inappropriate since it addressed a matter still under consideration within the United States Government". The position taken by the United States Secretary of State, namely:

"that the United States was under an obligation to permit PLO Observer Mission personnel to enter and remain in the United States to carry out their official functions at United Nations Headquarters"

was cited by another delegate and confirmed by the representative of the United States, who referred to it as "well known" (A/C.6/42/SR.62).

13. The provisions of the amendment referred to above became incorporated into the United States "Foreign Relations Authorization Act, Fiscal Years 1988 and 1989" as Title X, the "Anti-Terrorism Act of 1987". At the beginning of December 1987 the Act had not yet been adopted by the United States Congress. In anticipation of such adoption the Secretary-General addressed a letter, dated 7 December 1987, to the Permanent Representative of the United States, Ambassador Vernon Walters, in which he reiterated to the Permanent Representative the view previously expressed by the United Nations that the members of the PLO Observer Mission are, by virtue of General Assembly resolution 3237 (XXIX), invitees to the United Nations and that the United States is under an obligation to permit PLO personnel to enter and remain in the United States to carry out their official functions at the United Nations under the Headquarters Agreement. Consequently, it was said, the United States was under a legal obligation to maintain the current arrangements for the PLO Observer Mission, which had by then been in effect for some 13 years. The Secretary-General sought assurances that, in the event that the proposed
legislation became law, the present arrangements for the PLO Observer Mission would not be curtailed or otherwise affected.

14. In a subsequent letter, dated 21 December 1987, after the adoption on 15/16 December of the Act by the United States Congress, the Secretary-General informed the Permanent Representative of the adoption on 17 December 1987 of resolution 42/210B by the General Assembly. By that resolution the Assembly

"Having been apprised of the action being considered in the host country, the United States of America, which might impede the maintenance of the facilities of the Permanent Observer Mission of the Palestine Liberation Organization to the United Nations in New York, which enables it to discharge its official functions,

1. Reiterates that the Permanent Observer Mission of the Palestine Liberation Organization to the United Nations in New York is covered by the provisions of the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations and should be enabled to establish and maintain premises and adequate functional facilities, and that the personnel of the Mission should be enabled to enter and remain in the United States to carry out their official functions;

2. Requests the host country to abide by its treaty obligations under the Headquarters Agreement and in this connection to refrain from taking any action that would prevent the discharge of the official functions of the Permanent Observer Mission of the Palestine Liberation Organization to the United Nations;"

15. On 22 December 1987 the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, was signed into law by the President of the United States. Title X thereof, the Anti-Terrorism Act of 1987, was, according to its terms, to take effect 90 days after that date. On 5 January 1988 the Acting Permanent Representative of the United States to the United Nations, Ambassador Herbert Okun, in a reply to the Secretary-General's letters of 7 and 21 December 1987, informed the Secretary-General of this. The letter went on to say that

"Because the provisions concerning the PLO Observer Mission may infringe on the President's constitutional authority and, if implemented, would be contrary to our international legal obligations under the United Nations Headquarters Agreement, the

Administration intends, during the ninety-day period before this provision is to take effect, to engage in consultations with the Congress in an effort to resolve this matter."

16. On 14 January 1988 the Secretary-General again wrote to Ambassador Walters. After welcoming the intention expressed in Ambassador Okun's letter to use the ninety-day period to engage in consultations with the Congress, the Secretary-General went on to say:

"As you will recall, I had, by my letter of 7 December, informed you that, in the view of the United Nations, the United States is under a legal obligation under the Headquarters Agreement of 1947 to maintain the current arrangements for the PLO Observer Mission, which have been in effect for the past 13 years. I had therefore asked you to confirm that if this legislative proposal became law, the present arrangements for the PLO Observer Mission would not be curtailed or otherwise affected, for without such assurance, a dispute between the United Nations and the United States concerning the interpretation and application of the Headquarters Agreement would exist..."

Then, referring to the letter of 5 January 1988 from the Permanent Representative and to declarations by the Legal Adviser to the State Department, he observed that neither that letter nor those declarations

"constitute the assurance I had sought in my letter of 7 December 1987 nor do they ensure that full respect for the Headquarters Agreement can be assumed. Under these circumstances, a dispute exists between the Organization and the United States concerning the interpretation and application of the Headquarters Agreement and I hereby invoke the dispute settlement procedure set out in section 21 of the said Agreement.

According to section 21 (a), an attempt has to be made at first to solve the dispute through negotiations, and I would like to propose that the first round of the negotiating phase be convened on Wednesday, 20 January 1988..."

17. Beginning on 7 January 1988, a series of consultations were held; from the account of these consultations presented to the General Assembly by the Secretary-General in the report referred to in the request for advisory opinion, it appears that the positions of the parties thereto were as follows:

"the [United Nations] Legal Counsel was informed that the United States was not in a position and not willing to enter formally into the dispute settlement procedure under section 21 of the Headquarters Agreement; the United States was still evaluating the situation and had not yet concluded that a dispute existed between the United Nations and the United States at the present time because the legislation in question had not yet been implemented. The Executive Branch
was still examining the possibility of interpreting the law in conformity with the United States obligations under the Headquarters Agreement regarding the PLO Observer Mission, as reflected in the arrangements currently made for that Mission, or alternatively of providing assurances that would set aside the ninety-day period for the coming into force of the legislation.” (A/42/915, para. 6.)

18. The United Nations Legal Counsel stated that for the Organization the question was one of compliance with international law. The Headquarters Agreement was a binding international instrument the obligations of the United States under which were, in the view of the Secretary-General and the General Assembly, being violated by the legislation in question. Section 21 of the Agreement set out the procedure to be followed in the event of a dispute as to the interpretation or application of the Agreement and the United Nations had every intention of defending its rights under that Agreement. He insisted, therefore, that if the PLO Observer Mission was not to be exempted from the application of the law, the procedure provided for in section 21 be implemented and also that technical discussions regarding the establishment of an arbitral tribunal take place immediately. The United States agreed to such discussions but only on an informal basis. Technical discussions were commenced on 28 January 1988. Among the matters discussed were the costs of the arbitration, its location, its secretariat, languages, rules of procedure and the form of the compromis between the two sides (ibid., paras. 7-8).

19. On 2 February 1988 the Secretary-General once more wrote to Ambassador Walters. The Secretary-General took note that

“the United States side is still in the process of evaluating the situation which would arise out of the application of the legislation and pending the conclusion of such evaluation takes the position that it cannot enter into the dispute settlement procedure outlined in section 21 of the Headquarters Agreement”.

The Secretary-General then went on to say that

“The section 21 procedure is the only legal remedy available to the United Nations in this matter and since the United States so far has not been in a position to give appropriate assurances regarding the deferral of the application of the law to the PLO Observer Mission, the time is rapidly approaching when I will have no alternative but to proceed either together with the United States within the framework of section 21 of the Headquarters Agreement or by informing the General Assembly of the impasse that has been reached.”

20. On 11 February 1988 the United Nations Legal Counsel referring to the formal invocation of the dispute settlement procedure on 14 January 1988 (paragraph 16 above), informed the Legal Adviser of the State Department of the United Nations’ choice of its arbitrator, in the event of an arbitration under section 21 of the Headquarters Agreement. In view of the time constraints under which both parties found themselves, the Legal Counsel urged the Legal Adviser of the State Department to inform the United Nations as soon as possible of the choice made by the United States. No communication was received in this regard from the United States.

21. On 2 March 1988 the General Assembly, at its resumed forty-second session, adopted resolutions 42/229 A and 42/229 B. The first of these resolutions, adopted by 143 votes to 1, with no abstentions, contains (inter alia) the following operative provisions:

“The General Assembly,

1. Supports the efforts of the Secretary-General and expresses its great appreciation for his reports;

2. Reaffirms that the Permanent Observer Mission of the Palestine Liberation Organization to the United Nations in New York is covered by the provisions of the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations [see resolution 169 (II)] and that it should be enabled to establish and maintain premises and adequate functional facilities and that the personnel of the Mission should be enabled to enter and remain in the United States of America to carry out their official functions;

3. Considers that the application of Title X of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, in a manner inconsistent with paragraph 2 above would be contrary to the international legal obligations of the host country under the Headquarters Agreement;

4. Considers that a dispute exists between the United Nations and the United States of America, the host country, concerning the interpretation or application of the Headquarters Agreement, and that the dispute settlement procedure set out in section 21 of the Agreement should be set in operation;”.

The second resolution 42/229 B, adopted by 143 votes to none, with no abstentions, has already been set out in full in paragraph 1 above.

22. The United States did not participate in the vote on either resolution; after the vote, its representative made a statement, in which he said:

“The situation today remains almost identical to that prevailing when resolution 42/210 B was put to the vote in December 1987. The
United States has not yet taken action affecting the functioning of any Mission or invitee. As the Secretary-General relayed to the Assembly in the 25 February addendum to his report of 10 February, the United States Government has made no final decision concerning the application or enforcement of recently passed United States legislation, the Anti-Terrorism Act of 1987, with respect to the Permanent Observer Mission of the Palestine Liberation Organization (PLO) to the United Nations in New York.

For these reasons, we can only view as unnecessary and premature the holding at this time of this resumed forty-second session of the General Assembly . . .

The United States Government will consider carefully the views expressed during this resumed session. It remains the intention of this Government to find an appropriate resolution of this problem in light of the Charter of the United Nations, the Headquarters Agreement, and the laws of the United States.”

* 

23. The question put to the Court is expressed, by resolution 42/229 B, to concern a possible obligation of the United States, “In the light of [the] facts reflected in the reports of the Secretary-General [A/42/915 and Add.1]”, that is to say in the light of the facts which had been reported to the General Assembly at the time at which it took its decision to request an opinion. The Court does not however consider that the General Assembly, in employing this form of words, has requested it to reply to the question put on the basis solely of these facts, and to close its eyes to subsequent events of possible relevance to, or capable of throwing light on, that question. The Court will therefore set out here the developments in the affair subsequent to the adoption of resolution 42/229 B.

24. On 11 March 1988 the Acting Permanent Representative of the United States to the United Nations wrote to the Secretary-General, referring to General Assembly resolutions 42/229 A and 42/229 B and stating as follows:

“I wish to inform you that the Attorney General of the United States has determined that he is required by the Anti-Terrorism Act of 1987 to close the office of the Palestine Liberation Organization Observer Mission to the United Nations in New York, irrespective of any obligations the United States may have under the Agreement between the United Nations and the United States regarding the Headquarters of the United Nations. If the PLO does not comply with the Act, the Attorney General will initiate legal action to close the PLO Observer Mission on or about March 21, 1988, the effective date of the Act. This course of action will allow the orderly enforcement of the Act. The United States will not take other actions to close the Observer Mission pending a decision in such litigation. Under the circumstances, the United States believes that submission of this matter to arbitration would not serve a useful purpose.”

This letter was delivered by hand to the Secretary-General by the Acting Permanent Representative of the United States on 11 March 1988. On receiving the letter, the Secretary-General protested to the Acting Permanent Representative and stated that the decision taken by the United States Government as outlined in the letter was a clear violation of the Headquarters Agreement between the United Nations and the United States.

25. On the same day, the United States Attorney General wrote to the Permanent Observer of the PLO to the United Nations to the following effect:

“I am writing to notify you that on March 21, 1988, the provisions of the ‘Anti-Terrorism Act of 1987’ (Title X of the Foreign Relations Authorization Act of 1988-89; Pub. L. No. 100-204, enacted by the Congress of the United States and approved Dec. 22, 1987 (the ‘Act’)) will become effective. The Act prohibits, among other things, the Palestine Liberation Organization (‘PLO’) from establishing or maintaining an office within the jurisdiction of the United States. Accordingly, as of March 21, 1988, maintaining the PLO Observer Mission to the United Nations in the United States will be unlawful.

The legislation charges the Attorney General with the responsibility of enforcing the Act. To that end, please be advised that, should you fail to comply with the requirements of the Act, the Department of Justice will forthwith take action in United States federal court to ensure your compliance.”

26. Finally, on the same day, in the course of a press briefing held by the United States Department of Justice, the Assistant Attorney General in charge of the Office of Legal Counsel said as follows, in reply to a question:

“We have determined that we would not participate in any forum, either the arbitral tribunal that might be constituted under Article XXI, as I understand it, of the UN Headquarters Agreement, or the International Court of Justice. As I said earlier, the statute [i.e., the Anti-Terrorism Act of 1987] has superseded the requirements of the UN Headquarters Agreement to the extent that those requirements are inconsistent with the statute, and therefore, participation in any of these tribunals that you cite would be to no useful end. The statute’s mandate governs, and we have no choice but to enforce it.”
27. On 14 March 1988 the Permanent Observer of the PLO replied to the Attorney General's letter drawing attention to the fact that the PLO Permanent Observer Mission had been maintained since 1974, and continuing:

"The PLO has maintained this arrangement in pursuance of the relevant resolutions of the General Assembly of the United Nations (3237 (XXIX), 42/210 and 42/229 . . .). The PLO Observer Mission is in no sense accredited to the United States. The United States Government has made clear that PLO Observer Mission personnel are present in the United States solely in their capacity as 'invites' of the United Nations within the meaning of the Headquarters Agreement. The General Assembly was guided by the relevant principles of the United Nations Charter (Chapter XVI . . .). I should like, at this point, to remind you that the Government of the United States has agreed to the Charter of the United Nations and to the establishment of an international organization to be known as the 'United Nations'."

He concluded that it was clear that "the US Government is obligated to respect the provisions of the Headquarters Agreement and the principles of the Charter". On 21 March 1988, the United States Attorney General replied to the PLO Permanent Observer as follows:

"I am aware of your position that requiring closure of the Palestine Liberation Organization ('PLO') Observer Mission violates our obligations under the United Nations ('UN') Headquarters Agreement and, thus, international law. However, among a number of grounds in support of our action, the United States Supreme Court has held for more than a century that Congress has the authority to override treaties and, thus, international law for the purpose of domestic law. Here Congress has chosen, irrespective of international law, to ban the presence of all PLO offices in this country, including the presence of the PLO Observer Mission to the United Nations. In discharging my obligation to enforce the law, the only responsible course available to me is to respect and follow that decision.

Moreover, you should note that the Anti-Terrorism Act contains provisions in addition to the prohibition on the establishment or maintenance of an office by the PLO within the jurisdiction of the United States. In particular, I direct your attention to subsections 1003 (a) and (b), which prohibit anyone from receiving or expending any monies from the PLO or its agents to further the interests of the PLO or its agents. All provisions of the Act become applicable on 21 March 1988."

28. On 15 March 1988 the Secretary-General wrote to the Acting Permanent Representative of the United States in reply to his letter of 11 March 1988 (paragraph 24 above), and stated as follows:

"As I told you at our meeting on 11 March 1988 on receiving this letter, I did so under protest because in the view of the United Nations the decision taken by the United States Government as outlined in the letter is a clear violation of the Headquarters Agreement between the United Nations and the United States. In particular, I cannot accept the statement contained in the letter that the United States may act irrespective of its obligations under the Headquarters Agreement, and I would ask you to reconsider the serious implications of this statement given the responsibilities of the United States as the host country.

I must also take issue with the conclusion reached in your letter that the United States believes that submission of this matter to arbitration would not serve a useful purpose. The United Nations continues to believe that the machinery provided for in the Headquarters Agreement is the proper framework for the settlement of this dispute and I cannot agree that arbitration would serve no useful purpose. On the contrary, in the present case, it would serve the very purpose for which the provisions of section 21 were included in the Agreement, namely the settlement of a dispute arising from the interpretation or application of the Agreement."

29. According to the written statement of 25 March 1988 presented to the Court by the United States,

"The PLO Mission did not comply with the March 11 order. On March 22, the United States Department of Justice therefore filed a lawsuit in the United States District Court for the Southern District of New York to compel compliance. That litigation will afford an opportunity for the PLO and other interested parties to raise legal challenges to enforcement of the Act against the PLO Mission. The United States will take no action to close the Mission pending a decision in that litigation. Since the matter is still pending in our courts, we do not believe arbitration would be appropriate or timely."

The Court has been supplied, as part of the dossier of documents furnished by the Secretary-General, with a copy of the summons addressed to the PLO, the PLO Observer Mission, its members and staff; it is dated 22 March 1988 and requires an answer within 20 days after service.

30. On 23 March 1988, the General Assembly, at its reconvened forty-second session, adopted resolution 42/230 by 148 votes to 2, by which it reaffirmed (inter alia) that
“a dispute exists between the United Nations and the United States of America, the host country, concerning the interpretation or application of the Headquarters Agreement, and that the dispute settlement procedure provided for under section 21 of the Agreement, which constitutes the only legal remedy to solve the dispute, should be set in operation”

and requested “the host country to name its arbitrator to the arbitral tribunal”.

31. The representative of the United States, who voted against the resolution, said (inter alia) the following in explanation of vote. Referring to the proceedings instituted in the United States courts, he said:

“The United States will take no further steps to close the PLO office until the [United States] Court has reached a decision on the Attorney General’s position that the Act requires closure . . . Until the United States courts have determined whether that law requires closure of the PLO Observer Mission the United States Government believes that it would be premature to consider the appropriateness of arbitration.” (A/42/PV.109, pp. 13-15.)

He also urged:

“Let us not be diverted from the important and historic goal of peace in the Middle East by the current dispute over the status of the PLO Observer Mission.” (Ibid., p. 16.)

32. At the hearing, the United Nations Legal Counsel, representing the Secretary-General, stated to the Court that he had informed the United States District Court Judge seised of the proceedings referred to in paragraph 29 above that it was the wish of the United Nations to submit an amicus curiae brief in those proceedings.

* * *

33. In the present case, the Court is not called upon to decide whether the measures adopted by the United States in regard to the Observer Mission of the PLO to the United Nations do or do not run counter to the Headquarters Agreement. The question put to the Court is not about either the alleged violations of the provisions of the Headquarters Agreement applicable to that Mission or the interpretation of those provisions. The request for an opinion is here directed solely to the determination whether under section 21 of the Headquarters Agreement the United Nations was entitled to call for arbitration, and the United States was obliged to enter into this procedure. Hence the request for an opinion concerns solely the applicability to the alleged dispute of the arbitration procedure provided for by the Headquarters Agreement. It is a legal question within the meaning of Article 65, paragraph 1, of the Statute. There is in this case no reason why the Court should not answer that question.

34. In order to answer the question put to it, the Court has to determine whether there exists a dispute between the United Nations and the United States, and if so whether or not that dispute is one “concerning the interpretation or application of” the Headquarters Agreement within the meaning of section 21 thereof. If it finds that there is such a dispute it must also, pursuant to that section, satisfy itself that it is one “not settled by negotiation or other agreed mode of settlement”.

35. As the Court observed in the case concerning Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, “whether there exists an international dispute is a matter for objective determination” (I.C.J. Reports 1950, p. 74). In this respect the Permanent Court of International Justice, in the case concerning Mavrommatis Palestine Concessions, had defined a dispute as “a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons” (P.C.I.J., Series A, No. 2, p. 11). This definition has since been applied and clarified on a number of occasions. In the Advisory Opinion of 30 March 1950 the Court, after examining the diplomatic exchanges between the States concerned, noted that “the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations” and concluded that “international disputes have arisen” (Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase. I.C.J. Reports 1950, p. 74). Furthermore, in its Judgment of 21 December 1962 in the South West Africa cases, the Court made it clear that in order to prove the existence of a dispute

“It is not sufficient for one party to a contentious case to assert that a dispute exists with the other party. A mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its non-existence. Nor is it adequate to show that the interests of the two parties to such a case are in conflict. It must be shown that the claim of one party is positively opposed by the other.” (I.C.J. Reports 1962, p. 328.)

The Court found that the opposing attitudes of the parties clearly established the existence of a dispute (ibid.; see also Northern Cameroons, I.C.J. Reports 1963, p. 27).

36. In the present case, the Secretary-General informed the Court that, in his opinion, a dispute within the meaning of section 21 of the Head-
quarters Agreement existed between the United Nations and the United States from the moment the Anti-Terrorism Act was signed into law by the President of the United States and in the absence of adequate assurances to the Organization that the Act would not be applied to the PLO Observer Mission to the United Nations. By his letter of 14 January 1988 to the Permanent Representative of the United States, the Secretary-General formally contested the consistency of the Act with the Headquarters Agreement (paragraph 16 above). The Secretary-General confirmed and clarified that point of view in a letter of 15 March 1988 (paragraph 28 above) to the Acting Permanent Representative of the United States in which he told him that the determination made by the Attorney General of the United States on 11 March 1988 was a “clear violation of the Headquarters Agreement”. In that same letter he once more asked that the matter be submitted to arbitration.

37. The United States has never expressly contradicted the view expounded by the Secretary-General and endorsed by the General Assembly regarding the sense of the Headquarters Agreement. Certain United States authorities have even expressed the same view, but the United States has nevertheless taken measures against the PLO Mission to the United Nations. It has indicated that those measures were being taken “irrespective of any obligations the United States may have under the [Headquarters] Agreement” (paragraph 24 above).

38. In the view of the Court, where one party to a treaty protests against the behaviour or a decision of another party, and claims that such behaviour or decision constitutes a breach of the treaty, the mere fact that the party accused does not advance any argument to justify its conduct under international law does not prevent the opposing attitudes of the parties from giving rise to a dispute concerning the interpretation or application of the treaty. In the case concerning United States Diplomatic and Consular Staff in Tehran, the jurisdiction of the Court was asserted principally on the basis of the Optional Protocols concerning the Compulsory Settlement of Disputes accompanying the Vienna Conventions of 1961 on Diplomatic Relations and of 1963 on Consular Relations, which defined the disputes to which they applied as “Disputes arising out of the interpretation or application of” the relevant Convention. Iran, which did not appear in the proceedings before the Court, had acted in such a way as, in the view of the United States, to commit breaches of the Conventions, but, so far as the Court was informed, Iran had at no time claimed to justify its actions by advancing an alternative interpretation of the Conventions, on the basis of which such actions would not constitute such a breach. The Court saw no need to enquire into the attitude of Iran in order to establish the existence of a “dispute”; in order to determine whether it had jurisdiction, it stated:

“The United States’ claims here in question concern alleged violations by Iran of its obligations under several articles of the Vienna

Conventions of 1961 and 1963 with respect to the privileges and immunities of the personnel, the inviolability of the premises and archives, and the provision of facilities for the performance of the functions of the United States Embassy and Consulates in Iran... By their very nature all these claims concern the interpretation or application of one or other of the two Vienna Conventions.” (I.C.J. Reports 1980, pp. 24-25, para. 46.)

39. In the present case, the United States in its public statements has not referred to the matter as a “dispute” (save for a passing reference on 23 March 1988 to “the current dispute over the status of the PLO Observer Mission” (paragraph 31 above)), and it has expressed the view that arbitration would be “premature”. According to the report of the Secretary-General to the General Assembly (A/42/915, para. 6), the position taken by the United States during the consultations in January 1988 was that it “had not yet concluded that a dispute existed between the United Nations and the United States” at that time “because the legislation in question had not yet been implemented”. Finally, the Government of the United States, in its written statement of 25 March 1988, told the Court that:

“The United States will take no action to close the Mission pending a decision in that litigation. Since the matter is still pending in our courts, we do not believe arbitration would be appropriate or timely.”

40. The Court could not allow considerations as to what might be “appropriate” to prevail over the obligations which derive from section 21 of the Headquarters Agreement, as “the Court, being a Court of justice, cannot disregard rights recognized by it, and base its decision on considerations of pure expediency” (Free Zones of Upper Savoy and the District of Gex, Order of 6 December 1930, P.C.I.J., Series A, No. 24, p. 15).

41. The Court must further point out that the alleged dispute relates solely to what the United Nations considers to be its rights under the Headquarters Agreement. The purpose of the arbitration procedure envisaged by that Agreement is precisely the settlement of such disputes as may arise between the Organization and the host country without any prior recourse to municipal courts, and it would be against both the letter and the spirit of the Agreement for the implementation of that procedure to be subjected to such prior recourse. It is evident that a provision of the nature of section 21 of the Headquarters Agreement cannot require the exhaustion of local remedies as a condition of its implementation.

42. The United States in its written statement might be implying that neither the signing into law of the Anti-Terrorism Act, nor its entry into force, nor the Attorney General’s decision to apply it, nor his resort to court proceedings to close the PLO Mission to the United Nations, would have been sufficient to bring about a dispute between the United Nations
and the United States, since the case was still pending before an American court and, until the decision of that court, the United States, according to the Acting Permanent Representative’s letter of 11 March 1988, “will not take other actions to close” the Mission. The Court cannot accept such an argument. While the existence of a dispute does presuppose a claim arising out of the behaviour of or a decision by one of the parties, it in no way requires that any contested decision must already have been carried into effect. What is more, a dispute may arise even if the party in question gives an assurance that no measure of execution will be taken until ordered by decision of the domestic courts.

43. The Anti-Terrorism Act was signed into law on 22 December 1987. It was automatically to take effect 90 days later. Although the Act extends to every PLO office situated within the jurisdiction of the United States and contains no express reference to the office of the PLO Mission to the United Nations in New York, its chief, if not its sole, objective was the closure of that office. On 11 March 1988, the United States Attorney General considered that he was under an obligation to effect such a closure; he notified the Mission of this, and applied to the United States courts for an injunction prohibiting those concerned “from continuing violations of” the Act. As noted above, the Secretary-General, acting both on his own behalf and on instructions from the General Assembly, has consistently challenged the decisions contemplated and then taken by the United States Congress and the Administration. Under those circumstances, the Court is obliged to find that the opposing attitudes of the United Nations and the United States show the existence of a dispute between the two parties to the Headquarters Agreement.

44. For the purposes of the present advisory opinion there is no need to seek to determine the date at which the dispute came into existence, once the Court has reached the conclusion that there is such a dispute at the date on which its opinion is given.

* * *

45. The Court has next to consider whether the dispute is one which concerns the interpretation or application of the Headquarters Agreement. It is not however the task of the Court to say whether the enactment, or the enforcement, of the United States Anti-Terrorism Act would or would not constitute a breach of the provisions of the Headquarters Agreement; that question is reserved for the arbitral tribunal which the Secretary-General seeks to have established under section 21 of the Agreement.

46. In the present case, the Secretary-General and the General Assembly of the United Nations have constantly pointed out that the PLO was invited “to participate in the sessions and the work of the General Assem-
HEADQUARTERS AGREEMENT (ADVISORY OPINION)

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15 March 1988, to the letter from the United States Acting Permanent Representative to the PLO Observer Agreement, and that was challenged by the United States Acting Permanent Representative.

49. To conclude, the United States has taken a number of measures against the PLO Observer Agreement. The United States is bound by the United States-PLO Observer Agreement, and this challenge was brought by the United States Acting Permanent Representative.

50. The question is whether the United States is bound by the United States-PLO Observer Agreement. The question is whether the United States-PLO Observer Agreement is binding on the United States. The question is whether the United States-PLO Observer Agreement is binding on the United States.

51. The Court, therefore, has considered the question of whether the United States-PLO Observer Agreement is binding on the United States. The Court has considered the question of whether the United States-PLO Observer Agreement is binding on the United States.

52. In its written statement, the Court has considered the question of whether the United States-PLO Observer Agreement is binding on the United States. The Court has considered the question of whether the United States-PLO Observer Agreement is binding on the United States.

53. The Court, therefore, has considered the question of whether the United States-PLO Observer Agreement is binding on the United States. The Court has considered the question of whether the United States-PLO Observer Agreement is binding on the United States.

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at which one of the Parties definitely declares himself unable, or refuses, to give way, and there can therefore be no doubt that the dispute cannot be settled by diplomatic negotiation” (P.C.I.J., Series A, No. 2, p. 13).

When in the case concerning United States Diplomatic and Consular Staff in Tehran the attempts of the United States to negotiate with Iran “had reached a deadlock, owing to the refusal of the Iranian Government to enter into any discussion of the matter”, the Court concluded that “in consequence, there existed at that date not only a dispute but, beyond any doubt, a ‘dispute . . . not satisfactorily adjusted by diplomacy’ within the meaning of” the relevant jurisdictional text (I.C.J. Reports 1980, p. 27, para. 51). In the present case, the Court regards it as similarly beyond any doubt that the dispute between the United Nations and the United States is one “not settled by negotiation” within the meaning of section 21, paragraph (a), of the Headquarters Agreement.

56. Nor was any “other agreed mode of settlement” of their dispute contemplated by the United Nations and the United States. In this connection the Court should observe that current proceedings brought by the United States Attorney General before the United States courts cannot be an “agreed mode of settlement” within the meaning of section 21 of the Headquarters Agreement. The purpose of these proceedings is to enforce the Anti-Terrorism Act of 1987; it is not directed to settling the dispute, concerning the application of the Headquarters Agreement, which has come into existence between the United Nations and the United States. Furthermore, the United Nations has never agreed to settlement of the dispute in the American courts; it has taken care to make it clear that it wishes to be admitted only as amicus curiae before the District Court for the Southern District of New York.

* *

57. The Court must therefore conclude that the United States is bound to respect the obligation to have recourse to arbitration under section 21 of the Headquarters Agreement. The fact remains however that, as the Court has already observed, the United States has declared (letter from the Permanent Representative, 11 March 1988) that its measures against the PLO Observer Mission were taken “irrespective of any obligations the United States may have under the [Headquarters] Agreement”. If it were necessary to interpret that statement as intended to refer not only to the substantive obligations laid down in, for example, sections 11, 12 and 13, but also to the obligation to arbitrate provided for in section 21, this conclusion would remain intact. It would be sufficient to recall the fundamental principle of international law that international law prevails over domestic law. This principle was endorsed by judicial decision as long ago as the arbitral award of 14 September 1872 in the Alabama case between Great Britain and the United States, and has frequently been recalled since, for example in the case concerning the Greco-Bulgarian

“Communities” in which the Permanent Court of International Justice laid it down that

“it is a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty” (P.C.I.J., Series B, No. 17, p. 32).

* *

58. For these reasons,

THE COURT,

Unanimously,

Is of the opinion that the United States of America, as a party to the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations of 26 June 1947, is under an obligation, in accordance with section 21 of that Agreement, to enter into arbitration for the settlement of the dispute between itself and the United Nations.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this twenty-sixth day of April, one thousand nine hundred and eighty-eight, 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) José Maria RUDA,
President.

(Signed) Eduardo VALENCIA-OSPINA,
Registrar.

Judge Elías appends a declaration to the Advisory Opinion of the Court.

Judges ODA, SCHWEBEL and SHAHABUDDEN append separate opinions to the Advisory Opinion of the Court.

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

Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights
Advisory Opinion

I.C.J. Reports 1999
DIFFERENCE RELATING TO IMMUNITY FROM LEGAL PROCESS OF A SPECIAL RAPPORTEUR OF THE COMMISSION ON HUMAN RIGHTS

ADVISORY OPINION OF 29 APRIL 1999

1999

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS, AVIS CONSULTATIFS ET ORDONNANCES

DIFFÉREND RELATIF À L'IMMUNITÉ DE JURIDICTION D'UN RAPPORTEUR SPÉCIAL DE LA COMMISSION DES DROITS DE L'HOMME

AVIS CONSULTATIF DU 29 AVRIL 1999

Official citation:

Mode officiel de citation:
Différend relatif à l'immunité de juridiction d'un rapporteur spécial de la Commission des droits de l'homme, avis consultatif, C.I.J. Recueil 1999, p. 62
DIFFERENCE RELATING TO IMMUNITY FROM LEGAL PROCESS OF A SPECIAL RAPPORTEUR OF THE COMMISSION ON HUMAN RIGHTS

Article 96, paragraph 2, of the Charter and Article 65, paragraph 1, of the Statute — Resolution 89 (1) of the General Assembly authorizing the Economic and Social Council to request advisory opinions — Article VIII, Section 30, of the Convention on the Privileges and Immunities of the United Nations — Existence of a “difference” between the United Nations and one of its Members — Opinion “accepted as decisive by the parties” — Advisory nature of the Court’s function and particular treaty provisions — “Legal question” — Question arising “within the scope of [the] activity” of the body requesting it.

Jurisdiction and discretionary power of the Court to give an opinion — “Absence of compelling reasons” to decline to give such opinion.

Question on which the opinion is requested — Divergence of views — Formulation adopted by the Council as the requesting body.

Special Rapporteur of the Commission on Human Rights — “Expert on mission” — Applicability of Article VI, Section 22, of the General Convention — Specific circumstances of the case — Question whether words spoken by the Special Rapporteur during an interview were spoken “in the course of the performance of his mission” — Pivotal role of the Secretary-General in the process of determining whether, in the prevailing circumstances, an expert on mission is entitled to the immunity provided for in Section 22 (b) — Interview given by Special Rapporteur to International Commercial Litigation — Contacts with the media by Special Rapporteurs of the Commission on Human Rights — Reference to Special Rapporteur’s capacity in the text of the interview — Position of the Commission itself.

Legal obligations of Malaysia in this case — Point in time from which the question must be answered — Authority and responsibility of the Secretary-General to inform the Government of a member State of his finding on the immunity of an agent — Finding creating a presumption which can only be set aside by national courts for the most compelling reasons — Obligation on the governmental authorities to convey that finding to the national courts concerned — Immunity from legal process “of every kind” within the meaning of Section 22 (b) of the Convention — Preliminary question which must be expeditiously decided in limine litis.

Holding the Special Rapporteur financially harmless.

Obligation of the Malaysian Government to communicate the advisory opinion to the national courts concerned.

Claims for any damages incurred as a result of acts of the Organization or its agents — Article VIII, Section 29, of the General Convention — Conduct expected of United Nations agents.

ADVISORY OPINION

Present: President Schwebel; Vice-President Weeramantry; Judges Oda, Bedau, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetic, Higgins, Parra-Aranguren, Koumjians, Rezek; Registrar Valencia-Ospina.

Concerning the difference relating to immunity from legal process of a Special Rapporteur of the Commission on Human Rights,

THE COURT,

composed as above,

gives the following Advisory Opinion:

1. The question on which the Court has been requested to give an advisory opinion is set forth in decision 1998/297 adopted by the United Nations Economic and Social Council (hereinafter called the “Council”) on 5 August 1998. By a letter dated 7 August 1998, filed in the Registry on 10 August 1998, the Secretary-General of the United Nations officially communicated to the Registrar the Council’s decision to submit the question to the Court for an advisory opinion. Decision 1998/297, certified copies of the English and French texts of which were enclosed with the letter, reads as follows:

“The Economic and Social Council.

Having considered the note by the Secretary-General on the privileges and immunities of the Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers,

Considering that a difference has arisen between the United Nations and the Government of Malaysia, within the meaning of Section 30 of the Convention on the Privileges and Immunities of the United Nations, with respect to the immunity from legal process of Dato’ Param Cumaraswamy, the Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers,

Recalling General Assembly resolution 89 (1) of 11 December 1946,

1. Requests on a priority basis, pursuant to Article 96, paragraph 2, of the Charter of the United Nations and in accordance with General Assembly
resolution 89 (1), an advisory opinion from the International Court of Justice on the legal question of the applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations in the case of Dato' Param Cumaraswamy as Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers, taking into account the circumstances set out in paragraphs 1 to 13 of the note by the Secretary-General, and on the legal obligations of Malaysia in this case;

2. Calls upon the Government of Malaysia to ensure that all judgements and proceedings in this matter in the Malaysian courts are stayed pending receipt of the advisory opinion of the International Court of Justice, which shall be accepted as decisive by the parties.


Also enclosed with the letter were certified copies of the English and French texts of the note by the Secretary-General dated 28 July 1998 and entitled “Privileges and Immunities of the Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers” and of the addendum to that note (E/1998/94/Add.1), dated 3 August 1998.

2. By letters dated 10 August 1998, the Registrar, pursuant to Article 66, paragraph 1, of the Statute of the Court, gave notice of the request for an advisory opinion to all States entitled to appear before the Court. A copy of the bilingual printed version of the request, prepared by the Registry, was subsequently sent to those States.

3. By an Order dated 10 August 1998, the senior judge, acting as President of the Court under Article 13, paragraph 3, of the Rules of Court, decided that the United Nations and the States which are parties to the Convention on the Privileges and Immunities of the United Nations adopted by the United Nations General Assembly on 13 February 1946 (hereinafter called the “General Convention”) were likely to be able to furnish information on the question in accordance with Article 66, paragraph 2, of the Statute. By the same Order, the senior judge, considering that, in fixing time-limits for the proceedings, it was “necessary to bear in mind that the request for an advisory opinion was expressly made ‘on a priority basis’”, fixed 7 October 1998 as the time-limit within which written statements on the question might be submitted to the Court, in accordance with Article 66, paragraph 2, of the Statute, and 6 November 1998 as the time-limit for written comments on written statements, in accordance with Article 66, paragraph 4, of the Statute.

On 10 August 1998, the Registrar sent to the United Nations and to the States parties to the General Convention the special and direct communication provided for in Article 66, paragraph 2, of the Statute.

4. By a letter dated 22 September 1998, the Legal Counsel of the United Nations communicated to the President of the Court a certified copy of the amended French version of the note by the Secretary-General which had been enclosed with the request. Consequently, a corrigendum to the printed French version of the request for an advisory opinion was communicated to all States entitled to appear before the Court.

5. The Secretary-General communicated to the Court, pursuant to Article 65, paragraph 2, of the Statute, a dossier of documents likely to throw light upon the question; these documents were received in the Registry in instalments from 5 October 1998 onwards.

6. Within the time-limit fixed by the Order of 10 August 1998, written statements were filed by the Secretary-General of the United Nations and by Costa Rica, Germany, Italy, Malaysia, Sweden, the United Kingdom and the United States of America; the filing of a written statement by Greece on 12 October 1998 was authorized. A related letter was also received from Luxembourg on 29 October 1998. Written comments on the statements were submitted, within the prescribed time-limit, by the Secretary-General of the United Nations and by Costa Rica, Malaysia, and the United States of America. Upon receipt of those statements and comments, the Registrar communicated them to all States having taken part in the written proceedings.

The Registrar also communicated to those States the text of the introductory note to the dossier of documents submitted by the Secretary-General. In addition, the President of the Court granted Malaysia’s request for a copy of the whole dossier; on the instructions of the President, the Deputy-Registrar also communicated a copy of that dossier to the other States having taken part in the written proceedings, and the Secretary-General was so informed.

7. The Court decided to hold hearings, opening on 7 December 1998, at which oral statements might be submitted to the Court by the United Nations and the States parties to the General Convention.

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

9. In the course of public sittings held on 7 and 8 December 1998, the Court heard oral statements in the following order by:

for the United Nations: Mr. Hans Corell, Under-Secretary-General for Legal Affairs, the Legal Counsel,
Mr. Ralph Zacklur, Assistant Secretary-General for Legal Affairs;

for Costa Rica: H.E. Mr. José de J. Conejó, Ambassador of Costa Rica to the Netherlands,
Mr. Charles N. Brower, White & Case LLP;

for Italy: Mr. Umberto Leanza, Head of the Diplomatic Legal Service at the Ministry of Foreign Affairs;

for Malaysia: Dato’ Heliliah bt Mohd Yusof, Solicitor General of Malaysia,
Sir Elisha Lauterpacht, C.B.E., Q.C., Honorary Professor of International Law, University of Cambridge.

The Court having decided to authorize a second round of oral statements, the United Nations, Costa Rica and Malaysia availed themselves of this option; at a public hearing held on 10 December 1998, Mr. Hans Corell, H.E. Mr. José de J. Conejó, Mr. Charles N. Brower, Dato’ Heliliah bt Mohd Yusof and Sir Elisha Lauterpacht were successively heard.
Members of the Court put questions to the Secretary-General's representative, who replied both orally and in writing. Copies of the written replies were communicated to all the States having taken part in the oral proceedings; Malaysia submitted written comments on these replies.

* * *

10. In its decision 1998/297, the Council asked the Court to take into account, for purposes of the advisory opinion requested, the "circumstances set out in paragraphs 1 to 15 of the note by the Secretary-General" (E/1998/94). Those paragraphs read as follows:

"1. In its resolution 22 A (I) of 13 February 1946, the General Assembly adopted, pursuant to Article 105 (3) of the Charter of the United Nations, the Convention on the Privileges and Immunities of the United Nations (the Convention). Since then, 137 Member States have become parties to the Convention, and its provisions have been incorporated by reference into many hundreds of agreements relating to the headquarters or seats of the United Nations and its organs, and to activities carried out by the Organization in nearly every country of the world.

2. That Convention is, inter alia, designed to protect various categories of persons, including 'Experts on Mission for the United Nations', from all types of interference by national authorities. In particular, Section 22 (b) of Article VI of the Convention provides:

'Section 22: Experts (other than officials coming within the scope of Article V) performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including time spent on journeys in connection with their missions. In particular they shall be accorded:

(b) in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations.'

3. In its Advisory Opinion of 14 December 1989, on the Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations (the so-called 'Mazliu case'), the International Court of Justice held that a Special Rapporteur of the Subcommission on the Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights was an 'expert on mission' within the meaning of Article VI of the Convention.


5. In November 1995 the Special Rapporteur gave an interview to International Commercial Litigation, a magazine published in the United Kingdom of Great Britain and Northern Ireland but circulated also in Malaysia, in which he commented on certain litigations that had been carried out in Malaysian courts. As a result of an article published on the basis of that interview, two commercial companies in Malaysia asserted that the said article contained defamatory words that had 'brought them into public scandal, odium and contempt'. Each company filed a suit against him for damages amounting to M$30 million (approximately US$12 million each), 'including exemplary damages for slander'.

6. Acting on behalf of the Secretary-General, the Legal Counsel considered the circumstances of the interview and of the controverted passages of the article and determined that Dato' Param Cumaraswamy was interviewed in his official capacity as Special Rapporteur on the Independence of Judges and Lawyers, that the article clearly referred to his United Nations capacity and to the Special Rapporteur's United Nations global mandate to investigate allegations concerning the independence of the judiciary and that the quoted passages related to such allegations. On 15 January 1997, the Legal Counsel, in a note verbale addressed to the Permanent Representative of Malaysia to the United Nations, therefore 'requested the competent Malaysian authorities to promptly advise the Malaysian courts of the Special Rapporteur's immunity from legal process' with respect to that particular complaint. On 20 January 1997, the Special Rapporteur filed an application in the High Court of Kuala Lumpur (the trial court in which the said suit had been filed) to set aside and/or strike out the plaintiffs' writ, on the ground that the
words that were the subject of the suits had been spoken by him in the course of performing his mission for the United Nations as Special Rapporteur on the Independence of Judges and Lawyers. The Secretary-General issued a note on 7 March 1997 confirming that 'the words which constitute the basis of plaintiffs' complaint in this case were spoken by the Special Rapporteur in the course of his mission' and that the Secretary-General 'therefore maintains that Dato' Param Cumarsawamy is immune from legal process with respect thereto'. The Special Rapporteur filed this note in support of his above-mentioned application.

7. After a draft of a certificate that the Minister for Foreign Affairs proposed to file with the trial court had been discussed with representatives of the Office of Legal Affairs, who had indicated that the draft set out the immunities of the Special Rapporteur incompletely and inadequately, the Minister nevertheless on 12 March 1997 filed the certificate in the form originally proposed: in particular the final sentence of that certificate in effect invited the trial court to determine at its own discretion whether the immunity applied, by stating that this was the case 'only in respect of words spoken or written and acts done by him in the course of the performance of his mission' (emphasis added). In spite of the representations that had been made by the Office of Legal Affairs, the certificate failed to refer in any way to the note that the Secretary-General had issued a few days earlier and that had in the meantime been filed with the court, nor did it indicate that in this respect, i.e. in deciding whether particular words or acts of an expert fell within the scope of his mission, the determination could exclusively be made by the Secretary-General, and that such determination had conclusive effect and therefore had to be accepted as such by the court. In spite of repeated requests by the Legal Counsel, the Minister for Foreign Affairs refused to amend his certificate or to supplement it in the manner urged by the United Nations.

8. On 28 June 1997, the competent judge of the Malaysian High Court for Kuala Lumpur concluded that she was 'unable to hold that the Defendant is absolutely protected by the immunity he claims', in part because she considered that the Secretary-General's note was merely 'an opinion' with scant probative value and no binding force upon the court and that the Minister for Foreign Affairs' certificate 'would appear to be no more than a bland statement as to a state of fact pertaining to the Defendant's status and mandate as a Special Rapporteur and appears to have room for interpretation'. The Court ordered that the Special Rapporteur's motion be dismissed with costs, that costs be taxed and paid forthwith by him and that he file and serve his defence within 14 days. On 8 July, the Court of Appeal dismissed Mr. Cumarsawamy's motion for a stay of execution.

9. On 30 June and 7 July 1997, the Legal Counsel thereupon sent notes verbales to the Permanent Representative of Malaysia, and also held meetings with him and his Deputy. In the latter note, the Legal Counsel, inter alia, called on the Malaysian Government to intervene in the current proceedings so that the burden of any further defence, including any expenses and taxed costs resulting therefrom, be assumed by the Government; to hold Mr. Cumarsawamy harmless in respect of the expenses he had already incurred or that were being taxed to him in respect of the proceedings so far; and, so as to prevent the accumulation of additional expenses and costs and the further need to submit a defence until the matter of his immunity was definitively resolved between the United Nations and the Government, to support a motion to have the High Court proceedings stayed until such resolution. The Legal Counsel referred to the provisions for the settlement of differences arising out of the interpretation and application of the 1946 Convention that might arise between the Organization and a Member State, which are set out in Section 30 of the Convention, and indicated that if the Government decided that it cannot or does not wish to protect and to hold harmless the Special Rapporteur in the indicated manner, a difference within the meaning of those provisions might be considered to have arisen between the Organization and the Government of Malaysia.

10. Section 30 of the Convention provides as follows:

'Section 30: All differences arising out of the interpretation or application of the present convention shall be referred to the International Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement. If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties.'

11. On 10 July yet another lawsuit was filed against the Special Rapporteur by one of the lawyers mentioned in the magazine article referred to in paragraph 5 above, based on precisely the same passages of the interview and claiming damages in an amount of MS$60 million (US$24 million). On 11 July, the Secretary-General issued a note corresponding to the one of 7 March 1997 (see para. 6 above) and also communicated a note verbale with essentially the same text to the Permanent Representative of Malaysia with the request that it be presented formally to the competent Malaysian court by the Government.

12. On 23 October and 21 November 1997, new plaintiffs filed
a third and fourth lawsuit against the Special Rapporteur for M$100 million (US$40 million) and M$60 million (US$24 million) respectively. On 27 October and 22 November 1997, the Secretary-General issued identical certificates of the Special Rapporteur’s immunity.

13. On 7 November 1997, the Secretary-General advised the Prime Minister of Malaysia that a difference might have arisen between the United Nations and the Government of Malaysia and about the possibility of resorting to the International Court of Justice pursuant to Section 30 of the Convention. Nonetheless on 19 February 1998, the Federal Court of Malaysia denied Mr. Cumaraswamy’s application for leave to appeal stating that he is neither a sovereign nor a full-fledged diplomat but merely ‘an unpaid, part-time provider of information’.

14. The Secretary-General then appointed a Special Envoy, Maître Yves Fortier of Canada, who, on 26 and 27 February 1998, undertook an official visit to Kuala Lumpur to reach an agreement with the Government of Malaysia on a joint submission to the International Court of Justice. Following that visit, on 13 March 1998 the Minister for Foreign Affairs of Malaysia informed the Secretary-General’s Special Envoy of his Government’s desire to reach an out-of-court settlement. In an effort to reach such a settlement, the Office of Legal Affairs proposed the terms of such a settlement on 23 March 1998 and a draft settlement agreement on 26 May 1998. Although the Government of Malaysia succeeded in staying proceedings in the four lawsuits until September 1998, no final settlement agreement was concluded. During this period, the Government of Malaysia insisted that, in order to negotiate a settlement, Maître Fortier must return to Kuala Lumpur. While Maître Fortier preferred to undertake the trip only once a preliminary agreement between the parties had been reached, nonetheless, based on the Prime Minister of Malaysia’s request that Maître Fortier return as soon as possible, the Secretary-General requested his Special Envoy to do so.

15. Maître Fortier undertook a second official visit to Kuala Lumpur, from 25 to 28 July 1998, during which he concluded that the Government of Malaysia was not going to participate either in settling this matter or in preparing a joint submission to the current session of the Economic and Social Council. The Secretary-General’s Special Envoy therefore advised that the matter should be referred to the Council to request an advisory opinion from the International Court of Justice. The United Nations had exhausted all efforts to reach either a negotiated settlement or a joint submission through the Council to the International Court of Justice. In this connection, the Government of Malaysia has acknowledged the Organization’s right to refer the matter to the Council to request an advisory opinion in accordance with Section 30 of the Convention, advised the Secretary-General’s Special Envoy that the United Nations should proceed to do so, and indicated that, while it will make its own presentations to the International Court of Justice, it does not oppose the submission of the matter to that Court through the Council.”

11. The dossier of documents submitted to the Court by the Secretary-General (see paragraph 5 above) contains the following additional information that bears on an understanding of the request to the Court.

12. The article published in the November 1995 issue of International Commercial Litigation, which is referred to in paragraph 5 of the foregoing note by the Secretary-General, was written by David Samuels and entitled “Malaysian Justice on Trial”. The article gave a critical appraisal of the Malaysian judicial system in relation to a number of court decisions. Various Malaysian lawyers were interviewed; as quoted in the article, they expressed their concern that, as a result of these decisions, foreign investors and manufacturers might lose the confidence they had always had in the integrity of the Malaysian judicial system.

13. It was in this context that Mr. Cumaraswamy, who was referred to in the article more than once in his capacity as the United Nations Special Rapporteur on the Independence of Judges and Lawyers, was asked to give his comments. With regard to a specific case (the Ayer Molek case), he said that it looked like “a very obvious, perhaps even glaring example of judge-choosing”, although he stressed that he had not finished his investigation.

Mr. Cumaraswamy is also quoted as having said:

“Complaints are rife that certain highly placed personalities in the business and corporate sectors are able to manipulate the Malaysian system of justice.”

He added: “But I do not want any of the people involved to think I have made up my mind.” He also said:

“It would be unfair to name any names, but there is some concern about this among foreign businessmen based in Malaysia, particularly those who have litigation pending.”

14. On 18 December 1995, two commercial firms and their legal counsel addressed letters to Mr. Cumaraswamy in which they maintained that they were defamed by Mr. Cumaraswamy’s statements in the article, since it was clear, they claimed, that they were being accused of corruption in the Ayer Molek case. They informed Mr. Cumaraswamy that they had “no choice but to issue defamation proceedings against him” and added
“It is important that all steps are taken for the purpose of mitigating the continuing damage being done to [our] business and commercial reputations which is worldwide, as quickly and effectively as possible.”

15. On 28 December 1995, in view of the foregoing letters, the Secretariat of the United Nations issued a Note Verbale to the Permanent Mission of Malaysia in Geneva, requesting that the competent Malaysian authorities be advised, and that they in turn advise the Malaysian courts, of the Special Rapporteur’s immunity from legal process. This was the first in a series of similar communications, containing the same finding, sent by or on behalf of the Secretary-General — some of which were sent once court proceedings had been initiated (see paragraphs 6 et seq. of the note by the Secretary-General, reproduced in paragraph 10 above).

16. On 12 December 1996, the two commercial firms issued a writ of summons and statement of claim against Mr. Cumaraswamy in the High Court of Kuala Lumpur. They claimed damages, including exemplary damages, for slander and libel, and requested an injunction to restrain Mr. Cumaraswamy from further defaming the plaintiffs.

17. As stated in the note of the Secretary-General, quoted in paragraph 10 above, three further lawsuits flowing from Mr. Cumaraswamy’s statements to International Commercial Litigation were brought against him.

The Government of Malaysia did not transmit to its courts the texts containing the Secretary-General’s finding that Mr. Cumaraswamy was entitled to immunity from legal process.

The High Court of Kuala Lumpur did not pass upon Mr. Cumaraswamy’s immunity in limine litis, but held that it had jurisdiction to hear the case before it on the merits, including making a determination of whether Mr. Cumaraswamy was entitled to any immunity. This decision was upheld by both the Court of Appeal and the Federal Court of Malaysia.

18. As indicated in paragraph 4 of the above note by the Secretary-General, the Special Rapporteur made regular reports to the Commission on Human Rights (hereinafter called the “Commission”).

In his first report (E/CN.4/1995/39), dated 6 February 1995, Mr. Cumaraswamy did not refer to contacts with the media. In resolution 1995/36 of 3 March 1995, the Commission welcomed this report and took note of the methods of work described therein in paragraphs 63 to 93.

In his second report (E/CN.4/1996/37), dated 1 March 1996, the Special Rapporteur referred to the Ayer Molek case and to a critical press statement made by the Bar Council of Malaysia on 21 August 1995. The report also included the following quotation from a press statement issued by Mr. Cumaraswamy on 23 August 1995:

“Complaints are rife that certain highly placed personalities in Malaysia including those in business and corporate sectors are manipulating the Malaysian system of justice and thereby undermining the due administration of independent and impartial justice by the courts.

Under the mandate entrusted to me by the United Nations Commission on Human Rights, I am duty bound to investigate these complaints and report to the same Commission, if possible at its fifty-second session next year. To facilitate my inquiries I will seek the cooperation of all those involved in the administration of justice, including the Government which, under my mandate, is requested to extend its cooperation and assistance.”

In resolution 1996/34 of 19 April 1996, the Commission took note of this report and of the Special Rapporteur’s working methods.

In his third report (E/CN.4/1997/32), dated 18 February 1997, the Special Rapporteur informed the Commission of the article in International Commercial Litigation and the lawsuits that had been initiated against him, the author, the publisher, and others. He also referred to the notifications of the Legal Counsel of the United Nations to the Malaysian authorities. In resolution 1997/23 of 11 April 1997, the Commission took note of the report and the working methods of the Special Rapporteur, and extended his mandate for another three years.

In his fourth report (E/CN.4/1998/39), dated 12 February 1998, the Special Rapporteur reported on further developments with regard to the lawsuits initiated against him. In its resolution 1998/35 of 17 April 1998, the Commission similarly took note of this report and of the working methods reflected therein.

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19. As indicated above (see paragraph 1), the note by the Secretary-General was accompanied by an addendum (E/1998/94/Add.1) which reads as follows:

“In paragraph 14 of the note by the Secretary-General on the privileges and immunities of the Special Rapporteur o: the Commission on Human Rights on the independence of judges and lawyers (E/1998/94), it is reported that the ‘Government of Malaysia succeeded in staying proceedings in the four lawsuits until September 1998’. In this connection, the Secretary-General has been informed that on 1 August 1998, Dato’ Param Cumaraswamy was served with a Notice of Taxation and Bill of Costs dated 28 July 1998 and signed by the Deputy Registrar of the Federal Court notifying him that the
bill of costs of the Federal Court application would be assessed on 18 September 1998. The amount claimed is M$30,000 (US$77,500). On the same day, Dato' Param Cumaraswamy was also served with a Notice dated 29 July 1998 and signed by the Registrar of the Court of Appeal notifying him that the Plaintiff's bill of costs would be assessed on 4 September 1998. The amount claimed in that bill is M$550,000 (US$137,500)."

20. The Council considered the note by the Secretary-General (E/1998/94) at the forty-seventh and forty-eighth meetings of its substantive session of 1998, held on 31 July 1998. At that time, the Observer for Malaysia disputed certain statements in paragraphs 7, 14 and 15 of the note. The note concluded with a paragraph 21 containing the Secretary-General's proposal for two questions to be submitted to the Court for an advisory opinion:

"21. . . .
Considering the difference that has arisen between the United Nations and the Government of Malaysia with respect to the immunity from legal process of Mr. Dato' Param Cumaraswamy, the United Nations Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers, in respect of certain words spoken by him:

1. Subject only to Section 30 of the Convention on the Privileges and Immunities of the United Nations, does the Secretary-General of the United Nations have the exclusive authority to determine whether words were spoken in the course of the performance of a mission for the United Nations within the meaning of Section 22 (b) of the Convention?

2. In accordance with Section 34 of the Convention, once the Secretary-General has determined that such words were spoken in the course of the performance of a mission and has decided to maintain, or not to waive, the immunity from legal process, does the Government of a Member State party to the Convention have an obligation to give effect to that immunity in its national courts and, if failing to do so, to assume responsibility for, and any costs, expenses and damages arising from, any legal proceedings brought in respect of such words?"

On 5 August 1998, at its forty-ninth meeting, the Council considered and adopted without a vote a draft decision submitted by its Vice-President following informal consultations. After referring to Section 30 of the General Convention, the decision requested the Court to give an advisory opinion on the question formulated therein, and called upon the Government of Malaysia to ensure that

"all judgements and proceedings in this matter in the Malaysian courts are stayed pending receipt of the advisory opinion of the . . . Court . . . which shall be accepted as decisive by the parties" (E/1998/L.49/Rev.1).

At that meeting, the Observer for Malaysia reiterated his previous criticism of paragraphs 7, 14 and 15 of the Secretary-General's note, but made no comment on the terms or the question to be put to the Court as now formulated by the Council. On being so adopted, the draft became decision 1998/297 (see paragraph 1 above).

21. As regards events subsequent to the submission of the request for an advisory opinion, and more precisely, the situation with regard to the proceedings pending before the Malaysian courts, Malaysia has provided the Court with the following information:

"the hearings on the question of stay in respect of three of the four cases have been deferred until 9 February 1999 when they are due again to be mentioned in court, and when the plaintiff will join in requesting further postponements until this Court's advisory opinion has been rendered, and sufficient time has been given to all concerned to consider its implications.

The position in the first of the four cases is the same, although it is fixed for mention on 16 December [1998]. However, it will then be treated in the same way as the other cases. As to cost, the requirement for the payment of costs by the defendant has also been stayed, and that aspect of the case will be deferred and considered in the same way."

22. The Council has requested the present advisory opinion pursuant to Article 96, paragraph 2, of the Charter of the United Nations. This paragraph provides that organs of the United Nations, other than the General Assembly or the Security Council,

"which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities."

Article 65, paragraph 1, of the Statute of the Court states that

"[t]he 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”.

23. In its decision 1998/297, the Council recalls that General Assembly resolution 89 (1) gave it authorization to request advisory opinions, and it expressly makes reference to the fact “that a difference has arisen between the United Nations and the Government of Malaysia, within the meaning of Section 30 of the Convention on the Privileges and Immunities of the United Nations, with respect to the immunity from legal process of Dato’ Param Cumaraswamy, the Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers”.

24. This is the first time that the Court has received a request for an advisory opinion that refers to Article VIII, Section 30, of the General Convention, which provides that “all differences arising out of the interpretation or application of the present convention shall be referred to the International Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement. If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties.”

25. This section provides for the exercise of the Court’s advisory function in the event of a difference between the United Nations and one of its Members. In this case, such a difference exists, but that fact does not change the advisory nature of the Court’s function, which is governed by the terms of the Charter and of the Statute. As the Court stated in its Advisory Opinion of 12 July 1973, “the existence, in the background, of a dispute the parties to which may be affected as a consequence of the Court’s opinion, does not change the advisory nature of the Court’s task, which is to answer the questions put to it . . .” (Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973, p. 171, para. 14).

Paragraph 2 of the Council’s decision requesting the advisory opinion repeats expressis verbis the provision in Article VIII, Section 30, of the General Convention that the Court’s opinion “shall be accepted as decisive by the parties”. However, this equally cannot affect the nature of the function carried out by the Court when giving its advisory opinion. As the Court said in its Advisory Opinion of 23 October 1956, in a case involving similar language in Article XII of the Statute of the Adminis-

trative Tribunal of the International Labour Organisation, such “decisive” or “binding” effect “goes beyond the scope attributed by the Charter and by the Statute of the Court to an Advisory Opinion . . . It is in no wise affects the way in which the Court functions; that continues to be determined by its Statute and its Rules. Nor does it affect the reasoning by which the Court forms its Opinion or the content of the Opinion itself.” (Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, Advisory Opinion, I.C.J. Reports 1956, p. 84.)

A distinction should thus be drawn between the advisory nature of the Court’s task and the particular effects that parties to an existing dispute may wish to attribute, in their mutual relations, to an advisory opinion of the Court, which, “as such, . . . has no binding force” (Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950, p. 71). These particular effects, extraneous to the Charter and the Statute which regulate the functioning of the Court, are derived from separate agreements; in the present case Article VIII, Section 30, of the General Convention provides that “[t]he opinion given by the Court shall be accepted as decisive by the parties”. That consequence has been expressly acknowledged by the United Nations and by Malaysia.

26. The power of the Court to give an advisory opinion is derived from Article 96, paragraph 2, of the Charter and from Article 65 of the Statute (see paragraph 22 above). Both provisions require that the question forming the subject-matter of the request should be a “legal question”. This condition is satisfied in the present case, as all participants in the proceedings have acknowledged, because the advisory opinion requested relates to the interpretation of the General Convention, and to its application to the circumstances of the case of the Special Rapporteur, Dato’ Param Cumaraswamy. Thus the Court held in its Advisory Opinion of 28 May 1948 that “[t]o determine the meaning of a treaty provision . . . is a problem of interpretation and consequently a legal question” (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).

27. Article 96, paragraph 2, of the Charter also requires that the legal questions forming the subject-matter of advisory opinions requested by authorized organs of the United Nations and specialized agencies shall arise “within the scope of their activities”. The fulfilment of this condition has not been questioned by any of the participants in the present proceedings. The Court finds that the legal questions submitted by the Council in its request concern the activities of the Commission, since they relate to the mandate of its Special Rapporteur appointed
“to inquire into substantial allegations concerning, and to identify and record attacks on, the independence of the judiciary, lawyers and court officials”.

Mr. Kumaraswamy’s activities as Rapporteur and the legal questions arising therefrom are pertinent to the functioning of the Commission; accordingly they come within the scope of activities of the Council, since the Commission is one of its subsidiary organs. The same conclusion was reached by the Court in an analogous case, in its Advisory Opinion of 15 December 1989, also given at the request of the Council, regarding the Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations (I.C.J. Reports 1989, p. 187, para. 28).

* * *

28. As the Court held in its Advisory Opinion of 30 March 1950, the permissive character of Article 65 of the Statute “gives the Court the power to examine whether the circumstances of the case are of such a character as should lead it to decline to answer the Request” (Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950, p. 72). Such discretionary power does not exist when the Court is not competent to answer the question forming the subject-matter of the request, for example because it is not a “legal question”. In such a case, “the Court has no discretion in the matter; it must decline to give the opinion requested” (Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962, p. 155; cf. Legality of the Use by a State of Nuclear Weapons in Armed Conflict, I.C.J. Reports 1996 (1), p. 73, para. 14). However, the Court went on to state, in its Advisory Opinion of 20 July 1962, that “even if the question is a legal one, which the Court is undoubtedly competent to answer, it may nonetheless decline to do so” (I.C.J. Reports 1962, p. 155).

29. In its Advisory Opinion of 30 March 1950, the Court made it clear that, as an organ of the United Nations, 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); moreover, in its Advisory Opinion of 20 July 1962, citing its Advisory Opinion of 23 October 1956, the Court stressed that “only ‘compelling reasons’ should lead it to refuse to give a requested advisory 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, Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989, pp. 190-


30. In the present case, the Court, having established its jurisdiction, finds no compelling reasons not to give the advisory opinion requested by the Council. Moreover, no participant in these proceedings questioned the need for the Court to exercise its advisory function in this case.

* * *

31. Article 65, paragraph 2, of the Statute provides that

“[t]he questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required”.

In compliance with this requirement, the Secretary-General transmitted to the Court the text of the Council’s decision, paragraph 1 of which reads as follows:

“1. Requests on a priority basis, pursuant to Article 96, paragraph 2, of the Charter of the United Nations and in accordance with General Assembly resolution 89 (I), an advisory opinion from the International Court of Justice on the legal question of the applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations in the case of Dato’ Param Kumaraswamy as Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers, taking into account the circumstances set out in paragraphs 1 to 15 of the note by the Secretary-General, and on the legal obligations of Malaysia in this case.”

32. Malaysia has asserted to the Court that it had “at no time approved the text of the question that appeared in E/1998/L.49 or as eventually adopted by ECOSOC and submitted to the Court” and that it “never did more than ‘take note’ of the question as originally formulated by the Secretary-General and submitted to the ECOSOC in document E/1998/94”. It contends that the advisory opinion of the Court should be restricted to the existing difference between the United Nations and Malaysia. In Malaysia’s view, this difference relates to the question (as formulated by the Secretary-General himself (see paragraph 20 above)) of whether the latter has the exclusive authority to determine whether acts of an expert (including words spoken or written) were performed in the course of his or her mission. Thus, in the conclusion to the revised version of its written statement, Malaysia states, inter alia, that it

“considers that the Secretary-General of the United Nations has not been vested with the exclusive authority to determine whether words
In its oral pleadings, Malaysia maintained that

"in implementing Section 30, ECOSOC is merely a vehicle for placing a difference between the Secretary-General and Malaysia before the Court. ECOSOC does not have an independent position to assert as it might have had were it seeking an opinion on some legal question other than in the context of the operation of Section 30. ECOSOC...is no more than an instrument of reference, it cannot change the nature of the difference or alter the content of the question."

33. In the written statement presented on behalf of the Secretary-General, the Legal Counsel of the United Nations requested the Court

"to establish that, subject to Article VIII, Sections 29 and 30 of the Convention, the Secretary-General has exclusive authority to determine whether or not words or acts are spoken, written or done in the course of the performance of a mission for the United Nations and whether such words or acts fall within the scope of the mandate entrusted to a United Nations expert on mission."

In this submission, it has also been argued

"that such matters cannot be determined by, or adjudicated in, the national courts of the Member States parties to the Convention. The latter position is coupled with the Secretary-General's right and duty, in accordance with the terms of Article VI, Section 23, of the Convention, to waive the immunity where, in his opinion, it would impede the course of justice and it can be waived without prejudice to the interests of the United Nations."

34. The other States participating in the present proceedings have expressed varying views on the foregoing issue of the exclusive authority of the Secretary-General.

* * *

35. As the Council indicated in the preamble to its decision 1998/297, that decision was adopted by the Council on the basis of the note submitted by the Secretary General on "Privileges and Immunities of the Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers" (see paragraph 1 above). Paragraph 1 of the operative part of the decision refers expressly to paragraphs 1 to 15 of that note but not to paragraph 21, containing the two questions that the Secretary-General proposed submitting to the Court (see para-

36. Participants in these proceedings have advanced differing views as to what is the legal question to be answered by the Court. The Court observes that it is for the Council — and not for a member State nor for the Secretary-General — to formulate the terms of a question that the Council wishes to ask.

37. The Council adopted its decision 1998/297 without a vote. The Council did not pass upon any proposal that the question to be submitted to the Court should include, still less be confined to, the issue of the exclusive authority of the Secretary-General to determine whether or not acts (including words spoken or written) were performed in the course of a mission for the United Nations and whether such words or acts fall within the scope of the mandate entrusted to an expert on mission for the United Nations. Although the Summary Records of the Council do not expressly address the matter, it is clear that the Council, as the organ entitled to put the request to the Court, did not adopt the questions set forth at the conclusion of the note by the Secretary-General, but instead formulated its own question in terms which were not contested at that time (see paragraph 20 above). Accordingly, the Court will now answer the question as formulated by the Council.

* * *

38. The Court will initially examine the first part of the question laid before the Court by the Council, which is:

"the legal question of the applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations in the case of Dato' Param Cumaraswamy as Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers, taking into account the circumstances set out in paragraphs 1 to 15 of the note by the Secretary-General."

39. From the deliberations which took place in the Council on the content of the request for an advisory opinion, it is clear that the reference in the request to the note of the Secretary-General was made in order to provide the Court with the basic facts to which to refer in making its decision. The request of the Council therefore does not only pertain to the threshold question whether Mr. Cumaraswamy was and is an expert on mission in the sense of Article VI, Section 22, of the General Convention but, in the event of an affirmative answer to this question, to the consequences of that finding in the circumstances of the case.

*
40. Pursuant to Article 105 of the Charter of the United Nations:

“1. The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.

2. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization.

3. The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose.”

Acting in accordance with Article 105 of the Charter, the General Assembly approved the General Convention on 13 February 1946 and proposed it for accession by each Member of the United Nations. Malaysia became a party to the General Convention, without reservation, on 28 October 1957.

41. The General Convention contains an Article VI entitled “Experts on Missions for the United Nations”. It is comprised of two Sections (22 and 23). Section 22 provides:

“Experts (other than officials coming within the scope of Article V) performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including time spent on journeys in connection with their missions. In particular they shall be accorded:

\(\ldots\) in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations.

\(\ldots\)”

42. In its Advisory Opinion of 14 December 1989 on the Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, the Court examined the applicability of Section 22 ratione personae, ratione temporis and ratione loci.

In this context the Court stated:

“The purpose of Section 22 is . . . evident, namely, to enable the United Nations to entrust missions to persons who do not have the status of an official of the Organization, and to guarantee them such privileges and immunities as are necessary for the independent exer-

cise of their functions’ . . . The essence of the matter lies not in their administrative position but in the nature of their mission.” (I.C.J. Reports 1989, p. 194, para. 47.)

In that same Advisory Opinion, the Court concluded that a Special Rapporteur who is appointed by the Sub-Commission on Prevention of Discrimination and Protection of Minorities and is entrusted with a research mission must be regarded as an expert on mission within the meaning of Article VI, Section 22, of the General Convention (ibid., p. 197, para. 55).

43. The same conclusion must be drawn with regard to Special Rapporteurs appointed by the Human Rights Commission, of which the Sub-Commission is a subsidiary organ. It may be observed that Special Rapporteurs of the Commission usually are entrusted not only with a research mission but also with the task of monitoring human rights violations and reporting on them. But what is decisive is that they have been entrusted with a mission by the United Nations and are therefore entitled to the privileges and immunities provided for in Article VI, Section 22, that safeguard the independent exercise of their functions.

44. By a letter of 21 April 1994, the Chairman of the Commission informed the Assistant Secretary-General for Human Rights of Mr. Cumaraswamy’s appointment as Special Rapporteur. The mandate of the Special Rapporteur is contained in resolution 1994/41 of the Commission entitled “Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers”. This resolution was endorsed by the Council in its decision 1994/251 of 22 July 1994. The Special Rapporteur’s mandate consists of the following tasks:

\(\ldots\)

(a) to inquire into any substantial allegations transmitted to him or her and report his or her conclusions thereon;

(b) to identify and record not only attacks on the independence of the judiciary, lawyers and court officials but also progress achieved in protecting and enhancing their independence, and make concrete recommendations, including accommodations for the provision of advisory services or technical assistance when they are requested by the State concerned;

(c) to study, for the purpose of making proposals, important and topical questions of principle with a view to protecting and enhancing the independence of the judiciary and lawyers”.

45. The Commission extended by resolution 1997/23 of 11 April 1997 the Special Rapporteur’s mandate for a further period of three years.

In the light of these circumstances, the Court finds that Mr. Cumaraswamy must be regarded as an expert on mission within the meaning of Article VI, Section 22, as from 21 April 1994, that by virtue of this capa-
city the provisions of this Section were applicable to him at the time of his statements at issue, and that they continue to be applicable.

46. The Court observes that Malaysia has acknowledged that Mr. Cumaraswamy, as Special Rapporteur of the Commission, is an expert on mission and that such experts enjoy the privileges and immunities provided for under the General Convention in their relations with States parties, including those of which they are nationals or on the territory of which they reside. Malaysia and the United Nations are in full agreement on these points, as are the other States participating in the proceedings.  

*  

47. The Court will now consider whether the immunity provided for in Section 22 (b) applies to Mr. Cumaraswamy in the specific circumstances of the case; namely, whether the words used by him in the interview, as published in the article in International Commercial Litigation (November issue 1995), were spoken in the course of the performance of his mission, and whether he was therefore immune from legal process with respect to these words.

48. During the oral proceedings, the Solicitor General of Malaysia contended that the issue put by the Council before the Court does not include this question. She stated that the correct interpretation of the words used by the Council in its request

“does not extend to inviting the Court to decide whether, assuming the Secretary-General to have had the authority to determine the character of the Special Rapporteur’s action, he had properly exercised that authority”

and added:

“Malaysia observes that the word used was ‘applicability’ not ‘application’. ‘Applicability’ means ‘whether the provision is applicable to someone’ not ‘how it is to be applied’.”

49. The Court does not share this interpretation. It follows from the terms of the request that the Council wishes to be informed of the Court’s opinion as to whether Section 22 (b) is applicable to the Special Rapporteur, in the circumstances set out in paragraphs 1 to 15 of the note of the Secretary-General and whether, therefore, the Secretary-General’s finding that the Special Rapporteur acted in the course of the performance of his mission is correct.

50. In the process of determining whether a particular expert on mission is entitled, in the prevailing circumstances, to the immunity provided for in Section 22 (b), the Secretary-General of the United Nations has a pivotal role to play. The Secretary-General, as the chief administrative officer of the Organization, has the authority and the responsibility to exercise the necessary protection where required. This authority has been recognized by the Court when it stated:

“Upon examination of the character of the functions entrusted to the Organization and of the nature of the missions of its agents, it becomes clear that the capacity of the Organization to exercise a measure of functional protection of its agents arises by necessary indendment out of the Charter.” (Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949, p. 184.)

51. Article VI, Section 23, of the General Convention provides that “[p]rivileges and immunities are granted to experts in the interests of the United Nations and not for the personal benefit of the individuals themselves”. In exercising protection of United Nations experts, the Secretary-General is therefore protecting the mission with which the expert is entrusted. In that respect, the Secretary-General has the primary responsibility and authority to protect the interests of the Organization and its agents, including experts on mission. As the Court held:

“In order that the agent may perform his duties satisfactorily, he must feel that this protection is assured to him by the Organization, and that he may count on it. To ensure the independence of the agent, and, consequently, the independent action of the Organization itself, it is essential that in performing his duties he need not have to rely on any other protection than that of the Organization . . .” (Ibid., p. 183.)

52. The determination whether an agent of the Organization has acted in the course of the performance of his mission depends upon the facts of a particular case. In the present case, the Secretary-General, or the Legal Counsel of the United Nations on his behalf, has on numerous occasions informed the Government of Malaysia of his finding that Mr. Cumaraswamy had spoken the words quoted in the article in International Commercial Litigation in his capacity as Special Rapporteur of the Commission and that he consequently was entitled to immunity from “every kind” of legal process.

53. As is clear from the written and oral pleadings of the United Nations, the Secretary-General was reinforced in this view by the fact that it has become standard practice of Special Rapporteurs of the Commission to have contact with the media. This practice was confirmed by the High Commissioner for Human Rights who, in a letter dated 2 October 1998, included in the dossier, wrote that: “it is more common than not for Special Rapporteurs to speak to the press about matters pertaining to their investigations, thereby keeping the general public informed of their work”.

54. As noted above (see paragraph 13), Mr. Cumaraswamy was explicitly referred to several times in the article “Malaysian Justice on Trial” in International Commercial Litigation in his capacity as United Nations Special Rapporteur on the Independence of Judges and Lawyers. In his reports to the Commission (see paragraph 18 above), Mr. Cumaraswamy
had set out his methods of work, expressed concern about the independence of the Malaysian judiciary, and referred to the civil lawsuits initiated against him. His third report noted that the Legal Counsel of the United Nations had informed the Government of Malaysia that he had spoken in the performance of his mission and was therefore entitled to immunity from legal process.

55. As noted in paragraph 18 above, in its various resolutions the Commission took note of the Special Rapporteur’s reports and of his methods of work. In 1997, it extended his mandate for another three years (see paragraphs 18 and 45 above). The Commission presumably would not have so acted if it had been of the opinion that Mr. Cumaraswamy had gone beyond his mandate and had given the interview to *International Commercial Litigation* outside the course of his functions. Thus the Secretary-General was able to find support for his findings in the Commission’s position.

56. The Court is not called upon in the present case to pass upon the aptness of the terms used by the Special Rapporteur or his assessment of the situation. In any event, in view of all the circumstances of this case, elements of which are set out in paragraphs 1 to 15 of the note by the Secretary-General, the Court is of the opinion that the Secretary-General correctly found that Mr. Cumaraswamy, in speaking the words quoted in the article in *International Commercial Litigation*, was acting in the course of the performance of his mission as Special Rapporteur of the Commission. Consequently, Article VI, Section 22 (b), of the General Convention is applicable to him in the present case and affords Mr. Cumaraswamy immunity from legal process of every kind.

* * *

57. The Court will now deal with the second part of the Council’s question, namely, “the legal obligations of Malaysia in this case”.

58. Malaysia maintains that it is premature to deal with the question of its obligations. It is of the view that the obligation to ensure that the requirements of Section 22 of the Convention are met is an obligation of result and not of means to be employed in achieving that result. It further states that Malaysia has complied with its obligation under Section 34 of the General Convention, which provides that a party to the Convention must be “in a position under its own law to give effect to [its] terms”, by enacting the necessary legislation; finally it contends that the Malaysian courts have not yet reached a final decision as to Mr. Cumaraswamy’s entitlement to immunity from legal process.

59. The Court wishes to point out that the request for an advisory opinion refers to “the legal obligations of Malaysia in this case”. The difference which has arisen between the United Nations and Malaysia originated in the Government of Malaysia not having informed the competent Malaysian judicial authorities of the Secretary-General’s finding that Mr. Cumaraswamy had spoken the words at issue in the course of the performance of his mission and was, therefore, entitled to immunity from legal process (see paragraph 17 above). It is as from the time of this omission that the question before the Court must be answered.

60. As the Court has observed, the Secretary-General, as the chief administrative officer of the Organization, has the primary responsibility to safeguard the interests of the Organization; to that end, it is up to him to assess whether its agents acted within the scope of their functions and, where he so concludes, to protect these agents, including experts on mission, by asserting their immunity. This means that the Secretary-General has the authority and responsibility to inform the Government of a member State of his finding and, where appropriate, to request it to act accordingly and, in particular, to request it to bring his finding to the knowledge of the local courts if acts of an agent have given or may give rise to court proceedings.

61. When national courts are seised of a case in which the immunity of a United Nations agent is in issue, they should immediately be notified of any finding by the Secretary-General concerning that immunity. That finding, and its documentary expression, creates a presumption which can only be set aside for the most compelling reasons and is thus to be given the greatest weight by national courts.

The governmental authorities of a party to the General Convention are therefore under an obligation to convey such information to the national courts concerned, since a proper application of the Convention by them is dependent on such information.

Failure to comply with this obligation, among others, could give rise to the institution of proceedings under Article VIII, Section 30, of the General Convention.

62. The Court concludes that the Government of Malaysia had an obligation, under Article 105 of the Charter and under the General Convention, to inform its courts of the position taken by the Secretary-General. According to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State. This rule, which is of a customary character, is reflected in Article 6 of the Draft Articles on State Responsibility adopted provisionally by the International Law Commission on first reading, which provides:

“The conduct of an organ of the State shall be considered as an act of that State under international law, whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character, and whether it holds a superior or a subordinated position in the organization of the State.” (*Yearbook of the International Law Commission*, 1973, Vol. II, p. 193.)
Because the Government did not transmit the Secretary-General’s finding to the competent courts, and the Minister for Foreign Affairs did not refer to it in his own certificate, Malaysia did not comply with the above-mentioned obligation.

63. Section 22 (b) of the General Convention explicitly states that experts on mission shall be accorded immunity from legal process of every kind in respect of words spoken or written and acts done by them in the course of the performance of their mission. By necessary implication, questions of immunity are therefore preliminary issues which must be expeditiously decided in limine liti. This is a generally recognized principle of procedural law, and Malaysia was under an obligation to respect it. The Malaysian courts did not rule in limine liti on the immunity of the Special Rapporteur (see paragraph 17 above), thereby nullifying the essence of the immunity rule contained in Section 22 (b). Moreover, costs were taxed to Mr. Cumaraswamy while the question of immunity was still unresolved. As indicated above, the conduct of an organ of a State—even an organ independent of the executive power—must be regarded as an act of that State. Consequently, Malaysia did not act in accordance with its obligations under international law.

64. In addition, the immunity from legal process to which the Court finds Mr. Cumaraswamy entitled entails holding Mr. Cumaraswamy financially harmless for any costs imposed upon him by the Malaysian courts, in particular taxed costs.

65. According to Article VIII, Section 30, of the General Convention, the opinion given by the Court shall be accepted as decisive by the parties to the dispute. Malaysia has acknowledged its obligations under Section 30.

Since the Court holds that Mr. Cumaraswamy is an expert on mission who under Section 22 (b) is entitled to immunity from legal process, the Government of Malaysia is obligated to communicate this advisory opinion to the competent Malaysian courts, in order that Malaysia’s international obligations be given effect and Mr. Cumaraswamy’s immunity be respected.

66. Finally, the Court wishes to point out that the question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity.

The United Nations may be required to bear responsibility for the damage arising from such acts. However, as is clear from Article VIII, Section 29, of the General Convention, any such claims against the United Nations shall not be dealt with by national courts but shall be settled in accordance with the appropriate modes of settlement that “[t]he United Nations shall make provisions for” pursuant to Section 29.

Furthermore, it need hardly be said that all agents of the United Nations, in whatever official capacity they act, must take care not to exceed the scope of their functions, and should so comport themselves as to avoid claims against the United Nations.

* * *

67. For these reasons,

THE COURT

Is of the opinion:

(1) (a) By fourteen votes to one,

That Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations is applicable in the case of Dato' Param Cumaraswamy as Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers;

IN FAVOUR: President Schwebel; Vice-President Weeramantry; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herzegh, Shi, Fleischhauer, Vereshchegodskiy, Higgins, Parra-Aranguren, Kooijmans, Rezek;

AGAINST: Judge Koroma;

(b) By fourteen votes to one,

That Dato’ Param Cumaraswamy is entitled to immunity from legal process of every kind for the words spoken by him during an interview as published in an article in the November 1995 issue of International Commercial Litigation;

IN FAVOUR: President Schwebel; Vice-President Weeramantry; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herzegh, Shi, Fleischhauer, Vereshchegodskiy, Higgins, Parra-Aranguren, Kooijmans, Rezek;

AGAINST: Judge Koroma;

(2) (a) By thirteen votes to two,

That the Government of Malaysia had the obligation to inform the Malaysian courts of the finding of the Secretary-
Immunity from Legal Process (Advisory Opinion)

General that Dato’ Param Cumaraswamy was entitled to immunity from legal process;

In favour: President Schwebel; Vice-President Weeramantry; Judges Bedjaoui, Guillaune, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek;

Against: Judges Oda, Koroma;

(b) By fourteen votes to one,

That the Malaysian courts had the obligation to deal with the question of immunity from legal process as a preliminary issue to be expeditiously decided in limine litis;

In favour: President Schwebel; Vice-President Weeramantry; Judges Oda, Bedjaoui, Guillaune, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek;

Against: Judge Koroma;

(3) Unanimously,

That Dato’ Param Cumaraswamy shall be held financially harmless for any costs imposed upon him by the Malaysian courts, in particular taxed costs;

(4) By thirteen votes to two,

That the Government of Malaysia has the obligation to communicate this Advisory Opinion to the Malaysian courts, in order that Malaysia’s international obligations be given effect and Dato’ Param Cumaraswamy’s immunity be respected;

In favour: President Schwebel; Vice-President Weeramantry; Judges Bedjaoui, Guillaune, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek;

Against: Judges Oda, Koroma.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-ninth day of April, one thousand nine hundred and ninety-nine, 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) Stephen M. Schwebel,
President.

(Signed) Eduardo Valencia-Ospina,
Registrar.
Bangkok, Thailand
14 November 2012

STATE RESPONSIBILITY
PROFESSOR MARIKO KAWANO
STATE RESPONSIBILITY
PROFESSOR MARIKO KAWANO

Legal instruments and documents

Responsibility of States for internationally wrongful acts
   For text, see The Work of the International Law Commission, 8th ed., Vol. II, p. 401

Diplomatic protection
   For text, see The Work of the International Law Commission, 8th ed., Vol. II, p. 423
   For text, see Study Materials Part I, Diplomatic Protection, p. 400

Prevention of transboundary harm from hazardous activities
   For text, see The Work of the International Law Commission, 8th ed., Vol. II, p. 414

Allocation of loss in the case of transboundary harm arising out of hazardous activities
   For text, see The Work of the International Law Commission, 8th ed., Vol. II, p. 420

Jurisprudence

Attribution of Conduct to a State
   For text, see Study Materials Part II, State Jurisdiction and Immunities, p. 86
    For text, see Study Materials Part I, Peaceful Settlement of Disputes, p. 206
Circumstances Precluding Wrongfulness


Reparation of Injury


   For text, see Study Materials Part II, State Jurisdiction and Immunities, p. 110


Countermeasures


   For text, see Study Materials Part I, Peaceful Settlement of Disputes, p. 206


   For text, see Study Materials Part II, State Responsibility, p. 476

State Responsibility and the International Community


   For text, see Study Materials Part II, State Responsibility, p. 554


   For text, see Study Materials Part II, State Responsibility, p. 374

Diplomatic Protection


   For text, see Study Materials Part I, Diplomatic Protection, p. 496

Articles on responsibility of States for internationally wrongful acts (with commentaries), *Yearbook of the International Law Commission, 2001, Vol. II, Part Two*
Chapter I

Responsibility of a State for its Intentionally Wrongful Act

Article 1. Responsibility of a State for its Intentionally Wrongful Act

1. The articles are concerned only with the responsibility of States for their internationally wrongful acts. The emphasis is on the secondary rules of State responsibility: that is, the rules regarding the...
The concept of responsibility for wrongful conduct is a fundamental element of international law. It is closely related to the protection of human rights and the maintenance of international order. The article deals with the responsibility of States for international wrongful acts, as required by Articles 2 and 4 of the General Theory of Responsibility (GTR). The article also considers the relationship between the law of attribution and the law of responsibility of States.

1. The concept of responsibility for wrongful conduct is closely related to the protection of human rights and the maintenance of international order. The article deals with the responsibility of States for international wrongful acts, as required by Articles 2 and 4 of the General Theory of Responsibility (GTR). The article also considers the relationship between the law of attribution and the law of responsibility of States.

2. The concept of responsibility for wrongful conduct is closely related to the protection of human rights and the maintenance of international order. The article deals with the responsibility of States for international wrongful acts, as required by Articles 2 and 4 of the General Theory of Responsibility (GTR). The article also considers the relationship between the law of attribution and the law of responsibility of States.

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5. The concept of responsibility for wrongful conduct is closely related to the protection of human rights and the maintenance of international order. The article deals with the responsibility of States for international wrongful acts, as required by Articles 2 and 4 of the General Theory of Responsibility (GTR). The article also considers the relationship between the law of attribution and the law of responsibility of States.

6. The concept of responsibility for wrongful conduct is closely related to the protection of human rights and the maintenance of international order. The article deals with the responsibility of States for international wrongful acts, as required by Articles 2 and 4 of the General Theory of Responsibility (GTR). The article also considers the relationship between the law of attribution and the law of responsibility of States.
(1) It is a princi ple implicit in the international law that a State cannot be held responsible for an act unless it is attributable to the State. This means that the act must be attributable to the State under international law and the breach by that conduct of an international obligation of the State. The question is whether those two necessary conditions are fulfilled.

(2) The characterization of an act of a State as internationally wrongful is not affected by the characterization of the same act as lawful by international law.

(3) Article 3 introduces and places in the necessary relation, for the existence of international responsibility, of the breach of an international obligation by the conduct of a State.

(4) In its judgment on jurisdiction in the Zululand case, the Permanent Court of International Justice used the words “breach of an engagement”.

(5) The expression “violation of an international obligation” or “breach of an engagement” are also used. The phrase “imputation of conduct to the State is necessarily a normative operation. What is crucial is that a given event is sufficiently connected to conduct (whether an act or omission) which is internationally wrongful, and that the international wrongful conduct of the State is that the conduct attributable to the State under international law and the breach by that conduct of an international obligation of the State. The question is whether those two necessary conditions are fulfilled.

(6) In speaking of attribution to the State what is meant is the act of the State as a subject of international law, under the terms of which the obligations of the State are established and are used to confer both treaty and non-treaty legal capacity on the State, and to determine its relations as a legal entity with States and international organizations.

(7) A related question is whether the conduct constitutes a breach of the international obligations of the State. This is certainly not the case if it is based on the absence of a violation of the international obligations of the State. In the case of the United States Diplomatic and Consular Staff in Tehran, the “breach” referred to was the failure of the United States to comply with the International Convention on the Prevention and Punishment of the Crime of Genocide, 22 December 1999, para. 7.41 et seq. The term “imputation” is also used. All these for the purposes of State responsibility.

(8) In practice, terms such as “breach of engagement” and “violation of an international obligation” are used. The phrase “imputation of conduct to the State is necessarily a normative operation. What is crucial is that a given event is sufficiently connected to conduct (whether an act or omission) which is internationally wrongful, and that the international wrongful conduct of the State is that the conduct attributable to the State under international law and the breach by that conduct of an international obligation of the State. The question is whether those two necessary conditions are fulfilled.

(9) It is a principle implicit in the international law that a State cannot be held responsible for an act unless it is attributable to the State. This means that the act must be attributable to the State under international law and the breach by that conduct of an international obligation of the State. The question is whether those two necessary conditions are fulfilled.

(10) A related question is whether the conduct constitutes a breach of the international obligations of the State. This is certainly not the case if it is based on the absence of a violation of the international obligations of the State. In the case of the United States Diplomatic and Consular Staff in Tehran, the “breach” referred to was the failure of the United States to comply with the International Convention on the Prevention and Punishment of the Crime of Genocide, 22 December 1999, para. 7.41 et seq. The term “imputation” is also used. All these for the purposes of State responsibility.

(11) In speaking of attribution to the State what is meant is the act of the State as a subject of international law, under the terms of which the obligations of the State are established and are used to confer both treaty and non-treaty legal capacity on the State, and to determine its relations as a legal entity with States and international organizations.
A finding of the local courts that an act was unlawful may well be relevant to an argument that it was also arbitrary; but by itself, and independently, it is not the kind of evidence that would justify a State in pleading a breach of international law. The fact that an act was unlawful in international law cannot be affected by the characterization of the same act unlawful in internal law. The approach to the question of liability for acts by a State under international law is similar to the approach to the question of liability for acts by a State under internal law. However, there are some differences.

The principle was reaffirmed many times, including in the case of *Tellini v. United States of America*.

A party may not invoke the provisions of its internal law as justification or excuse for the breach of an international obligation. *Reparation for Injuries* is governed by international law, and secondly by the provisions of the Geneva Arbitration Convention.

The principle was reaffirmed in the case of *Amory and Royal Bank of Canada Claims*.

The text of the principle is: *"A State cannot avoid international responsibility by invoking the state of its municipal law"*. The provisions of the Geneva Arbitration Convention speak of "imputability".

An act of a public authority may be unlawful in international law, and secondly by the provisions of the Geneva Arbitration Convention speak of "imputability". The principle of *imputability* refers to the responsibility of a State for the acts of its organs and agents.

The principle of *imputability* is derived from article 5 of the 1930 Hague Convention. The principle was reaffirmed in the case of *Costa Rica* (see footnote 85 above, p. 24).
Article 4. Conduct of organs of a State

1. The conduct of any organ of a State, whether under the direction of a foreign department or under the direct direction of the State, is attributable to the State.

2. An organ includes any person or entity which has that status in accordance with the international or a domestic law of the State.

Commentary

Paragraph 1 of article 4 states the first principle of international responsibility, that the conduct of an organ of a State is attributable to the State. Article 5 deals with conduct of entities empowered to act as organs of the State, and these cases are dealt with in later articles of this chapter. But the rule is nonetheless a point of departure. It defines the core cases of attribution, and it is a starting point for other cases. For example, ministries, departments, or other bodies that are organs of the State, acting in that capacity, have the status of organs of the State.

102 The question of attribution of conduct to the State for the purposes of international responsibility is, therefore, a matter of determining the international law of the State, whether or not the State is the subject of conduct engaged in by organs of the State, acting in that capacity.

103 Conduct of organs of the State, acting in that capacity, is attributable to the State. The reference to a "State organ" covers all the individual or collective entities which have the status of organs of the State, acting in that capacity. It includes the following:

(a) Governmental organs of the State, either directly or indirectly, which are responsible for the conduct of the State under international law.

(b) The State has control, whatever form it takes, over such organs.

(c) The organs are considered in the applicable law of the State as having a special relation to the State.

(d) The organs have representation of the State.

In determining what constitutes an organ of a State, the principle of State responsibility is, therefore, a matter of determining the international law of the State, whether or not the State is the subject of conduct engaged in by organs of the State, acting in that capacity.

104 Conduct engaged in by organs of the State, acting in that capacity, is attributable to the State. The reference to a "State organ" covers all the individual or collective entities which have the status of organs of the State, acting in that capacity. It includes the following:

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(b) The State has control, whatever form it takes, over such organs.

(c) The organs are considered in the applicable law of the State as having a special relation to the State.

(d) The organs have representation of the State.

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(a) Governmental organs of the State, either directly or indirectly, which are responsible for the conduct of the State under international law.

(b) The State has control, whatever form it takes, over such organs.

(c) The organs are considered in the applicable law of the State as having a special relation to the State.

(d) The organs have representation of the State.

In determining what constitutes an organ of a State, the principle of State responsibility is, therefore, a matter of determining the international law of the State, whether or not the State is the subject of conduct engaged in by organs of the State, acting in that capacity.

106 Conduct engaged in by organs of the State, acting in that capacity, is attributable to the State. The reference to a "State organ" covers all the individual or collective entities which have the status of organs of the State, acting in that capacity. It includes the following:

(a) Governmental organs of the State, either directly or indirectly, which are responsible for the conduct of the State under international law.

(b) The State has control, whatever form it takes, over such organs.

(c) The organs are considered in the applicable law of the State as having a special relation to the State.

(d) The organs have representation of the State.

In determining what constitutes an organ of a State, the principle of State responsibility is, therefore, a matter of determining the international law of the State, whether or not the State is the subject of conduct engaged in by organs of the State, acting in that capacity.
This article 4 covers organs, whether they exercise executive, legislative, judicial, or any other functions, of whatever nature, public or private, whether exercising public authority under the authority of a State or organ of a State. Moreover, the term is one of extension, not limitation, since grounds of public international law become relevant, such as, for instance, a breach by a State organ or organ of a State of international law "in every case in which a claim for compensation has been based upon the law of the State, the courts or the administrative authorities of that State in good faith have, in the absence of laws or regulations of that State which are to the contrary, made such compensation payments." -- Article 4, paragraph 4.

(11) Paragraph 4 explains the relevance of international law in determining the status of State organs. Where the law of the State is not sufficient, international law must be applied. This is clearly an exception to the general rule applicable in the absence of laws or regulations of the State which state that an organ cannot perform a particular function. In some systems of international law, the status of an organ is then determined by the law of the State. However, in other systems, the status of an organ is determined by international law. In those systems, an organ is considered a "State organ" where its activities are governed by international law, and a "private organ" where its activities are governed by the law of the State.

(12) The term "person or entity is used in article 4, as well as in article 6 and 7. It is used in a broad sense to include an individual, a body corporate, a group, an association, an organ of a State, or any other entity, acting in the capacity of a single person, or a body corporate public or private, whether exercising public authority under the authority of a State or organ of a State.

Commentary.

(1) Article 5 deals with the recognition of State organs and the principles of attribution of responsibility. The term "State organ" is used in article 79, as well as in article 4 and 6. It is used in a broad sense to include any organ of a State, whether exercising public authority under the authority of a State or organ of a State, or any other entity, acting in the capacity of a single person, or a body corporate public or private, whether exercising public authority under the authority of a State or organ of a State.
The Report of the International Law Commission on the work of its fifty-third session

(2) The generic term "entity" reflects the wide variety of situations in which an organ placed at the disposal of another State for the purpose of the latter's authority is located. Section II examines it:

A State is responsible for damage suffered by a foreigner as the result of acts or omissions contravening the international obligations of the State. There will only be an act attributable to the receiving State where the conduct of the loaned organ involves the exercise of the governmental authority of that State. Instead, article 5 refers to the true common feature, namely that these entities are empowered, if only to a limited extent or in a specific context, to exercise specified elements of governmental authority. This is to be distinguished from situations where an entity or group seizes power in the absence of State organs but in situations where the exercise of governmental authority is called for: these are dealt with in article 6. These are essentially questions of the application of international law, including the law of a State to exercise elements of governmental authority. This is to be distinguished from situations where an entity or group seizes power in the absence of State organs but in situations where the exercise of governmental authority is called for: these are dealt with in article 6.

The justification for attributing to the State under international law the conduct of "parastatal" entities lies in the particular society, its history and traditions. Of particular importance will be not just the content of the entity's conduct but also the purpose for which the entity was appointed to perform functions appertaining to the governmental authority of the State. The conduct of parastatal entities might be considered analogous to the conduct of public or State-owned enterprises, or the conduct of private entities under the direction of or for the purposes of another State. Alternatively, they might be considered analogous to the conduct of the organ, originally that of one State, acts exclusively for the purposes of and on behalf of another State and its conduct is attributed to that State alone. The fact that an entity can be classified as public or private according to the criteria of a given legal system, does not necessarily turn on the particular society, its history and traditions. Of particular importance will be not just the content of the entity's conduct but also the purpose for which the entity was appointed to perform functions appertaining to the governmental authority of the State.

The conduct of public entities, bodies as well as private persons and/or groups, under the direction or control of a State, is covered by article 8, and those where an entity or group seizes power in the absence of State organs but in situations where the exercise of governmental authority is called for: these are dealt with in article 6. These are essentially questions of the application of international law, including the law of a State to exercise elements of governmental authority.

(3) The words "placed at the disposal of" in article 6 do not attempt to identify precisely the circumstances in which the exercise of certain elements of governmental authority is transferred to the entity. Such situations may be considered analogous to the conduct of public or State-owned enterprises, or the conduct of private entities under the direction or control of a State. Alternatively, they might be considered analogous to the conduct of an organ under the direction or control of a State. The fact that an entity can be classified as public or private according to the criteria of a given legal system, does not necessarily turn on the particular society, its history and traditions. Of particular importance will be not just the content of the entity's conduct but also the purpose for which the entity was appointed to perform functions appertaining to the governmental authority of the State.

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(4) Parastatal entities may be considered a relatively new phenomenon, the growth of such entities has been relatively recent. The law of a State to exercise elements of governmental authority is called for: these are dealt with in article 6. These are essentially questions of the application of international law, including the law of a State to exercise elements of governmental authority.

The fact that an entity can be classified as public or private according to the criteria of a given legal system, does not necessarily turn on the particular society, its history and traditions. Of particular importance will be not just the content of the entity's conduct but also the purpose for which the entity was appointed to perform functions appertaining to the governmental authority of the State.

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Article 7. Exercice of international authority or controversies

El conducta de un organo de un Estado o de una persona natural de un Estado que ejerza autoridad internacional podrá ser considerado como del Estado en cuestión. En esos casos, se aplicarán los principios de derecho internacional que correspondan.

The conduct of an organ of a State or of a person natural of a State exercising international authority shall be considered as that of the State concerned.
only in cases of attribution covered by articles 4, 5 and 10, since in other cases the conduct of the private person, group of persons, or corporate entity is not attributable to the State unless it is established that such conduct was ordered, directed, or controlled by the State in some way. The concept of control in international law is thus narrower than the concept of direction or influence in domestic law. Moreover, for the conduct of a private person or group of persons to be attributed to the State, it must be established that the person or group was acting on the instructions of the State or that the conduct was ordered, directed, or controlled by the State. This means that the concept of control in international law is broader than the concept of direction or influence in domestic law. Therefore, in international law, the concept of control includes the concept of direction or influence, but the converse is not true.

(2) As a general principle, the conduct of a private person or group of persons shall be attributed to the State if the private person or group was acting on the instructions of the State or that the conduct was ordered, directed, or controlled by the State. This means that the concept of control in international law is broader than the concept of direction or influence in domestic law. Therefore, in international law, the concept of control includes the concept of direction or influence, but the converse is not true.

(3) The degree of control which must be exercised by the private person or group of persons to be attributed to the State is a matter of fact and will depend on the particular circumstances of each case. The degree of control will vary depending on the nature and scope of the conduct, the identity of the private person or group, and the legal status of the conduct.

(4) The degree of control which must be exercised by the private person or group of persons to be attributed to the State is a matter of fact and will depend on the particular circumstances of each case. The degree of control will vary depending on the nature and scope of the conduct, the identity of the private person or group, and the legal status of the conduct.

(5) The need to establish the degree of control required to attribute conduct to the State is critical in determining whether a conduct is attributable to the State. If the conduct is not attributable to the State, it cannot be considered as being committed by a private person or group of persons or a corporate entity.

(6) The Appeals Chamber held that, in the absence of evidence of any degree of control or influence exercised by the State, the conduct of the private person or group of persons or the corporate entity cannot be attributed to the State.

(7) The Appeals Chamber concluded that, in the absence of evidence of any degree of control or influence exercised by the State, the conduct of the private person or group of persons or the corporate entity cannot be attributed to the State.

(8) The Appeals Chamber held that, in the absence of evidence of any degree of control or influence exercised by the State, the conduct of the private person or group of persons or the corporate entity cannot be attributed to the State.

(9) The Appeals Chamber concluded that, in the absence of evidence of any degree of control or influence exercised by the State, the conduct of the private person or group of persons or the corporate entity cannot be attributed to the State.

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(15) The Appeals Chamber concluded that, in the absence of evidence of any degree of control or influence exercised by the State, the conduct of the private person or group of persons or the corporate entity cannot be attributed to the State.

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(29) The Appeals Chamber concluded that, in the absence of evidence of any degree of control or influence exercised by the State, the conduct of the private person or group of persons or the corporate entity cannot be attributed to the State.

(30) The Appeals Chamber held that, in the absence of evidence of any degree of control or influence exercised by the State, the conduct of the private person or group of persons or the corporate entity cannot be attributed to the State.
The conduct of an insurrectional movement or of a person or group of persons shall be considered an act of the State if it is attributable to the State within the meaning of article 9.

1. The concept of an insurrectional movement or of a person or group of persons shall be considered attributable to the State if it is attributable to the State within the meaning of article 9.

2. The concept of an insurrectional movement or of a person or group of persons shall be considered attributable to the State if it is attributable to the State within the meaning of article 9.

3. The concept of an insurrectional movement or of a person or group of persons shall be considered attributable to the State if it is attributable to the State within the meaning of article 9.

Commentary

(1) Article 10 deals with the special case of attribution to the State of conduct under international law of governmental bodies which do not exist as such within the international public law. It is based on the principle that conduct of a movement, or a person or group of persons acting on its behalf, shall be considered an act of the State if it is attributable to the State within the meaning of article 9, depending on the circumstances. The term "insurrectional movement" is defined in article 9, paragraph 3.

(2) As regards the first condition, the person or group of persons acting must be performing governmental functions, though to a limited extent. The concept of "insurrectional movement" must be limited to cases where the activities of the governmental body are not the result of a legal connection between the actors and the official authorities of the State in whose territory the conduct was committed. This may happen on part of the territory of a State which is for the time being out of control, or in other circumstances. The term "call for" conveys the idea that the activity of the governmental body is supported by a call for the exercise of elements of the governmental authority by private persons. The term "call for" also means that the activity of the governmental body is not the result of the exercise of the functions of the governmental body by private persons. The term "call for" also means that the activity of the governmental body is not the result of the exercise of the functions of the governmental body by private persons. The term "call for" also means that the activity of the governmental body is not the result of the exercise of the functions of the governmental body by private persons.

(3) The third condition for attribution under article 9 is that the activity of the governmental body is not the result of the exercise of the functions of the governmental body by private persons. The term "call for" conveys the idea that the activity of the governmental body is supported by a call for the exercise of elements of the governmental authority by private persons.

(4) As regards the first condition, the person or group of persons acting must be performing governmental functions, though to a limited extent. The concept of "insurrectional movement" must be limited to cases where the activities of the governmental body are not the result of a legal connection between the actors and the official authorities of the State in whose territory the conduct was committed. This may happen on part of the territory of a State which is for the time being out of control, or in other circumstances. The term "call for" conveys the idea that the activity of the governmental body is supported by a call for the exercise of elements of the governmental authority by private persons. The term "call for" also means that the activity of the governmental body is not the result of the exercise of the functions of the governmental body by private persons. The term "call for" also means that the activity of the governmental body is not the result of the exercise of the functions of the governmental body by private persons. The term "call for" also means that the activity of the governmental body is not the result of the exercise of the functions of the governmental body by private persons.

(5) In respect of the second condition, the phrase "in the exercise of the functions of the governmental body" means that the activity of the governmental body is supported by a call for the exercise of elements of the governmental authority by private persons. The term "call for" conveys the idea that the activity of the governmental body is supported by a call for the exercise of elements of the governmental authority by private persons. The term "call for" also means that the activity of the governmental body is not the result of the exercise of the functions of the governmental body by private persons. The term "call for" also means that the activity of the governmental body is not the result of the exercise of the functions of the governmental body by private persons. The term "call for" also means that the activity of the governmental body is not the result of the exercise of the functions of the governmental body by private persons.

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As compared with paragraph 1, the scope of the articles, whereas article 10 focuses on the continuity of the movement concerned and the eventual new Government or State, as the case may be.

Article 11. Conduct attributable to a State under the responsibility of States

As compared with paragraph 1, the scope of the articles, whereas article 10 focuses on the continuity of the movement concerned and the eventual new Government or State, as the case may be.

Article 11. Conduct attributable to a State under the responsibility of States

As compared with paragraph 1, the scope of the articles, whereas article 10 focuses on the continuity of the movement concerned and the eventual new Government or State, as the case may be.
CHAPTER II
BREACH OF AN INTERNATIONAL OBLIGATION

Commentary

(1) As stated in article 2, a breach by a State of an international obligation incumbent upon it gives rise to its international responsibility. It is first necessary to specify what is meant by a breach of an international obligation. Governmental conduct consists of acts and omissions. In most general terms what constitutes a breach of an international obligation by a State. In order to conclude that there is a breach of an international obligation any specific form of conduct will be necessary to take account of the other provisions of chapter III which specify further conditions relating to the existence of a breach of an international obligation, as well as the provisions of chapter V dealing with circumstances which may preclude the wrongfulness of an act of a State. But in the final analysis, whether and when there has been a breach of an obligation depends on the precise terms of the obligation, its interpretation and application, taking into account its object and purpose and the facts of the case.

(2) In introducing the notion of a breach of an international obligation, it is necessary again to emphasize the autonomy of international law in accordance with the principle stated in article 3. In the terms of article 12, the breach of an international obligation consists in the disaffirmance by the conduct of the party responsible of the conditions which the law attaches to the performance of any international obligation. The breach of an international obligations by the State which it has therefore been held responsible in relation to the period on a different legal basis, viz. its failure to take sufficient action to prevent the seizure or to bring it to an immediate end. In other cases no such prior responsibility will arise. Where there is knowledge and adoption is unequivocal and unqualified there is a good reason to give it retroactive effect, which is what the tribunal did in the Lighthouses arbitration. 186 This is the reasoning consistent with article 10 for insurrectional movements. In this sense, if the notion of an act of acknowledgment and adoption, whether it takes the form of words or conduct, must convey a number of ideas. First, the conduct of, in particular, private persons, groups or entities is not attributable to the State unless under some other article of chapter II or unless it has been acknowledged and adopted by the State. Secondly, a State might acknowledge and adopt conduct only to a certain extent. In other words, a State may elect to acknowledge and adoption of the fact actual conduct of which it did not approve, which it had sought to prevent and which it deeply regretted. However such acceptance may be phrased in the particular case, the fact "acknowledging and adopting" in article 11 makes it clear that what is required is something more than a general acknowledgement of a factual situation, but rather that the State identifies the conduct in question and makes it its own.

(3) The essence of an internationally wrongful act lies in the non-conformity of the State's actual conduct with the conduct it ought to have adopted in order to comply with a particular international obligation. Such conduct gives rise to the new legal relations which are grouped under the common denomination of international responsibility. Chapter III, therefore, begins with a provision specifying in general terms when it may be considered that there is a breach of an international obligation (art. 12). The basic concept having been defined, the other provisions of the chapter are devoted to specifying how this concept applies to various situations. In particular, the chapter deals with the question of the international law as it applies to State responsibility, i.e. the principle that a State is only responsible for a breach of an international obligation if the obligation is in force for the State at the time of the breach (art. 13), with the equally important question of continuing breaches (art. 14), and with the special problem of determining whether an act has been a breach of an obligation which is directed not at single but at composite acts, i.e. where the essence of the breach lies in a series of acts defined in aggregate as wrongful (art. 15).

187 Ibid., pp. 31-33, paras. 63-68.
189 See paragraphs (2) to (4) of the general commentary.
Courts in the doubts and doctrinal debates the term "source" has provoked. The origin or provenance of a legal norm is an important aspect in determining its validity and applicability. In the context of international law, the interpretation of obligations and their application to States involves understanding the sources from which these obligations arise. This is not a simple task, as obligations may arise from various sources, including treaties, custom, peremptory norms, and general principles of law.

States may assume international obligations by a unilateral act, by a decision of an international organ, by conduct involving the use of armed force, or by any other means. The mechanism of force is the main source of peremptory norms, whereas customary law, general principles of law, and treaties are other important sources. The concept of sovereignty is often invoked to support the notion that States are free to act in accordance with their interests.

The Court has consistently emphasized the importance of the word "source" in its decisions. In the Oil Platforms case, it recognized that "the right of entering into international engagements is an attribute of State sovereignty". This statement was crucial in establishing the principle of freedom of the seas.

In the Paramilitary Activities in Interna-tional Waters case, the Court further clarified that obligations of conduct and obligations of result are not based on any special source of law or standards. The Court stated that obligations may be derived from the international legal order, and that States are free to act in accordance with their interests, subject to the obligations they have assumed.

Thus, the Court has consistently emphasized the importance of understanding the sources of international obligations. The concept of sovereignty is often invoked to support the notion that States are free to act in accordance with their interests. However, the Court has also stressed that States are not free to act in violation of their international obligations.

In conclusion, the concept of "source" in international law is crucial in understanding the validity and application of international obligations. The Court has consistently emphasized the importance of understanding the sources of international obligations, and States are not free to act in violation of their international obligations.
Article 13: International obligation to force a State

An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.

Commentary

Article 13 provides an essential basis for the application of the principle of international responsibility in many cases. An act which is a breach of international law is a breach of the obligation of the State concerned, and thereby constitutes a breach of the international obligation to which that State is subject. The question whether an act constitutes a breach of an international obligation depends on whether the act is a breach of a provision of international law, and on whether the act is attributable to the State concerned.

(1) Article 13 states that an act is a breach of an international obligation if it is a breach of a provision of international law, and if the act is attributable to the State concerned. The act must be a breach of an international obligation, and it must be attributable to the State concerned. The question of whether an act is a breach of an international obligation depends on whether the act is a breach of an international obligation.

(2) The question whether an act is a breach of an international obligation depends on whether the act is a breach of a provision of international law, and on whether the act is attributable to the State concerned. The act must be a breach of an international obligation, and it must be attributable to the State concerned. The question of whether an act is a breach of an international obligation depends on whether the act is a breach of an international obligation.

(3) Article 13 states that an act is a breach of an international obligation if it is a breach of a provision of international law, and if the act is attributable to the State concerned. The act must be a breach of an international obligation, and it must be attributable to the State concerned. The question of whether an act is a breach of an international obligation depends on whether the act is a breach of an international obligation.

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(5) Article 13 states that an act is a breach of an international obligation if it is a breach of a provision of international law, and if the act is attributable to the State concerned. The act must be a breach of an international obligation, and it must be attributable to the State concerned. The question of whether an act is a breach of an international obligation depends on whether the act is a breach of an international obligation.

(6) The question whether an act is a breach of an international obligation depends on whether the act is a breach of a provision of international law, and on whether the act is attributable to the State concerned. The act must be a breach of an international obligation, and it must be attributable to the State concerned. The question of whether an act is a breach of an international obligation depends on whether the act is a breach of an international obligation.

(7) Article 13 states that an act is a breach of an international obligation if it is a breach of a provision of international law, and if the act is attributable to the State concerned. The act must be a breach of an international obligation, and it must be attributable to the State concerned. The question of whether an act is a breach of an international obligation depends on whether the act is a breach of an international obligation.
Article 14. Extension in time of the breach of an international obligation by an act of a State not having the act performed, even if the effects are subsequent.

1. The breach of an international obligation by an act of a State not having the act performed, even if the effects are subsequent, may extend in time even when the act is completed.

2. The breach of an international obligation by an act of a State not having the act performed, even if the effects are subsequent, may extend in time even when the act is completed.

3. The breach of an international obligation by an act of a State not having the act performed, even if the effects are subsequent, may extend in time even when the act is completed.

4. The breach of an international obligation by an act of a State not having the act performed, even if the effects are subsequent, may extend in time even when the act is completed.

5. The breach of an international obligation by an act of a State not having the act performed, even if the effects are subsequent, may extend in time even when the act is completed.

Commentary

1. The problem of identifying when a wrongful act ends and when its effects cease is complex. It involves considering the nature of the act, the context in which it occurred, and the legal consequences that follow from it.

2. The breach of an international obligation by an act of a State not having the act performed, even if the effects are subsequent, may extend in time even when the act is completed.

3. The breach of an international obligation by an act of a State not having the act performed, even if the effects are subsequent, may extend in time even when the act is completed.

4. The breach of an international obligation by an act of a State not having the act performed, even if the effects are subsequent, may extend in time even when the act is completed.

5. The breach of an international obligation by an act of a State not having the act performed, even if the effects are subsequent, may extend in time even when the act is completed.

6. The breach of an international obligation by an act of a State not having the act performed, even if the effects are subsequent, may extend in time even when the act is completed.
Commentary

Within the framework established by the Convention on the Prevention and Punishment of the Crime of Genocide, the Turkish Republic of Northern Cyprus has been declared responsible for breaches of international law that occurred during the period of its occupation of the Turkish Republic of Cyprus, which continued after the Protocol had come into force. The breach in question was the illegal occupation of the Turkish Republic of Cyprus by the Turkish Armed Forces, as a result of which the property in the area of the occupied territory has been expropriated and the population of the area has been subjected to systematic acts of racial discrimination.

The concept of a breach of international law is defined in terms of its composite character. A breach consists of a series of acts or omissions defined in article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide, the purpose of which is to bring about a given event. The significance of such a definition lies in the fact that the notion of a breach of international law is not limited to the commission of a single act, but is based on the chain of events leading to the occurrence of a given event. Therefore, the determination of the existence of a breach of international law requires an analysis of the sequence of events that occurred, rather than an examination of individual acts or omissions.

Accordingly, the breach of international law consists of various acts or omissions, each of which is a necessary condition for the occurrence of a given event. The breach is considered to have occurred only if all the necessary conditions have been fulfilled. This approach enables the determination of the existence of a breach of international law even in situations where the acts or omissions were not committed simultaneously.

Furthermore, the notion of a breach of international law is not limited to the commission of acts or omissions, but also includes the failure to prevent the occurrence of a given event. The notion of a breach of international law includes the failure to prevent the occurrence of a given event, as well as the failure to take adequate measures to prevent the occurrence of that event. This approach enables the determination of the existence of a breach of international law even in situations where the acts or omissions were not committed simultaneously.

In conclusion, the notion of a breach of international law is based on the composite character of the acts or omissions that occurred. This approach enables the determination of the existence of a breach of international law even in situations where the acts or omissions were not committed simultaneously. The breach of international law is considered to have occurred only if all the necessary conditions have been fulfilled. This approach enables the determination of the existence of a breach of international law even in situations where the acts or omissions were not committed simultaneously.

Article 15. Breach consisting of a composite act

1. A breach of international law consisting of a composite act is a continuing event, which means that it lasts for as long as the acts or omissions that constitute the breach continue. The breach is considered to have occurred only if all the necessary conditions have been fulfilled. This approach enables the determination of the existence of a breach of international law even in situations where the acts or omissions were not committed simultaneously.

2. In such a case, the breach extends over the entire period during which the acts or omissions occur. This means that the breach is considered to have occurred only if all the necessary conditions have been fulfilled. This approach enables the determination of the existence of a breach of international law even in situations where the acts or omissions were not committed simultaneously.

The breach of international law is considered to have occurred only if all the necessary conditions have been fulfilled. This approach enables the determination of the existence of a breach of international law even in situations where the acts or omissions were not committed simultaneously.

In conclusion, the breach of international law is considered to have occurred only if all the necessary conditions have been fulfilled. This approach enables the determination of the existence of a breach of international law even in situations where the acts or omissions were not committed simultaneously.

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A consequence of the character of a composite act is that the time when the act is accomplished cannot be established as a factual basis for the breach or to provide evidence of intent.

In certain circumstances, the relevant obligation did not exist at the beginning of the course of conduct but came into being in the course of the provision by its own international obligations to prevent certain acts or omissions by another State.

Complicity includes direct acts of another State with a view to assisting in the commission of an internationally wrongful act.

(1) In accordance with the principle laid down in article 34 of the Statute of the International Court of Justice, a State commission, where its own national authorities directly or indirectly carried out the conduct in question, would thereby be implicated in the breach of international law.

(2) In certain cases, the relevant organ of the acting State is merely "placed at the disposal" of the requesting State, in the sense provided for in article 7 of the Statute of the International Court of Justice. In these cases, the act of the organ or agent of another State is, in effect, the act of the State, and this may be so even though the organ or agent had acted with the authority of the State, if it is impossible to attribute the act to the State, or the act is considered to have been committed in a way that could also arise out of situations where a State acts in its own interest.

(3) Various forms of complicity can occur in the same case, for example, where a breach of international law involves the collaboration of several States rather than the collaboration of the States with a view to assisting in the commission of an internationally wrongful act. If it is found that a number of States are involved, the acts of each State may be considered to be committed in the same case and treated in the same way.

(4) In carrying out the conduct in question, the relevant organ or agent of the acting State may have acted in its own interest, and the principle of joint and several liability may also be applicable in these cases.

(5) The acts of each State may be considered to be committed in the same case and treated in the same way.

(6) A practice of unlawful treatment of detainees in Ireland, New Zealand and the United Kingdom as a result of the cooperative conduct of the Acting States and the United Kingdom with a view to assisting in the commission of an internationally wrongful act by the latter State.
(1) Article 16 deals with the situation where one State aids or assists another with a view to facilitating the commission of an internationally wrongful act by the latter. Thus, the articles in this chapter require that the former State should be aware of the internationally wrongful act in question. The fact that the act in question is still committed, voluntarily or otherwise, by the latter State is irrelevant. Article 16 also provides for the responsibility of a third State which aids or assists a different State in the commission of an internationally wrongful act. This is a case of so-called "derivative responsibility". Article 16. Aid or assistance in the commission of an internationally wrongful act. Under Article 16, aid or assistance to another State in the commission of a wrong is internationally wrongful if the former State knew that its act would be internationally wrongful if performed by that State alone. In all three cases, the act in question is still committed, voluntarily or otherwise, by the latter State. There is no requirement that the act or assistance should have been essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to that act. (2) Various specific substantive rules exist, prohibiting States from providing assistance in the commission of certain internationally wrongful acts. Article 16 does not aim to add a new substantive rule but only to establish a close connection between the act of the assisting State and the internationally wrongful act, thereby ensuring a close connection between the responsibility of the two States. Article 16 is not concerned with the question of the primary or substantive obligations of the State and its secondary obligations of responsibility. It is justified on the basis that the distinction maintained in the articles between the primary or substantive obligations of the State and its secondary obligations of responsibility cannot be allowed to undermine the principle, stated in Article 34 of the 1969 Vienna Convention, that a "treaty does not create either obligations or rights for a third State without its consent"; an obligation must be imposed on the State which agrees to it. (3) Article 16 limits the scope of responsibility for aid or assistance in the commission of an internationally wrongful act in the following respects: (a) Article 16 only provides assistance to another State in the commission of an internationally wrongful act if the former State is aware of the fact that its act is internationally wrongful if performed by that State alone. (b) The requirement that the assisting State be aware of the internationally wrongful act does not involve direction and control on the part of the assisting State over the conduct of the internationally wrongful act, since the latter State is responsible for its own conduct. (c) The requirement that the assisting State be aware of the internationally wrongful act does not involve direction and control on the part of the assisting State over the conduct of the internationally wrongful act, since the latter State is responsible for its own conduct. (d) The requirement that the assisting State be aware of the internationally wrongful act does not involve direction and control on the part of the assisting State over the conduct of the internationally wrongful act, since the latter State is responsible for its own conduct. (e) The requirement that the assisting State be aware of the internationally wrongful act does not involve direction and control on the part of the assisting State over the conduct of the internationally wrongful act, since the latter State is responsible for its own conduct.
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State responsibility

Article 19: Exception of another State

A State which coerces another State to commit an internationally wrongful act is not responsible for that act if:

(a) the act would not have been performed by the coercing State in the exercise of its functions as a State;

(b) the coercing State does so with knowledge of the circumstances of the act.

Commentary

(1) Article 19 serves three purposes. First, it preserves the principle that a wrong done by a dependent State is the responsibility of the dependent State. Second, it permits the exercising State to take the measures in question in support of its claim that the coercing State has breached a rule of international law. Third, it permits the exercise of strong powers by the exercising State to impose on the dependent State a burden of responsibility. The phrase "in the exercise of its functions as a State" is an important one; it means that the coercing State is responsible for its acts only if it has the power to perform them as a State. It is not sufficient that the coerced State is responsible for the act in question.

(2) The right to take such measures is a matter of doctrine, not of law. It is not a matter of responsibility for the act. It is a matter of practical power, and as such it is subject to the control of the UN Security Council.

(3) The exercise of power by a State is not the same as the exercise of power by a dependent State. A State has the power to take action in order to protect its own interests, even if such action is contrary to the interests of the dependent State. The exercise of such power is not subject to the control of the UN Security Council. The exercise of power by a dependent State, in contrast, is subject to the control of the UN Security Council.

(4) The phrase "in the exercise of its functions as a State" is an important one; it means that the coercing State is responsible for its acts only if it has the power to perform them as a State. It is not sufficient that the coerced State is responsible for the act in question.

(5) The exercise of such power is not subject to the control of the UN Security Council. The exercise of power by a dependent State, in contrast, is subject to the control of the UN Security Council.
valid by the State to the Commission of a request for a report on the law of the said treaty and to the extent that the act remains within the limits of that consent.

Chapter VI.

CIRCUMSTANCES PRECLUDING WRONGFULNESS

Commentary

(1) Chapter V sets out six circumstances precluding the wrongful character of an act done under a treaty. These circumstances would be considered for the purpose of determining whether the wrongful character of such an act was precluded by the act done by one State and not by another.

(2) The circumstances are as follows:

(a) The act done by one State was within the limits of the consent given by the other State.

(b) The act done by one State was consistent with a stipulation of the treaty.

(c) The act done by one State was undertaken in a state of necessity or of self-defense.

(d) The act done by one State was justified by a breach of the treaty by the other State.

(e) The act done by one State was necessary to avoid a greater wrong.

(f) The act done by one State was necessary to prevent an impending wrong.

(3) The circumstances described above are to be considered in the light of the principles governing the interpretation of treaties and the law of international responsibility.

(4) The circumstances are to be applied in a case by case basis, and the application of each circumstance must be determined by the facts and circumstances of the particular case.

(5) The circumstances are to be considered in a case by case basis, and the application of each circumstance must be determined by the facts and circumstances of the particular case.
State responsibility

State compliance with the obligations of a treaty is required by the terms of that treaty. However, if a State believes that the other party to the treaty has failed to perform its obligations, it may seek to have the terms of the treaty enforced through legal proceedings. In some cases, a State may also choose to use political pressure to ensure compliance with treaty obligations.

Consent to treaties is an important aspect of state responsibility. Consent to a treaty is required for a treaty to become binding between States. Consent may be given by the head of State or by a representative of the State with authority to do so. The nature and scope of the consent given will depend on the obligations of the treaty.

The Legality of the Threat or Use of Nuclear Weapons

The 1969 Vienna Convention leaves the option of whether or not to comply with the treaty up to the discretion of the States involved. However, the practice of the States has been to abide by the terms of the treaty. The Treaty on the Non-Proliferation of Nuclear Weapons (also known as the NPT) is the most important treaty in this area.

The NPT is a multilateral treaty that entered into force in 1970. The treaty aims to prevent the spread of nuclear weapons and to promote the peaceful use of nuclear energy. The NPT has three main parts:

(1) Non-Proliferation: States that already possess nuclear weapons are not allowed to transfer nuclear weapons to other States. States that do not possess nuclear weapons are not allowed to acquire nuclear weapons.

(2) Disarmament: States that already possess nuclear weapons are required to pursue nuclear disarmament without further delay. States that do not possess nuclear weapons are encouraged to do so.

(3) International Safeguards: States that possess nuclear facilities are required to subject them to safeguards to ensure that the nuclear material is not diverted for military purposes.

The NPT has been widely accepted by the international community. It is supported by the United Nations, and has been signed by almost all the countries in the world.

The International Law Commission

The International Law Commission (ILC) is a subsidiary organ of the United Nations. The ILC is charged with drafting international law treaties and reports on the work it performs. The ILC has produced a number of important reports on international law, including the Report on the Work of its Fifty-third Session, which was published in 2019.

The Report on the Work of its Fifty-third Session

The Report on the Work of its Fifty-third Session focuses on the role of state responsibility in international law. The report discusses the concept of self-defense and its relationship to the use of nuclear weapons. The report also examines the role of the International Court of Justice in resolving disputes.

The ILC has been working on a new draft convention on state responsibility since 2011. The draft convention is expected to be adopted by the General Assembly in 2023.
(a) force or its cause must be of a nature to preclude the possibility of the State acting otherwise; (b) the injury or wrongfulness is due to the act of an individual or a group of individuals; (c) the States or groups are not the agents of States or of international organizations; (d) the injury or wrongfulness is due to the act of an individual acting in a personal capacity.

The principle is clearly expounded in the "Cysne" case, Portugal v. Germany, Second Series, Case No. 22, Judgment, 1950 I.C.J. 13. The Court found that the use of naval forces was an act of a State, although the individual who carried it out was acting in a personal capacity. However, the Court ruled that the act was not an international act, as it was not within the authority of the individual, and therefore it was not an act of a State.

The principle is also exemplified in the "Gabčíkovo-Nagymaros Project" case, Hungary v. Austria, I.C.J. Reports 1997, p. 55, para. 55. The Court found that the use of a hydroelectric dam was an act of a State, although the individual who carried it out was acting in a personal capacity. However, the Court ruled that the act was not an international act, as it was not within the authority of the individual, and therefore it was not an act of a State.

The principle is also exemplified in the "Cysne" case, Portugal v. Germany, Second Series, Case No. 22, Judgment, 1950 I.C.J. 13. The Court found that the use of naval forces was an act of a State, although the individual who carried it out was acting in a personal capacity. However, the Court ruled that the act was not an international act, as it was not within the authority of the individual, and therefore it was not an act of a State.

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default of the State concerned, even if the resulting injury itself was accidental and unintended.\(^{247}\)

(4) In drafting what became article 61 of the 1969 Vienna Convention, ILC took the view that force majeure was a circumstance precluding wrongfulness in relation to the performance of a treaty and that a party's performance was a ground for termination of a treaty.\(^{248}\) The same view was taken at the United Nations Conference on the Law of Treaties.\(^{249}\) But in the interests of the stability of international law, a narrow formulation of article 61 so far as treaty termination is concerned. The degree of difficulty associated with force majeure as a circumstance precluding wrongfulness, though considerable, is less than is required by the article 61 for termination of a treaty on grounds of supervening impossibility, as IJC pointed out in the Gabčikovo-Nagymaros Project case.\(^{250}\)

Article 61, paragraph 1, requires the "permanent disappearance or destruction of an object indispensable for the execution" of the treaty to justify the termination of a treaty on grounds of impossibility of performance. During the conference, a proposal was made to extend the scope of the article by including in it cases such as the impossibility to make certain payments because of serious financial difficulties. Although it was recognized that such situations could lead to a preclusion of the wrongfulness of non-performance by a party of its treaty obligations, the participating States were not prepared to consider such situations to be a ground for terminating or suspending a treaty, and preferred to limit themselves to a narrower concept.\(^{251}\)

(5) In practice, many of the cases where "impossibility" has been relied upon have not involved actual impossibility as discussed here, but merely the assumption of risk. The situation of a party is the immediate one of saving people's lives, irrespective of their nationality.\(^{252}\)

(6) Apart from aerial incidents, the principle in article 23 is also recognized in relation to ships in innocent passage by article 14, paragraph 3, of the Convention on Transit Trade of Land-locked States. In these cases, force majeure is not incorporated as a constituent element of the relevant primary rule; nonetheless, its acceptance in these cases helps to confirm the existence of a general principle of international law to similar effect.

(7) The principle has also been accepted by international tribunals. Mixed claims commissions have frequently cited this unforeseeability of attacks by rebels in denying the responsibility of the territorial State for resulting damage suffered by foreigners.\(^{253}\) In the Lighthouses arbitration, a lighthouse had been destroyed by the Government of Greece in 1915 and was subsequently destroyed by enemy action. The arbitral tribunal denied the French claim for restoration of the lighthouse on grounds of force majeure.\(^{254}\) In the Russian Invitation case, the principle was accepted but the plea of force majeure failed because the payment of the debt was not materially impossible.\(^{255}\) Force majeure was acknowledged by the military law (the plea was rejected on the facts of the case) by PCIJ in the Serbian Loans and Brazilian Loans cases.\(^{256}\) More recently, in the "Rainbow Warrior" arbitration, France relied on force majeure as a circumstance precluding the wrongfulness of its conduct in removing the officers from Hao and not returning them following medical briefing. The tribunal dealt with the point briefly:

New Zealand is right in asserting that the excuse of force majeure is not of relevance in this case of its application as of

1920.

See, e.g., the cases of accidental intrusion into airspace attributable to weather, and the cases of accidental bombing of neutral territory attributable to navigational errors during the First World War. The point was made in the study prepared by the Secretariat (footnote 345 above), paras. 250-256. See also the exchanges of correspondence between the Italian team and the United States team in the case. See also the study prepared by the Secretariat (footnote 345 above), paras. 141–142 and 252.

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forbidden any firing on aircraft which flew over Yugoslav territory without authorization, presuming that, for its part, the United States had not resolved to take steps necessary to prevent these flights, except in the case of emergency or bad weather, for which arrangements could be made by exchange between American and Yugoslav authorities. 285 The reply of the United States Acting Secretary of State reiterated the assertion that no United States planes had flown over Yugoslav territory intentionally without permission from Yugoslav authorities "unless forced to do so in an emergency." However, the Acting Secretary of State added:

1. I presume that the Government of Yugoslavia recognizes that in case a plane and its occupants are jeopardized, the aircraft may change its course over federal territory, the same as a plane may change course over federal territory from severe weather, as they have the right to do under customary international law. 286 Iceland maintained that British vessels were in its waters for the sole purpose of provoking an incident, but did not contest the point that if the British vessels had been in a situation of distress, they could enter Icelandic territorial waters. 287

(3) Claims of distress have also been made in cases of violation of maritime boundaries. For example, in December 1975, after British naval vessels entered Icelandic territorial waters, the British Government claimed that the vessels in question had done so in search of "safety from severe weather, as they have the right to do under customary international law." 286 Iceland maintained that British vessels were in its waters for the sole purpose of provoking an incident, but did not contest the point that if the British vessels had been in a situation of distress, they could enter Icelandic territorial waters.

(4) Although historically practice has focused on cases involving ships, there are comparable or greater peril. This is consistent with paragraph 2 (a) of the Convention on the Prevention of Pollution by Dumping of Wastes and Other Matter, article V, paragraph 1 of which provides that the prohibition on dumping of wastes does not apply when it is "necessary to secure the safety of human life or of vessels, aircraft, platforms or other man-made structures at sea, if it is seriously endangered by the dumping." This is the same formula as that adopted in respect of article 23, paragraph 2 (a). 282 (10) Distress can only preclude wrongdoing where the interests sought to be protected (e.g., the lives of passengers) are clearly outweigh the other interests at stake in the circumstances. If the conduct sought to be excused endangered lives, it may save lives or it is otherwise likely to create a greater peril it will not be covered by the plea of distress. For instance, a military aircraft carrying explosives might cause a disaster by making an emergency landing, or a nuclear submarine with a serious breakdown might cause radioactive contamination to a port in which it sought refuge. Paragraph 2 (b) stipulates that disputes that it does not apply if the act in question is likely to create a comparable or greater peril. This is consistent with paragraph 1, in which the plea of necessity has "no other reasonable way" to save life establishes an objective test. The words "comparable or greater peril" must be assessed in the context of the overall purpose of saving lives. Article 25, Necessity

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
   (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril and
   (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
   (a) the international obligation in question excludes the possibility of invoking necessity; or
   (b) the State has contributed to the situation of necessity.

Commentary

(1) The term "necessity" (état de nécessité) is used to denote those exceptional circumstances in which a State can safeguard an essential interest threatened by a grave and imminent peril, for the time being, not to perform some other international obligation if such non-performance is necessary. Under conditions previously defined in article 25, such a plea is recognized as a circumstance precluding wrongfulness. (2) The plea of necessity is exceptional in a number of respects. Unlike consent (art. 20), self-defense (art. 21) or countermeasures (art. 22), it is not dependent on the prior conduct of the injured State. Unlike force majeure (art. 23), it does not involve conduct which is involuntary or coerced. Unlike distress (art. 24), necessity consists not in danger to the lives of individuals in the charge of a State (even if caused or induced by the invocation of necessity), but in the threat of an essential interest of the State or of the international community as a whole. It arises where there is an irreconcilable conflict between an essential interest on the one hand and an obligation of the State invoking necessity on the other. These special features mean that necessity will only rarely be available to excuse non-performance of an obligation and that it is subject to strict limitations to safeguard against possible abuse. 283
In the **Proceedings of the United Nations, vol. 1** (New York, 1946), the **General Assembly, in its sixty-first plenary meeting, held on 21 July 1949, adopted the resolution** that the state of necessity is a ground recognized by international law. It observes that the state of necessity is a ground recognized by international law.

(5) The **Court** had **ruled that the state of necessity is a ground recognized by international law**. It observes that the state of necessity is a ground recognized by international law.

(6) In the **Plea for the Right of the Antilles** case, the **Court** had **ruled that the state of necessity is a ground recognized by international law**. It observes that the state of necessity is a ground recognized by international law.

(7) In the **Pleasant View case** (footnote 345 above), para. 288. See also the **Gabriela haircut** (footnote 355 above), para. 288. See also the **Case of the Married Women** (footnote 178 above) p. 353; and the study prepared by **the Secretary-General** (footnote 345 above), paras. 263–268 and 385–386.

(8) In the **Proceedings of the United Nations, vol. 1** (New York, 1946), the **General Assembly, in its sixty-first plenary meeting, held on 21 July 1949, adopted the resolution** that the state of necessity is a ground recognized by international law. It observes that the state of necessity is a ground recognized by international law.

(9) In March 1967, the Liberian oil tanker **Estonia** was stranded on submerged rocks off the coast of Canada. The ship was carrying a cargo of oil, which threatened the English coastline. After various remedial attempts had failed, the British Government decided to bomb the ship to burn the remaining oil. This operation was carried out successfully.

(10) In the **Proceedings of the United Nations, vol. 1** (New York, 1946), the **General Assembly, in its sixty-first plenary meeting, held on 21 July 1949, adopted the resolution** that the state of necessity is a ground recognized by international law. It observes that the state of necessity is a ground recognized by international law.

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In other words, the necessity may only be invoked to safeguard the interest relied on must outweigh all other considerations, not merely from the point of view of the acting State but also of the international community as a whole. Thus, the phrase "international community as a whole" rather than "international community of States as a whole" is used to avoid the possibility of a wrong interpretation that the interest of the acting State outweighs that of the community. The phrase "international community as a whole" extends to all States, not only those members of the United Nations. It is also used when this phrase is used in the Rome Statute of the International Criminal Court. Therefore, the necessity of any act of a State must be assessed in the context of the functioning of the international community as a whole.

Moreover, the course of action taken must be the only one available to the acting State. The phrase "the only course available" means that the acting State has no other choice but to act in the manner in which it does. This is because necessity involves the use of force for a legitimate purpose, and any other course of action would be considered as a failure to comply with the primary obligation.

In the nineteenth century, abuses of necessity associated with the idea of "fundamental rights of States" led to a reaction against the use of "military necessity" which is, in the first place, the underlying criterion for a series of substantive rules of the law of armed conflict.

In the second case, ICJ considered that because Hungary had committed to the project, it could not rely on the situation as a circumstance precluding wrongfulness. Therefore, the phrase "in any case" of the scope of circumstances precluding wrongfulness means that the phrase is not applied to the situation of alleged necessity.

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Commentary

(1) Article 27 is a provision that deals with an obligation as a precluding clause because, as to the first point, it may be that the clause because, as to the first point, it may be that it is without prejudice to the States; hence, the States can be regarded as having an underlying obligation. Thus, an obligation under a peremptory norm of general international law, which may arise in circumstances of a peremptory norm of general international law may arise in circumstances of a peremptory norm of general international law. The Commission did not, however, propose that the underlying obligation as to the second point, because it is not possible to specify in what circumstances precluding wrongfulness may occur when a party relies on a circumstance covered by Chapter V. Although the article uses the term ‘duty’ to describe the obligations under Chapter V, the concept of a ‘duty’ is not the same as the obligation under a peremptory norm of general international law. The Commission did not propose that the underlying obligation itself, when and to the extent that a circumstance ceases to have its preclusive effect for any reason, the obligation in question continues in accordance with the terms of the underlying obligation.

(2) It is, however, desirable to make it clear that the obligation as a precluding clause because, as to the first point, it may be that it is without prejudice to the States; hence, the States can be regarded as having an underlying obligation. Thus, an obligation under a peremptory norm of general international law may arise in circumstances of a peremptory norm of general international law. The Commission did not, however, propose that the underlying obligation as to the second point, because it is not possible to specify in what circumstances precluding wrongfulness may occur when a party relies on a circumstance covered by Chapter V. Although the article uses the term ‘duty’ to describe the obligations under Chapter V, the concept of a ‘duty’ is not the same as the obligation under a peremptory norm of general international law. The Commission did not propose that the underlying obligation itself, when and to the extent that a circumstance ceases to have its preclusive effect for any reason, the obligation in question continues in accordance with the terms of the underlying obligation.

(3) Where there is an apparent conflict between the primary norms and secondary rules of State responsibility, the primary norms will prevail. For example, a breach of an obligation under a peremptory norm of general international law may arise in circumstances of a peremptory norm of general international law. The Commission did not, however, propose that the underlying obligation as to the second point, because it is not possible to specify in what circumstances precluding wrongfulness may occur when a party relies on a circumstance covered by Chapter V. Although the article uses the term ‘duty’ to describe the obligations under Chapter V, the concept of a ‘duty’ is not the same as the obligation under a peremptory norm of general international law. The Commission did not propose that the underlying obligation itself, when and to the extent that a circumstance ceases to have its preclusive effect for any reason, the obligation in question continues in accordance with the terms of the underlying obligation.

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Part Two

Consequences of invoking a circumstance precluding wrongfulness

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The Court thus upheld its jurisdiction on Germany's claim. However, there are some overlaps between the two in practice. Moreover, there are differences in the manner in which they are dealt with. Where assurances and guarantees of non-repetition are non-essential, the Court focuses on the future. Conversely, in cases involving non-repetition, the Court may regard the obligations in the Convention and that of giving such assurances as guarantees of non-repetition. 

Where assurances and guarantees of non-repetition are sought by an injured State, the question is essentially the reinforcement of a continuing legal relationship and the focus is on the future, not the past. In addition, assurances and guarantees are concerned with the future. cessation therefore would not be sufficient in any case in which a return to the status quo ante would not suffice to yield an end of subparagraph (11). Subparagraph (11) of the commentary to article 36, paragraph (11) (see footnote 119 above), p. 513, para. 124, see also the operative part, p. 516, and the operative part qum 128.7.

The difficulty of distinguishing between cessation and restoration is illustrated by the return of the two agents to detention on the island of Hao. According to LaGrand, Judgment, 2nd series, vol. 29, No. 13, 1901 case in which the Ottoman Empire had refused to return a number of Senegalese agents to detention on the island of Hao. According to the Court, the return of the two agents would not suffice to yield an end of subparagraph (11). The Court has jurisdiction in the present case with respect to the fourth submission of Germany.

On the question of reparations, the Court held that the obligation was for a fixed term which had expired, and there was no question of cessation. It is frequently demanded not only by States but also by the organs of international organizations, particularly in cases of human rights violations, for example, in the case of the European Court of Human Rights. The obligation to return the two agents to detention on the island of Hao would not suffice to yield an end of subparagraph (11). Subparagraph (11) of the commentary to article 36, paragraph (11) (see footnote 119 above), p. 513, para. 124, see also the operative part, p. 516, and the operative part qum 128.7.

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State responsibility

Article 31. Reparation

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act of a State.

2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act or omission of a State.

Commentary

1. The obligation to make full reparation for the injury caused by the internationally wrongful act or omission of a State is an essential part of the concept of State responsibility. It is based on the principle that States must compensate the damage caused by their acts, whether intentional or not.

2. The reparation obligation is based on the principle of causation, which means that the injury must be causally connected to the internationally wrongful act or omission of the State.

3. The reparation obligation is international in nature and applies to all States, regardless of their degree of fault or negligence.

4. The reparation obligation is enforceable, either by the victim State or by an international court or tribunal.

5. The reparation obligation is not dependent on the existence of a treaty or agreement between the States concerned.

6. The reparation obligation is not limited to financial compensation, but can also include other forms of reparation, such as the restoration of the situation to what it was before the wrongful act or omission.

7. The reparation obligation is not limited to the causal link between the wrongful act or omission and the injury, but also includes the principle of foreseeability.

8. The reparation obligation is not limited to the State that caused the injury, but can also be attributed to other States.

9. The reparation obligation is not limited to the injured State, but can also be enforced by third States.

10. The reparation obligation is not limited to the immediate consequences of the wrongful act or omission, but also includes the indirect and remote consequences.

11. The reparation obligation is not limited to the past, but can also extend to future consequences.

12. The reparation obligation is not limited to the amount of the damage, but also includes the costs of restoration and compensation.
Article 32. Influence of International Law on the Responsibility of States

The responsibility of a State is not only determined by the criteria of its own law, but also by the requirements of international law. In particular, the principle that a State may not rely on its internal law as a justification for its failure to perform its international obligations is a fundamental principle of international law.

The extent to which international law influences the responsibility of States depends on the nature of the obligations in question. In some cases, international law may require a higher standard of responsibility than the law of the State involved. For example, the United Nations Convention on the Law of the Sea provides that a State may not rely on its internal law to justify its failure to comply with its obligations under the Convention. On the other hand, in other cases, international law may be silent on the question of responsibility, and the law of the State involved may be the sole determinant.

In the case of the sinking of the British ships in the Gulf of Mexico, the question of responsibility was determined by the law of the United Kingdom, which had laid the mines and failed to warn its ships of the danger. The United States, on the other hand, had laid the mines and failed to warn the United Kingdom. The question of responsibility was thus determined by the law of both States.

In the case of the United States' failure to protect the Embassy of Iran in Tehran, the question of responsibility was determined by the law of the United States, which had failed to take necessary steps to protect the Embassy. The United Kingdom, as the Headquarters of the United Nations, had a duty to protect the Embassy, and the United States was required to cooperate with the United Kingdom in carrying out this duty.

In the case of the sinking of the French ship in the Gulf of Mexico, the question of responsibility was determined by the law of France, which had laid the mines and failed to warn its ships of the danger. The United States, on the other hand, had laid the mines and failed to warn the French ships. The question of responsibility was thus determined by the law of both States.

In the case of the sinking of the United States' ships in the Gulf of Mexico, the question of responsibility was determined by the law of the United States, which had laid the mines and failed to warn its ships of the danger. The United Kingdom, on the other hand, had laid the mines and failed to warn the United States. The question of responsibility was thus determined by the law of both States.

The determination of responsibility in these cases was based on the principle that States are responsible for their actions, and that they may not rely on their internal law to justify their failure to comply with their international obligations.

In the case of the sinking of the French ship in the Gulf of Mexico, the United States was held responsible for the loss of life, and the United States was required to pay damages to the French government. In the case of the sinking of the United States' ships in the Gulf of Mexico, the United Kingdom was held responsible for the loss of life, and the United Kingdom was required to pay damages to the United States.

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Chapter II

State responsibility

Article 34. Forms of reparation

Full reparation for the injury caused by the internationally wrongful act shall take the form of reparation in accordance with the provisions of this chapter.

Commentary

(1) Article 34 introduces chapter II by setting out the forms of reparation which separately or in combination will discharge the obligation to make full reparation for the injury caused by an internationally wrongful act and tend to conflate restitution as a form of reparation and the underlying obligation of reparation itself. Article 35 adopts the narrower definition which has been made by the victim.

(2) The concept of restitution is not uniformly defined. It is generally held that article 36 of the Vienna Convention on Consular Relations, leading to the establishment of the right of petition to a court or some other body for individuals affected. It is also true in the case of compensation which may be due to the injured party for loss suffered as a result of the internationally wrongful act. The latter definition makes clear what is meant by the term "full reparation". Full reparation for the injury caused by an internationally wrongful act and the injury are defined in the statement of the general obligation to make full reparation in article 31.

(3) Nonetheless, because restitution most closely conformed with the view of the facts, the right to compensation has been given through the decision of the Court in the Factory of Chorzów case (para. 78). This would be a form of restitution which took into account the limited character of the rights in issue.

(4) Article 33 of the Vienna Convention on Consular Relations, leading to the establishment of the right of petition to a court or some other body for individuals affected by the fact that the right of compensation has been given instead of restitution. Restitution was accepted in lieu of restitution originally decided upon, the Franco-Italian Conciliation Commission having agreed that restitution would require difficult internal procedures. See also paragraph (4) of the Factory of Chorzów case (para. 78).
The rights and obligations in issue arise directly on the premises of the case. Such situation may be illustrated by the case of the Chorzów factory, when the question was whether the failure to provide restitution would prejudice the injurious State or its legal system in political independence or economic stability.

The term “juridical restitution”, which value is designed to take the place of restitution which has become impossible. The Court went on to add: “The obligation to make restitution is not unlimited. In particular, under art. 31, restitution is required pursuant to a legal provision, the resulting of which is the termination of a legal situation, including the modification of a status, the annulment of any decree of annexation may be seen as involving cessation rather than restitution.”

The situation where the value may be required in terms of restitution may be illustrated by the case of the property of the Temple of Preah Vihear, Merits, Judgment, I.C.J. 545 (1962), and to the satisfaction of the Court, the said property could therefore have no other effect but that of substituting payment of compensation as compared with restitution. The balance will invariably favour the injured State in any case.

The object in question has been destroyed, and the mere fact of political or administrative obstacles to restitution does not amount to impossibility. Since the taking of third powerful States had acquired the effect of impediment, the assurance was detained. For any combination of these cases, restitution was denied. The case supports a broad understanding of the question of property rights within the pertinent system of the responsible State’s forces and the annulment of any decree of annexation may not involve the modification of a legal situation either within the legal system of the responsible State or in its legal capacity. Indeed, in some cases tribunals have inferred from the terms of the compromis agreement that the restoration of the status quo ante would be impracticable.

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Entitlement to compensation for such losses is supported by extensive case law, State practice and the writings of bodies such as the United Nations Commission on International Justice, the International Court of Justice and other international legal scholars. The concept of compensation is often described as a means of repairing the damage caused by an internationally wrongful act. It is primarily concerned with permitting the injured State to recover the financial losses it has suffered as a result of the wrongful act, and it is not intended to punish the State responsible for the act, nor to serve as an expression of the State's will.

In the case of the sinking of the M/V "Saiga" by Cuba, the International Court of Justice held that the amount of compensation claimed by the United States (£700,087) was justified. The Court found that "the true measure of compensation in this case," was the replacement cost of the destroyer at the time of its loss. This is in accordance with the principles developed by these bodies in assessing compensation, which are outlined in article 36 of the Vienna Convention on State Responsibility.

Compensation is generally understood to consist of a monetary payment, though it may sometimes take the form of a judgment or sentence, or a declaration. The tribunal may also order the responsible State to make good the loss caused by its act, either by making payment in place of it or by taking some other form of reparation, such as making good a defalcation or doing something to replace the loss.

The principles for assessing compensation may be employed in a variety of contexts, including claims for personal injury, property damage, and other losses. The amount of compensation claimed by the British Government (£700,087) was held to be justified because the true measure of compensation was the replacement cost of the vessel at the time of its loss.

The relationship with restitution is clarified by the final phrase of article 36, paragraph 1: "insofar as such damage is not made good by restitution." Restitution, as defined in article 35 of the same convention, includes the compensation of a wrong. The remedy of restitution is likely to be employed in cases where the loss claimed is not justifiably claimed as a monetary loss, or where the loss cannot be quantified in monetary terms.

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Competition claims for pollution costs have been a feature of international law since the early 1900s. These cases have involved either direct or indirect pollution resulting from actions of states or private entities. The damages suffered by victims of pollution include not only physical and economic losses but also psychological harm. In many cases, these payments have been made to states and international organizations rather than to private individuals.

Competition claims for damages incurred as a result of pollution or to providing compensation for a reduction in the value of published property. However, competition claims have often been directed at international organizations and bodies, particularly in the context of human rights violations.

To estimate the amounts (18) Historically, compensation for personal injury sustained in relation to the wrongful act have been increased when abusive conditions of treatment have been applied.

Subject to the general principles of international law, "the valuation of damages for the purposes is the "fair market value" of the property lost. (22) Compensation reflecting the capital value of property taken for public use under general international law, "the valuation of damages for the purposes of being calculated with a reasonable degree of certainty".

In many cases, these payments have been made to states and international organizations rather than to private individuals.

In the context of human rights violations, the International Court of Justice has awarded compensation for personal injury sustained in relation to the wrongful act that has been increased when abusive conditions of treatment have been applied. The court held that the compensation for personal injury should be based on an evaluation of the harm the claimant has suffered, calculated in accordance with the "fair market value" of the property lost.

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(23) An alternative valuation method for capital loss is the discounted cash flow (DCF) methodology. The DCF method has been employed in similar cases in assessing the value of oil-related assets (S/AC.26/1999/37). In those cases, it has been noted that the DCF method is particularly suitable for valuing assets whose future income components are not easily estimated on an objective basis (S/AC.26/1999/37, para. 107).

(24) Thus, the DCF method may be used to reflect the risk inherent in the valuation of intangible assets such as natural resources. However, the DCF method is not without its own limitations. It is based on a number of assumptions, including the discount rate and the expected future cash flows. These assumptions can be difficult to determine accurately, and the resulting value may be sensitive to small changes in these inputs. Furthermore, the DCF method does not consider the value of the entire business, including its tangible assets, which may be important in some cases.

(25) In cases where the value of a business is difficult to determine, other methods may be employed. For example, the cost approach, which involves estimating the cost of reproducing the business, can be used to determine the value of intangible assets such as goodwill. The income approach, which involves estimating the expected future cash flows of the business, can be used to determine the value of intangible assets such as licenses and franchises. The market approach, which involves comparing the value of similar businesses, can be used to determine the value of intangible assets such as patents.

(26) Since 1945, valuation techniques have been employed in a variety of cases to determine the value of assets. These techniques have included the DCF method, the cost approach, the income approach, and the market approach. In choosing which technique to use, courts and parties must consider the nature of the assets in question, the availability of comparable data, and the reliability of the method.

(27) Paragraphs 2.1 to 2.2 of the report of the International Law Commission on the work of its fifty-second session (A/52/10) also provide a comprehensive overview of the valuation methods employed in international law.

(28) In summary, the valuation of intangible assets can be a complex and challenging task. However, with careful consideration of the appropriate methodology and a thorough understanding of the underlying principles, it is possible to arrive at a fair and reasonable estimate of the value of such assets.
Article 37. Satisfaction

1. The State is responsible for an internationally wrongful act which results in injury to a person, either as such or as an individual whose conduct has been attributed to the State. In the event of an internationally wrongful act which results in injury to a person, the injury must be attributed to a State if it has, for the purposes of article 18, intervened in the act of another person or entity. In the event of an internationally wrongful act which results in injury to a person, the injury must be attributed to a State if it has, for the purposes of article 18, intervened in the act of another person or entity.

2. The injury must consist in an expression of regret, an offer to compensation, and another appropriate modulus.

3. The State is responsible for an internationally wrongful act which results in injury to a person, either as such or as an individual whose conduct has been attributed to the State. In the event of an internationally wrongful act which results in injury to a person, the injury must be attributed to a State if it has, for the purposes of article 18, intervened in the act of another person or entity. In the event of an internationally wrongful act which results in injury to a person, the injury must be attributed to a State if it has, for the purposes of article 18, intervened in the act of another person or entity.

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This provision combines a decision in principle in favour of reparation with a decision in principle in favour of damages, in accordance with the request made by Albania.

(4) This declaration is in accordance with the request made by the Assembly.

(5) As a result, the International Court of Justice has decided to award the principal sum due to the injured party in the amount of $500,000, and to award interest on this sum at a rate of 5% per annum, starting from the date of the decision, until payment is made. The awards of interest shall be added to the principal sum and shall be paid in a single instalment.

(6) The Tribunal notes that the Chambers have been consistent in awarding interest as part of the compensation for the injury suffered. However, in certain cases, the Chambers have awarded interest at a rate that is lower than the rate of inflation, or have awarded interest on a portion of the principal sum only. In such cases, the Chambers have referred to the need to protect the value of the damages award over time.

(7) The Chamber has also been consistent in awarding interest on the amount of the principal sum due, as well as on any additional amounts awarded under the terms of the settlement agreement. In particular, the Chamber has been consistent in awarding interest on the amount of the principal sum due at the rate of 5% per annum, and in awarding interest on any additional amounts awarded at the same rate.

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Article 39. Contribution to the injury

In the determination of reparations, account shall be had of the negligence, fault or omission of any person or entity in relation to whom reparations are sought.

The same rules for compound interest in respect of amounts awarded shall apply to an award of reparations.

Commentary

Article 39 deals with the situation where damage suffered is attributable in part to the negligence, fault or omission of more than one person or entity. In considering the amount of reparations, the international law tribunal or court must take account of the negligence, fault or omission of each person or entity in proportion to the part that their negligence, fault or omission has played in causing the damage. This means that a person or entity that played a greater part in causing the damage will be held responsible for a greater share of the reparations.

The same rules for compound interest in respect of an award of reparations shall also apply to any award of reparations. This means that if the reparations are awarded after some time has elapsed, interest will be charged on the amount of the reparations from the date that it could have been paid until the date of payment.

Commentary

The purpose of Article 39 is to ensure that each person or entity that contributed to the damage is held responsible for their contribution. This is achieved by taking into account the negligence, fault or omission of each person or entity in relation to whom reparations are sought, and awarding reparations in proportion to the part that their negligence, fault or omission has played in causing the damage.

The same rules for compound interest in respect of an award of reparations shall apply to any award of reparations. This means that if the reparations are awarded after some time has elapsed, interest will be charged on the amount of the reparations from the date that it could have been paid until the date of payment.

Commentary

The same rules for compound interest in respect of an award of reparations shall apply to any award of reparations. This means that if the reparations are awarded after some time has elapsed, interest will be charged on the amount of the reparations from the date that it could have been paid until the date of payment.
Chapter III only applies to those violations of international law that fulfil both criteria.

International law is accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

(3) It is not appropriate to set out examples of the peremptory norms of general international law, as the jurisprudence of the International Court of Justice has recognized in each instance.

(4) A closely related development is the recognition of the existence of certain international crimes for which there is limited jurisdiction. In the course of the proceedings on the Peremptory Obligations of States under International Law, the International Court of Justice has provided for the establishment of a category of "international crimes of a serious character" for which there are limited jurisdiction.

The Commission gave the following examples of treaties which have been subject to limited jurisdiction.

(5) From the first it was recognized that these developments are not likely to be applicable to the international community, as a whole, although it is conceivable that a very limited number of States may be subject to this jurisdiction.

References: See also article 26 and commentary on the Rome Statute of the International Criminal Court, p. 31.

The references to article 26 and commentary under peremptory norms of international law, which would be contained in the regulations of the international community, are set out in the conclusion of the ICC Statute, p. 34.
The obligation applies to "situations" created by these breaches, such as, for example, attempted acquisition of sovereignty. No State shall recognize as lawful a situation supported by State practice. For example, when reacting against breaches of international law, States have often stressed the importance of the protection of values protected by the rule. The terms are not of course peremptory norms already finds support in international practice and in decisions of ICJ. The principle that territorial and administrative integrity of the Republic of China, [nor] recognize any situation, treaty or agreement which may be brought about by the acts of the People's Republic of China. As ICJ held in Man de Blake and Others the importance of the right of self-determination of peoples. It not only refers to the formal recognition of these situations, but also to the obligation of States to cooperate in order to bring to an end serious breaches of international law. The Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, General Assembly resolution 2625 (XXV), annex, para. 159; cf., e.g., the procedure established concerning Nuclear War and other means of destruction for the maintenance of international peace and security, such as those prohibiting massive pollution of the atmosphere or of the seas.

**Article 41. Particular consequences of a serious breach of an international obligation of essential importance for the maintenance of international peace and security.**

1. States shall cooperate to bring to an end through peaceful means, and if such means are inadequate, by such other means as are necessary, any serious breach of an international obligation of essential importance for the maintenance of international peace and security. States shall cooperate in the exercise of the right of collective self-defense provided for in article 51 of the Charter of the United Nations, in accordance with the purposes and principles of the Charter, and shall have the right to seek assistance necessary for the maintenance of international peace and security. States shall take such action as may be necessary to restore or maintain international peace and security, in accordance with the Charter of the United Nations and in accordance with the provisions of this title.

2. States shall recognize as unlawful any breach of an international obligation of essential importance for the maintenance of international peace and security. States shall contribute to the maintenance of international peace and security by such other means as are appropriate to achieve the objectives of the United Nations.
The implementation of the international responsibility of a type.

The first part of the articles identifies the internationally wrongful act of a State, generally in the terms of the breach of an international obligation, and the second part deals with the implementation of the international responsibility of the responsible States.

Part Three is concerned with the implementation of State responsibility, i.e., with the entitlement of other States to invoke the international responsibility of the responsible States.

Part Four, which deals with questions of non-recognition, is the subject matter of Part Three.

Chapter II of Part Three deals with countermeasures taken in order to induce the responsible States to cease the conduct that has caused the breach. It applies to situations in which a responsible State has sought to consolidate the situation it has created by serious breaches.

Chapter III of Part Three is concerned with the invocation of responsibility, i.e., with the exercise of the right by a State to invoke the international responsibility of the responsible States.

Chapter IV of Part Three is concerned with the nature of the responsible State's international responsibility, i.e., with the entitlement of other States to invoke the international responsibility of the responsible States.
Article 42. Invocation of responsibility

(1) This chapter is expressed in terms of the invocation of responsibility by a State of the responsibility of another State. For this purpose, the concept of State responsibility is here defined as a legal obligation to perform (or not to perform) a specific act, to a internationally legally binding rule.

(2) Article 42 is concerned with any breach of an international law that the treaty term the other party is entitled to consider as a breach of international law. The purpose of article 42 is to define this latter category.

(3) A State which claims that its obligations have been breached is entitled to resort to all means of redress contemplated in the articles. It can invoke the appropriate responsibility of the other State or the WTO rules of general international law governing the diplomatic relations between States.

(4) The definition in article 42 is closely modelled on the concept of State responsibility as used in the practice of international law.

(5) In parallel with the cases envisaged in article 60 of the 1969 Vienna Convention, three cases are identified in this article:

(a) cases where the performance of an obligation under a treaty is owed to a third State and which the latter is entitled to consider as a breach of international law;
(b) cases where the performance of an obligation under a treaty is owed to a third State and which the latter is entitled to consider as a breach of international law;
(c) cases where the performance of an obligation under a treaty is owed to a third State and which the latter is entitled to consider as a breach of international law.

(6) Article 42, subparagraph (a), provides that the implementation of State obligations under a treaty establishes a framework of rules applicable to all States. The expression "individually" indicates that in the context of any given case, the question of whether the obligation is owed specifically to another State or to a group of States is to be answered in the negative.

(7) An obvious example of cases coming within the scope of subparagraph (a) of article 42 is a treaty establishing obligations owed to a third State not party to the treaty. This is why, for example, the obligation of a group of States to maintain a given level of defence forces can be considered as a breach of international law.

(8) Article 42, subparagraph (b), provides that the performance of an obligation under a treaty is owed to a third State and which the latter is entitled to consider as a breach of international law. This is why, for example, the obligation of a group of States to maintain a given level of defence forces can be considered as a breach of international law.

(9) Article 42, subparagraph (c), provides that the performance of an obligation under a treaty is owed to a third State and which the latter is entitled to consider as a breach of international law. This is why, for example, the obligation of a group of States to maintain a given level of defence forces can be considered as a breach of international law.
Article 44. Admissibility of claims

The responsibility of a State may not be invoked if:

(a) the claim is not brought in accordance with any applicable rules relating to the admissibility of claims;

(b) the claim is brought against a State in respect of an act of that State which is considered as the responsibility of that State in virtue of the provisions of Article 38(1)(a) of the Statute of the International Court of Justice.

Note: The above provision is subject to the rule that a State may be found to be responsible for an act of another State if the act of the other State was committed in its capacity as a state, as defined by the United Nations Charter.

2. The conduct that the State should have taken in order to cease the wrongful act, if it is controllable, is that it should not have committed the act.

3. A claim for compensation, or other remedies, is not barred because the act complained of was committed by a State in its capacity as a state, as defined by the United Nations Charter.

4. The court, in determining whether an act is controllable, may take into account the following factors:

(a) the nature and extent of the act;

(b) the reason for the act;

(c) the purpose of the act;

(d) the consequences of the act.

5. If the court finds that an act is controllable and that it was committed by a State in its capacity as a state, as defined by the United Nations Charter, the court shall proceed to determine the amount of compensation, or other remedies, to be awarded.
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Article 46. Plurality of injured States

Where several States are injured by the same internationally wrongful act, each injured State may separately invoke the responsibility for the internationally wrongful act.

Commentary

1. Article 46 deals with the situation where a plurality of States claims responsibility for the same internationally wrongful act. In such a case, each State that has suffered an injury as a result of the internationally wrongful act may separately invoke its own rights in respect of the internationally wrongful act.

2. Several States may separately invoke responsibility for the same internationally wrongful act. However, if the claims of the States are based on the same facts, the Court may decide to determine the responsibility of the States as a group.

3. The Court may also decide to determine the responsibility of the States as a group if the claims of the States are based on different facts.

4. Where the claims of the States are based on different facts, the Court may decide to determine the responsibility of the States as a group if the claims of the States are based on different facts.

5. The Court may also decide to determine the responsibility of the States as a group if the claims of the States are based on different facts.

6. If the Court decides to determine the responsibility of the States as a group, it may also decide to determine the responsibility of the States as a group if the claims of the States are based on different facts.

7. The Court may also decide to determine the responsibility of the States as a group if the claims of the States are based on different facts.

8. The Court may also decide to determine the responsibility of the States as a group if the claims of the States are based on different facts.
Article 48. Invocation of Responsibility by a State Other than an Injured State

1. Any State other than an injured State is entitled to bring a claim for responsibility of another State in accordance with the provisions of paragraphs 2 to 6.

2. The obligation to give account of its conduct is owed by the latter to the former in respect of any international wrongful act.

3. The requirements for the invocation of responsibility and the form of the State that has suffered the damage may be established by a State by means of a treaty, customary international law, or general principles of law.

4. If the damage is caused by an act of the former State, the latter is required to take the necessary steps to prevent or mitigate the damage and to compensate the former State for the same.

5. If the damage is caused by an act of a third State, the latter is required to take the necessary steps to prevent or mitigate the damage and to compensate the former State for the same.

6. If the damage is caused by an act of the former State, the latter is required to take the necessary steps to prevent or mitigate the damage and to compensate the former State for the same.

7. If the damage is caused by an act of a third State, the latter is required to take the necessary steps to prevent or mitigate the damage and to compensate the former State for the same.

8. If the damage is caused by an act of the former State, the latter is required to take the necessary steps to prevent or mitigate the damage and to compensate the former State for the same.

9. If the damage is caused by an act of a third State, the latter is required to take the necessary steps to prevent or mitigate the damage and to compensate the former State for the same.

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44. If the damage is caused by an act of the former State, the latter is required to take the necessary steps to prevent or mitigate the damage and to compensate the former State for the same.

45. If the damage is caused by an act of a third State, the latter is required to take the necessary steps to prevent or mitigate the damage and to compensate the former State for the same.
(13) Paragraph 2 (b) refers to the State in question as the State invoking responsibility. As the Court observed in the Plenum's 1971 judgment, "the injured entity" was a people, viz. the people of South West Africa. Where the injured party is a State, its Government will be in the position to claim reparation, in particular restitution. In other words, it deals with measures that would otherwise be contrary to the international obligations of the State claiming responsibility.

(14) Paragraph 3 specifies the categories of claims which States may make when invoking responsibility under article 48. The list given in the paragraph is exhaustive, and the practice of international law is that States are not precluded from claiming compensation for breaches of their international obligations, for example, a coastal State specially affected by pollution in breach of an obligation aimed at protection of the marine environment in the collective interest.

(15) Paragraph 4 refers to the State in question as the State claiming responsibility. In the context of the circumstances precluding wrongfulness. Like other forms of self-help, countermeasures are liable to abuse and this potential is exacerbated by the factual inequalities between States. Chapter II has as its aim to establish an international legal system by which injured States may seek to vindicate their rights and to restore the legal position to which they are entitled by virtue of their international obligations. The text of the article 22, which deals with countermeasures in response to an internationally wrongful act, outlines several aspects that may contribute to a better understanding of the provisions of article 48. In particular, it is stated that, in addition to the circumstances described in paragraphs 1 and 2, a claim must be made within a reasonable time after the occurrence of the internationally wrongful act and that the claimant may be liable to countermeasures if it fails to comply with its obligations under article 48. The text of the article 49, which deals with the consequences of the failure to comply with obligations under article 48, is also relevant in this context. The provisions of chapter II are intended to provide a legal framework within which injured States may seek to vindicate their rights and to restore the legal position to which they are entitled by virtue of their international obligations. The text of the article 22, which deals with countermeasures in response to an internationally wrongful act, outlines several aspects that may contribute to a better understanding of the provisions of article 48. In particular, it is stated that, in addition to the circumstances described in paragraphs 1 and 2, a claim must be made within a reasonable time after the occurrence of the internationally wrongful act and that the claimant may be liable to countermeasures if it fails to comply with its obligations under article 48. The text of the article 49, which deals with the consequences of the failure to comply with obligations under article 48, is also relevant in this context.
This chapter also deals to some extent with the con-
obligation but justified as a necessary and proportionate
response to an internationally wrongful act of the State against which they
committed an internationally
are taken. They are essentially tem-
mand and exceptional nature of coun-
tions …
T wo. The limited object and exceptional nature of coun-
termeasures are indicated by the use of the word 'only' in
paragraph 1 of article 49.

(5) This does not mean that countermeasures may not
be adopted against a State which is the author of the internationally wrongful act. Countermeasures may not be directed against States other than the responsible State. In a situation where a third State is owed an international obligation by the State
which injured the State taking the countermeasure. This
point was clearly made in (C) in the Gabonese Air Service
Agreement case, in the following passage:

"Naulilaa"

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Section 3

1. Countermeasures shall not affect:

(a) the obligations of a State as a successor to a predecessor State, provided the other conditions laid down in chapter II are satisfied.

(b) the obligations of a State which had ceased to be the State in question by reason of its annexation, incorporation or other legal means, provided the other conditions laid down in chapter II are satisfied.

2. A State taking countermeasures shall:

(a) require that the injured State fulfill its obligations under peremptory norms of international law.

(b) require the injured State to modify its behavior so as to prevent or terminate the circumstances precluding wrongfulness elaborated in chapter V of Part One.

(c) require the injured State to ensure that the injury is redressed.

(d) under any dispute settlement procedure applicable to the circumstances, such sanctions should always be designed to secure the removal of the cause of the injury and the restoration of the situation existing before the injury.

3. The obligations dealt with in article 50 fall into two categories:

(a) obligations under peremptory norms of international law;

(b) other obligations.

4. Paragraph 1(a) provides that a lawful countermeasure must be "limited by the requirements of humanity and the demands of the public conscience".

The reference to "other" obligations under part II to preclude the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.

Commentary

(1) Paragraph 1(a) specifies certain obligations the performance of which may not be suspended or terminated by countermeasures. These obligations are referred to as "peremptory norms of international law".

(2) Paragraph 1(b) specifies certain obligations which, by reason of their character, must not be the subject of countermeasures at all. Paragraph 2 deals with this type of obligations.

(3) Paragraph 1(c) reiterates for the purposes of article 26 that the recognition in article 26 that "a lawful countermeasure must be limited by the requirements of humanity and the demands of the public conscience".

(4) Paragraph 1(d) implies that a State's failure to provide adequate redress for an injury may be considered as an act of reprisal.

(5) The paragraph reiterates, in the context of article 26, the passage in the Declaration on Principles Guiding Relations between States and in their Mutual Relations from Any Act of Reprisal by Force, that the recognition in article 26 that a lawful countermeasure must be limited by the requirements of humanity and the demands of the public conscience.

(6) The paragraph reiterates, in the context of article 30, the passage in the Declaration on Principles Guiding Relations between States and in their Mutual Relations from Any Act of Reprisal by Force, that the recognition in article 30 that a lawful countermeasure must be limited by the requirements of humanity and the demands of the public conscience.

(7) The paragraph reiterates, in the context of article 50, the passage in the Declaration on Principles Guiding Relations between States and in their Mutual Relations from Any Act of Reprisal by Force, that the recognition in article 50 that a lawful countermeasure must be limited by the requirements of humanity and the demands of the public conscience.

(8) The paragraph reiterates, in the context of article 60, the passage in the Declaration on Principles Guiding Relations between States and in their Mutual Relations from Any Act of Reprisal by Force, that the recognition in article 60 that a lawful countermeasure must be limited by the requirements of humanity and the demands of the public conscience.

(9) The paragraph reiterates, in the context of article 70, the passage in the Declaration on Principles Guiding Relations between States and in their Mutual Relations from Any Act of Reprisal by Force, that the recognition in article 70 that a lawful countermeasure must be limited by the requirements of humanity and the demands of the public conscience.

(10) The paragraph reiterates, in the context of article 80, the passage in the Declaration on Principles Guiding Relations between States and in their Mutual Relations from Any Act of Reprisal by Force, that the recognition in article 80 that a lawful countermeasure must be limited by the requirements of humanity and the demands of the public conscience.

(11) The paragraph reiterates, in the context of article 90, the passage in the Declaration on Principles Guiding Relations between States and in their Mutual Relations from Any Act of Reprisal by Force, that the recognition in article 90 that a lawful countermeasure must be limited by the requirements of humanity and the demands of the public conscience.

(12) The paragraph reiterates, in the context of article 100, the passage in the Declaration on Principles Guiding Relations between States and in their Mutual Relations from Any Act of Reprisal by Force, that the recognition in article 100 that a lawful countermeasure must be limited by the requirements of humanity and the demands of the public conscience.

(13) The paragraph reiterates, in the context of article 110, the passage in the Declaration on Principles Guiding Relations between States and in their Mutual Relations from Any Act of Reprisal by Force, that the recognition in article 110 that a lawful countermeasure must be limited by the requirements of humanity and the demands of the public conscience.
nullification and the continued validity or effect of which is challenged. As ICJ said in *Appeal Relating to the Jurisdiction of the ICAO Council*, "nullification may be taken as a countermeasure only if it is in response to an act constituting a breach of an international obligation and if it is consistent with the provisions of the applicable international law." In this case, the United States' actions were a breach of its obligations under the WTO agreements, as evidenced by the WTO panel's findings and the appellate body's confirmation. Therefore, the United States' actions were a valid countermeasure.

The question of proportionality arises when determining whether the countermeasure is excessive in relation to the act that prompted it. Proportionality is a principle that requires states to consider the severity of the act in question and the potential harm that a countermeasure could cause. In the case of the United States' actions, the measure was not clearly disproportionate, given the gravity of the situation and the need for a response consistent with the WTO framework.

Furthermore, the United States' actions were not in violation of the Vienna Convention on Diplomatic Relations, as argued by the plaintiff. The United States' actions were within the scope of its diplomatic privileges and immunities, and the plaintiff's claims were therefore inadmissible due to the immunity of diplomatic representatives.

In conclusion, the United States' actions were a valid and proportionate countermeasure in response to the plaintiff's violations of the applicable international law, as evidenced by the findings of the WTO panel and appellate body. The court thus found in favor of the United States, confirming its actions as lawful and consistent with international law.
Article 52. Conditions relating to resort to countermeasures

1. Before taking countermeasures, an injured State shall:

(a) call upon the responsible State, in accordance with article 43, to fulfill its obligations under Part X of the Treaty on the Construction and Operation of the Barrage System of 1977, and
(b) notify the responsible State of any decision to take countermeasures thereunder.

2. A dispute is not "pending before a court or tribunal" for the purposes of paragraph 3 (b) unless, and until, the injured State has taken all measures necessary to achieve the result of ensuring compliance.

3. Countermeasures may not be taken if:

(a) the internationally wrongful act has ceased;
(b) the dispute is pending before a court or tribunal established pursuant to a treaty to which both parties are parties; or
(c) the injured State has consented to the jurisdiction of such a court or tribunal.

4. Paragraph 3 does not apply if the responsible State fails to implement the dispute settlement procedure in good faith.

5. In other areas of the law, where proportionality is a matter of principle, the test and the circumstances of the case shall be such as to determine whether the countermeasures are necessary to achieve the result of ensuring compliance.

6. The Court considers that Czechoslovakia, by unilaterally assuming jurisdiction over the Nagymaros Project, has infringed article 36 of the Convention on the Law of the Sea, as well as the rights in question under the International Convention on the Transfer of Undertakings at the Time of Nationalizations or Expropriations, 1973.

7. Paragraph 3 does not apply in the case of the Air Service Agreement for the period during which the dispute is pending before a court or tribunal established pursuant to it.

8. The principle underlying the notification requirement is that the internationally wrongful act has continued.

9. The principle underlying the notification requirement is that countermeasures are not taken until the dispute is pending before a court or tribunal established pursuant to a treaty.

10. Paragraph 3 does not apply if the responsible State has been notified of the decision to take countermeasures, and has not objected thereto within a reasonable time.

11. Paragraph 3 does not apply if the responsible State has been notified of the decision to take countermeasures, and has not objected thereto within a reasonable time.

12. Paragraph 3 does not apply if the responsible State has been notified of the decision to take countermeasures, and has not objected thereto within a reasonable time.

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34. Paragraph 3 does not apply if the responsible State has been notified of the decision to take countermeasures, and has not objected thereto within a reasonable time.

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In October 1978, the United States Congress adopted legislation prohibiting emergency measures against Ugandans. The legislation recited that "[t]he President is authorized to take such measures as he deems necessary to defend the economy of the United States against the current and future effects of the war in Vietnam." This immediate suspension was contrary to the terms of the 1947 United States-Union (1981) Collective Measures against Argentina (1982). The United States Senate, United States Air Force (1990), which suspended landing rights of South African Airlines on United States territory, was justified as a measure which should encourage the Government of Iran to withdraw its forces from the disputed territory. The question is to what extent these States may legitimately assert a right to react against unremedied breaches. The suspension procedures provided for in the respective treaties were disregarded. If the non-performance of bilateral aviation agreements. (3) Practice on the subject is limited and rather embryonic. In a number of cases referred to in Part I, there has been no indication that the States concerned have attempted to invoke the responsibility of a State for an internationally wrongful act.

Article 55. Termination of countermeasures. Countermeasures shall be terminated as soon as the responsible State has complied with its obligations under Part Two in relation to the internationally wrongful act.

Commentary.

(1) Chapter II deals with the right of an injured State to take countermeasures against a responsible State in order to induce that State to comply with its obligations of cessation and reparation. The text of article 53 allows for the suspension of obligations under article 48 to invoke the responsibility of a State for an internationally wrongful act. Such countermeasures may also demand cessation of the conduct of affairs, which is to be requested by the injured State. It is vital for this purpose to distinguish between individual measures, whether taken by one State or by a group of States, in the case of other obligations established for the protection of the collective interest. The latter are particularly relevant in the context of countermeasures in response to the Iraqi invasion with the consent of the Security Council immediately condemned the invasion. European Community member States and the United Kingdom, France, the Netherlands, and the United States contributed to the establishment of a non-racial democracy.

(2) It is vital for this purpose to distinguish between individual measures, whether taken by one State or by a group of States, in the case of other obligations established for the protection of the collective interest. The latter are particularly relevant in the context of countermeasures in response to the Iraqi invasion with the consent of the Security Council immediately condemned the invasion. European Community member States and the United Kingdom, France, the Netherlands, and the United States contributed to the establishment of a non-racial democracy.

(3) More generally, the articles do not cover the case where action is taken by a single or by a group of States, in the case of other obligations established for the protection of the collective interest. The latter are particularly relevant in the context of countermeasures in response to the Iraqi invasion with the consent of the Security Council immediately condemned the invasion. European Community member States and the United Kingdom, France, the Netherlands, and the United States contributed to the establishment of a non-racial democracy.

(4) In the case of countermeasures by a single State or by a group of States, the injured State has the right to demand cessation of the conduct of affairs, which is to be requested by the injured State. It is vital for this purpose to distinguish between individual measures, whether taken by one State or by a group of States, in the case of other obligations established for the protection of the collective interest. The latter are particularly relevant in the context of countermeasures in response to the Iraqi invasion with the consent of the Security Council immediately condemned the invasion. European Community member States and the United Kingdom, France, the Netherlands, and the United States contributed to the establishment of a non-racial democracy.

(5) The suspension procedures provided for in the respective treaties were disregarded. If the non-performance of bilateral aviation agreements. (3) Practice on the subject is limited and rather embryonic. In a number of cases referred to in Part I, there has been no indication that the States concerned have attempted to invoke the responsibility of a State for an internationally wrongful act.

(6) Under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, the State of nationals and shareholders may invoke the responsibility of a State for an internationally wrongful act. In the case of other obligations established for the protection of the collective interest. The latter are particularly relevant in the context of countermeasures in response to the Iraqi invasion with the consent of the Security Council immediately condemned the invasion. European Community member States and the United Kingdom, France, the Netherlands, and the United States contributed to the establishment of a non-racial democracy.
The Federal Republic of Yugoslavia protested these measures as "unlawful, unilateral and an example of forcible interference with the political independence of Suriname. In response to a crackdown by the new Government on opposition movements in December 1982, the Dutch Government suspended the financial assistance that was to be made available to Suriname under the terms of a loan agreement. This measure was taken in response to a breach of the terms of the agreement, which is inconsistent with a covered agreement. For WTO purposes, "compensation" refers to the future conduct, not past conduct, and involves a limited number of States. At present, there are no international agreements that are applicable to the case of fighting within the Federal Republic of Yugoslavia. European Community members suspended and later denounced the 1983 General Agreement on Tariffs and Trade (GATT) in response to a breach of the terms of the agreement, which is later in time. Thus, the legal consequences of a breach of some overriding rule may be modified, leaving other aspects still applicable. An example of the former is the WTO Understanding on Rules and Procedures governing the Settlement of Disputes, which would authorize a compensatory form of response. In some cases, it will be clear from the language of the treaty whether the provisions in question are intended to apply to the case of fighting within the Federal Republic of Yugoslavia. European Community members suspended and later denounced the 1983 General Agreement on Tariffs and Trade (GATT) in response to a breach of the terms of the agreement, which is inconsistent with a covered agreement. For WTO purposes, "compensation" refers to the future conduct, not past conduct, and involves a limited number of States. At present, there are no international agreements that are applicable to the case of fighting within the Federal Republic of Yugoslavia. European Community members suspended and later denounced the 1983 General Agreement on Tariffs and Trade (GATT) in response to a breach of the terms of the agreement, which is later in time.
Article 57. Responsibility of an international organization

These articles are not prejudicial to any question of State responsibility or of the international responsibility of any person acting on behalf of a State.

Commentary

Article 58. Individual responsibility

These articles are not prejudicial to any question of the individual responsibility of any person acting on behalf of a State.

Commentary

1. Article 58 makes clear that the articles as a whole do not address questions of individual responsibility. As a result, any question of individual responsibility remains governed by the law of international responsibility, as set out in the law of treaties, the law of State responsibility, and other relevant sources of international law.

2. This is consistent with the principle that individual responsibility is a matter of legal personality, and is therefore governed by the law of State responsibility.

3. As a result, any question of individual responsibility must be addressed by reference to the law of State responsibility, as set out in the law of treaties, the law of State responsibility, and other relevant sources of international law.

4. This is consistent with the principle that individual responsibility is a matter of legal personality, and is therefore governed by the law of State responsibility.

5. As a result, any question of individual responsibility must be addressed by reference to the law of State responsibility, as set out in the law of treaties, the law of State responsibility, and other relevant sources of international law.
State is not exempted from its own responsibility for internationally wrongful conduct by the prosecution and punishment of the State officials who carried it out. Nor may those officials hide behind the State in respect of their own responsibility for conduct of theirs which is contrary to rules of international law which are applicable to them. The former principle is reflected, for example, in article 25, paragraph 4, of the Rome Statute of the International Criminal Court, which provides that: "[n]o provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law." The latter is reflected, for example, in the well-established principle that official position does not excuse a person from individual criminal responsibility under international law.

(4) Article 58 reflects this situation, making it clear that the articles do not address the question of the individual responsibility under international law of any person acting on behalf of a State. The term "individual responsibility" has acquired an accepted meaning in the light of the Rome Statute and other instruments; it refers to the responsibility of individual persons, including State officials, under certain rules of international law for conduct such as genocide, war crimes and crimes against humanity.

840 Prosecution and punishment of responsible State officials may be relevant to reparation, especially satisfaction: see paragraph (5) of the commentary to article 36.

841 See, e.g., the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, Principle III (footnote 836 above), p. 375; and article 27 of the Rome Statute of the International Criminal Court.

Article 59. Charter of the United Nations

These articles are without prejudice to the Charter of the United Nations.

Commentary

(1) In accordance with Article 103 of the Charter of the United Nations, "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail". The focus of Article 103 is on treaty obligations inconsistent with obligations arising under the Charter. But such conflicts can have an incidence on issues dealt with in the articles, as for example in the Lockerbie case. More generally, the competent organs of the United Nations have often recommended or required that compensation be paid following conduct by a State characterized as a breach of its international obligations, and article 103 may have a role to play in such cases.

(2) Article 59 accordingly provides that the articles cannot affect and are without prejudice to the Charter of the United Nations. The articles are in all respects to be interpreted in conformity with the Charter.

Articles on prevention of transboundary harm from hazardous activities (with commentaries), Yearbook of the International Law Commission, 2001, Vol. II, Part Two
NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

References to the *Yearbook of the International Law Commission* are abbreviated to *Yearbook ...*, followed by the year (for example, *Yearbook ... 2000*).

The *Yearbook* for each session of the International Law Commission comprises two volumes:

- Volume I: summary records of the meetings of the session;
- Volume II (Part One): reports of special rapporteurs and other documents considered during the session;
- Volume II (Part Two): report of the Commission to the General Assembly.

All references to these works and quotations from them relate to the final printed texts of the volumes of the *Yearbook* issued as United Nations publications.
Article 1. Scope

The present articles apply to activities, not prohibited by international law, which involve a risk of causing significant transboundary harm through their physical consequences.

The term "transboundary harm" means any damage, threat of damage, impairment or risk of impairment to the environment on the territory of another State caused by an activity situated on the territory of a State, in such a chain of causation, makes it also imperative for operators of hazardous activities to take all steps necessary to prevent or abate any transboundary environmental damage and to provide reparation for any such damage.

The term "cause" means the physical link between the activities and the environmental damage, and even the several intermediate links necessary to bring about the damage.

The term "activity" means any human action or activity bringing about an environmental impact, and includes any event or series of events that has the potential to cause adverse effects within the territory of another State, such as actions or events within the territory of a State that may have adverse consequences on the environment of another State.

The term "transboundary environmental damage" means any adverse effect on the environment of another State caused by an activity situated on the territory of a State, in such a chain of causation.

The term "environmental impact" means any change in the environment in the territory of another State caused by an activity situated on the territory of a State, in such a chain of causation.

The term "significant environment damage" means any damage or threat of damage to the environment that may adversely affect human health, animal or plant life, or property, or that may affect the environment in such a way as to hamper the achievement of the environmental objectives set out in the relevant environmental legislation of the States concerned.

The term "environmental objectives" means the environmental objectives set out in the relevant environmental legislation of the States concerned.
The concept of "territory" (1) for the purposes of these articles extends to the establishment of the jurisdiction of a State on the territorial sea, as well as to the territorial sea of an island territory, as defined in article 49 of the United Nations Convention on the Law of the Sea.

The term "accident" (2) extends to any accidental event which involves the risk of causing significant transboundary harm, as defined in article 2, subparagraph (d), is one of the elements of the concept of "international liability for injurious consequences of activities not prohibited by international law" (3).

The term "protection" (4) is defined in articles 2 and 3 of the United Nations Convention on the Law of the Sea.

The term "international law" (5) includes any law, practice, or procedure recognized as customary international law, any treaty, any international convention, any decision of an international organ or court, or any international agreement, as defined in article 38 of the Statute of the International Court of Justice.

The term "significant transboundary harm" (6) is defined in article 2 of the United Nations Convention on the Law of the Sea.

The term "prevention" (7) is defined in article 3 of the United Nations Convention on the Law of the Sea.

The term "responsible State" (8) is defined in articles 2 and 3 of the United Nations Convention on the Law of the Sea.

The term "transboundary harm" (9) is defined in article 2 of the United Nations Convention on the Law of the Sea.

The term "activity" (10) is defined in article 1 of the United Nations Convention on the Law of the Sea.

The term "significant" (11) is defined in article 2 of the United Nations Convention on the Law of the Sea.

The term "activity not prohibited by international law" (12) is defined in article 1 of the United Nations Convention on the Law of the Sea.

The term "legal" (13) is defined in article 2 of the United Nations Convention on the Law of the Sea.

The term "party" (14) is defined in article 2 of the United Nations Convention on the Law of the Sea.

The term "resulting from" (15) is defined in article 2 of the United Nations Convention on the Law of the Sea.

The term "transboundary" (16) is defined in article 2 of the United Nations Convention on the Law of the Sea.

The term "significant transboundary harm" (17) is defined in article 2 of the United Nations Convention on the Law of the Sea.

The term "international liability for injurious consequences of activities not prohibited by international law" (18) is defined in article 1 of the United Nations Convention on the Law of the Sea.

The term "damage" (19) is defined in article 2 of the United Nations Convention on the Law of the Sea.

The term "economic" (20) is defined in article 2 of the United Nations Convention on the Law of the Sea.

The term "natural" (21) is defined in article 2 of the United Nations Convention on the Law of the Sea.

The term "environmental" (22) is defined in article 2 of the United Nations Convention on the Law of the Sea.

The term "furthermore" (23) is defined in article 2 of the United Nations Convention on the Law of the Sea.
The term "significant harm," as defined in paragraph 9, means the suffering of a high probability of causing significant transboundary harm, as that term is defined in paragraph 10, to the environment of another State or of areas beyond the limits of national jurisdiction. This definition is intended to provide a threshold for determining when an activity conducted by a State is likely to be significant harm to the environment of another State or of areas beyond the limits of national jurisdiction. The threshold is intended to be lower than the level of harm that would be considered significant in the context of the ordinary activities of States. The threshold is designed to reflect the principle of the "harm of one State to the other" and to ensure that States take all appropriate measures to prevent significant transboundary harm. The threshold also reflects the principle of the "seriousness of the harm" and the need to ensure that States take all appropriate measures to prevent significant transboundary harm. The threshold is designed to be consistent with the principles of the Stockholm Declaration, which states that "serious consequences for the environment of other States or of areas beyond the limits of national jurisdiction should be avoided." The threshold is also consistent with the principles of the United Nations Convention on the Law of the Sea, which states that "States shall take all appropriate measures to prevent significant transboundary harm."
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Article 4. Cooperation

States concerned shall cooperate in good faith and, as necessary, seek the assistance of one or more compre-

hensive information exchange mechanisms to prevent or mitigate the risk thereof.

Commentary

(1) The principle of cooperation between States is ex-

pressed in article 3(1), which provides that States shall, in exercising their rights and freedoms,

respect the obligation to avoid causing or threatened causal effects to States not当事icipating in an international

activity, to other States or to private persons, with a view to effecting in the light of the situation, which may

render the use of such assistance necessary to prevent or mitigate the risk thereof.

(2) The article requires each of the States concerned to cooperate to prevent or mitigate the risk thereof, and

if the risk is not prevented or mitigated by means of such cooperation, each of the States concerned shall

take the measures necessary to prevent or mitigate the risk thereof. The standard of cooperation is

that of the principle of good faith, as expressed in article 18, and of the principle of the benefit of doubt,

as expressed in article 19, and of the principle of due diligence, as expressed in article 20. The

standard of cooperation is that of the principle of good faith, as expressed in article 18, and of the

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that of the principle of good faith, as expressed in article 18, and of the principle of the benefit of
doubt, as expressed in article 19, and of the principle of due diligence, as expressed in article 20.
3. The State of origin, which has the main responsibility to monitor these activities, is given the necessary legal, administrative, or other measures to implement the provisions of this Convention, including, with respect to proposed activities, the approval or authorization of the States concerned to carry out such activities. The States concerned shall take the necessary measures to ensure that the activities are carried out in accordance with the Convention.

4. The action referred to in article 5 may appropriately be taken where the obligations of States under the Convention are not being carried out or are being carried out in a manner inconsistent with the Convention. The action may include inspection, visits, or other measures to determine compliance with the provisions of the Convention. The action may also include the enforcement of penalties or other sanctions if necessary.

5. States concerned shall ensure that the cooperation, assistance, and assistance measures provided for under this article are carried out in a manner consistent with the provisions of the Convention and with the principles of good faith in international relations. They shall ensure that the cooperation, assistance, and assistance measures are provided in a manner that is not inconsistent with the interests of international peace and security.

6. Requests for cooperation, assistance, and assistance measures under this article shall be made in accordance with the provisions of the Convention. The requests shall be made in a manner consistent with the principles of good faith in international relations. The States concerned shall ensure that the cooperation, assistance, and assistance measures are carried out in a manner that is consistent with the provisions of the Convention and the principles of good faith in international relations.

7. This article applies to all activities conducted by States in a position to contribute to the goals of these activities. It applies to all States in a position to contribute to the goals of these activities, including, but not limited to, States in a position to contribute to the goals of the Convention of the United Nations on the Law of the Sea. It applies to all States in a position to contribute to the goals of the Convention of the United Nations on the Law of the Sea, including, but not limited to, States in a position to contribute to the goals of the Convention of the United Nations on the Law of the Sea.
The environmental impact assessment has become very prevalent in order to assess whether a particular activity has the potential of causing significant transboundary harm. The legal obligation to conduct an environmental impact assessment under national laws or as part of international agreements, such as the Convention on the Protection of the Marine Environment from Pollution by Dumping of Wastes and on the Prevention of Pollution of the Sea by Fuel油, has been established in various legal instruments. The purpose of this article, together with articles 9, 11, 12 and 13, is to provide the State of origin that provides the State likely to be affected with timely notification of the risk and all other relevant information on which the assessment is based. This article does not oblige the State of origin to require risk assessment for any activity being undertaken within their territory or otherwise under their jurisdiction. The requirement of notification is an indispensable part of any system designed to prevent transboundary harm or to minimize the risk thereof.

The assessment should include all the effects of the activity related to the environment, both within and outside the jurisdiction of the State concerned. The assessment should be conducted by an independent authority. The assessment should be comprehensive, covering all aspects of the activity, including the identification of potential adverse impacts and the development of appropriate measures to mitigate or prevent them. The assessment should be transparent and participatory, involving stakeholders and the public.

The assessment should be based on a broad range of information, including scientific data, expert opinion, and stakeholder input. The assessment should be able to quantify the likely environmental impacts of the activity and to evaluate the risk to which the activity is likely to be exposed. The assessment should also consider the cumulative effects of similar activities and the risks associated with the potential for future development.

The assessment should be able to indicate whether the activity is likely to cause significant transboundary harm. This assessment should be able to identify the affected States and to provide them with timely notification of the risk and all other relevant information on which the assessment is based. The assessment should also provide the State of origin with the necessary information to make an informed decision.

The assessment should be subject to public participation and to the conclusions reached by that authority. The assessment should be able to indicate whether the activity is likely to cause significant transboundary harm. This assessment should be able to identify the affected States and to provide them with timely notification of the risk and all other relevant information on which the assessment is based. The assessment should also provide the State of origin with the necessary information to make an informed decision.
Article 9. Conclusions on preventive measures

1. The States concerned shall enter into consultation with each other in order to achieve a balanced solution. The consultations shall also include the States that may be affected. The consultations shall seek solutions for preventing significant transboundary harm, and for any other action that the States concerned agree to undertake in order to prevent the activity from causing significant transboundary harm.

2. The States concerned shall seek solutions based on an equitable balance of interests in the light of international law.

3. If the consultations referred to in paragraph 1 are unsuccessful, the States concerned shall agree to enter into a procedure in order to achieve a solution. The procedure shall be conducted in accordance with the rules of international law.

Article 10. Factors involved in an equitable balance of interests

(a) the degree of risk of significant transboundary harm and the availability of means of preventing significant transboundary harm;

(b) the importance of the activity, taking into account its economic and social benefits and its environmental impact;

(c) the prior use of similar activities by the State of origin and the potential risk for the States likely to be affected;

(d) the degree to which the State of origin and other States likely to be affected have cooperated in the preparation of the activity.

(8) Article 9 has a broad scope of application. It is to apply to all issues related to preventive measures. For example, it applies in cases of prior authorization, following the development of a certain method of delimitation, or before the commencement of an activity.

(9) The procedure for notification has been established in the case of the North Sea Continental Shelf (see footnote 197 above), para. 85.

(5) Consultations shall be conducted in good faith and in accordance with the principles of international law.

(6) The States concerned shall provide guidance for States when entering into such consultations. The guidance shall include information on the applicable rules of international law, the likely impact of the activity, and the possible solutions for preventing significant transboundary harm.

(7) Article 9 may be used to maintain a balance between two equally important considerations. For example, the States concerned may consider the economic benefits of the activity and the environmental impact on a case-by-case basis.

(8) The States concerned shall be aware of the obligations imposed by international law in order to prevent the activity from causing significant transboundary harm.
(e) the economic viability of the activity in relation to the costs of prevention and to the possibility of
replacing it with an alternative activity;

(f) the standards of prevention which the State
likely to be affected applies to the same or comparable
activities and the standards applied in comparable
regional or international practice.

Commentary

(1) The purpose of this article is to provide some guidance for States which are engaged in consultations seek-
ing to achieve an equitable balance of interests. In reach-
ing an equitable balance of interests, the facts have to be established and the factors and circumstances weighed. This article draws its inspiration from article 6

(2) The main clause of the article provides that in order to achieve an equitable balance of interests as referred to in paragraph 2 of article 9, the States concerned shall take into account all relevant factors and circumstances”.

The article proceeds to set forth a non-exhaustive list of such factors and circumstances. The wide diversity of types of activities which are covered by these factors, and the different situations and circumstances in which they will be conducted, make it impossible to compile an ex-
haustive list of factors relevant to all individual cases. No priori or weight is assigned to the factors and circum-
cstances listed, since some of them may be more important in certain cases while others may deserve to be accorded greater weight in other cases. In general, the factors and circumstances indicated are intended to be parties to the costs and benefits which may be involved in a partic-
ular case.

(3) Subparagraph (a) compares the degree of risk of significant transboundary harm to the availability of means of preventing such harm or minimizing the risk thereof and the possibility of repairing the harm. For example, the degree of risk of serious or irreversible damage is high where there may be measures that can prevent the harm or reduce that risk, or there may be possibilities for repairing the harm. The comparisons here are both quantitative and qualitative.

(4) Subparagraph (b) compares the importance of the activity in terms of its social, economic and technical advan-
tages for the State of origin and the potential and the harm to the States likely to be affected. The Commission in this context recalls the decision in the Donauwinksel case where the court stated that:

The interests of the States in question must be weighed in an equitable manner against one another. One must consider not only the absolute injury caused to the neighbouring State, but also the relation of the advantage gained by the one to the injury caused to the other.

(5) Subparagraph (c) compares, in the same fashion as subparagraph (a), the risk of significant harm to the envi-
ronment and the availability of means of preventing such harm, or minimizing the risk thereof and the possibil-
ity of restoring the environment. It is necessary to empha-
size the particular importance of protection of the envi-
ronment. Principle 15 of the Rio Declaration is relevant in this context. Subparagraph (d) will be covered in the section on the precautionary principle.

(6) The precautionary principle was affirmed in the "pan-
european" Bergen Ministerial Declaration on Sustainable Development in the ECE Region, adopted in May 1990 by the ECE member States. It stated that: "Environmental measures must anticipate, prevent and attack the causes of pollution in the environment. Where there are threats of serious or irreversible damage, lack of scientific certainty should not be used as a reason for postponing cost-
effective measures to prevent environmental degradation."

(7) According to the Rio Declaration, the precaution-
ary principle constitutes a very general rule of conduct of public authorities and mankind in general in attaining the obligations of prevention in a continuous manner to keep abreast of the advances in scientific knowledge.

(8) States should consider suitable means to restore, as far as possible, the situation existing prior to the oc-
currence of harm. It is considered that this should be highlighted as a factor to be taken into account by States concerned which should adopt environmentally friendly measures.

(9) Subparagraph (d) provides that one of the elements determining the choice of preventive measures is the willingness of the State of origin and States likely to be affected to contribute to the cost of prevention. For exam-
ple, if the States likely to be affected are prepared to contribute to the expense of preventive measures, it may be reasonable, taking into account other factors, to expect the States of origin to take more drastic preventive measures. This, however, should not underplay the measures the State of origin is obliged to take under these articles.

(10) These considerations are in line with the basic pol-
icy of the so-called polluter-pays principle. This princ-
iple was given cognizance at the Convention on the Protection of the Rhine against Pollution from Chlorides, with the Additional Protocol to the Convention on the Protection of the Rhine against Pollution from Chlorides (Berlin, Duncker und Humblot, 1992), pp. 406–411;

"Pollution is the damage caused to the environment, the community as amended by the Treaty of Amsterdam; and arti-
cle 2 of the Vienna Convention for the Protection of the Ozone Layer. It may be noted that previous treaties apply the precautionary principle in a very general sense without making any explicit reference to it.

(11) The expression "as appropriate" indicates that the State of origin and the States likely to be affected are not put on the same level as regards the contribution to the cost of preventive measures. In so doing, they proceed from the basic principle derived from article 3 according to which these costs are to be assumed by the operator or the State of origin. These negotiations mostly occur in cases where there is no agreement on the amount of the pre-
ventive measures and where the affected State contributes to the cost of preventive measures in order to ensure a higher degree of protection that it desires over and above what is essential for the State of origin to ensure. This link between the distribution of costs and the amount of preventive measures is in particular reflected in subparagraph (d).

(12) Subparagraph (e) introduces a number of factors that must be compared and taken into account. The eco-
nomic viability of the activity must be compared to the costs of prevention. The cost of the preventive measures should not be so high as to make the activity economically non-viable. The economic viability of the activity should also be assessed in terms of the possibility of changing the

382 See OECD Council recommendation C(72)128 on Principles rel-
ed to oceans or coastal and marine uses of environmental concepts, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.

This is conceived as the most efficient means of allocating the cost of pollution prevention and control measures so as to encourage the rational use of scarce resources. It also
encourages internalization of the cost of publicly man-
aged activities and reduces the level of pollution and competitive distortions in governmental subsidies.

This principle is specifically referred to in article 174 (ex-
article 130) of the Treaty establishing the European Community as amended by the Treaty of Amsterdam.

779 See footnote 857 above.

Article 12. Exchange of information

The expression "State" is not intended to exclude a non-State party to the条约. The phrase "exchange of information" is used in the treaty to include all relevant information concerning a risk of significant transboundary harm or any event that may result in such harm.

The treaty provides for the exchange of information to prevent or minimize significant transboundary harm. Article 12 deals with the exchange of information under article 8. In the case of an activity carried out in another State, the State (or that other States, if they are a large number of States) concerned may request that the State of origin provide the information under article 8. The request may be made in writing, and the State of origin is required to respond within a reasonable time.

The treaty also provides for the exchange of information between the States concerned and the State of origin, as well as between the States directly concerned. The States concerned and the State of origin are required to exchange information in a timely manner, and the State of origin is required to take appropriate measures to prevent or minimize significant transboundary harm.

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(1) Article 14 is intended to create a narrow exception to the obligation of States to provide information in accordance with articles 8, 12 and 13. States are not obligated to provide information concerning industrial secrets. The obligation is to provide as much information as possible under the circumstances. The words "as much information as possible under the circumstances" refer to the conditions invoked for withholding information on the grounds of security or industrial secrecy to cooperate in good faith with the other States in providing as much information as possible under the circumstances. The words "as much information as possible under the circumstances" refer to the conditions invoked for withholding information on the grounds of security or industrial secrecy to cooperate in good faith with the other States in providing as much information as possible under the circumstances.

(2) Article 15 provides for a similar exception to the requirement of disclosure of information about national security and industrial secrecy. The obligation is to provide as much information as possible under the circumstances. The words "as much information as possible under the circumstances" refer to the conditions invoked for withholding information on the grounds of security or industrial secrecy to cooperate in good faith with the other States in providing as much information as possible under the circumstances.

(3) Article 15 also states that if the State of origin is withholding information on the grounds of state secrets, it may provide as much information as possible under the circumstances. The words "as much information as possible under the circumstances" refer to the conditions invoked for withholding information on the grounds of state secrets to cooperate in good faith with the other States in providing as much information as possible under the circumstances.

(4) Article 15 is intended to create a narrow exception to the obligation of States to provide information in accordance with articles 8, 12 and 13. States are not obligated to provide information concerning industrial secrets. The obligation is to provide as much information as possible under the circumstances. The words "as much information as possible under the circumstances" refer to the conditions invoked for withholding information on the grounds of security or industrial secrecy to cooperate in good faith with the other States in providing as much information as possible under the circumstances.

(5) Article 15 also provides for a similar exception to the requirement of disclosure of information about national security and industrial secrecy. The obligation is to provide as much information as possible under the circumstances. The words "as much information as possible under the circumstances" refer to the conditions invoked for withholding information on the grounds of security or industrial secrecy to cooperate in good faith with the other States in providing as much information as possible under the circumstances.

(6) Article 15 also states that if the State of origin is withholding information on the grounds of state secrets, it may provide as much information as possible under the circumstances. The words "as much information as possible under the circumstances" refer to the conditions invoked for withholding information on the grounds of state secrets to cooperate in good faith with the other States in providing as much information as possible under the circumstances.

(7) The obligation of States to provide information in accordance with articles 8, 12 and 13 is intended to create a narrow exception to the obligation of States to provide information in accordance with articles 8, 12 and 13. States are not obligated to provide information concerning industrial secrets. The obligation is to provide as much information as possible under the circumstances. The words "as much information as possible under the circumstances" refer to the conditions invoked for withholding information on the grounds of security or industrial secrecy to cooperate in good faith with the other States in providing as much information as possible under the circumstances.

(8) Article 15 also provides for a similar exception to the requirement of disclosure of information about national security and industrial secrecy. The obligation is to provide as much information as possible under the circumstances. The words "as much information as possible under the circumstances" refer to the conditions invoked for withholding information on the grounds of security or industrial secrecy to cooperate in good faith with the other States in providing as much information as possible under the circumstances.
The State of origin shall develop contingency plans for responding to possible emergencies, in cooperation, where appropriate, with the State likely to be affected and with international organizations concerned. The Convention on the Law of the Non-Navigational Uses of International Watercourses contains several provisions concerning international watercourses. It provides for the development of contingency plans to respond to emergencies, in cooperation, where appropriate, with the State likely to be affected and with international organizations concerned. The obligation to develop contingency plans is also found in certain bilateral and multilateral agreements, such as the Convention on the Protection of the Marine Environment of the North East Atlantic, the Convention on the Protection of the Marine Environment in the North Sea, and the Agreement for the Protection of the North Sea against Pollution, which establishes a framework for the development of contingency plans to respond to emergencies in the North Sea. The need for the development of contingency plans for responding to possible emergencies is well recognized in international law, as evidenced by the recommendations of the United Nations Commission on International Trade Law (UNCITRAL) and the International Law Commission (ILC) on the topic. The provisions of the first paragraph of this article shall be equally applicable in the case of proceedings concerning compensation for damage caused by environmentally harmful activities. The provisions of article 198 of the Convention on Environmental Impact Assessment in a Transboundary Context shall be equally applicable in the case of proceedings concerning compensation for damage caused by environmentally harmful activities.
3. The Fact-finding Commission shall be composed of one member nominated by each party to the dispute and in addition a member not having the nationality of any of the parties to the dispute chosen by the nominated members who shall serve as Chairperson.

4. If more than one State is involved on one side of the dispute and those States do not agree on a common member of the Commission and each of them nominates a member, the other party to the dispute has the right to nominate an equal number of members of the Commission.

5. If the members nominated by the parties to the dispute are unable to agree on a Chairperson within three months of the request for the establishment of the Commission, any party to the dispute may request the Secretary-General of the United Nations to appoint a Chairperson who shall not have the nationality of any of the parties to the dispute. If one of the parties to the dispute fails to nominate a member within three months of the initial request pursuant to paragraph 2, any other party to the dispute may request the Secretary-General of the United Nations to appoint a person who shall not have the nationality of any of the parties to the dispute. The person so appointed shall constitute a single-member Commission.

6. The Commission shall adopt its report by a majority vote, unless it is a single-member Commission, and shall submit that report to the parties to the dispute setting forth its findings and recommendations, which the parties to the dispute shall consider in good faith.

Commentary

(1) Article 19 provides a basic rule for the settlement of disputes arising from the interpretation or application of the regime of prevention set out in the present articles. The rule is residual in nature and applies where the States concerned do not have an applicable agreement for the settlement of such disputes.

(2) It is assumed that the application of this article would come into play only after States concerned have exhausted all the means of persuasion at their disposal through appropriate consultation and negotiations. These could take place as a result of the obligations imposed by the present articles or otherwise in the normal course of inter-State relations.

(3) Failing any agreement through consultation and negotiation, the States concerned are urged to continue to exert efforts to settle their dispute, through other peaceful means of settlement to which they may resort by mutual agreement, including mediation, conciliation, arbitration or judicial settlement. These are means of peaceful settlement of disputes set forth in Article 33 of the Charter of the United Nations, in the second paragraph of the relevant section of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations and in paragraph 5 of section I of the Manila Declaration on the Peaceful Settlement of International Disputes, which are open to States as free choices to be mutually agreed upon.

(4) If the States concerned are unable to reach an agreement on any of the means of peaceful settlement of disputes within a period of six months, paragraph 2 of article 19 obliges States, at the request of one of them, to have recourse to the appointment of an impartial fact-finding commission. Paragraphs 3, 4, and 5 of article 19 elaborate the compulsory procedure for the appointment of the fact-finding commission. This compulsory procedure is useful and necessary to help States to resolve their disputes expeditiously on the basis of an objective identification and evaluation of facts. Lack of proper appreciation of the correct and relevant facts is often at the root of differences or disputes among States.

(5) Resort to impartial fact-finding commissions is a well-known method incorporated in a number of bilateral or multilateral treaties, including the Covenant of the League of Nations, the Charter of the United Nations and the constituent instruments of certain specialized agencies and other international organizations within the United Nations system. Its potential to contribute to the settlement of international disputes is recognized by General Assembly resolution 1967 (XVIII) of 16 December 1963 on the “Question of methods of fact-finding” and the Declaration on Fact-Finding by the United Nations in the Field of the Maintenance of International Peace and Security adopted by the General Assembly in its resolution 46/59 of 9 December 1991, annex.

(6) By virtue of the mandate to investigate the facts and to clarify the questions in dispute, such commissions usually have the competence to arrange for hearings of the parties, the examination of witnesses or on-site visits.

(7) The report of the Commission usually should identify or clarify “facts”. Insofar as they involve no assessment or evaluation, they are generally beyond further contention. States concerned are still free to give such weight as they deem appropriate to these “facts” in arriving at a resolution of the dispute. However, article 19 requires the States concerned to give the report of the fact-finding commission a good-faith consideration at the least.

947 See footnote 273 above.
948 General Assembly resolution 37/10 of 15 November 1982, annex.
949 For an analysis of the various means of peaceful settlement of disputes and references to relevant international instruments, see Handbook on the Peaceful Settlement of Disputes between States (United Nations publication, Sales No. E.92.V.7).
951 The criteria of good faith are described in the commentary to article 9.
Principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities (with commentaries), Report of the International Law Commission, Fifty-eighth session (1 May-9 June and 3 July-11 August 2006), A/61/10
Report of the International Law Commission
Fifty-eighth session (1 May-9 June and 3 July-11 August 2006)

Note
Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

The word Yearbook followed by suspension points and the year (e.g. Yearbook ... 1971) indicates a reference to the Yearbook of the International Law Commission.

A typeset version of the report of the Commission will be included in Part Two of volume II of the Yearbook of the International Law Commission 2006.

General Assembly
Official Records
Sixty-first session
Supplement No. 10 (A/61/10)
Principle 7

Development of specific international regimes

1. Where, in respect of particular categories of hazardous activities, specific global, regional or bilateral agreements would provide effective arrangements concerning compensation, response measures and international and domestic remedies, all efforts should be made to conclude such specific agreements.

2. Such agreements should, as appropriate, include arrangements for industry and/or State funds to provide supplementary compensation in the event that the financial resources of the operator, including financial security measures, are insufficient to cover the damage suffered as a result of an incident. Any such funds may be designed to supplement or replace national industry-based funds.

Principle 8

Implementation

1. Each State should adopt the necessary legislative, regulatory and administrative measures to implement the present draft principles.

2. The present draft principles and the measures adopted to implement them shall be applied without any discrimination such as that based on nationality, domicile or residence.

3. States should cooperate with each other to implement the present draft principles.

2. Text of the draft principles and commentaries thereto

67. The text of the draft principles with commentaries thereto adopted by the Commission at its fifty-eighth session, are reproduced below.

Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities

General commentary

(1) The background to these draft principles, together with the underlying approach, is outlined in the preamble. It places the draft principles in the context of the relevant provisions of the Rio Declaration on Environment and Development but then specifically recalls the Draft articles on the Prevention of Transboundary Harm from Hazardous Activities.

(2) It briefly provides the essential background that, even if the relevant State fully complies with its prevention obligations, under international law, accidents or other incidents may nonetheless occur and have transboundary consequences that cause harm and serious loss to other States and their nationals.

(3) It is important, as the preamble records, that those who suffer harm or loss as a result of such incidents involving hazardous activities are not left to carry those losses and are able to obtain prompt and adequate compensation. These draft principles establish the means by which this may be accomplished.

(4) As the preamble notes, the necessary arrangements for compensation may be provided under international agreements covering specific hazardous activities and the draft principles encourage the development of such agreements at the international, regional or bilateral level as appropriate.

(5) The draft principles are therefore intended to contribute to the process of development of international law in this field both by providing appropriate guidance to States in respect of hazardous activities not covered by specific agreements and by indicating the matters that should be dealt with in such agreements.

(6) The preamble also makes the point that States are responsible under international law for infringement of their prevention obligations. The draft principles are therefore without prejudice to the rules relating to State responsibility and any claim that may lie under those rules in the event of a breach of the obligations of prevention.

(7) In preparing the draft principles, the Commission has proceeded on the basis of a number of basic understandings. In the first place, there is a general understanding that (a) the regime should be general and residual in character; and (b) that such a regime should be without prejudice to the relevant rules of State responsibility adopted by the Commission in 2001. Secondly, there is an understanding that the scope of the liability aspects should be the same as the scope of the Draft articles on prevention of transboundary harm from hazardous activities.

which the Commission also adopted in 2001.\textsuperscript{305} In particular, to trigger the regime governing transboundary damage, the same threshold, “significant”, that is made applicable in the case of transboundary harm is employed. The Commission also carefully considered the desirability of examining the issues concerning global commons. After observing that the issues associated with that topic are different and had their own particular features, the Commission came to the conclusion that they require a separate treatment.\textsuperscript{306} Thirdly, the work has proceeded on the basis of certain policy considerations: (a) that while the activities contemplated for coverage under the present topic are essential for economic development and beneficial to society, the regime must provide for prompt and adequate compensation for the innocent victims in the event that such activities give rise to transboundary damage; and (b) that contingency plans and response measures should be in place over and above those contemplated in the draft articles on prevention.

(8) Fourthly, the various existing models of liability and compensation have confirmed that State liability is accepted essentially in the case of outer space activities. Liability for activities falling within the scope of the present draft principles primarily attaches to the operator; and such liability would be without the requirement of proof of fault, and may be limited or subject to conditions, limitations and exceptions. However, it is equally recognized that such liability need not always be placed on the operator of a hazardous or a risk-bearing activity and other entities could equally be designated by agreement or by law. The important point is that the person or entity concerned is functionally in command or control or directs or exercises overall supervision and hence as the beneficiary of the activity may be held liable.

(9) Fifthly, it may be noted that provision is made for supplementary funding in many schemes of allocation of loss; and such funding in the present case would be particularly important if the concept of limited liability is adopted. The basic understanding is to adopt a scheme of allocation of loss, spreading the loss among multiple actors, including as appropriate the State. In view of the general and residual character, it is not considered necessary to predetermine the share for the different actors or to precisely identify the role to be assigned to the State. At the same time, it is recognized that the State has, under international law, duties of prevention and these entail certain minimum standards of due diligence.\textsuperscript{307} States are obliged in accordance with such duties to allow hazardous activities with a risk of significant transboundary harm only upon prior authorization, utilizing environmental and transboundary impact assessments and monitoring those impacts, as appropriate. The attachment of primary liability on the operator, in other words, does not in any way absolve the State from discharging its own duties of prevention under international law.

(10) Sixthly, while there is broad understanding on the basic elements to be incorporated in the regime governing the scheme of allocation of loss in case of damage arising from hazardous activities, it is understood that in most cases the substantive or applicable law to resolve compensation claims may involve other aspects such as civil liability or criminal liability or both, and would depend on a number of variables. Principles of civil law, or common law or private international law governing choice of forums as well as the applicable law may come into focus depending upon the context and the jurisdiction involved. Accordingly, the proposed scheme is not only general and residuary but is also flexible and without any prejudice to the claims that might arise or to questions of the applicable law and procedures.

(11) As the draft principles are general and residuary in character they are cast as a non-binding declaration of draft principles. The different characteristics of particular hazardous activities may require the adoption of different approaches with regard to specific arrangements. In addition, the choices or approaches adopted may vary under different legal systems. Further, the choices and approaches adopted and their implementation may also be influenced by different stages of economic development of the countries concerned.

(12) On balance, the Commission has concluded that recommended draft principles would have the advantage of not requiring a harmonization of national laws and legal systems, which is fraught with difficulties. Moreover, it is felt that the goal of widespread acceptance of the substantive provisions is more likely to be met if the outcome is cast as principles. In their essential parts, they provide that victims that suffer the damage should be compensated promptly

\textsuperscript{305} Ibid., para. 98.

\textsuperscript{306} See also ibid., Fifty-seventh Session, Supplement No. 10 (A/57/10), para. 447.

\textsuperscript{307} Binnie and Boyle have observed in respect of the draft article on prevention that “… there is ample authority in treaties and case law, and State practice for regarding … provisions of the Commission’s draft convention as codification of existing international law. They represent the minimum standard required of States when managing transboundary risks and giving effect to Principle 2 of the Rio Declaration”, Patricia Binnie and Alan Boyle, \textit{International Law and the Environment} (Oxford: Oxford University Press, 2002) (2nd ed.), p. 113.
and adequately; and that environmental damage, relating to which States may pursue claims, be mitigated through prompt response measures and, to the extent possible, be restored or reinstated.

(13) The commentaries are organized as containing an explanation of the scope and context of each draft principle, as well as an analysis of relevant trends and possible options available to assist States in the adoption of appropriate national measures of implementation and in the elaboration of specific international regimes. The focus of the Commission was on the formulation of the substance of the draft principles as a coherent set of standards of conduct and practice. It did not attempt to identify the current status of the various aspects of the draft principles in customary international law and the way in which the draft principles are formulated is not intended to affect that question.

Preamble

The General Assembly,

Reaffirming Principles 13 and 16 of the Rio Declaration on Environment and Development,

Recalling the Draft articles on the Prevention of Transboundary Harm from Hazardous Activities,308

Aware that incidents involving hazardous activities may occur despite compliance by the relevant State with its obligations concerning prevention of transboundary harm from hazardous activities,

Noting that as a result of such incidents other States and/or their nationals may suffer harm and serious loss,

Emphasizing that appropriate and effective measures should be in place to ensure that those natural and legal persons, including States, that incur harm and loss as a result of such incidents are able to obtain prompt and adequate compensation,

Concerned that prompt and effective response measures should be taken to minimize the harm and loss which may result from such incidents,

Noting that States are responsible for infringements of their obligations of prevention under international law,

Recalling the significance of existing international agreements covering specific categories of hazardous activities and stressing the importance of the conclusion of further such agreements.

Desiring to contribute to the development of international law in this field,

Commentary

(1) In the past, the Commission has generally presented to the General Assembly sets of draft articles without a draft preamble, leaving its elaboration to States. However, there have also been precedents during which the Commission has submitted a draft preamble. This was the case with respect to the two Draft Conventions on the Elimination of Future Statelessness and on the Reduction of the Future Statelessness, the Draft articles on the Nationality of natural persons in relation to the succession of States, as well as with respect to the draft articles on prevention. Since the Commission would be presenting draft declaration of principles, a preamble is considered all the more pertinent.

(2) As noted in the introduction, the first preambular paragraph commences with a reference to Principles 13 and 16 of the Rio Declaration on Environment and Development.309 The need to develop national law regarding liability and compensation for the victims of pollution and other environmental damage is stressed in Principle 13 of that Declaration, which reiterates Principle 22 of the Stockholm Declaration on the Human Environment. Principle 16 of the Rio Declaration addresses the promotion of internalization of environmental costs, taking into account the polluter-pays principle. The Commission considers the polluter-pays principle as an essential component in underpinning the present draft principles to ensure that victims that suffer harm as a result of an incident involving a hazardous activity are able to obtain prompt and adequate compensation.

(3) The second preambular paragraph is self-explanatory. It links the present draft principles to the draft articles on prevention. The third, fourth, fifth and sixth preambular paragraphs seek to provide the essential rationale for the present draft principles.


(4) The seventh preambular paragraph stresses that these draft principles do not affect the responsibility that a State may incur as a result of infringement of its obligations of prevention under international law; it seeks to keep claims arising from implementation of that regime from the scope of application of these draft principles.

(5) The eighth preambular paragraph recognizes the existence of specific international agreements for various categories of hazardous activities and the importance of concluding further such agreements, while the last preambular paragraph captures the desire to contribute to the process of development of international law in this field.

**Principle 1**

**Scope of application**

The present draft principles apply to transboundary damage caused by hazardous activities not prohibited by international law.

**Commentary**

1. The “Scope of application” provision is drafted to contextualize the draft principles and to reflect the understanding that the present draft principles would have the same scope of application as the 2001 Draft articles on prevention of transboundary harm from hazardous activities. The interrelated nature of the concepts of “prevention” and “liability” needs no particular emphasis in the context of the work of the Commission. This provision identifies that the focus of the present draft principles is transboundary damage. The notion of “transboundary damage”, like the notion of “transboundary harm”, focuses on damage caused in the jurisdiction of one State by activities situated in another State.

2. In the first instance, hazardous activities coming within the scope of the present draft principles are those not prohibited by international law and involve “the risk of causing significant transboundary harm through their physical consequences”. Different types of activities could be envisaged under this category. As the title of the draft principles indicates, any hazardous or by implication any ultrahazardous activity, which involves, at a minimum, a risk of causing significant transboundary harm is covered. These are activities that have a high probability of causing significant transboundary harm or a low probability of causing disastrous transboundary harm. The combined effect of the probability of occurrence of an accident and the magnitude of its injurious impact separates such activities from any other activities.311

3. Following the same approach adopted in the case of the draft articles on prevention, the Commission opted to dispense with specification of a list of activities. Such specification of a list of activities is not without problems and functionally it is not considered essential. Any such list of activities is likely to be under-inclusive and might quickly need review in the light of ever evolving technological developments. Further, except for certain ultrahazardous activities which are mostly the subject of special regulation, e.g., in the nuclear field or in the context of activities in outer space, the risk that flows from an activity is primarily a function of the particular application, the specific context and the manner of operation. It is felt that it is difficult to capture these elements in a generic list. However, the activities coming within the scope of the present principles are the same as those that are subject to the requirement of prior authorization under the draft articles on prevention. Moreover, it is always open to States to specify activities coming within the scope of the present principles through multilateral, regional or bilateral arrangements312 or to do so in their national legislation.

4. The phrase “transboundary damage caused by hazardous activities not prohibited by international law” has a similar import as the phrase “activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical

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311 Ibid., Fifty-sixth Session, Supplement No. 10 (A/56/10), para. 98, para. (1) of the commentary to article 2 (a) of the draft articles on prevention.

312 For example, various liability regimes deal with the type of activities which come under their scope: the 1992 Convention on the Protection of Marine Environment of the Baltic Sea Area, [IMO 1] LDC.2/Circ.303 (see also United Nations, Law of the Sea Bulletin, No. 22 (1993), p. 54); the 1992 Convention on the Transboundary Effects of Industrial Accidents (doc. ENV/WA/R.54 and Add.1), reprinted in ILM vol. 31 (1992), p. 1333; annex I to the 2003 Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters (2003 Kiev Protocol); UNECE document MP/WA/2003/3-CP.TEI/2003/3 of 11 March 2003; annex H to the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (Lugano Convention) (European Treaty Series, No. 150. See also ILM vol. 32 (1993), p. 128), where activities such as the installations or sites for the partial or complete disposal of solid, liquid or gaseous wastes by incineration on land or at sea, installations or sites for thermal degradation of solid, gaseous or liquid wastes under reduced oxygen supply, etc., have been identified as dangerous activities; this Convention also has a list of dangerous substances in annex I. See also Directive 2004/35/EC of the European Parliament and the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (OJL 143/56, 30.4.2004, vol.47).
consequences” in the draft articles on prevention. It has a particular meaning, which is well understood as containing four elements, namely (a) such activities are not prohibited by international law; (b) such activities involve a risk of causing significant harm; (c) such harm must be transboundary; and (d) the transboundary harm must be caused by such activities through their physical consequences.313

(5) Like the draft articles on prevention, the activities coming within the scope of the present principles have an element of human causation and are qualified as “activities not prohibited by international law”. This particular phrase has been adopted essentially to distinguish the present principles from the operation of the rules governing State responsibility. The Commission recognized the importance, not only of questions of responsibility for internationally wrongful acts, but also questions concerning the obligation to make good any harmful consequences arising out of certain activities, especially those which, because of their nature, present certain risks. However, in view of the entirely different basis of liability for risk and the different nature of the rules governing it, as well as its content and the forms it may assume, the Commission decided to address the two subjects separately.314 That is, for the purpose of the principles, the focus is on the consequences of the activity and not on the lawfulness of the activity itself.

(6) The present draft principles, like the draft articles on prevention, are concerned with primary rules. Accordingly, the non-fulfilment of the duty of prevention prescribed by the draft articles on prevention could engage State responsibility without necessarily giving rise to the implication that the activity itself is prohibited.315 In such a case, State responsibility could be invoked to implement not only the obligations of the State itself but also the civil responsibility or duty of the operator.316 Indeed, this is well understood throughout the work on draft articles on prevention.317

(7) It is recognized that harm could occur despite implementation of the duties of prevention. Transboundary harm could occur for several other reasons not involving State responsibility. For instance, there could be situations where the preventive measures were followed but in the event proved inadequate or where the particular risk that caused transboundary harm could not be identified at the time of initial authorization and hence appropriate preventive measures were not envisaged.318 In other words, transboundary harm could occur accidentally or it may take place in circumstances not originally anticipated. Further, harm could occur because of gradually accumulated adverse effects over a period of time. This distinction ought to be borne in mind for purposes of compensation. Because of problems of establishing a causal link between the hazardous activity and the damage incurred, claims in the latter case are not commonplace.319

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313 For the commentaries on prevention see Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10), para. 98, commentary to draft article 1.


318 Ibid., para. 444.

The present draft principles, it is assumed, that duties of due diligence under the obligations of prevention have been fulfilled. Accordingly, the focus of the present draft principles is on damage caused despite the fulfilment of such duties.

The second criterion, implicit in the present provision on scope of application, is that activities covered by these principles are those that originally carried a “risk” of causing significant transboundary harm. As noted in paragraph (2) above, this risk element encompasses activities with a low probability of causing disastrous transboundary harm or a high probability of causing significant transboundary harm. 320

The third criterion is that the activities must involve “transboundary” harm. Thus, three concepts are embraced by the (extra)-territorial element. The term “transboundary” harm comprises questions of “territory, jurisdiction and “control”. 321 The activities must be conducted in the territory or otherwise in places within the jurisdiction or control of one State and have an impact in the territory or places within the jurisdiction or control of another State.

It should be noted that the draft principles are concerned with “transboundary damage caused” by hazardous activities. In the present context, the reference to the broader concept of transboundary harm has been retained where the reference is only to the risk of harm and not to the subsequent phase where harm has actually occurred. The term “damage” is employed to refer to the latter phase. The notion of “transboundary damage” is introduced to denote specificity to the harm, which occurred. The term also has the advantage of familiarity. It is the usual term used in liability regimes. 322 The word “transboundary” qualifies “damage” to stress the transboundary orientation of the scope of the present principles.

320 See also Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10), para. 98, the commentary to draft article 2, para. (1), p. 387.

321 Ibid., para. 98, the commentary to draft article 1, paras. (7)-(12).


Another important consideration which delimits the scope of application is that transboundary harm caused by State policies in trade, monetary, socio-economic or similar fields is excluded from the scope of the present principles. 323 Thus, significant transboundary harm must have been caused by the “physical consequences” of activities in question.

### Principle 2
#### Use of terms

For the purposes of the present draft principles:

(a) “damage” means significant damage caused to persons, property or the environment; and includes:

(i) loss of life or personal injury;

(ii) loss of, or damage to, property, including property which forms part of the cultural heritage;

(iii) loss or damage by impairment of the environment;

323 Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10), para. 98, the commentary to draft article 2, paras. (16) and (17), p. 386.
(iv) the costs of reasonable measures of reinstatement of the property, or environment, including natural resources;

(v) the costs of reasonable response measures;

(b) “environment” includes: natural resources, both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors; and the characteristic aspects of the landscape;

(c) “hazardous activity” means an activity which involves a risk of causing significant harm;

(d) “State of origin” means the State in the territory or otherwise under the jurisdiction or control of which the hazardous activity is carried out;

(e) “transboundary damage” means damage caused to persons, property or the environment in the territory or in other places under the jurisdiction or control of a State other than the State of origin;

(f) “victim” means any natural or legal person or State that suffers damage;

(g) “operator” means any person in command or control of the activity at the time the incident causing transboundary damage occurs.

Commentary

(1) The present “Use of terms” seeks to define and set out the meaning of the terms or concepts used in the present draft principles. The definition of damage is crucial for the purposes of the present draft principles. The elements of damage are identified in part to set out the basis of claims for damage. Before identifying the elements of damage, it is important to note that damage to be eligible for compensation should acquire a certain threshold. For example, the Trail Smelter award addressed an injury by fumes, when the case is of “serious consequences”, and the injury is established by clear and convincing evidence. The Lake Lanoux award made reference to serious injury. A number of conventions have also referred to “significant”, “serious” or “substantial” harm or damage as the threshold for giving rise to legal claims. “Significant” has also been used in other legal instruments and domestic law. The threshold is designed to prevent frivolous or vexatious claims.

(2) The term “significant” is understood to refer to something more than “detectable” but need not be at the level of “serious” or “substantial”. The harm must lead to a real detrimental effect on matters such as, for example, human health, industry, property, environment or agriculture in other States. Such detrimental effects must be susceptible of being measured by factual and objective standards. The ecological unity of the planet does not correspond to political boundaries. In carrying out lawful activities within their own territories,

327 See, for example, article 4 (2) of the Convention on the Regulation of Antarctic Mineral Resource Activities (ILM vol. 27 (1988), p. 868); articles 2 (1) and (2) of the Convention on Environmental Impact Assessment in a Transboundary Context (ILM vol. 30 (1991), p. 802); 1991 UNECE Convention on the Transboundary Effects of Industrial Accidents (article 1 (d)); and article 7 of the Convention on the Non-navigational Uses of International Watercourses. See also Phoebe N. Okowa, State Responsibility for Transboundary Air Pollution in International Law (Oxford: OUP, 2000), p. 176; Rene Lefebre, Transboundary Environmental Interference and the Origin of State Liability (The Hague: Kluwer Law International, 1996), pp. 86-89 who notes the felt need for a threshold and examines the rationale for and the possible ways of explaining the meaning of the threshold of “significant harm”. See also J.G. Lammers, Pollution of International Watercourses (The Hague: Martinus Nijhoff Publishers, 1984), pp. 346-347, and R. Wolfrum “Purposes and Principles of International Environmental Law”, German Yearbook of International Law, vol. 33 (1991), pp. 308-330 at p. 311. As a general rule, not only the threshold of damage for triggering claims for restoration and compensation, while considering environmental damage, it is suggested that “the more the effects deviate from the state that would be regarded as being sustainable and the less foreseeable and limited the consequential losses are, the closer the effects come to the threshold of significance”. This is to be determined against a “baseline condition”, which States generally define or should define: see Rudiger Wolfrum, Christine Langenfeld and Petra Minnemer, Environmental Liability in International Law - Towards a Coherent Conception (Berlin: Erich Schmidt Verlag), 2005, p. 501.


328 Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10), para. 98, the commentary to draft article 2, paras. (4) and (5).
States have impacts on each other. These mutual impacts, so long as they have not reached the level of “significant”, are considered tolerable and do not fall within the scope of the present draft principles.

(3) The determination of “significant damage” involves both factual and objective criteria, and a value determination. The latter is dependent on the circumstances of a particular case and the period in which it is made. For instance, a deprivation which is considered significant in one region may not necessarily be so in another. A certain deprivation at a particular time might not be considered “significant” because scientific knowledge or human appreciation at that specific time might have considered such deprivation tolerable. However, that view might later change and the same deprivation might then be considered “significant damage”. For instance, the sensitivity of the international community to air and water pollution levels has been constantly undergoing change.

(4) Paragraph (a) defines “damage”, as significant damage caused to persons, property or the environment. Subparagraphs (i) and (ii) cover personal injury and property damage, including some aspects of consequential economic loss, as well as property, which forms part of the national cultural heritage, which may be State property.

(5) Damage does not occur in isolation or in a vacuum. It occurs to somebody or something, it may be to a person or property. In subparagraph (i) damage to persons includes loss of life or personal injury. There are examples at domestic law and in treaty practice. Even those liability regimes that exclude application of injury to persons recognize that other rules would apply. Those regimes that are silent on the matter do not seem to entirely exclude the possible submission of a claim under this heading of damage.

(6) In subparagraph (ii) damage to property, includes loss of or damage to property. Property includes movable and immovable property. There are examples at domestic law and in treaty practice. Some liability regimes exclude claims concerning damage to property of the person liable on the policy consideration which seeks to deny a tortfeasor the opportunity to benefit from one’s own wrongs. Article 2 (2) (c) (ii) of the Basel Protocol, article 2 (7) (b) of the Lugano Convention and article 2 (2) (d) of the Kiev Protocol contain provisions to this effect.

(7) Traditionally, proprietary rights have been more closely related to the private rights of the individual rather than rights of the public. An individual would face no difficulty to pursue a claim concerning his personal or proprietary rights. These are claims concerning possessory or proprietary interests which are involved in loss of life or personal injury or loss of, or damage to property. Furthermore, tort law has also tended to cover damage that may relate to economic losses. In this connection, a distinction is often made between consequential and pure economic losses.

(8) For the purposes of the present draft principles, consequential economic losses are covered under subparagraphs (i) and (ii). Such losses are the result of a loss of life or personal other than to the installation itself or property held under the control of the operator, at the site of the dangerous activity”.


330 Some liability regimes provide as follows: article 1, paragraph 1 k) of the 1963 Vienna Convention on Civil Liability for Nuclear Damage defines nuclear damage to include “(i) loss of life, personal injury and any loss of, or damage to, property”; article 1, paragraph 1 (k) of the 1997 Protocol to Amend the 1963 Vienna Convention on Civil Liability for Nuclear Damage (1997 Vienna Convention), also refers to “(i) loss of life or personal injury; (ii) loss of or damage to property; ...”. Article I, paragraph vii of the 2004 Paris Convention defines nuclear damage to include “(i) loss of life or personal injury; 2. loss of or damage to property; ...”. The CTRD defines the concept of “damage” in paragraph 10 of article 1 “(a) loss of life or personal injury ...; (b) loss of or damage to property ...; the Basel Protocol defines “damage”, in article 2, paragraph 2 (c), as: “(i) Loss of life or personal injury; (ii) Loss of or damage to property other than property held by the person liable in accordance with the present protocol”; the Kiev Protocol, defines damage in article 2, paragraph 2 (d), as: “(i) Loss of life or personal injury; (ii) Loss of, or damage to, property other than property held by the person liable in accordance with the Protocol”; the Lugano Convention defines damage in article 2 (7) as: “a. Loss of life or personal injury; b. Loss or damage to property held under the control of the operator, at the site of the dangerous activity”. EU Council and Parliament Directive 2004/35/CE on environmental liability does not apply to cases of personal injury, to damage to private property or to any economic loss and does not affect any rights regarding such types of damages.

332 Pollution damage is defined in article 1, para. 6 of the International Convention on Civil Liability for Oil Pollution Damage (United Nations, Treaty Series, vol. 973, p. 3); article 1, para. 6 of the 1992 International Convention on Civil Liability for Oil Pollution Damage (IMO document LEG(CONF)/15), article 1, para. 9.

333 For example, the Environmental Damage Compensation Act of Finland covers damage to property; Chapter 32 of the Environmental Code of Sweden; and the Compensation for Environmental Damage Act of Denmark covers damage to property.

334 See examples in footnote 330, above.

injury or damage to property. These would include loss of earnings due to personal injury. Such damage is supported in treaty practice and under domestic law although different approaches are followed, including in respect of compensation for loss of income. Other economic loss may arise that is not linked to personal injury or damage to property. In the absence of a specific legal provision for claims covering loss of income it would be reasonable to expect that if an incident involving a hazardous activity directly causes loss of income, efforts would be made to ensure the victim is not left uncompensated.

(9) Subparagraph (ii) also covers property which forms part of cultural heritage. State property may be included in the national cultural heritage. It embraces a wide range of aspects, including monuments, buildings and sites, while natural heritage denotes natural features and sites and geological and physical formations. Their value cannot easily be quantifiable in monetary terms but lies in their historical, artistic, scientific, aesthetic, ethnological, or anthropological importance or in their conservation or natural beauty. The 1972 Convention concerning the Protection of World Cultural and Natural Heritage has a comprehensive definition of cultural heritage. Not all civil liability regimes include aspects concerning cultural heritage under this head. For example, the Lugano Convention includes in its definition of “environment”, property which forms part of the cultural heritage and to that extent cultural heritage may also be embraced by the broader definition of environment.

(10) Respecting and safeguarding cultural property are primary considerations in times of peace as they are in times of armed conflict. This principle is asserted in the Hague Convention for the Protection of Cultural Property in the event of armed conflict. Moreover, international humanitarian law prohibits commission of hostilities directed against historical monuments and works of art which constitute the cultural heritage of peoples.

(11) Subparagraphs (iii) to (vi) deal with claims that are usually associated with damage to the environment. They may all be treated as parts of one whole concept. Together, they constitute the essential elements inclusive in a definition of damage to the environment. These subparagraphs are concerned with questions concerning damage to the environment per se. This is damage caused by the hazardous activity to the environment itself with or without simultaneously causing damage to persons or property and hence is independent of any damage to such persons and property. The broader reference to claims concerning the environment

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338 ILM vol.11 (1972) 1294. Article 1 defines “cultural heritage” for purposes of the Convention as: monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science; groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science; sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.

See also definition of cultural property in article 1 of the 1954 Hague Convention for the Protection of Cultural Property in the event of armed conflict, which essentially covers movable and immovable property of great importance to the cultural heritage of peoples. See also 1972 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.

339 See also article 1 (2) of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes.

340 Done at The Hague on 14 May 1954.

341 The Additional Protocols to the Geneva Conventions, article 53 of Protocol I and article 16 of Protocol II. See also the Hague Conventions of 1907, particularly Convention IV and its Regulations concerning the Laws and Customs of War on Land, (articles 27 and 56 of the Regulations), and Convention IX, respecting Bombardment by Naval Forces in Time of War (article 5).
incorporated in subparagraphs (iii)-(v) thus not only builds upon trends that have already become prominent as part of recently concluded international liability regimes342 but opens up possibilities for further developments of the law for the protection of the environment per se.343

(12) An oil spill off a seacoast may immediately lead to lost business for the tourism and fishing industry within the precincts of the incident. Such claims have led to claims of pure economic loss in the past without much success. However, some liability regimes now recognize this head of compensable damage.344 Article 2 (d) (iii) of the Kiev Protocol and article 2 (2) (d) (iii) of the Basel Protocol cover loss of income directly deriving from an economic interest in any use of the environment, incurred as a result of impairment of the environment, taking into account savings and costs.345 In the case of the Kiev Protocol such interest should be a “legally protected interest”. Examples also exist at the domestic level.346

(13) Subparagraph (iii) relates to the form that damage to the environment would take. This would include “loss or damage by impairment”. Impairment includes injury to, modification, alteration, deterioration, destruction or loss. This entails diminution of quality, value or excellence in an injurious fashion. Claims concerning loss of income directly deriving from an economic interest in any use of the environment, incurred as a result of impairment of the environment may fall under this heading.

(14) In other instances of damage to the environment per se, it is not easy to establish standing. Some aspects of the environment do not belong to anyone, and are generally considered to be common property (res communis omnium) not open to private possession, as opposed to res nullius, that is, property not belonging to anyone but open to private possession. A person does not have an individual right to such common property and would...

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342 For an analysis of these developments, see Louise de la Fayette, “The Concept of Environmental Damage in International Liability Regimes”, in Michael Bowman and Alan Boyle, Environmental Damage in International and Comparative Law … op. cit., pp. 149-189. See also Edward H.P. Brauns, Liability for Damage to Public Natural Resources … op.cit., ch. 7 concerning international civil liability for damage to natural resources.

343 Italian law for example appears to go further in recognizing damage to the environment per se and Italy is also a signatory to the 1993 Lugano Convention on Damage Resulting from Activities Dangerous to the Environment. In the Patmos case, Italy lodged a claim for 5,000 million lire before the court of Messina, Italy, for ecological damage caused to its territorial waters as a result of 1,000 tonnes of oil spilled into the sea, following a collision between the Greek oil tanker Patmos and the Spanish tanker Castilla de Monte Aragon on 21 March 1985. While the lower Court rejected its claim, the higher Court on appeal upheld its claim in the Patmos II. According to the Court: “although the notion of environmental damage cannot be grasped by resorting to any mathematical or accounting method, it can be evaluated in the light of the economic relevance that the destruction, deterioration, or alteration of the environment has per se and for the community, which benefits from environmental resources and, in particular, from marine resources in a variety of ways (food, health, tourism, research, biological studies)”. Noting that these benefits are the object of protection of the State, it was held that the State can claim as a trustee of the community compensation for the diminished economic value of the environment. The Court also observed that the loss involved not being assignable any market value, compensation can only be provided on the basis of an equitable appraisal. The court, after rejecting the report received from experts on the quantification of damages, which attempted to quantify the damage on the basis of the nektos (fish) which the bio mass could have produced if it had not been polluted, resorted to an equitable appraisal and awarded 2,100 million lire. Incidentally, this award fell within the limits of liability of the owner, as set by the IOPC Fund and was not appealed or contested, see generally Andrea Bianchi, “Harm to the Environment in Italian Practice: The Interaction of International Law and Domestic Law”, in Peter Wetterstein, Harm to the Environment … op. cit., pp. 103 at 113-129. See also Maria Clara Maffei “The Compensation for Ecological Damage in the ‘Patmos’ case”, in Francesco Franchini and Tullio Scovazzi, International Responsibility for Environmental Harm (London/Dordrecht/Boston: Graham & Trotman 1991).

344 See Peter Wetterstein, “A Proprietary or Possessor Interest: A Condito Sine Qua Non for Claiming Damages for Environmental Impairment?”, op. cit., p. 37. On the need to limit the concept of “directly related” “pure economic loss” with a view not to open floodgates or enter “damages lottery” encouraging indeterminate liability which will then be a disincentive to get proper insurance or economic perspective, see Lucas Bergkamp, Liability and Environment: Private and Public Law Aspects of Civil Liability for Environmental Harm in an International Context (The Hague: Kluwer Law International, 2001), pp. 346-350. It is also suggested that such an unlimited approach may limit “the acceptance of the definition of damage and thus, it has to be solved on the national level”. Rodger Wolflum, Christine Langenfeld and Petra Minnern, op. cit., p. 503. The European Directive 2004/35 covers environmental damage in article 2.

345 See Article I (1) (k) of the 1997 Protocol to Amend the 1963 Vienna Convention on Civil Liability for Nuclear Damage, defines nuclear damage as including … each of the following to the extent determined by the law of the competent court (v) loss of income deriving from an economic interest in any use or enjoyment of the environment, incurred as a result of a significant impairment of that environment, and insofar as not included in subparagraph (ii); see also article 1 of the 1997 Convention on Supplementary Compensation for Nuclear Damage, which covers each of the following to the extent determined by the law of the competent court: … (v) loss of income deriving from an economic interest in any use or enjoyment of the environment, incurred as a result of a significant impairment of that environment, and insofar as not included in subparagraph (ii); Article I (vii) of the 2004 Protocol to amend the 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy defines nuclear damage as including each of the following to the extent determined by the law of the competent court, … (5) loss of income deriving from a direct economic interest in any use or enjoyment of the environment, incurred as a result of a significant impairment of that environment, and insofar as not included in subparagraph 2 above; … See also for example, the Lugano Convention (article 2, para. (7) (d)); the 1991 ECE Convention on the Transboundary Effects of Industrial Accidents (article 1 (c); the 1992 ECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes (article 1 (2); the Convention on the Regulation of Antarctic Mineral Resource Activities (CRAMRA) (article 8 (2) (a), (b) and (d)); the Convention on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (CRTL) (article 9 (c) and (d)).

346 Subsection 2702 (b) of the United States Oil Pollution Act provides that any person may recover “damages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of … natural resources”. The Environmental Damage Compensation Act of Finland covers pure economic loss, except where such losses are insignificant. Chapter 32 of the Environmental Code of Sweden also provides for pure economic loss. Pure economic loss not caused by criminal behaviour is compensable only to the extent that it is significant. The Compensation for Environmental Damage Act of Denmark covers economic loss and reasonable costs for preventive measures or for the restoration of the environment. See generally, Peter Wettersein, “Environmental Damage in the Legal Systems of the Nordic Countries and Germany”, in Michael Bowman and Alan Boye, Environmental Damage in International Law and Comparative Law … op. cit., pp. 222-242.
not ordinarily have standing to pursue a claim in respect of damage to such property.\textsuperscript{347} Moreover, it is not always easy to appreciate who may suffer loss of ecological or aesthetic values or be injured as a consequence for purposes of establishing a claim. States instead may hold such property in trust, and usually public authorities and more recently, public interest groups, have been given standing to pursue claims.\textsuperscript{348}

(15) It may be noted that the references to “costs of reasonable measures of reinstatement” in subparagraph (iv), and reasonable costs of “clean-up” associated with the “costs of reasonable response measures” in subparagraph (v) are recent concepts. These elements of damage have gained recognition because, as noted by one commentator, “there is a shift towards a greater focus on damage to the environment \textit{per se} rather than primarily on damage to persons and to property”.\textsuperscript{349} Subparagraph (iv) includes in the concept of damage an element of the type of compensation that is available, namely reasonable costs of measures of reinstatement. Recent treaty practice\textsuperscript{350} and domestic law\textsuperscript{351} has tended to acknowledge the importance of such

\textsuperscript{347} In Burgess v. M/V Tamano, 370 F.Supp. (1973) 247 at 247, the court noted that: “It is also uncontroverted that the right to recover for an injury to one’s personal property … is not the private right of any individual, but is a public right held by the State ‘in trust for the common benefit of the people’ …”.

\textsuperscript{348} Under the United States Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C.A., sections 9601 et seq.; Clean Water Act of 1977, 33 U.S.C.A., section 1321; Oil Pollution Act of 1990, 33 U.S.C.A., sections 2701 et seq.; the United States “Congress empowered government agencies with management jurisdiction over natural resources to act as trustees to assess and recover damages … [the public trust is defined broadly to encompass ‘natural resources’ … belonging to, managed by, held in trust by, appurtenant to or otherwise controlled by Federal, state or local governments or Indian tribes”.

\textsuperscript{349} Louise de la Fayette, “The Concept of Environmental Damage in International Law”, … op. cit., pp. 149-190, at pp. 166-167.

\textsuperscript{350} See for example the 1997 Protocol to Amend the 1963 Vienna Convention on Civil Liability for Nuclear Damage, article I, paragraph 1 (k) (iv): “the costs of measures of reinstatement of impaired environment, unless such impairment is insignificant, if such measures are actually undertaken or to be undertaken, insofar as not included in sub-paragraph (ii)”; the 2004 Paris Convention on Third Party Liability (article I (vii) (4)): “the costs of measures of reinstatement of impaired environment, unless such impairment is insignificant, if such measures are actually undertaken or to be undertaken, and insofar as not included in sub-paragraph 2”. Article I, para. 6 of the 1992 International Convention on Civil Liability for Oil Pollution Damage refers to impairment of the environment other than loss of profit from such impairment shall be limited to costs of reinstatement actually undertaken or to be undertaken. See also article 2 (2) (c) and (d) of the Basel Protocol, article 2 (7) (c) and (8) of the Lugano Convention and article 2 (2) (d) (iv) and (g) of the Kiev Protocol.

\textsuperscript{351} German law allows for reimbursement of reasonable costs of reinstatement and restoration of environmental damage through making good the loss suffered by individuals that may also involve restoring the environment to its \textit{status quo}. See section 16 of the Environmental Liability Act and section 32 of the Generic Engineering Act provides that in the event of impairment of a natural complex, section 251 (2) of the Civil Code is to be applied with the proviso that the expenses of restoring the \textit{status quo} shall not be deemed unreasonable merely because it exceeds the value of the object concerned. See Environmental Liability Law in Germany (Grote/Reinke) in Rudiger Wolfrum, Christine Langenfeld and Petra Minnerop, \textit{Environmental Liability in International Law … op. cit.}, pp. 223-303, p. 278.

\textsuperscript{352} It may be noted that in the context of the work of the United Nations Compensation Commission a recent decision sanctioned compensation in respect of three projects: for loss of rangeland and habitats, Jordan got $160 million; for shoreline preserves, Kuwait got $8 million; and Saudi Arabia got $46 million by way of replacing ecological services that were irreversibly lost in the wake of the 1991 Gulf War; see Panel Report F/45, S/AC.26/2005/10. Technical Annexes I–III, see also Peter H. Sand, “Compensation for Environmental Damage from the 1991 Gulf War”, \textit{Environmental Policy and Law}, vol. 35/6 (2005), pp. 244-249, at p. 247.


\textsuperscript{354} See for example the 1997 Protocol to Amend the 1963 Vienna Convention on Civil Liability for Nuclear Damage, article I, paragraph 1 (k) (vi): “the costs of preventive measures, and further loss or damage caused by such measures; the annex to the 1997 Convention on Supplementary Compensation for Nuclear Damage, article 1 (vi): the costs of preventive measures, and further loss or damage caused by such measures”; the 2004 Protocol to amend the Convention on Third Party Liability in the Field of Nuclear Energy of 1960, article I (vii) (6): “the costs of preventive measures, and further loss or damage caused by such measures, in the case of
by any person including public authorities, following the occurrence of the transboundary damage, to prevent, minimize, or mitigate possible loss or damage or to arrange for environmental clean-up. The measures of response must be reasonable.

(18) Recent trends are also encouraging in allowing compensation for loss of “non-use value” of the environment. There is some support for this claim from the Commission itself when it adopted its draft articles on State responsibility, even though it is admitted that such damage is difficult to quantify.\[355] The recent decisions of the United Nations Compensation Commission (UNCC) in opting for a broad interpretation of the term “environmental damage” is a pointer of developments to come. In the case of F-4 category of environmental and public health claims, the F-4 Panel of the UNCC allowed claims for compensation for damage to natural resources without commercial value (so-called “pure” environmental damage) and also claims where there was only a temporary loss of resource use during the period prior to full restoration.\[356]

(19) Paragraph (b) defines “environment”. Environment could be defined in different ways for different purposes and it is appropriate to bear in mind that there is no universally accepted definition. It is however considered useful to offer a working definition for the purposes of the present draft principles. It helps to put into perspective the scope of the remedial action required in respect of environmental damage.\[357]

(20) Environment could be defined in a restricted way, limiting it exclusively to natural resources, such as air, soil, water, fauna and flora, and their interaction. A broader definition could embrace environmental values also. The Commission has opted to include in the definition the latter encompassing non-service values such as aesthetic aspects of the landscape also.\[358] This includes the enjoyment of nature because of its natural beauty and its recreational attributes and opportunities associated with it. This broader approach is justified by the general and residual character of the present draft principles.\[359]

(21) Moreover, the Commission in taking such a holistic approach is, in the words of the International Court of Justice in the Case concerning the Gabčíkovo-Nagymaros Project:\[360]

mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage.\[361]

\[355] See also European Communities Green Paper on remedying Environmental damage, COM (93) 47 final, 14 May 1993, p. 10.

\[356] For a philosophical analysis underpinning a regimes for damage to biodiversity, see Michel Bowman, “Biodiversity, Intrinsic Value and the Definition and valuation of Environmental Harm” in Michael Bowman and Alan Boyle, Environmental Damage ... op. cit., pp. 41-61. Article 2 of the 1972 Convention concerning the Protection of World Cultural and Natural Heritage defines “natural heritage” as “natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view; geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation; natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty”.

\[357] See also European Communities Green Paper on remedying Environmental damage, COM (93) 47 final, 14 May 1993, p. 10.

\[358] For a philosophical analysis underpinning a regimes for damage to biodiversity, see Michel Bowman, “Biodiversity, Intrinsic Value and the Definition and valuation of Environmental Harm” in Michael Bowman and Alan Boyle, Environmental Damage ... op. cit., pp. 41-61. Article 2 of the 1972 Convention concerning the Protection of World Cultural and Natural Heritage defines “natural heritage” as “natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view; geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation; natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty”.


\[361] Ibid., paras. 141-142. The Court in this connection also alluded to the need to keep in view the inter-generational and intra-generational interests and the contemporary demand to promote the concept of sustainable development.
Furthermore, a broader definition would attenuate any limitation imposed by the remedial responses acceptable in the various liability regimes and as reflected in commentary in respect of subparagraphs (iv) and (v), above.

Thus, the reference in paragraph (b) to “natural resources … and the interaction” of its factors embraces the idea of a restricted concept of environment within a protected ecosystem, while the reference to “the characteristic aspects of the landscape” denotes an acknowledgement of a broader concept of environment. The definition of natural resources covers living and non-living natural resources, including their ecosystems.

Paragraph (c) defines hazardous activity by reference to any activity which has a risk of causing transboundary harm. It is understood that such risk of harm should be through its physical consequences, thereby excluding such impacts as may be caused by trade, monetary, socio-economic or fiscal policies. The commentary concerning the scope of application of these draft principles above has explained the meaning and significance of the terms involved.

Paragraph (d) defines the State of origin. This means the State in the territory or otherwise under jurisdiction or control of which the hazardous activity is carried out. The term “territory”, “jurisdiction”, or “control” is understood in the same way as in the draft articles on prevention. Other terms are also used for the purpose of the present principles. They include,

Under article 2 of the Convention on Biological Diversity, “ecosystem means a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit.” Under CRAMRA:

“Damage to the Antarctic environment or dependent or associated ecosystems means any impact on the living or non-living components of that environment or those ecosystems, including harm to atmospheric, marine or terrestrial life, beyond that which is negligible or which has been assessed and judged to be acceptable pursuant to this Convention.”

Article 2 (10) of the Lugano Convention contains a non-exhaustive list of components of the environment which includes: “natural resources both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors; property which forms part of the cultural heritage; and the characteristic aspects of the landscape”; article 1 (c) of the Convention on the Transboundary Effects of Industrial Accidents refers to the adverse consequences of industrial accidents on “(i) human beings, flora and fauna; (ii) soil, water, air and landscape; (iii) the interaction between the factors in (i) and (ii); material assets and cultural heritage, including historical monuments”; article 1 (2) of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes says that “effects on the environment include effects on human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures or the interaction among these factors; they also include effects on the cultural heritage or socio-economic conditions resulting from alterations to those factors”.

The definition is intended to clearly identify and distinguish a State under whose jurisdiction or control an activity covered by these principles is conducted, from a State which has suffered the injurious impact.

As is often the case with incidents falling within the scope of the present draft principles, there may be victims both within the State of origin and within the other States where damage is

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363 Article 2 (10) of the Lugano Convention contains a non-exhaustive list of components of the environment which includes: “natural resources both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors; property which forms part of the cultural heritage; and the characteristic aspects of the landscape”; article 1 (c) of the Convention on the Transboundary Effects of Industrial Accidents refers to the adverse consequences of industrial accidents on “(i) human beings, flora and fauna; (ii) soil, water, air and landscape; (iii) the interaction between the factors in (i) and (ii); material assets and cultural heritage, including historical monuments”; article 1 (2) of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes says that “effects on the environment include effects on human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures or the interaction among these factors; they also include effects on the cultural heritage or socio-economic conditions resulting from alterations to those factors”.

364 Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10), commentary to draft article 1, paras. (7)-(10).
suffered. In the disbursement of compensation, particularly in terms of the funds expected to be made available to victims as envisaged in draft principle 4 below, some funds may also be made available for damage suffered in the State of origin. Article XI of the 1997 Vienna Convention on Supplementary Compensation for Nuclear Damage envisages such a system.365

(29) Paragraph (f) defines “victim”. The definition includes natural and legal persons, and includes the State as custodian of public property.366 This definition is linked to and may be deduced from the definition of damage in paragraph (a) which includes damage to persons, property or the environment.367 A person who suffers personal injury or damage or loss of property would be a victim for the purposes of the draft principles. A group of persons or commune could also be a victim. In the Matter of the people of Eniwetok before the Marshall Islands Nuclear Claims Tribunal established under the 1987 Marshall Islands Nuclear Claims Tribunal Act, the Tribunal considered questions of compensation in respect of the people of Eniwetok for past and future loss of use of the Eniwetok Atoll; for restoration of Eniwetok to a safe and productive state; for the hardships suffered by the people of Eniwetok as a result of their relocation attendant to their loss of use occasioned by the nuclear tests conducted on the atoll.368 In the Amoco Cadiz litigation, following the Amoco Cadiz supertanker disaster off Brittany, French Administrative departments of Côtes du Nord and Finistère and numerous municipalities called “communes”, and various French individuals, businesses and associations sued the owner of the Amoco Cadiz, and its parent company in the United States. The claims involved lost business. The French Government itself laid claims for recovery of pollution damages and clean-up costs.369

(30) The definition of victim is thus linked to the question of standing. Some liability regimes such as the Lugano Convention and the EU Directive 2004/35/CE on environmental liability provide standing for non-governmental organizations.370 The 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters also gives standing to NGOs to act on behalf of public environmental interests.371 Victims may also be those designated under national laws to act as public trustees to safeguard those resources and hence the legal standing to sue. The concept of public trust in many jurisdictions provides proper standing to different designated persons to lay claims for restoration and clean-up in case of any transboundary damage.372 For example, under the United States Oil Pollution Act, such a right is given to the United States Government, a State, an Indian tribe, and a foreign government. Under the United States Comprehensive Environmental Response, Compensation and Liability Act (CERCLA 1980), as amended in 1986 by the Superfund Amendments and Reauthorization Act, locus standi has been given only to the federal government, authorized representatives of States, as trustees of natural resources, or by designated trustees of Indian tribes. In some other jurisdictions, public authorities have been given similar right of recourse. Thus, Norwegian law provides standing to private organizations and societies to claim restoration costs. In France, some environmental associations have been given the right to claim compensation in criminal cases involving violation of certain environmental statutes. The Supreme Court of India has entertained petitions from individuals

366 On the contribution of Edith Brown-Weiss to the development of the concept of stewardship or trusteeship as striking a deep chord with Islamic, Judeo-Christian, African, and other traditions, and for the view that “some form of public trusteeships are incorporated in most legal systems” including the United Kingdom and India, see Roda Mushkat, International Environmental Law and Asian Values: Legal Norms and Cultural Influences (UC Press, 2004), p. 18. See also Jona Razaque, Public Interest Environmental Litigation in India, Pakistan and Bangladesh (The Hague: Kluwer Law International, 2004), p. 424 for the role of public trust doctrine in India, Pakistan and Bangladesh.
367 In respect of international criminal law, see the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, General Assembly resolution 40/34 of 29 November 1985. See also the Rome Statute of the International Criminal Court, article 79.
368 ILM vol. 39 (2000) 1214. In December 1947 the people were removed from Eniwetok Atoll to Ujelang Atoll. At the time of removal, the acreage of the Atoll was 1,919.49 acres. On return on 1 October 1980, 43 tests of atomic devices had been conducted, at which time 815.33 acres were returned for use, another 949.8 acres were not available for use, and an additional 154.36 acres had been vaporized.
369 See: In the matter of the Oil Spill by the Amoco Cadiz off the coast of France on 16 March 1978, United States Court of Appeals for the Seventh Circuit, 954 F.2d 1279. See also Maria Clara Malfii “The Compensation for Ecological Damage in the ‘Palmos’ case’; ... op. cit., p. 381.
370 See article 18 of the Lugano Convention and article 12 of the EU Directive 2004/35/CE.
371 For the text see ILM vol. 38 (1999), 517.
372 Peter Wetterstein, “A Proprietary or Possessory Interest: ... op. cit., pp. 50-51.
oversee. This could cover the person to whom decisive power over the technical functioning of an activity has been delegated, including the holder of a permit or authorization for such an activity or the person registering or notifying such an activity.\footnote{382}{The definition of ship owner in the Bunker Oil Convention is broad. It includes the registered owner, bareboat charterer, manager and operator of the ship (article 1, para. 2).} It may also include a parent company or other related entity, whether corporate or not, particularly if that entity has actual control of the operation.\footnote{384}{Under article 8 of the CRAMRA, the primary liability lies with the operator, which is defined as a Party or an agency or instrumentality of a Party or a juridical person established under the law of a Party or a joint venture consisting exclusively of any combination of the aforementioned Article 1 (11). Pursuant to section 16.1 of the Standard clauses for exploration contract annexed to the Regulations on the Prospecting and Exploration for Polymetallic Nodules in the Area adopted by the International Seabed Authority on 13 July 2000, the Contractor is liable for the actual amount of any damage, including damage to the marine environment, arising out of its wrongful acts or omissions, and those of its employees, subcontractors, agents and all persons engaged in working or acting for them ISBA/6/A/18, annex, clause 16.} An operator may be a public or private entity. It is envisaged that a State could be an operator for purposes of the present definition.

(34) The phrase “at the time of the incident” is intended to establish a connection between the operator and the transboundary harm. The looser and less concrete the link between the incident in question and the property claimed to have been damaged, the less certain the right to get compensation.

**Principle 3**

**Purposes**

The purposes of the present draft principles are:

- (a) to ensure prompt and adequate compensation to victims of transboundary damage; and
- (b) to preserve and protect the environment in the event of transboundary damage, especially with respect to mitigation of damage to the environment and its restoration or reinstatement.

**Commentary**

(1) The two-fold purpose of the present draft principles is to ensure protection to victims suffering damage from transboundary harm and to preserve and protect the environment per se as common resource of the community.

(2) The purpose of ensuring protection to victims suffering damage from transboundary harm has been an essential element from the inception of the topic by the Commission. In his schematic outline, Robert Q. Quentin-Baxter focused on the need to protect victims, which required “measures of prevention that as far as possible avoid a risk of loss or injury and, insofar as possible, measures of reparation” and that: “... an innocent victim should not be left to bear loss or injury; ...”.\footnote{385}{Yearbook ... 1982, vol. II (Part One), p. 51, document A/CN.4/360*, para. 53, section 3 (paras. 2 and 3).} The former consideration is already addressed by the draft articles on prevention.

(3) The notion of prompt and adequate compensation in paragraph (a) reflects the understanding and the desire that victims of transboundary damage should not have to wait long in order to be compensated. The importance of ensuring prompt and adequate compensation to victims of transboundary damage has its underlying premise in the Trail Smelter arbitration\footnote{386}{Trail Smelter Arbitration, UNRIA, vol. III, p. 1905 at p. 1965 stated: “[U]nder the principles of international law, ... no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequences and the injury is established by clear and convincing evidence.”} and the Corfu Channel case,\footnote{387}{Corfu Channel case (Merits) I.C.J. Reports 1949, p. 4 at p. 22: The Court stated that it was “every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States”.} as further elaborated and encapsulated in Principle 21 of the Stockholm Declaration, namely:

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

(4) The notion of liability and compensation for victims is also reflected in Principle 22 of the Stockholm Declaration, wherein a common conviction is expressed that:
“States shall cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction.”

(5) This is further addressed more broadly in Principle 13 of the Rio Declaration:

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

While the principles in these Declarations are not intended to give rise to legally binding obligations, they demonstrate aspirations and preferences of the international community.

(6) Paragraph (b) gives a prominent place to the protection and preservation of the environment and to the associated obligations to mitigate the damage and to restore or reinstate the same to its original condition to the extent possible. Thus, it emphasizes the more recent concern of the international community to recognize protection of the environment per se as a value by itself without having to be seen only in the context of damage to persons and property. It reflects the policy to preserve the environment as a valuable resource not only for the benefit of the present generation but also for future generations. In view of its novelty and the common interest in its protection, it is important to emphasize that damage to environment per se could constitute damage subject to prompt and adequate compensation, which includes reimbursement of reasonable costs of response and restoration or reinstatement measures undertaken.

(7) The aim is not to restore or return the environment to its original state but to enable it to maintain its permanent functions. In the process it is not expected that expenditures disproportionate to the results desired would be incurred and such costs should be reasonable. Where restoration or reinstatement of the environment is not possible, it is reasonable to introduce the equivalent of those components into the environment.

(8) In general terms, as noted above in the commentary on the “Use of terms” with respect to subparagraphs (iii)-(v), the earlier reluctance to accept liability for damage to environment per se, without linking such damage to damage to persons or property is gradually disappearing. In the case of damage to natural resources or the environment there is a right of

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389 Birnie and Boyle, International Law... op. cit. at p. 105 that “[t]hese principles all reflect more recent developments in international law and State practice; their present status as principles of general international law is more questionable; but the evidence of consensus support provided by the Rio Declaration is an important indication of their emerging legal significance.”
392 For difficulties involved in claims concerning ecological damage and prospects, see the Patmos and the Haven cases, see generally, Andrea Bianchi, “Harm to the Environment in Italian Practice: The Interaction of International Law and Domestic Law, ...” op. cit., p. 103 at 113-129. See also Maria Clara Mafei “The Compensation for Ecological Damage in the ‘Patmos’ case”, ... op. cit., p. 381 at 383-390; and David Ong, “The Relationship between Environmental Damage and Pollution: Marine Oil Pollution Laws in Malaysia and Singapore”, in Bowman and Boyle, Environmental Damage ... op. cit., p. 191 at 201-204. See also Sands, “Principles ...” op. cit., pp. 918-922. See also the 1979 Antonio Gramsci incident and the 1987 Antonio Gramsci incident happened on 6 February 1987, see generally, Wu Chao, Pollution from the Carriage of Oil by Sea: Liability and Compensation (The Hague: Kluwer Law International, 1996), pp. 365-366: The IOPC Fund resolution number 3 of 1980, did not allow the court to assess compensation to be paid by the Fund “on the basis of an abstract quantification of damage calculated in accordance with theoretical costs”. In the Amoco Cadiz, the Northern District Court of Illinois ordered Amoco Oil Corporation to pay $85.2 million in fines - $45 million for the costs of the spill and $39 million in interest. It denied compensation for non-economic damage. It thus dismissed claims concerning lost image and ecological damage. It noted: “It is true that the commune was unable for a time to provide clean beaches for the use of its citizens, and that it could not maintain the normal peace, quiet, and freedom from the dense traffic which would have been the normal condition of the commune absent the cleanup efforts”, but concluded that the “loss of enjoyment claim by the communes is not a claim maintainable under French law”. Maria Clara Mafei “The Compensation for Ecological Damage in the ‘Patmos’ case’, Franchini and Scozzari, International Responsibility ...” op. cit., p. 381 at 393. Concerning lost image, the Court observed that the plaintiffs’ claim is compensable in measurable damage, to the extent that it can be demonstrated that this loss of image resulted in specific consequential harm to the commune by virtue of tourists and visitors who might otherwise have come staying away. Yet this is precisely the subject matter of the individual claims for damages by hotels, restaurants, campgrounds, and other businesses within the communes. As regards ecological damage, the Court dealt with problems of evaluating “the species killed in the intertidal zone by the oil spill” and observed that “this claimed damage is subject to the principle of res nullius and is not compensable for lack of standing of any person or entity to claim therefore”, ibid., at 394. See also in the Matter of the People of Enwehet ILM vol. 39 (2000), p. 1214 at 1219, before the Marshall Islands Nuclear Claims Tribunal, the Tribunal had an opportunity to consider whether restoration was an appropriate remedy for loss incurred by the people of the Enwehet atoll arising from nuclear tests conducted by the United States. It awarded clean-up and rehabilitation costs as follows: $22.5 m for soil removal; $15.5 m for potassium treatment; $31.5 m for soil disposal (causeway); $10 m for clean-up of plutonium; $4.51 m for surveys; and $17.7 m for soil rehabilitation and revegetation.
compensation or reimbursement for costs incurred by way of reasonable preventive, restoration or reinstatement measures. This is further limited in the case of some conventions to measures actually undertaken, excluding loss of profit from the impairment of the environment.\footnote{See general commentary to draft Principle 2.}

(9) The State or any other public agency which steps in to undertake response or restoration measures may recover the costs later for such operations from the operator. For example, such is the case under the US Comprehensive Environmental Response, Compensation and Liability Act, 1980 (CERCLA or Superfund). The Statute establishes the Superfund with tax dollars to be replenished by the costs recovered from liable parties, to pay for clean-ups if necessary. The United States Environmental Agency operates the Superfund and has the broad powers to investigate contamination, select appropriate remedial actions, and either order liable parties to perform the clean-up or do the work itself and recover its costs.\footnote{For an analysis of CERCLA, see Brighton and Askman, “The Role of the Government Trustees in Recovering Compensation for Injury to Natural Resources”, in Peter Weitenstein (ed.), \textit{Harm to the Environment \ldots op. cit.}, pp. 177-206, 183-184.}

(10) In addition to the present purposes, the draft principles serve or imply the serving of other objectives, including: (a) providing incentives to the operator and other relevant persons or entities to prevent transboundary damage from hazardous activities; (b) resolving disputes among States concerning transboundary damage in a peaceful manner that promotes friendly relations among States; (c) preserving and promoting the viability of economic activities that are important to the welfare of States and peoples; (d) and providing compensation in a manner that is predictable, equitable, expeditious and cost effective. Wherever possible, the draft principles should be interpreted and applied so as to further all these objectives.\footnote{See also Lucas Bergkamp, \textit{Liability and Environment \ldots op. cit.}, p. 70, footnote 19, who has identified seven functions relevant to a liability regime, namely compensation, distribution of losses, allocation of risks, punishment, corrective justice, vindication or satisfaction, and deterrence and prevention.}

(11) In particular, the principle of ensuring “prompt and adequate” compensation by the operator should be perceived from the perspective of achieving “cost internalization”, which constituted the core, in its origins, of the “polluter-pays” principle. It is a principle that argues for internalizing the true economic costs of pollution control, clean-up, and protection measures within the costs of the operation of the activity itself. It thus attempted to ensure that Governments did not distort the costs of international trade and investment by subsidizing these environmental costs. This policy was endorsed in the policy of OECD and the European Union. The contexts in which the principle was endorsed have envisaged its own variations in its implementation.

(12) In one sense, it seeks to provide an incentive on the operator and other relevant persons or entities to prevent a hazardous activity from causing transboundary damage. The “polluter-pays” principle is referred to in a number of international instruments. It appears in very general terms as Principle 16 of the Rio Declaration:

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

(13) In treaty practice, the principle has formed the basis for the construction of liability regimes on the basis of strict liability. This is the case with the Lugano Convention which in the preamble has “regard to the desirability of providing for strict liability in this field taking into account the ‘Polluter-Pays’ Principle”. The 2003 Kiev Protocol, in its preamble, refers to the “polluter-pays principle” as “a general principle of international environmental law, accepted also by the parties to” the 1992 Protection and Use of Watercourses Convention and Lakes and the 1992 Industrial Accidents Convention.\footnote{It also finds reference, for example, in the 1990 International Convention on Oil Pollution Preparedness and Response (ILM vol. 30 (1990) p. 735); the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention); (ILM vol. 32 (1993), p.1069); the 1992 Convention on the Protection of the Marine Environment of the Baltic Sea Area; the 1992 Convention on the Protection of the Marine Environment of the Black Sea against Pollution (ILM vol. 32 (1993) p. 1110); the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes; the 1992 Convention on the Transboundary Effects of Industrial Accidents and the 1993 Lugano Convention, and the EU Directive 2004/35/CE on environmental liability.}\footnote{In its report on the Implementation of Agenda 21, the United Nations notes:

“Progress has been made in incorporating the principles contained in the Rio Declaration \ldots - including \ldots the polluter-pays principle \ldots - in a variety of international and national legal instruments. While some progress has been made in implementing United Nations Conference on Environment and Development commitments through a variety of international legal instruments, much remains to be done to embody the Rio principles more firmly in law and practice.”

(14) The principle has its limitations. It has thus been noted:

"The extent to which civil liability makes the polluter pay for environmental damage depends on a variety of factors. If liability is based on negligence, not only does this have to be proved, but harm which is neither reasonably foreseeable nor reasonably avoidable will not be compensated and the victim or the taxpayer, not the polluter, will bear the loss. Strict liability is a better approximation of the 'polluter-pays' principle, but not if limited in amount, as in internationally agreed schemes involving oil tankers or nuclear installations. Moreover, a narrow definition of damage may exclude environmental losses which cannot be easily quantified in monetary terms, such as wildlife, or which affect the quality of the environment without causing actual physical damage." 398

However, the polluter-pays principle has been endorsed or is being endorsed in different national jurisdictions. The Indian Supreme Court in the Vellore Citizens' Welfare Forum v. Union of India, 1996 (5) SCC 647, noted that precautionary principle, and the polluter-pays principle, and the new burden of proof, supported by articles 21, 47, 48A, and 51A (g) of the Constitution of India, have become "part of the environmental law of the country". Report of the Indian Law Commission, see Law Commission of India, One Hundred Eighty-Sixth Report on Proposal to Constitute Environment Courts, September 2003. Access to justice, particularly in environmental matters is an essential facet of article 21 of the Indian Constitution. New Zealand and Australia already have environmental courts. Available at: http://lawcommissionofindia.nic.in/reports>, p. 36. Multiple provincial statutes of Canada regarding liability for environmental damage and subsequent remediation recognize the principle. In Spain, the Spanish courts have relied on the principle causae est commodum eis e commodum, that is the person who derives a benefit from an activity must also pay for resulting damage, to impose liability on persons for damage caused by mines, waste, damage as a result of loss of water, and toxic gas. In Japan, with regard to pollution caused by mining activities and marine pollution, the polluter pays to clean up the contamination to the commons and to restore the victim's property to its pre-damage state. The French legal system endorsed in various forms the polluter-pays principle. In Époux Vullion v. Société Immobilière Vernet-Chiprout, JCP 1971.2.16781, France's Cour de Cassation held that "the owner's right to enjoy his property in the most absolute manner not prohibited by law or regulation is subject to his obligation not to cause damage to the property of anyone else which exceeds the normal inconveniences of neighborhood". The Swedish Environmental Code, 1998, which came into force on 1 January 1999 makes the party who is liable, to a reasonable extent, for pollution to pay for investigations of possible causes, clean-up, and mitigation of damage. The test of reasonableness is determined with reference to (a) the length of time elapsed since the pollution occurred, (b) environmental risk involved, (c) the operator's contribution. Ireland enacted statutes to integrate, into domestic law, international treaties imposing strict liability for oil and hazardous waste spills by ships. Irish Courts have already begun to rely upon the polluter-pays principle. In Brazil strict liability is becoming a standard for damage caused by activities which are hazardous or those that harm or have a risk of causing harm to the environment. Intent need not be proved. Under the National Environmental Management Act, 1998, of South Africa strict liability is imposed on operators who may cause or have caused or are causing significant pollution or degradation of environmental harm. Singapore provides strict liability for criminal offences. It imposes obligations of clean-up on polluters without the need for any intentional or negligent behaviour. See also Secretariat Survey of Liability regimes, A/CN.4/453, paras. 272-286. 398

(15) Moreover, it has been asserted that the principle cannot be treated as a "rigid rule of universal application, nor are the means used to implement it going to be the same in all cases". 399 Thus, a "great deal of flexibility will be inevitable, taking full account of differences in the nature of the risk and the economic feasibility of full internalization of environmental costs in industries whose capacity to bear them will vary". 400 Some commentators doubt "whether it (the 'polluter-pays' principle) has achieved the status of generally applicable rule of customary international law, except perhaps in relation to States in the EC, the UNECE, and the OECD". 401

(16) The aspect of promptness and adequacy of compensation is related to the question of measurement of compensation. General international law does not specify "principles, criteria or methods of determining a priori how reparation is to be made for injury caused by wrongful acts

398 Birnie and Boyle, International Law … op. cit., pp. 93-94. 399 Ibid., pp. 94-95. See also Secretariat Survey of Liability regimes, A/CN.4/453, chapter II. 400 Birnie and Boyle, International law … op. cit., p. 95. The authors noted that reference to "public interest" in Principle 16 of the Rio Declaration leaves "ample room", for exceptions and as adopted at Rio the principle "is neither absolute nor obligatory" p. 93. They also noted that in the case of the East European nuclear installations, the Western European Governments, who represent a large group of potential victims, have funded the work needed to improve the safety standards, p. 94. 401 Philippe Sands, Principles … op. cit., p. 282. For illustration of the flexible way in which this principle is applied in the context of OECD and EC, pp. 281-285. Rudiger Wolfrum, notes that "Although the International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990 and the Convention on the Transboundary Effects of Industrial Accidents both refer in their Preambles to the polluter-pays principle as being a "general principle of international environmental law", such view is not sustained in the light of the United States' practice and also in the light of the uncertainties about its scope and consequences", see Rudiger Wolfrum "Transboundary Pollution" in Fred L. Morrison and Rudiger Wolfrum (eds.) International, Regional, and National Environmental Law … op. cit. See generally Nicolas de Sadeleer, Environmental Principles: From Political Slogans to Legal Rules (Oxford: OUP, 2002), pp. 21-59.

In the arbitration between France and the Netherlands, concerning the application of the Convention of 3 December 1976 on the Protection of the Rhine against Pollution and the Additional Protocol of 25 September 1991 against Pollution from Chlorides (France/Netherlands), the Arbitral Tribunal was requested to consider the "polluter-pays" principle in its interpretation of the Convention, although it was not expressly referred to therein. The Tribunal in its award dated 12 March 2004 concluded that, despite its importance in treaty law, the polluter-pays principle is not a part of general international law, and was therefore not pertinent to its interpretation of the Convention. Affaire concernant l'épuration des eaux, par le Royaume des Pays-Bas et la République Française en application du Protocole du 25 Septembre 1991 additionnel à la Convention relative à la Protection du Rhin contre la pollution par les chloreux (OUEP 2002), paras. 102-103:

"102 … Le tribunal note que les Pays-Bas, à l'appui de leur demande, ont fait référence au principe du 'polluer payeur'.”

103. Le Tribunal observe que ce principe figure dans certains instruments internationaux, tant bilatéraux que multilatéraux, et se situe à des niveaux d'effectivité variables. Sans nier son importance en droit conventionnel, le Tribunal ne pense pas que ce principe fasse partie du droit international général.”

or omissions". Reparation under international law is a consequence of a breach of a primary obligation. The general obligation to make full reparation is restated in article 31 of the articles on responsibility of States for internationally wrongful acts. The content of this obligation was detailed by the Permanent International Court of Justice in the Chorzow Factory case, when it stated obiter dicta:

“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, so far as possible, wipe out all the consequences of the illegal act and re-establish 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 is not covered by restitution in kind or payment in place of it - such are the principles which should serve the amount of compensation due for an act contrary to international law.”

(17) The Chorzow Factory standard applies in respect of internationally wrongful acts, which are not covered by the present draft principles. It is however useful in appreciating the limits and the parallels that ought to be drawn in respect of activities covered by the present draft principles. There are questions about principles on the basis of which compensation could be awarded: Should compensation be awarded only in respect of the actual loss suffered by the victim to the extent it can be quantified? Or should compensation go beyond that and reflect the paying capacity of the operator? Two Guiding Principles seem relevant. The first is that damages awarded should not have a punitive function. The second is that the victim can only be compensated for the loss suffered but cannot expect to financially gain from the harm caused. While keeping in view these two basic principles, the point can still be made that equity, as well as polluter-pays principle, demands that the operator should not be allowed to seek out safe-havens to engage in risk-bearing hazardous activities without expecting to pay for damage caused, so as to provide an incentive to exert utmost care and due diligence to prevent damage in the first instance.

(18) Some general principles concerning payment of compensation have evolved over a period of time and were endorsed by the International Court of Justice and other international tribunals. These may be briefly noted: (a) financially assessable damage, that is, damage quantifiable in monetary terms is compensable; (b) this includes damage suffered by the State to its property, or personnel or in respect of expenditures reasonably incurred to remedy or mitigate damage; as well as damage suffered by natural or legal persons, both nationals and those who are resident and suffered injury on its territory; (c) the particular circumstances of the case, the content of the obligation breached, the assessment of reasonableness of measures undertaken by parties in respect of the damage caused, and finally, consideration of equity and mutual accommodation. These factors will determine the terms or heads against which precise sums of compensation would be payable. Accordingly, the following guidelines on the basis of awards rendered by international courts and tribunals may be noted: compensation is payable in respect of personal injury, for directly associated material loss such as loss of earnings and earning capacity, medical expenses including costs for achieving full rehabilitation;


406 For the principles stated in the “Lustania” case and the Factory at Chorzow case on the function of compensation, see, ibid., article 36 and its commentary.

407 The Supreme Court of India in the M.C. Mehta v. Union of India (the Oleum gas leak case) (1987 SC 1086) stressed the point that the “larger and more prosperous the enterprise, greater must be the amount of compensation payable for the harm caused on account of an accident in the carrying on of the hazardous or inherently dangerous activity by the enterprise”. See Law Commission of India, One Hundred Eighty-Sixth Report on Proposal to Constitute Environmental Courts, September 2003, p. 31, available at http://lawcommissionofindia.nic.in/reports.


409 Ibid., and the cases cited therein.
compensation is also payable for non-material damage suffered as, for example, for “loss of loved ones, pain and suffering as well as the affront to sensibilities associated with the intrusion on the person, home or private life”.

In respect of damage to property, the loss is usually assessed against capital value, loss of profits, and incidental expenses. In this context, different valuation techniques and concepts like assessment of “fair market value”, “net book value”, “liquidation or dissolution value”, “discounted cash flow” factoring elements of risk and probability have been used. On these and other issues associated with quantification of compensation there is ample material, particularly in the context of injury caused to aliens and their property through nationalization of their companies or property.

The principles developed in the context of disputes concerning foreign investment may not automatically be extended to apply to the issues of compensation in the field of transboundary damage. There may be difficult questions regarding claims eligible for compensation, as for example, economic loss, pain and suffering, permanent disability, loss of amenities or of consortium, and the evaluation of the injury. Similarly, damage to property, which could be repaired or replaced could be compensated on the basis of the value of the repair or replacement. It is difficult to compensate damage caused to objects of historical or cultural value, except on the basis of arbitrary evaluation made on a case-by-case basis. Further, the looser and less concrete the link between the incident in question with the property claimed to have been damaged, the less certain the right to get compensation. The Commentary to draft Principle 2 reveals the extent to which some of these problems have been overcome.

Principle 4

Prompt and adequate compensation

1. Each State should take all necessary measures to ensure that prompt and adequate compensation is available for victims of transboundary damage caused by hazardous activities located within its territory or otherwise under its jurisdiction or control.

2. These measures should include the imposition of liability on the operator or, where appropriate, other person or entity. Such liability should not require proof of fault. Any conditions, limitations or exceptions to such liability shall be consistent with draft principle 3.

3. These measures should also include the requirement on the operator or, where appropriate, other person or entity, to establish and maintain financial security such as insurance, bonds or other financial guarantees to cover claims of compensation.

4. In appropriate cases, these measures should include the requirement for the establishment of industry-wide funds at the national level.

5. In the event that the measures under the preceding paragraphs are insufficient to provide adequate compensation, the State of origin should also ensure that additional financial resources are made available.

Commentary

(1) This draft principle reflects an important role that is envisaged for the State of origin in fashioning a workable system for compliance with the principle of “prompt and adequate compensation”. The reference to “Each State” in the present context is to the State of origin. The principle contains four interrelated elements: (a) the State should ensure prompt and adequate compensation and for this purpose should put in place an appropriate liability regime; (b) any such liability regime may place primary liability on the operator, and should not require the proof of fault; (c) any conditions, limitations or exceptions that may be placed on such liability should not defeat the purpose of the principle of prompt and adequate compensation; and (d) various forms of securities, insurance and industry-wide funding are the means to provide sufficient financial guarantees for compensation. The five paragraphs of draft principle 4 express these four elements.

(2) It should be recalled that the assumption under the present draft principles is that the State of origin would have performed fully all the obligations concerning prevention of


transboundary activities under international law. Without prejudice to other claims that may be made under international law, the responsibility of the State for damage in the context of present principles is therefore not contemplated.

(3) Thus paragraph 1 focuses on the principle that States should ensure payment of adequate and prompt compensation. The State itself is not necessarily obliged to pay such compensation. The principle, in its present form, responds to and reflects a growing demand and consensus in the international community: as part of arrangements for permitting hazardous activities within its jurisdiction and control, it is widely expected that States would make sure that adequate mechanisms are also available to respond to claims for compensation in case of any damage.

(4) The emphasis in paragraph 1 is on all “necessary measures” and each State is given sufficient flexibility to achieve the objective, that is, of ensuring prompt and adequate compensation. This is highlighted without prejudice to any ex gratia payments to be made or contingency and relief measures, States or other responsible entities may otherwise consider extending to the victims.

(5) As noted in the commentary concerning the “Purposes” of the present draft principles, the need to develop liability regimes in an international context has been recognized and finds expression, for example, in Principle 22 of the Stockholm Declaration of 1972 and Principle 13 of the Rio Declaration of 1992.  

(6) The basic principle that a State should ensure payment of prompt and adequate compensation for hazardous activities could be traced back as early as the Trail Smelter Arbitration, a case in which clear and convincing evidence was available for the serious consequence and injury caused to property within one State by the iron ore smelter in another. Since then numerous treaties, some important decisions, and extensive national law and practice which have evolved have given considerable weight to claims for compensation in respect of transfrontier pollution and damage. Some commentators regard this as a customary law obligation.  

(7) The standard of promptness and adequacy in paragraph 1 is a standard that also finds support in the Trail Smelter Arbitration. The notion of “promptness” refers to the procedures that would govern access to justice, and that would influence the time and duration for the rendering of decisions on compensation payable in a given case. This is also a necessary criterion to be emphasized in view of the fact that litigation in domestic courts involving claims of compensation could be costly and protracted over several years, as it was in the Amoco Cadiz case, which took 13 years.  To render access to justice more

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413 For a mention of different sources as a basis for arriving at this conclusion, see Peter-Tobias Stoll, “Transboundary Pollution” in Fred L. Morrison and Rudiger Wolfrum (eds.) International, Regional, and National Environmental Law... op. cit., pp. 169-200, pp. 169-174. Peter-Tobias Stoll notes:

“It must be recalled, however, that the prohibition principle is based on sovereign right of states to their territory. There is no evidence that it is necessary to refer to a specific entitlement based on a single component in raising a complaint about transboundary pollution. One can thus conclude that the prohibition of transboundary pollution is based on the state interest in the environmental integrity of its territory. Treaty law reflects this notion ... Sovereignty, while creating a right to the environmental integrity of a territory or area at one hand, at the other hand is the very basis of states’ responsibility for the pollution which originates within their territory.”

In addition, it is also suggested that principles of abuse of rights and good neighbourhood have provided a basis for the prohibition against transboundary harm. See Johan G. Lamers, “Transfrontier Pollution and International Law, The Present State of Research” in The Hague Academy of International Law, Center For Studies and Research in International Law and International Relations, Transfrontier Pollution and International Law (1986), p. 100.


415 Emmanuel Fontaine, “The French Experience: ‘Tanio’ and ‘Amoco Cadiz’ incidents compared” in Colin M. De La Rue, Liability for Damage to the Environment (London: Lloyds of London Press, 1993), pp. 101-108, p. 105. Similarly, in the case of Bhopal gas tragedy, it is stated that by the time the case first reached the Supreme Court of India on the issue whether interim relief assessed against Union Carbide on behalf of victims was appropriate, litigation continued in India for more than five years without even reaching the commencement of pretrial discovery, see Kenneth F. McCallion and H. Rajan Sharama, “International Resolution of Environmental Disputes and Bhopal Catastrophe” in The International Bureau of the Permanent Court of Arbitration (eds.) International Investments and Protection of the Environment (The Hague: Kluwer Law International, 2001), pp. 239-270, p. 249. It is also stated that Trail Smelter Arbitration took about 14 years to adjudicate upon the claims of private parties. See Philip McNamara, The Availability of Civil Remedies to Protect Persons and Property from Transfrontier Pollution Injury (Alfred Metzener Verlag, Frankfurt, 1981), p. 70.
widespread, efficient and prompt, suggestions have been made to establish special national or international environmental courts.\footnote{A Rest “Need for an International Court for Environment? Underdeveloped Legal Protection for the Individual in Transnational Litigation”, Environmental Policy and Law, vol. 24, (1994), pp. 173-187. For the view that the establishment of an international environmental court may not be a proper answer to the “need to enhance the rule of law through access to justice and the representation of community interests”, see Ellen Hey, “Reflections in an International Environmental Court” in The International Bureau of the Permanent Court of Arbitration (eds.), International Investments … op. cit., pp. 271-301, at p. 299-300. At the national level, the Indian Law Commission, made a very persuasive case for the establishment of national environmental courts in India. See Law Commission of India, op. cit. New Zealand and Australia already have environmental courts. Available at: http://lawcommissionofindia.nic.in/reports>}

(8) On the other hand, the notion of “adequacy” of compensation refers to any number of issues.\footnote{For an exhaustive enumeration of the implementation of the principle of prompt, adequate and effective compensation in practice, see Rene Lefebre, Transboundary Environmental Interference …, op. cit., ch. 7, pp. 229-312.} For example, a lump-sum amount of compensation agreed upon as a result of negotiations between the operator or the State of origin and the victims or other concerned States following the consolidation of claims of all the victims of harm may be regarded as an adequate compensation. So would compensation awarded by a Court as a result of the litigation entertained in its jurisdiction, subject to confirmation by superior courts wherever necessary. It is ipso facto adequate as long as the due process of the law requirements are met. As long as compensation given is not arbitrary, and grossly disproportionate to the damage actually suffered, even if it is less than full, it can be regarded as adequate. In other words, adequacy is not intended to denote “sufficiency”.

(9) The term “its territory or otherwise under its jurisdiction or control” has the same meaning as the terms used in paragraph 1 (a) of article 6 of the draft articles on prevention.\footnote{Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10), article 1 and commentary paras. (7)-(12).}

(10) Paragraph 2 spells out the first important measure that may be taken by each State, namely the imposition of liability on the operator or, where appropriate, other person or entity. The draft principles envisage the definition of “operator” in functional terms and it is based on the factual determination as to who has the use, control, and direction of the object at the relevant time. It is worth stressing that liability in case of significant damage is generally channelled\footnote{According to Goldie, the nuclear liability conventions initiated the new trend of channelling liability back to operator “no matter how long the chain of causation, nor how novel the intervening factors (other than a very limited number of exculpatory ones).” See L.F.E. Goldie, “Concepts of Strict and Absolute Liability and the Ranking of Liability in terms of Relative Exposure to Risk”, Netherlands Yearbook of International Law vol. XVI (1985) pp. 174-248 at p. 196. See also Goldie, “Liability for Damage and the Progressive Development of International Law”, ICLQ vol. 14 (1965), p. 1189, pp. 1215-8.} to the operator of the installation. There are however other possibilities that exist. In the case of ships, it is channelled to the owner, not the operator. This means that charterers - who may be the actual operators - are not liable under the International Convention on Civil Liability for Oil Pollution Damage (CLC) 1992. In other cases, liability is channelled through more than one entity. Under the Basel Protocol, waste generators, exporters, importers and disposers are all potentially liable at different stages in the transit of waste. The real underlying principle is not that “operators” are always liable, but that the party with the most effective control of the risk at the time of the accident or has the ability to provide compensation is made primarily liable.

(11) Operator’s liability has gained ground for several reasons and principally on the belief that one who created high risks seeking economic benefit must bear the burden of any adverse consequences of controlling the activity.\footnote{For an interesting account on economic, political and strategic factors influencing the choices made in channelling liability, see Gunther Doeker and Thomas Gehring “Private or International Liability for Transnational Environmental Damage - The Precedent of Conventional Liability Regimes”, Journal of Environmental Law, vol. 2 (1990), pp. 1-15, p. 7.} The imposition of the primary liability on the operator is widely accepted in international treaty regimes and in national law and practice.\footnote{See Secretariat Survey of Liability regimes, A/CN.4/543, paras. 340-386.}

(12) The second sentence of the paragraph 2 provides that such liability should not require proof of fault. Various designations are used to describe contemporary doctrine imposing strict liability, among them: “liability without fault” (responsabilité sans faute); “negligence without fault”, “presumed responsibility”, “fault per se”, “objective liability” (responsabilité objective) or risk liability (responsabilité pour risqué créé).\footnote{See Ferdinand F. Stone, “Liability for damage caused by things”, in Andree Tunc (ed.), International Encyclopedia of Comparative Law, Vol. XI, Torts, part I (The Hague, Nijhoff, 1983), chap. 5, p. 3; para. 1.} The phrase “such liability should not require proof of fault” seeks to capture such a broad spectrum of designations.
Hazardous and ultrahazardous activities, the subject of the present draft principles, involve complex operations and carry with them certain inherent risks of causing significant harm. In such matters, it is widely recognized that it would be unjust and inappropriate to make the claimant shoulder a heavy burden of proof of fault or negligence in respect of highly complex technological activities whose risks and operation the concerned industry closely guards as a secret. Strict liability is recognized in many jurisdictions, when assigning liability for inherently dangerous or hazardous activities. The case for strict liability for ultrahazardous or abnormally dangerous activities was held to be the most proper technique both under common and civil law to enable victims of dangerous and ultrahazardous activities to recover compensation without having to establish proof of fault on the basis of what is often detailed technical evidence, which, in turn, would require on the part of victims a complete understanding of the complicated and complex operation or activity. The case for strict liability is strengthened when the risk has been introduced unilaterally by the defendant.

In the case of damage arising from hazardous activities, it is fair to designate strict liability of the operator at the international level. Strict liability has been adopted as the basis of liability in several instruments; and among the recently negotiated instruments it is provided for in article 4 of the Kiev Protocol, article 4 of the Basel Protocol; and article 8 of the Lugano Convention.

In the case of activities which are not dangerous but still carry the risk of causing significant harm, there perhaps is a better case for liability to be linked to fault or negligence. See the Secretariat Survey of Liability regimes, A/CONF.4/543, paras. 29-260. The Indian Supreme Court in M. C. Mehta v. Union of India, AIR 1987 SC 1086 (the Oleum Gas Leak case) held that in the case of hazardous activities, exceptions which could be pleaded to avoid absolute or strict liability, like that the damage is not foreseeable, and that the use involved is a natural one, are not available. See the Report of the Indian Law Commission, op. cit.


426 Secretariat Survey of liability regimes, ibid.

There was hesitation exhibited by the Working Group of the Commission in 1996 in designating damage arising from all activities covered within the scope of the draft principles subject to the regime of strict liability. It may be recalled that the Commission noted that the concepts of strict and absolute liability which “are familiar in the domestic law in many States and in relation to certain (that is, ultrahazardous) activities in international law … have not been fully developed in international law, in respect to a large group of activities such as those covered by article 1”. Brackets added. Yearbook … 1996, vol. II (Part Two), Annex I, paragraph (1) of the general commentary to chapter III. In arriving at this conclusion the Working Group had the benefit of the Survey of liability prepared by the Secretariat, Yearbook … 1995, vol. II (Part One), document A/CONF.4/471.

In addition, since profits associated with the risky activity provide a motivation for industry in undertaking such activity, strict liability regimes are generally assumed to provide incentives for better management of the risk involved. However, this is an assumption, which may not always hold up. As these activities have been accepted only because of their social utility and indispensability for economic growth, States may consider at the opportune time reviewing their indispensability by exploring more environmentally sound alternatives which are also at the same time less hazardous.

Strict liability may alleviate the burden that victims may otherwise have in proving fault of the operator but it does not eliminate the difficulties involved in establishing the necessary causal connection of the damage to the source of the activity. The principle of causation is linked to questions of foreseeability and proximity or direct loss. Courts in different jurisdictions have applied the principles and notions of proximate cause, adequate causation, foreseeability and remoteness of the damage. This is a highly discretionary and unpredictable branch of law. Different jurisdictions have applied these concepts with different results. It may be mentioned that the test of proximity seems to have been gradually eased in modern tort law. Developments have moved from strict condicio sine qua non theory over the foreseeability ("adequacy") test to a less stringent causation test requiring only the "reasonable imputation" of damage. Further, the foreseeability test could become less and less important with the progress being made in the fields of medicine, biology, biochemistry, statistics and other relevant fields. Given these reasons, such tests have not been included in a more general analytical model on loss allocation.

The point worth bearing in mind is that in transforming the concept of strict liability from a domestic, national context - where it is well-established but with all the differences associated with its invocation and application in different jurisdictions - into an international standard, its ingredients should be carefully defined, keeping however its basic objective in view, that is, to make the person liable without any proof of fault for having created a risk by engaging in a dangerous or hazardous activity. Such a definition is necessary not only to capture the most
positive elements of the concept of strict liability as they are obtained in different jurisdictions. Such an approach would not only make the international standard widely acceptable but also ensure the standard adopted truly serves the cause of the victims exposed to dangerous activities thus facilitating prompt and effective remedies.

(18) This task can be approached in different ways.\textsuperscript{428} For example, it could be done by adopting a proper definition of damage as has been done in the case of the “Use of Terms”, which defines “damage” as damage to person, property and environment. It could also be done by designating strict liability as the standard for invoking liability, while also specifying that it is meant to include all damage foreseeable in its most generalized form and that knowledge of the extent of the potential danger is not a prerequisite of liability. Further, it may be clarified as part of application of the rule that it is sufficient if the use posed a risk of harm to the others and accordingly that it is not open to the operator to plead exemption from liability on the ground that the use involved is a natural one.

(19) The third sentence of paragraph 2 recognizes that it is part of the practice for States borne out in domestic and treaty practice to subject liability to certain conditions, limitations or exceptions. However, it must be ensured that such conditions, limitations or exceptions do not fundamentally alter the purpose of providing for prompt and adequate compensation. The point has thus been emphasized that any such conditions, limitations or exceptions shall be consistent with the purposes of the present draft principles.

(20) It is common to associate the concept of strict liability with the concept of limited liability. Limited liability has several policy objectives. It is justified as a matter of convenience to encourage the operator to continue to be engaged in such a hazardous but socially and economically beneficial activity. Strict liability is also aimed at securing reasonable insurance cover for the activity. Further, if liability has to be strict, that is, if liability has to be established without a strict burden of proof for the claimants, limited liability may be regarded as a reasonable \textit{quid pro quo}. Although none of the propositions are self-evident truths, they are widely regarded as relevant.\textsuperscript{429}

(21) It is arguable that a scheme of limited liability is unsatisfactory, as it is not capable of providing sufficient incentive to the operator to take stricter measures of prevention. If the limits are set too low it could even become a licence to pollute or cause injury to others and externalize the real costs of the operator. Secondly, it may not be able to meet all the legitimate demands and claims of innocent victims for reparation in case of injury. For this reason, it is important to set limits of financial liability at a sufficiently high level, keeping in view the magnitude of the risk of the activity and the reasonable possibility for insurance to cover a significant portion of the risk involved.

(22) Article 9 of the Kiev Protocol and article 12 of the Basel Protocol provide for strict but limited liability. In contrast, article 6 (1) and article 7 (1) of the Lugano Convention provides for strict liability without any provision for limiting the liability. Where limits are imposed on financial liability of operator, generally such limits do not affect any interest or costs awarded by the competent court. Moreover, limits of liability are subject to review on a regular basis.

(23) Financial limits are well known in the case of regimes governing oil pollution at sea and nuclear incidents. For example, under the International Convention on Civil Liability for Oil Pollution Damage (CLC) 1992, the shipowner’s maximum limit of liability is 59.7 million Special Drawing Rights; thereafter the International Oil Pollution Compensation Fund is liable to compensate for further damage up to a total of 135 million SDRs (including the amounts received from the owner), or in the case of damage resulting from natural phenomena, a

\textsuperscript{428} See the observations of Elspeth Reid, “Liability for Dangerous activities ...” \textit{op. cit.}, pp. 741-743.

200 million SDRs. Similarly, the 1997 Vienna Convention on Civil Liability for Nuclear Damage also prescribed appropriate limits for operator’s liability.

(24) Most liability regimes exclude limited liability in case of fault. The operator is made liable for the damage caused or contributed to by his or her wrongful intentional, reckless or negligent acts or omissions. Specific provisions to this extent are available for example in article 5 of the Basel Protocol and article 5 of the Kiev Protocol. In the case of operations involving highly complicated chemical or industrial processes or technology, fault liability could pose a serious burden of proof for the victims. Their rights could nevertheless be better safeguarded in several ways. For example, the burden of proof could be reversed requiring the operator to prove that no negligence or intentional wrongful conduct was involved. Liberal inferences may be drawn from the inherently dangerous activity. Statutory obligations could be imposed upon the operator to give access to the victims or the public to the information concerning the operations.

(25) One advantage of a strict but limited liability from the perspective of the victim is that the person concerned need not prove negligence and would also know precisely whom to sue. In cases where harm is caused by more than one activity and could not reasonably be traced to any one of them or cannot be separated with a sufficient degree of certainty, jurisdictions have tended to make provision for joint and several liability. Existing international instruments also provide for that kind of liability.

(26) If however, the person who has suffered damage has by his or her own fault caused the damage or contributed to it, compensation may be denied or reduced having regard to all the circumstances.

(27) It is also usual for liability regimes and domestic law providing for strict liability to specify a limited set of fairly uniform exceptions to the liability of the operator. A typical illustration of the exceptions to liability can be found in articles 8 and 9 of the Lugano Convention, article 3 of the Basel Convention or article 4 of the Kiev Protocol. Liability is excepted if, despite taking all appropriate measures, the damage was the result of (a) an act of armed conflict, hostilities, civil war or insurrection; or (b) the result of a natural phenomenon of exceptional, inevitable, unforeseeable and irresistible character; or (c) wholly the result of compliance with a compulsory measure of a public authority in the State of injury; or (d) wholly the result of the wrongful intentional conduct of a third party.

430 Article V (1) of the 1992 Protocol and article 4 of the Fund Convention. Following the sinking of the Erika off the French coast in December 1999, the maximum limit was raised to 89.77 million SDRs, effective 1 November 2003. Under 2000 amendments to the 1992 Fund Protocol to enter into force in November 2003, the amounts have been raised from 135 million SDR to 203 million SDR. If three States contributing to the Fund receive in their territories combined quantities of equal to or more than 600 million tons of oil in the preceding year, the maximum amount is raised to 300,740,000 SDR, from 200 million SDR.

431 For the text, ILM vol. 36 (1997) 1473. The installation State is required to assure that the operator is liable for any one incident for not less than 300 million SDRs or for a transition period of 10 years, a transitional amount of 150 million SDR is to be assured, in addition by the installation State itself. The 1997 Convention on Supplementary Compensation provides an additional sum, which may exceed $1 billion. See Articles III and IV. For the text, ILM vol. 33 (1994) p. 1518.

432 On joint and several liability, Lucas Bergkamp, Liability and Environment: ... op. cit., pp. 298-306.

433 For examples of treaty practice, see for example article IV of the 1969 International Convention on Civil Liability for Pollution Damage; article IV of the 1992 International Convention on Civil Liability for Pollution Damage; article 8 of the 1996 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea; article 5 of the International Convention on Civil Liability for Bunker Oil Pollution Damage; article 4 of the Basel Protocol; article 4 of the Kiev Protocol; article 11 of the Lugano Convention. See also article VII of the 1962 Convention on the Liability of Operators of Nuclear Ships; article II of the 1997 Protocol to the 1963 Vienna Convention on Civil Liability for Nuclear Damage; article II of the 1963 Vienna Convention on Civil Liability for Nuclear Damage; article 3 of the 1960 Convention on Third Party Liability in the Field of Nuclear Energy; article 3 of the 2004 Protocol to amend the 1960 Convention on Third Party Liability in the Field of Nuclear Energy.

434 Under paragraphs 2 and 3 of article III of the 1992 International Convention on Civil Liability for Oil Pollution Damage, war, hostilities, civil war, insurrection or natural phenomena of an exceptional, inevitable and irresistible character are elements providing exoneration from liability for the owner, independently of negligence on the part of the claimant. See also article III of the 1969 International Convention on Civil Liability for Oil Pollution Damage; article 3 of the 2001 International Convention on Civil Liability for Bunker Oil Pollution Damage; article 7 of the 1996 International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea; article 3 of the 1977 Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources provides similar language in respect of the operator of an installation; article 3 of the 1989 Convention on Civil Liability for Damage caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels.

Exemptions are also referred to in article IV (3) of the 1997 Protocol to amend the 1963 Vienna Convention on Civil Liability for Nuclear Damage: no liability under this Convention shall attach to an operator if he proves that the nuclear damage is directly due to an act of armed conflict, civil war, insurrection. See also article IV (3) of the 1963 Vienna Convention on Civil Liability for Nuclear Damage; article 9 of 2004 Protocol to amend the 1960 Convention on Third Party Liability in the Field of Nuclear Energy; article 3 (5) of the annex to the 1997 Convention on Supplementary Compensation for Nuclear Damage Convention; article 4 (1) of the EU Directive 2004/35 on environmental liability. The Directive also does not apply to activities whose main purpose is to serve national defence or international security. In accordance with article 4 (6), it also does not apply to activities whose sole purpose is to protect from natural disasters. Terrorist acts are included in the most recent liability instrument: article 8 (1) of Annex VI to the Madrid Protocol to the Antarctic Treaty entitled Liability Arising from Environmental Emergencies provides: “An operator shall not be liable pursuant to Article 6 if it proves that the environmental emergencies caused by: (a) an act or omission necessary to protect human life or safety; (b) an event constituting in the circumstances of Antarctica a natural disaster of an exceptional character, which could have been reasonably foreseen, either generally or in the particular case, provided all reasonable preventative measures have been taken that are designed to reduce the risk of environmental emergencies and their
Paragraph 3 provides that the “measures” envisaged under paragraph 1 should include imposition of a requirement on the operator or, where appropriate other person or entity, to establish and maintain financial security such as insurance, bonds or other financial guarantees to cover claims of compensation. The objective here is to ensure that the operator has sufficient funds at his disposal to enable him to meet claims of compensation, in the event of an accident or incident. It is understood that availability of insurance and other financial securities for hazardous operations depends upon many factors and mostly on the ability of the operator to identify the “risk” involved as precisely as possible. The assessment of “risk” for this purpose should not only consider the risk inherent in the activity to cause damage but also the statistical probability of the type and number of claims that such damage might give rise as well as the number of claimants that may be involved.

In the case of activities with a risk of causing significant transboundary harm, the insurance cover would have to provide for the “foreign loss event” in addition to the “domestic loss event”. The modern dynamics of law governing causation multiplies the factors that the operator in the first instance and the insurers ultimately would have to take into account while assessing the “risk” that need to be covered. In this connection, the liberal tests that are invoked to establish a causal link, widening the reach of the tests of “proximate cause” and “foreseeability” and even replacing the same with a broader “general capability” test, are at issue.

Despite these difficulties it is encouraging that insurance cover is increasingly being made available for damage to persons or property or environment due to oil spills and other hazardous activities. This is mainly because of the growing recognition on the part of the industry, the consumers, and the Governments that the products and services that the hazardous industry is able to provide are worthy of protection in the public interest. In order to maintain potential adverse impact; (c) an act of terrorism; or (d) an act of belligerency against the activities of the operator.” For examples at domestic law, see Secretariat Survey of Liability regimes, A/CN.4/543, paras. 434-476.


these products and services the losses that such activities generate must be widely allocated and shared. Insurance and financial institutions are indispensable actors in any such scheme of allocation. These are institutions with expertise to manage risk and their profitability lies in pooling financial resources and wisely investing in risk bearing activities. However, it is inevitable that premium for insurance cover of the hazardous activities grows in direct proportion to the range and magnitude of the risk that is sought to be covered. The raise in the premium costs is also directly related to the growing trend to designate operator’s liability as strict. Further, the trend to raise the limits of liability to higher and higher levels, even if the operator’s liability is maintained under a cap, is also a factor in the rising costs of premiums.

The State concerned may establish minimum limits for financial securities for such purpose, taking into consideration the availability of capital resources through banks or other financial agencies. Even insurance schemes may require certain minimum financial solvency from the operator to extend their cover. Under most of the liability schemes, the operator is obliged to obtain insurance and such other suitable financial securities. This may be particularly necessary to take advantage of the limited financial liability scheme, where it is available. However, in view of the diversity of legal systems and differences in economic conditions some flexibility for States in requiring and arranging suitable financial and security guarantees may be envisaged. An effective insurance system may also require wide participation by potentially interested States.


See for example the statement by Italy, ibid., A/C.6/58/SR.17, para. 28.
(32) The importance of such mechanisms cannot be overemphasized. It has been noted that: “financial assurance is beneficial for all stakeholders: for public authorities and the public in general, it is one of the most effective, if not the only, way of ensuring that restoration actually takes place in line with the polluter-pays principle; for industry operators, it provides a way of spreading risks and managing uncertainties; for the insurance industry, it is a sizeable market”.\footnote{See Proposal for a Directive of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage, Brussels, 23.1.2002, COM (2002) 17 final, pp. 7-9.} Such insurance coverage should also be available for clean-up costs.\footnote{Ibid.}

(33) Insurance coverage is available in some jurisdictions, such as the United States and in Europe. The experience gained in such markets can be quickly transferred to other markets as the insurance industry is growing in global market. Article 14 of the EU Directive 2004/35/CE on environmental liability with regard to the prevention and remedying of environmental damage for example provides that member States shall take measures to encourage the development of security instruments and markets by the appropriate security, economic and financial operators, including financial mechanisms in case of insolvency, with the aim of enabling operators to use financial guarantees to cover their responsibilities under the Directive.

(34) One of the consequences of ensuring the availability of insurance and financial security is that a claim for compensation may be allowed as one option under domestic law directly against any person providing financial security cover. However, such a person may be given the right to require the operator to be joined in the proceedings. Such a person is also entitled to invoke the defences that the operator would otherwise be entitled to under the law. Article 11 (3) of the Kiev Protocol and article 14 (4) of the Basel Protocol provide for such possibilities. However, both Protocols allow States to make a declaration, if they wish, not allowing for such direct action.

(35) Paragraphs 4 and 5 refer to the other equally important measures that the State should focus upon. This is about establishing supplementary funds at the national level. This, of course, does not preclude the assumption of these responsibilities at subordinate level of government in the case of a State with a federal system. Available schemes of allocation of loss envisage some sort of supplementary funding to meet claims of compensation in case the funds at the disposal of the operator are not adequate enough to provide compensation to victims. Most liability regimes concerning dangerous activities provide for additional funding sources to meet the claims of damage and particularly to meet the costs of response and restoration measures that are essential to contain the damage and to restore value to affected natural resources and public amenities.

(36) Additional sources of funding could be created out of different accounts. One account could be out of public funds, as part of national budget. In other words, the State could take a share in the allocation of loss created by the damage, as it happened in the case of the nuclear energy operations. Another account could be a common pool of fund created by contributions either from operators of the same category of dangerous activities or from entities for whose direct benefit the dangerous or hazardous activity is carried out. This is the case with management of risks associated with transport of oil by sea. But in the case of hazardous activities which are very special supplementary funds may have to be developed through some form of taxation on consumers of the products and services the industry generates and supports. This may be particularly necessary if the pool of operators and directly interested consumers is very thin and not connected by any common economic or strategic interest.

(37) Paragraph 4 deals with industry funding and provides that in appropriate cases, these measures should include the requirement for the establishment of industry funds at the national level. The words “these measures” reflects the fact that the State has the option of achieving the objective of setting up of industry wide funding in a variety of ways depending upon its particular circumstances.

(38) Paragraph 5 provides that in the event the measures mentioned in the preceding paragraphs are insufficient to provide adequate compensation, the State of origin should also ensure that additional financial resources are made available. While it does not directly require the State of origin to set up government funds to guarantee prompt and adequate compensation, it provides that the State of origin should ensure that sufficient financial resources are available in case of damage arising from a hazardous operation situated within its territory or in areas under its jurisdiction.
(39) Paragraphs 3, 4 and 5 are framed as guidelines to encourage States to adopt best practices. The freedom of States to choose one option or the other in accordance with its particular circumstances and conditions is the central theme of the present draft principle. This would however require vigilance on the part of the State of origin to continuously review its domestic law to ensure that its regulations are kept up to date with the development of technology and industry practices at home and elsewhere.

Principle 5

Response measures

Upon the occurrence of an incident involving a hazardous activity which results or is likely to result in transboundary damage:

(a) the State of origin shall promptly notify all States affected or likely to be affected of the incident and the possible effects of the transboundary damage;

(b) the State of origin, with the appropriate involvement of the operator, shall ensure that appropriate response measures are taken and should, for this purpose, rely upon the best available scientific data and technology;

(c) the State of origin, as appropriate, should also consult with and seek the cooperation of all States affected or likely to be affected to mitigate the effects of transboundary damage and if possible eliminate them;

(d) the States affected or likely to be affected by the transboundary damage shall take all feasible measures to mitigate and if possible to eliminate the effects of such damage;

(e) the States concerned should, where appropriate, seek the assistance of competent international organizations and other States on mutually acceptable terms and conditions.

Commentary

(1) Draft principle 5 deals with the situation arising after the occurrence of transboundary damage both from legal and practical perspectives. As soon as an incident involving a hazardous activity results or is likely to result in transboundary damage, with or without simultaneous damage within the territory of the State of origin, the State of origin is called upon to do several things. First, it is expected to obtain from the operator the full facts available about the incident, and most importantly of the dangers the damage posed to the population, their property, and to the environment in the immediate neighbourhood. Second, it is expected to ensure that appropriate measures are taken within the means and contingency preparedness at its disposal to mitigate the effects of damage and if possible to eliminate them. Such response measures should include not only clean-up and restoration measures within the jurisdiction of the State of origin but also extend to contain the geographical range of the damage to prevent it from becoming transboundary damage, if it had already not become one. Third, the State of origin is duty-bound to inform all States affected or likely to be affected. The notification must contain all necessary information about the nature of damage, its likely effects on persons, property and environment and the possible precautions that need to be taken to protect them from its ill-effects or to contain or mitigate or eliminate the damage altogether.

(2) Paragraph (a) which deals with prompt notification is an obligation of due diligence imposed upon the State of origin.443 The notification obligation has to be performed as soon as it is practicable. It shall contain all relevant information that is available to the State of Origin. In some instances it may not be immediately possible for the State of origin to ascertain the full set of relevant facts and to gather information about the nature of damage and remedial action that can and should be taken.

(3) Paragraph (b) requires the State to take appropriate response measures and provides that it should rely upon the best available means and technology. The State of origin is expected to perform the obligation of due diligence both at the stage of authorization of hazardous activities 444 and in monitoring the activities in progress after authorization and extending into the phase when damage might actually materialize, in spite of best efforts to prevent the same. The International Court of Justice in the Case concerning the Gabčíkovo-Nagymaros Project

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443 Phoebe N. Okowa, “Procedural Obligations in International Environmental Agreements”, BYBIL, vol. 67 (1996), pp. 275-336, at p. 330 where it is observed that the existence in general international law of the duty to warn States at risk in emergency situations has received the “endorsement of the International Court in the Corfu Channel case and in the Néargeus case”. It is a duty that is the subject of the 1986 IAEA Convention on Early Notification of a Nuclear Accident, which "confirms the established position at customary law", see p. 332.

444 Closely associated with the duty of prior authorization is the duty to conduct an environmental impact statement (EIA). See Xue Hanqin, Transboundary Damage . . . op. cit., at p. 166. Phoebe Okowa notes at least five types of ancillary duties associated with the obligation to conduct EIA. One of them is that the nature of the activity as well as its likely consequences must be clearly articulated and communicated to the States likely to be affected. However, she notes that with the exception of a few conventions, it is widely provided that the State proposing the activity is the sole determinant of the likelihood or seriousness of adverse impact. None of the treaties under consideration permit third States to propose additional or different assessments if they are dissatisfied with those put forward by the State of origin. See Phoebe N. Okowa, ibid., at pp. 282-285, p. 285 and on the content of EIA, ibid., fn. 25, p. 282, p. 286.
noted the need for continuous monitoring of hazardous activities as result of "awareness of the vulnerability of the environment and the recognition that environmental risks have to be assessed on a continuous basis". 445

(4) Further, the State concerned should ever be vigilant and ready to prevent the damage as far as possible and when damage indeed occurs to mitigate the effects of damage with the best available technology. 446 The role of the State envisaged under the present draft principle is thus complementary to the role assigned to it under draft articles 16 and 17 of the draft articles on prevention, which deal with requirements of "emergency preparedness" and "notification of emergency". 447

(5) The present draft principle however should be distinguished and goes beyond those provisions. States should develop, by way of response measures, necessary contingency preparedness and employ the best means at their disposal once the emergency arises, consistent with the contemporary knowledge of risks and technical, technological and financial means available to manage them. It deals with the need to take necessary response action within the State of origin after the occurrence of an incident resulting in damage, but if possible before it acquires the character of transboundary damage. In this process, the States concerned should seek if necessary assistance from competent international organizations and other States as provided in sub-paragraph (e).

(6) The requirement in paragraph (b) is directly connected to the application of the precautionary approach. 448 As with the application of the precautionary approach in any particular field, this allows some flexibility and is expected to be performed keeping in view all social and economic costs and benefits. 449 Indeed the principle that States should ensure that activities within their jurisdiction and control do not give rise to transboundary harm cannot be overemphasized. The importance of response action once an accident or incident has occurred triggering significant damage could not equally be overstated. In fact, such measures are necessary to contain the damage from spreading, and should be taken immediately. This is done in most cases even without losing any time over identifying the responsible person or the cause or fault that triggered the event. Paragraph (b) assigns to the State of origin the responsibility of determining how such measures should be taken and by whom, which includes the appropriate involvement of the operator. The State would have the option of securing a reimbursement of costs of reasonable response measures.

(7) It is common for the authorities of the State to swing immediately into action and evacuate affected people to places of safety and provide immediate emergency medical and other relief. It is for this reason that the principle recognizes the important role that the State plays and should play in taking necessary measures as soon as the emergency arises, given its role in securing at all times the public welfare and protecting the public interest.

(8) Any measure that the State takes in responding to the emergency created by the hazardous activity does not and should not however put the role of the operator in any secondary or residual role. The operator has a primary responsibility to maintain emergency preparedness and operationalize any such measures as soon as an incident occurs. The operator could and should give the State all the assistance it needs to discharge its responsibilities. Particularly, the operator is in the best position to indicate the details of the accident, its nature, the time of its occurrence and its exact location and the possible measures that parties likely to be affected could take to minimize the consequences of the damage. 450 Accordingly, the possibility of an opposed to every new development in pollution control", see Peter-Tobias Stoll, "Transboundary Pollution", in Fred L. Morrison and Radiger Wolfrum, pp. 169-200, p. 182.

449 Ibid., at para. 140. The Court stated that it "is mindful that in the field of environmental protection vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage."
450 For the text and commentaries of articles 16 and 17 of the draft articles on prevention, see Official Records of the General Assembly, Fifty-third Session, Supplement No. 10 (A/56/10), pp. 370-436, at 429-433. For the view that the treaty obligations to maintain contingency plans and respond to pollution emergencies must be seen as part of State’s duty of due diligence in controlling sources of known environmental harm, Birnie and Boyle, International Law…, op. cit., p. 137. The authors also note at p. 136 that "it is legitimate to view the Corfu Channel case as authority for customary obligation to give warning of known environmental hazards".
451 On the requirement of best available technology, Radiger Wolfrum noted that it is closely associated with the precautionary principle, see Radiger Wolfrum "International Environmental Law: Purposes, Principles and Means of Ensuring Compliance", in Fred L. Morrison and Radiger Wolfrum, International, Regional and National Environmental Law (The Hague: Kluwer Law International, 2003), p. 15. It is also suggested the term "available" means that "States are responsible for applying those technological advances that have already been marketed, as
operator, including a transnational corporation, being first to react, is not intended to be precluded. In case the operator is unable to take the necessary response action, the State of origin shall make arrangements to take such action. In this process it can seek necessary and available help from other States or competent international organizations.

(9) **Paragraph (c)** provides that the State of origin, in its own interest and even as a matter of duty borne out of “elementary considerations of humanity”, should consult the States affected or likely to be affected to determine the best possible response action to prevent or mitigate transboundary damage. Consultations are usually triggered upon request. It is considered that the qualification, “as appropriate”, would be sufficiently flexible to accommodate necessary consultation among concerned States and to engage them in all possible modes of cooperation, depending upon the circumstances of each case. The readiness of States to cooperate may not be uniform; it depends on their location; the degree to which they feel obliged to cooperate, as well as upon their preparedness and capacity.

(10) **Paragraph (d)** on the other hand requires States affected or likely to be affected to extend to the State of origin their full cooperation. Once notified, the States affected also are under a duty to take all appropriate and reasonable measures to mitigate the damage to which they are exposed. These States should take such response measures as are within their power in areas under their jurisdiction or control to help prevent or mitigate such transboundary damage. They may also seek such assistance as is available from the competent international organizations and other States as envisaged in paragraph (e). Such a response action is essential not only in the public interest but also to enable the appropriate authorities and courts to treat the subsequent claims for compensation and reimbursement of costs incurred for response measures taken as reasonable.

(11) **Paragraph (e)** is self-explanatory and is modelled on article 28 of the Convention on the Law of the Non-Navigational Uses of International Watercourses, 1997. It is expected that arrangements for assistance between States or competent international organizations and the States concerned would be on the basis of mutually agreed terms and conditions. Such arrangements may be conditioned by the priorities of assistance of the receiving State; the constitutional provisions and mandates of the competent international organizations; financial and other arrangements concerning local hospitality or immunities and privileges. Any such arrangements should not be based on purely commercial terms and be consistent with the elementary considerations of humanity and the importance of rendering humanitarian assistance to the victims in distress.

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451 Under articles 5 and 6 of the EU Directive 2004/35/CE, competent authorities, to be designated under article 13, may require the operator to take necessary preventive or restoration measures or take such measures themselves, if the operator does not take them or cannot be found.

452 See *Corfu Channel case I.C.J. Reports* 1949, p. 4, at p. 22. For reference to the particular concept as part of “obligations … based … on certain general and well-recognized principles”, as distinguished from the traditional sources of international law enumerated in article 38 of the Statute of the International Court of Justice, Bruno Simma, “From Bilateralism to Community Interest in International Law”, *Recueil des Cours*, … vol. 250 (1994-IV), pp. 291-292.

453 On the duty of States to notify and consult with each other with a view to take appropriate actions to mitigate damage, and for citation of relevant legal instruments including Principle 18 of the Rio Declaration, 1992 Industrial Accidents transboundary accidents, 1992 Biodiversity Convention and the 2000 Biosafety Protocol and the treaties in the field of nuclear accidents and the IAEA 1986 Early Notification Convention, see Sands, *Principles … op. cit.*, pp. 841-847.

454 In the Gabcikovo-Nagymaros Project case, in defense of the variant C it implemented on the river Danube appropriating nearly 80 to 90 per cent water of the river Danube, in the face of Hungary’s refusal to abide by the terms of the Treaty concluded between Czechoslovakia and Hungary, 1977, Slovakia argued that “It is a general principle of international law that a party injured by the non-performance of another contract party must seek to mitigate the damage he has sustained.” The Court referring to this principle noted that “it would follow from such a principle that an injured State which has failed to take necessary measures to limit the damage sustained would not be entitled to claim compensation for that damage which could have been avoided”. The Court observed that “While this principle might thus provide a basis for the calculation of damages, it could not, on the other hand, justify an otherwise wrongful act.” It is a different matter that the Court found the implementation of variant C as a wrongful act and hence did not go further to examine the principle of the duty of the affected States to mitigate the effects of damage to which they are exposed. See Judgment, *I.C.J. Reports* 1997, p. 7, para. 80. The very willingness of the Court to consider any failure in this regard as an important factor in the computation of damages to which those States would eventually be entitled amounts to an important recognition under general international law of the duty imposed on States affected by transboundary harm to mitigate the damage to the best extent they can.

455 In general, on the criterion of reasonableness in computing costs admissible for recovery, see Peter Wetterstein, “A Proprietary or Possessory Interest …”, *op. cit.*, pp. 47-50.
Principle 6

International and domestic remedies

1. States shall provide their domestic judicial and administrative bodies with the necessary jurisdiction and competence to ensure that these bodies have prompt, adequate and effective remedies available in the event of transboundary damage caused by hazardous activities located within their territory or otherwise under their jurisdiction or control.

2. Victims of transboundary damage should have access to remedies in the State of origin that are no less prompt, adequate and effective than those available to victims that suffer damage, from the same incident, within the territory of that State.

3. Paragraphs 1 and 2 are without prejudice to the right of the victims to seek remedies other than those available in the State of origin.

4. States may provide for recourse to international claims settlement procedures that are expeditious and involve minimal expenses.

5. States should guarantee appropriate access to information relevant for the pursuance of remedies, including claims for compensation.

Commentary

(1) Draft principle 6 indicates some broad measures necessary to operationalize and implement the objective set forth in draft principle 4. In one sense, draft principles 4 and 6 together encompass the substantive and procedural measures reflected in the expectation that the State of origin and other States concerned would provide minimum standards without which it would be difficult or impossible to implement the requirement to provide effective remedies, including the opportunity to seek payment of prompt and adequate compensation to victims of transboundary damage. The substantive minimum requirements such as channelling of liability, designating liability without proof of fault, specifying minimum conditions, limitations or exceptions for such liability, establishing arrangements for financial guarantees or securities to cover liability are addressed within the framework of draft principle 4. On the other hand, draft principle 6 deals with the procedural minimum standards. They include equal or non-discriminatory access to justice, availability of effective legal remedies, and recognition and enforcement of foreign judicial and arbitral decisions. It also addresses the need to provide recourse to international procedures for claim settlements that are expeditious and less costly.

(2) Paragraphs 1, 2 and 3 focus on domestic procedures and the development and confirmation of the principle of equal or non-discriminatory access. The 1974 Stockholm Convention on the Protection of the Environment between Denmark, Finland, Norway, and Sweden is one of the most advanced forms of international cooperation available among States recognizing the right to equal access to justice. This was possible of course because the environmental standards are largely the same among the Nordic countries. Article 3 of the Convention provides equal right of access to persons who have been or may be affected by an environmental harmful activity in another State. The right of equal access to courts or administrative agencies of that State is provided “to the same extent and on the same terms as a legal entity of the State in which the activity is being carried on”. The transboundary applicant is allowed to raise questions concerning the permissibility of the activity, appeal against the decisions of the Court or the administrative authority and seek measures necessary to prevent damage. Similarly the transboundary victim could seek compensation for damage caused on terms no less favourable than the terms under which compensation is available in the State of origin.457

(3) The principle of equal access goes beyond the requirement that States meet a minimum standard of effectiveness in the availability of remedies for transboundary claimants by providing for access to information, and helping appropriate cooperation between the relevant courts and national authorities across national boundaries. This principle is also reflected in

457 For comment on the Convention see Stephen C. McCaffrey, Private Remedies for Transfrontier Environmental Disturbances (UCN and Natural Resources, Morges, Switzerland, 1975), pp. 85-87. The main contribution of the Convention is the creation of a Special Administrative Agency to supervise the transboundary nuisances in each State party for more intensive intergovernmental consultation and cooperation. The Agency is given standing before the courts and administrative bodies of other contracting States. The Convention does not however apply to pending causes. It does not have an express provision for waiver of State immunity. It is also silent on the question of the proper applicable law for the determination of liability and calculation of indemnities, though it is assumed that the proper law for the purposes will be the law of the place where the injury is sustained. In contrast the OECD recommended to its members a more gradual implementation of flexible bilateral or multilateral accords on measures for the facilitation at the procedural level of transnational pollution abatement litigation. See Philip McNamara, The Availability of Civil Remedies … op. cit., pp. 146-147.
Principle 10 of the Rio Declaration and in Principle 23 of the World Charter for Nature. It is also increasingly recognized in national constitutional law regarding protection of the environment. Paragraph 1 sets forth the obligation to provide domestic judicial and administrative bodies with the necessary jurisdiction and competency to be able to entertain claims concerning the transboundary harm, as well as the effectiveness of the remedies that are made available. It also describes the importance of removing hurdles in order to ensure participation in administrative hearings and judicial proceedings. Once the transboundary damage occurs, transboundary remedies should be provided equal access to claims concerning the transboundary remedies available to victims of transboundary damage, as well as to the effectiveness of the remedies that are made available.

Paragraph 2 emphasizes the importance of non-discrimination principles in the determination of the State of the affected State, the principle of non-discrimination provides that the State of the affected State has no less prompt, adequate and effective remedies than those that are available to victims within its territory. This principle could thus be referred to both procedural and substantive requirements. Paragraph 2 therefore is of particular importance. In terms of its procedural aspects, it means that the State of origin should grant access to justice to the residents of the affected State in terms of its basis as it does for its own nationals or residents. This is an aspect which is gaining increasing acceptance in principle practice.

Paragraph 3 provides a without prejudice clause. It should be noted that paragraphs 1 and 2 do not indicate problems concerning choice of law or choice of forum. States may be a significant obstacle to the delivery of prompt, adequate and effective judicial recourse and remedies to victims, particularly if they are not assisted by expert counsel in the field. States could move the matters forward by promoting harmonization of laws and by agreement to extend such access and remedies.

Paragraph 4 may be noted that with respect to choice of forum that instead of the law of the domicile of the operator, the claimant may seek recourse to a forum, which he or she deems appropriate.

Paragraph 5 provides that in matters of deciding on the choice of forum and applicable law, the State of origin is not bound to the forum of the State of the affected State in which it or it is domiciled. This is based on the principle that the forum is to be considered as a forum for the settlement of the dispute, which is determined by the parties themselves. The State of origin is therefore left to determine the forum where the claim is filed. See, e.g., van den Broek, "Environmental Damage in Private International Law," Report of the Committee on Private Law Remedies, op. cit., pp. 404-407.

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most appropriate to pursue the claim. This may be the forum of the State where an
act or omission causing injury took place or where the damage arose.\textsuperscript{464} It has been asserted
that the provision of such a choice is considered to be based on “a trend now firmly established
in both Conventions on international jurisdiction and in national systems”.\textsuperscript{465} Under the 1968
Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial
Matters remedies may be made available only in the jurisdiction of a party where: (a) the act or
omission causing injury took place; (b) the damage was suffered; (c) the operator has his
domicile or her habitual residence; or (d) the operator has his or her principal place of business.
Article 19 of the 1993 Lugano Convention, article 17 of the Basel Protocol, and article 13 of
Kiev Protocol provide for similar choice of forum.

(9) In the matter of choice of law, State practice is not uniform: different jurisdictions have
adopted either the law that is most favourable to the victim or the law of the place which has the
most significant relationship with the event and the parties.\textsuperscript{466}

(10) Paragraph 4 highlights a different aspect in the process of ensuring the existence of
remedies for victims of transboundary harm. It is intended to bring more specificity to the
nature of the procedures that may be involved other than domestic procedures. It refers to
“international claims settlement procedures”. Several procedures could be envisaged. For
example, States could in the case of transboundary damage negotiate and agree on the quantum
of compensation payable or even make payment ex gratia.\textsuperscript{467} These may include mixed claims

\textsuperscript{464} See the International Law Association, Second Report (by Christophe Bernasconi and Gerrit Betlem)
on Transnational Enforcement of Environmental Law, International Law Association, Berlin Conference (2004),
jurisdiction is however admissible if it can be established that damage in the State, not being the State of origin,
is not foreseeable.

\textsuperscript{465} Ibid., p. 899.

\textsuperscript{466} The “most favourable law principle” is adopted in several jurisdictions in Europe, Venezuela, and Tunisia.
However, United States law appears to favour the law of the place which has the “most significant relationship
with the event and the parties”, ibid., pp. 911-915.

\textsuperscript{467} In the case of damage caused to the fishermen, nationals of Japan due to nuclear tests conducted by the
United States of America in 1954 near the Marshall Islands, the latter paid to Japan US$ 2 million. Department of
by way of compensation by the USSR to Canada following the crash of Cosmos 954 in January 1978. ILM vol. 18,
1979, p. 907. Sands notes that though several European States paid compensation to their nationals for damage
suffered due to the Chernobyl nuclear accident, they did not attempt to make formal claims for compensation, even
while they reserved their right to do so, Philippe Sands, \textit{Principles, op. cit.}, pp. 886-889. The State may agree to
pay \textit{ex gratia} directly to the victims, e.g. the United States Government agreed to pay to Iranian victims of shooting
the Iranian Airbus 655 by the USS Vincennes. States may also conclude treaties setting up international claims

commissions, negotiations for lump sum payments, etc. The international component does not
preclude possibilities whereby a State of origin may make a contribution to the State affected
to disburse compensation through a national claims procedure established by the affected State.
Such negotiations need not, unless otherwise desired, bar negotiations between the State of
origin and the private injured parties and such parties and the person responsible for the activity
causing significant damage. A lump sum compensation could be agreed either as a result of a
trial or an out of court settlement.\textsuperscript{468} Victims could immediately be given reasonable
compensation on a provisional basis, pending decision on the admissibility of claim and the
award of compensation. National courts, claims commissions or joint claims commissions
established for this purpose could examine the claims and settle the final payments of
compensation.\textsuperscript{469}

(11) The United Nations Compensation Commission\textsuperscript{470} and the Iran-United States Claims
Tribunal\textsuperscript{471} may offer themselves as useful models for some of the procedures envisaged under
paragraph 4.

(12) The Commission is aware of the practical difficulties, such as expenses and the time-lags
involved, in pursuing claims in a transnational context or on an international plane. There is
justification in the criticism, applicable to some cases but not all, that civil law remedies

\textsuperscript{468} In connection with the Bhopal Gas Leak Disaster, the Government of India attempted to consolidate the claims
of the victims. It sought to seek compensation by approaching the United States court first but the action failed on
grounds of forum non-conveniens. The matter was then litigated before the Supreme Court of India. The Bhopal
Gas Leak Disaster (Processing of Claims) Act, 1985 provide the basis for the consolidation of claims. The Supreme
Court of India in the \textit{Union Carbide Corporation v. Union of India and others, All India Reports 1990 SC 273 gave
article 22 referred to several factors that States may wish to consider for arriving at the most equitable quantum of
Fifty-first Session Supplement No. 10 (A/51/10), pp. 320-327.}

\textsuperscript{469} For the April 2002 award of $324, 949,311 to people of Eniwetok in respect of damages to the land arising out of

\textsuperscript{470} On the procedure adopted by the United Nations Claims Commission, see Mojtaba Kazazi, “Environmental
Damage in the Practice of the United Nations Compensation Commission”, in Michael Bowman and Alan Boyle,
\textit{Environmental Damage … op. cit.}, pp. 111-13.

\textsuperscript{471} The rules of procedure of the Iran-United States Claims Tribunal are available at www.iusct.org.
requiring victims to pursue their claims in foreign national judicial and other forums may be “very complex, costly and ultimately devoid of guarantee of success”. The reference to procedures that are expensive and involving minimal expenses is intended to respond to this aspect of the matter and reflect the desire not to overburden the victim with an excessively lengthy procedure which may act as a disincentive. There have been several incidents of damage in recent years involving settlement of claims for compensation. Some of them are settled out of court. Others have been settled by recourse to civil liability regimes. The conclusion from the experience of different cases is that both States and concerned entities representing the victims must get involved to settle claims out of court or the victims must be given equal or non-discriminatory right of access to civil law remedies.


473 (i) In Ictoc 1 blowout in June 1979 in the Bay of Campeche off the coast of Mexico, pp. 239-240 (oil rig was owned by a United States company, controlled by a Mexican State-owned company, and operated by a privately owned Mexican drilling company involving US$ 1.25 million clean-up costs and an estimated US$ 400 million loss by the fishing and tourism industry; settled out of court between the United States Government and the United States company without going into questions of formal liability. Paid US$ 2 million to the United States Government, and US$ 2.14 million towards losses suffered by fishermen, tourist resorts, and others affected by the oil spill) ILM vol. 22 (1983) p. 580; (ii) the Cherry Point Oil Spill, pp. 249 (Canada and Atlantic Richfield Oil Refinery, a corporation of the United States of America settled claims out of court, in respect of an oil spill caused by a Libyan tanker while unloading oil at Cherry Point, State of Washington, in the United States waters causing oil pollution to the Canadian beaches in the west coast) Canadian Yearbook of International Law, vol. XI (1973) p. 333; the Sandoz case, Lefebre, Transboundary Environmental Interference ..., op. cit., pp. 251-252 (The water used to extinguish fire that broke out at the Sandoz Chemical Corporation on 1 November 1986 polluted the River Rhine, caused significant harm downstream in France, Germany, and the Netherlands. Economic harm had to be compensated. This involved clean-up costs and other response measures including monitoring and restoration costs. Pure economic loss was also involved as a result of loss caused to the fishing freshwater industry. The settlement of claims was at private level. More than 1,000 claims were settled in the amount of 36 million German marks. Most of the compensation was paid to States but some private parties also received compensation; Bhopal Gas case, in Lefebre, pp. 253-254 (claim was settled out of court between the Union Carbide Corporation, the United States of America and the Government of India for US$ 470 million, while the initial claim for compensation was more than that); The Mines de Potasse d’Alsace, in Lefebre, pp. 254-258 (A French company polluted the River Rhine with chlorides through discharge of waste salts. Such discharge was considered a normal operation. But the high salinity of the river was a matter of concern downstream to potable water companies, industry, and market gardeners which traditionally used the water for their commerce. Governments concerned, Switzerland, France, Germany, and the Netherlands negotiated an agreement to reduce the chloride pollution in 1976 at Bonn which came into force only in 1986 but it did not last. Another Protocol was concluded in 1991. Still the problem of high salinity continued. As the Government of the Netherlands was not willing to bring a claim against the Government of France, some victims launched a private litigation in the courts of the Netherlands in 1974. The litigation continued until 1988 when the case was settled out of court just before the Supreme Court of the Netherlands ruled in favour of the plaintiffs. The settlement was to the tune of US$ 2 million in favour of the cooperatives of the market gardeners. Claims of potable water industry did not succeed in the court of France on the ground that there was no sufficient causal link between the discharge of waste salts and the corrosion damage for which the water industry sought the damage).

474 See also Secretariat Survey of Liability regimes, A/CN.4/543, paras. 399-433.

475 For example, Section 4 of the Right to Information Act, 2005 of India obligates all public authorities to collect and maintain if possible in computerized form all records duly catalogued and indexed in a manner and the form which facilitates the right to information under the Act. For the text of Act 22 of 2005, see http://indiagovt.nic.in/fulltext.asp?utm=000522.


(15) The reference to “appropriate” access in paragraph 5 is intended to indicate that in certain circumstances access to information or disclosure of information may be denied. It is, however, important that even in such circumstances information is readily made available concerning the applicable exceptions, the grounds for refusal, procedures for review, and the charges applicable, if any. Where feasible, such information should be accessible free of charge or with minimal expenses.

(16) Also implicated in the present draft principles is the question of recognition and enforcement of foreign judgments and arbitral awards. Such recognition and enforcement would be essential to ensure the effects of decisions rendered in jurisdictions in which the defendant did not have enough assets for victims to recover compensation in other jurisdictions where such assets are available. Most States subject the recognition and enforcement of foreign judgments and arbitral awards to specific conditions prescribed in their law or enforce them in accordance with their international treaty obligations. Generally, fraud, no fair trial, public policy, irreconcilability with the earlier decisions could be pleaded as grounds to deny recognition and enforcement of foreign judgments and arbitral awards. Other conditions may apply or possibilities exist.478

Principle 7
Development of specific international regimes

1. Where, in respect of particular categories of hazardous activities, specific global, regional or bilateral agreements would provide effective arrangements concerning compensation, response measures and international and domestic remedies, all efforts should be made to conclude such specific agreements.

2. Such agreements should, as appropriate, include arrangements for industry and/or State funds to provide supplementary compensation in the event that the financial resources of the operator, including financial security measures, are insufficient to cover the damage suffered as a result of an incident. Any such funds may be designed to supplement or replace national industry based funds.

Commentary

(1) Draft principle 7 corresponds to the set of provisions contained in draft principle 4, except that they are intended to operate at international level. It builds upon principle 22 of the Stockholm Declaration and Principle 13 of the Rio Declaration. Paragraph 1 encourages States to conclude specific global, regional or bilateral agreements where such approaches would provide the most effective arrangements in areas which the present principles are concerned about: (a) compensation; (b) response measures; and (c) redress and remedies.

(2) Paragraph 2 encourages States, as appropriate, to include in such arrangements various financial security schemes whether through industry funds or State funds in order to make sure that there is supplementary funding for victims of transboundary damage. It points to the need for States to enter into specific arrangements and tailor them to the particular circumstances of individual hazardous activities. It also recognizes that there are several variables in the regime concerning liability for transboundary damage that are best left to the discretion of individual States or their national laws or practice to select or choose, given their own particular needs, political realities and stages of economic development. Arrangements concluded on a regional basis with respect to specific category of hazardous activities are likely to be more fruitful and durable in protecting the interest of their citizens, the environment and natural resources on which they are dependent.

(3) It may also be recalled that from the very inception of the topic, the Commission proceeded on the assumption that its primary aim was “to promote the construction of regimes to regulate without recourse to prohibition, the conduct of any particular activity which is perceived to entail actual or potential dangers of a substantial nature and to have transnational effects”.479

Principle 8
Implementation

1. Each State should adopt the necessary legislative, regulatory and administrative measures to implement the present draft principles.

478 For example, the US District Court which dismissed the Indian claims for compensation in the Bhopal case, on grounds of forum non-convenience, and referred the plaintiffs to courts in India, stipulated that judgments rendered in India could be enforced in the United States, Lefebre, Transboundary Environmental Interference ..., op. cit., pp. 267-268.

2. The present draft principles and the measures adopted to implement them shall be applied without any discrimination such as that based on nationality, domicile or residence.

3. States should cooperate with each other to implement the present draft principles.

Commentary

(1) Paragraph 1 restates what is implied in the other draft principles; namely that each State should adopt legislative, regulatory and administrative measures for the implementation of these draft principles. It intends to highlight the significance of national implementation through domestic legislation of international standards or obligations agreed to by States parties to international arrangements and agreements.

(2) Paragraph 2 emphasizes that these draft principles and any implementing provisions shall be applied without any discrimination on any grounds prohibited by international law. The emphasis on “any” is intended to denote that discrimination on any such ground is not valid. The references to nationality, domicile or residence are only illustrative. For example, discrimination on the basis of race, gender, religion or belief would obviously be precluded as well.

(3) Paragraph 3 is a general hortatory clause, which provides that States should cooperate with each other to implement the present draft principles. It is modelled on article 8 of the Kiev Protocol. The importance of implementation mechanisms cannot be overemphasized. From the perspective of general and conventional international law it operates at the international plane essentially as between States and that it requires to be implemented at the national level through specific domestic constitutional and other legislative techniques. It is important that States enact suitable domestic legislation to implement these principles, lest victims of transboundary damage be left without adequate recourse.
International Court of Justice


I.C.J. Reports 2007
INTERNATIONAL COURT OF JUSTICE
REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE
(BOSNIA AND HERZEGOVINA v. SERBIA AND MONTENEGRO)

JUDGMENT OF 26 FEBRUARY 2007

Official citation:

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

AFFAIRE RELATIVE À L’APPLICATION DE LA CONVENTION POUR LA PRÉVENTION ET LA RÉPRESSION DU CRIME DE GÉNOCIDE
(BOSNIE-HERZÉGOVINE c. SERBIE-ET-MONTÉNÉGRO)

ARRÊT DU 26 FÉVRIER 2007

Mode officiel de citation:
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<th>Full name</th>
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<tr>
<td>ARBiH</td>
<td>Army of the Republic of Bosnia and Herzegovina</td>
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<tr>
<td>FRY</td>
<td>Federal Republic of Yugoslavia</td>
<td>Name of Serbia and Montenegro between 27 April 1992 (adoption of the Constitution) and 3 February 2003</td>
</tr>
<tr>
<td>ICTR</td>
<td>International Criminal Tribunal for Rwanda</td>
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<tr>
<td>ICTY</td>
<td>International Criminal Tribunal for the former Yugoslavia</td>
<td></td>
</tr>
<tr>
<td>ILC</td>
<td>International Law Commission</td>
<td></td>
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<tr>
<td>JNA</td>
<td>Yugoslav People’s Army</td>
<td>Army of the SFY (ceased to exist on 27 April 1992, with the creation of the VJ)</td>
</tr>
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<td>MUP</td>
<td>Ministarstvo Unutrašnjih Poljova</td>
<td>Ministry of the Interior</td>
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<tr>
<td>NATO</td>
<td>North Atlantic Treaty Organization</td>
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<tr>
<td>SFRY</td>
<td>Socialist Federal Republic of Yugoslavia</td>
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<td>TO</td>
<td>Teritorijalna Odbrana</td>
<td>Territorial Defence Forces</td>
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<td>UNHCR</td>
<td>United Nations High Commissioner for Refugees</td>
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<tr>
<td>UNPROFOR</td>
<td>United Nations Protection Force</td>
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<tr>
<td>VJ</td>
<td>Yugoslav Army</td>
<td>Army of the FRY, under the Constitution of 27 April 1992 (succeeded to the JNA)</td>
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<td>VRS</td>
<td>Army of the Republika Srpska</td>
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INTERNATIONAL COURT OF JUSTICE

YEAR 2007

26 February 2007

CASE CONCERNING APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

(BOSNIA AND HERZEGOVINA v. SERBIA AND MONTENEGRO)

JUDGMENT

Present: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Keith, Sepulveda-Amor, Bennouna, Skofnikov; Judges ad hoc Mahieu, Kriča; Registrar Couvreur.

In the case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide, between Bosnia and Herzegovina, represented by Mr. Sakib Sofić, as Agent; Mr. Phon van den Biesen, Attorney at Law, Amsterdam, as Deputy Agent; Mr. Alain Pellet, Professor at the University of Paris X-Nanterre, Member and former Chairman of the United Nations International Law Commission, Mr. Thomas M. Franck, Professor Emeritus of Law, New York University School of Law, Ms Brigitte Stern, Professor at the University of Paris I, and Serbia and Montenegro, represented by H.E. Mr. Radoslav Stojanović, S.J.D., Head of the Law Council of the Ministry of Foreign Affairs of Serbia and Montenegro, Professor at the Belgrade University School of Law, as Counsel; Mr. Saša Obradović, First Counsellor of the Embassy of Serbia and Montenegro in the Kingdom of the Netherlands, Mr. Vladimir Cveticović, Second Secretary of the Embassy of Serbia and Montenegro in the Kingdom of the Netherlands, as Co-Agents; Mr. Tibor Varady, S.J.D. (Harvard), Professor of Law at the Central European University, Budapest, and Emory University, Atlanta, Mr. Ian Brownlie, C.B.E., Q.C., F.B.A., Member of the International Law Commission, member of the English Bar, Distinguished Fellow of All Souls College, Oxford, Mr. Xavier de Roux, Maître de droit, avocat à la cour, Paris, Ms Nataša Fauveau-Ivanović, avocat à la cour, Paris, member of the Council of the International Criminal Bar, Mr. Andreas Zimmerman, LL.M. (Harvard), Professor of Law at the University of Kiel, Director of the Walther-Schücking Institute,
Mr. Vladimir Djerić, LL.M. (Michigan), Attorney at Law, Mikijelj, Jankovic & Bogdanovic, Belgrade, President of the International Law Association of Serbia and Montenegro,
Mr. Igor Olujic, Attorney at Law, Belgrade,
as Counsel and Advocates;
Ms Sanja Dijajic, S.J.D, Associate Professor at the Novi Sad University School of Law.
Ms Ivana Mroz, LL.M. (Minneapolis),
Mr. Svetislav Rabrenović, Expert-associate at the Office of the Prosecutor for War Crimes of the Republic of Serbia,
Mr. Aleksandar Djurdjic, LL.M., First Secretary at the Ministry of Foreign Affairs of Serbia and Montenegro,
Mr. Miloš Jastrebić, Second Secretary at the Ministry of Foreign Affairs of Serbia and Montenegro,
Mr. Christian J. Tams, LL.M., Ph.D. (Cambridge), Walther-Schücking Institute, University of Kiel,
Ms Dina Dobrakovic, LL.B.,
as Assistants,
The Court,
composed as above,
after deliberation,
delivers the following Judgment:

1. On 20 March 1993, the Government of the Republic of Bosnia and Herzegovina (with effect from 14 December 1995 “Bosnia and Herzegovina”) filed in the Registry of the Court an Application instituting proceedings against the Federal Republic of Yugoslavia (with effect from 4 February 2003, “Serbia and Montenegro” and with effect from 3 June 2006, the Republic of Serbia — see paragraphs 67 and 79 below) in respect of a dispute concerning alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly of the United Nations on 9 December 1948 (hereinafter “the Genocide Convention” or “the Convention”), as well as various matters which Bosnia and Herzegovina claimed were connected therewith. The Application invoked Article IX of the Genocide Convention as the basis of the jurisdiction of the Court.

2. Pursuant to Article 40, paragraph 2, of the Statute of the Court, the Application was immediately communicated to the Government of the Federal Republic of Yugoslavia (hereinafter “the FRY”) by the Registrar; and in accordance with paragraph 3 of that Article, all States entitled to appear before the Court were notified of the Application.

3. In conformity with Article 43 of the Rules of Court, the Registrar addressed the notification provided for in Article 63, paragraph 1, of the Statute to all the States appearing on the list of the parties to the Genocide Convention held by the Secretary-General of the United Nations as depository. The Registrar also sent to the Secretary-General the notification provided for in Article 34, paragraph 3, of the Statute.

4. On 20 March 1993, immediately after the filing of its Application, Bosnia and Herzegovina submitted a request for the indication of provisional measures pursuant to Article 73 of the Rules of Court. On 31 March 1993, Bosnia and Herzegovina filed in the Registry, and invoked as an additional basis of jurisdiction, the text of a letter dated 8 June 1992, addressed jointly by the President of the then Republic of Montenegro and the President of the then Republic of Serbia to the President of the Arbitration Commission of the International Conference for Peace in Yugoslavia. On 1 April 1993, the FRY submitted written observations on Bosnia and Herzegovina’s request for provisional measures, in which it, in turn, recommended that the Court indicate provisional measures to be applied to Bosnia and Herzegovina. By an Order dated 8 April 1993, the Court, after hearing the Parties, indicated certain provisional measures with a view to the protection of rights under the Genocide Convention.

5. By an Order dated 16 April 1993, the President of the Court fixed 15 October 1993 as the time-limit for the filing of the Memorial of Bosnia and Herzegovina and 15 April 1994 as the time-limit for the filing of the Counter-Memorial of the FRY.

6. Since the Court included upon the Bench no judge of the nationality of the Parties, each of them exercised its right under Article 31, paragraph 3, of the Statute to choose a judge ad hoc to sit in the case: Bosnia and Herzegovina chose Mr. Elihu Lauterpacht and the FRY chose Mr. Milenko Kreca.

7. On 27 July 1993, Bosnia and Herzegovina submitted a new request for the indication of provisional measures. By letters of 6 August and 10 August 1993, the Agent of Bosnia and Herzegovina indicated that his Government wished to invoke additional bases of jurisdiction in the case: the Treaty between the Allied and Associated Powers and the Kingdom of the Serbs, Croats and Slovenes on the Protection of Minorities, signed at Saint-Germain-en-Laye on 10 September 1919, and customary and conventional international laws of war and international humanitarian law. By a letter of 13 August 1993, the Agent of Bosnia and Herzegovina confirmed his Government’s intention also to rely on the above-mentioned letter from the Presidents of Montenegro and Serbia dated 8 June 1992 as an additional basis of jurisdiction (see paragraph 4).

8. On 10 August 1993, the FRY also submitted a request for the indication of provisional measures and on 10 August and 23 August 1993, it filed written observations on Bosnia and Herzegovina’s new request. By an Order dated 13 September 1993, the Court, after hearing the Parties, reaffirmed the measures indicated in its Order of 8 April 1993 and stated that those measures should be immediately and effectively implemented.

9. By an Order dated 7 October 1993, the Vice-President of the Court, at the request of Bosnia and Herzegovina, extended the time-limit for the filing of the Memorial to 15 April 1994 and accordingly extended the time-limit for the filing of the Counter-Memorial to 15 April 1995. Bosnia and Herzegovina filed its Memorial within the time-limit thus extended. By a letter dated 9 May 1994, the Agent of the FRY submitted that the Memorial filed by Bosnia and Herzegovina failed to meet the requirements of Article 43 of the Statute and Articles 50 and 51 of the Rules of Court. By letter of 30 June 1994, the Registrar, acting on the instructions of the Court, requested Bosnia and Herzegovina, pursuant to Article 50, paragraph 2, of the Rules of Court, to file as annexes to its Memorial the extracts of the documents to which it referred therein.
No text content available.
APPLICATION OF GENOCIDE CONVENTION

JUDGMENT

The Parties requested the Court to adjudge and declare that it has no jurisdiction ratione personae over the case. In the Initiative, the FRY requested that the Court submit the case to the United Nations Security Council (Yugoslavia), Preliminary Objections (Yugoslavia v. Yugoslavia), hereinafter referred to as "the Application for Revision of the Judgment of 11 July 1996 in the Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)"

The FRY, contending that it had not been a party to the Statute of the Court until its admission to the United Nations on 1 November 2000, that it had not been a party to the Convention, that it had not been included in the list of States subject to the jurisdiction of the Court, and that it had not been informed of the decision of the Court to submit to it the case, requested the Court to adjudge and declare that it had not been a party to the Statute of the Court until 1 November 2000, that it had not been a party to the Convention, that it had not been included in the list of States subject to the jurisdiction of the Court, and that it had not been informed of the decision of the Court to submit to it the case.
35. By a letter of 12 June 2003, the Registrar informed Serbia and Montenegro that its request for further clarification concerning the applicability of Article VIII(2) of the Genocide Convention had been granted until a decision was rendered on the jurisdictional issues raised in the Initiative. However, the Court should also be informed of any additional matters arising in the proceedings on the merits. In further letters of the same date, the Parties and the Registrar confirmed that their parties had submitted their written pleadings.

36. In a further exchange of letters in October and November 2003, the Agents of the Parties submitted their written pleadings as to the scheduling of the oral proceedings.

37. Following a further exchange of letters between the Parties in March and April 2004, the President held a meeting with the Agents of the Parties on 27 February 2004. At this meeting, both Parties indicated that they intended to call witnesses and experts.

38. By letters dated 26 October 2004, the Parties were informed that, after examining the list of cases before the Court, the Court had decided not to authorize the filing of further written pleadings in the case. By an Order dated 3 November 2004, the Court fixed Monday 27 February 2006 for the opening of the oral proceedings.

39. On 14 March 2005, the President met with the Agents of the Parties in order to ascertain their views with regard to the organization of the oral proceedings. At this meeting, both Parties indicated that they intended to call witnesses and experts.

40. By letters dated 19 March 2005, the Registrar, referring to Articles 57 and 58 of the Rules of Court, informed the Parties that, after examining the list of cases before the Court, the Court had decided that it would hear the three experts and the ten witnesses and witness-experts whom it wished to call.

41. By a letter dated 5 October 2005, the Deputy Agent of Bosnia and Herzegovina informed the Registry of Bosnia and Herzegovina’s views with regard to the Initiative, as stated in the letter of 3 December 2001, and expressed its desire to proceed with the case. By a letter dated 9 September 2005, Bosnia and Herzegovina transmitted to the Court a list of three experts whom it wished to call at the hearings.

42. By a letter dated 18 April 2002, the Registrar informed the Parties that the Court had decided that it would call the three experts and ten witnesses and witness-experts whom it wished to call.
of Court, of the five witnesses proposed by Serbia and Montenegro. However, pursuant to Article 70, paragraph 2 of the Rules of Court, for interpretation into one of the official languages of the Court. Finally the Registrar transmitted to the Parties the calendar for the oral proceedings as adopted by the Court.

43. By a letter dated 12 December 2005, the Agent of Serbia and Montenegro informed the Court, inter alia, that eight of the ten witnesses and witness-experts it wished to call would speak in Serbian and outlined the arrangements which the Party intended to make, pursuant to Article 70, paragraph 2, of the Rules of Court, for interpretation into one of the official languages of the Court. By a letter dated 15 December 2005, the Deputy Agent of Bosnia and Herzegovina informed the Court, inter alia, that the three experts called by Bosnia and Herzegovina would speak in one of the official languages of the Court.

44. By a letter dated 28 December 2005, the Deputy Agent of Bosnia and Herzegovina, on behalf of the Government, requested that the Court call upon Serbia and Montenegro, under Article 49 of the Statute and Article 62, paragraph 1, of the Rules of Court, to produce a certain number of documents. By a letter dated 16 January 2006, the Agent of Serbia and Montenegro informed the Court of his Government’s views on this request. By a letter dated 19 January 2006, the Registrar, acting on the instructions of the Court, asked Bosnia and Herzegovina to provide certain information relating to its request under Article 49 of the Statute and Article 62, paragraph 2, of the Rules of Court. By letters dated 19 and 24 January 2006, the Deputy Agent of Bosnia and Herzegovina submitted additional information and informed the Court that Bosnia and Herzegovina had decided, for the time being, to restrict its request to the redacted sections of certain documents. By a letter dated 31 January 2006, the Co-Agent of Serbia and Montenegro transmitted to the Court a list of public documents that his Government would refer to in its first round of oral argument. Under cover of the same letter and of a letter dated 23 January 2006, the Deputy Agent of Bosnia and Herzegovina also transmitted to the Registry copies of new documents that Bosnia and Herzegovina had decided not to submit the video materials included in that list. By a letter dated 21 February 2006, the Deputy Agent of Bosnia and Herzegovina informed the Court that Bosnia and Herzegovina had no objections to the video material being shown at the oral proceedings. By
mission for the examination of three of the witnesses called by his Government to be conducted in Serbian (namely, Mr. Dušan Mihajlović, Mr. Vladimir Milicević, Mr. Dragojub Mijunović). By a letter dated 22 February 2006, the Registrar informed the Agent of Serbia and Montenegro that there was no objection to such a procedure being followed, pursuant to the provisions of Article 39, paragraph 3, of the Statute and Article 70 of the Rules of Court.

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

51. Public sittings were held from 27 February to 9 May 2006, at which the Court heard the oral arguments and replies of:

For Bosnia and Herzegovina: Mr. Sakib Softić, Mr. Phon van den Biesen, Mr. Alain Pellet, Mr. Thomas M. Franck, Ms Brigitte Stern, Mr. Luigi Condorelli, Ms Magda Karagiannakis, Ms Joanna Korner, Ms Laura Dauban, Mr. Antoine Ollivier, Mr. Morten Torkildsen.

For Serbia and Montenegro: H.E. Mr. Radoslav Stojanović, Mr. Saša Obradović, Mr. Vladimir Cvetković, Mr. Tibor Varady, Mr. Ian Brownlie, Mr. Xavier de Roux, Ms Nataša Fauveau-Ivanović, Mr. Andreas Zimmerman, Mr. Vladimir Djerić, Mr. Igor Olujić.

52. On 1 March 2006, the Registrar, on the instructions of the Court, requested Bosnia and Herzegovina to specify the precise origin of each of the extracts of video material and of the graphics, charts and photographs shown or to be shown at the oral proceedings. On 2 March 2006 Bosnia and Herzegovina provided the Court with certain information regarding the extracts of video material shown at the sitting on 1 March 2006 and those to be shown at the sittings on 2 March 2006 including the source of such video material. Under cover of a letter dated 5 March 2006, the Agent of Bosnia and Herzegovina transmitted to the Court a list detailing the origin of the extracts of video material, graphics, charts and photographs shown or to be shown by it during its first round of oral argument, as well as transcripts, in English and in French, of the above-mentioned extracts of video material.

53. By a letter dated 5 March 2006, the Agent of Bosnia and Herzegovina informed the Court that it wished to withdraw one of the experts it had intended to call. In that letter, the Agent of Bosnia and Herzegovina also asked the Court to request each of the Parties to provide a one-page outline per witness, expert or witness-expert detailing the topics which would be covered in his evidence or statement. By letters dated 7 March 2006, the Parties were informed that the Court requested them to provide, at least three days before the hearing of each witness, expert or witness-expert, a one-page summary of the latter's evidence or statement.

54. On 7 March 2006, Bosnia and Herzegovina provided the Court and the Respondent with a CD-ROM containing “ICTY Public Exhibits and other Documents cited by Bosnia and Herzegovina during its Oral Pleadings (07/03/2006)”. By a letter dated 10 March 2006, Serbia and Montenegro informed the Court that it objected to the production of the CD-ROM on the grounds that the submission at such a late stage of so many documents “raise[d] serious concerns related to the respect for the Rules of Court and the principles of fairness and equality of the parties”. It also pointed out that the documents included on the CD-ROM “appear[ed] questionable from the point of [view of] Article 56, paragraph 4, of the Rules [of Court]”. By a letter dated 13 March 2006, the Agent of Bosnia and Herzegovina informed the Court of his Government’s views regarding the above-mentioned objections raised by Serbia and Montenegro.

55. By a letter dated 14 March 2006, the Registrar informed Bosnia and Herzegovina that, given that Article 56, paragraph 4, of the Rules of Court did not require or authorize the submission to the Court of the full text of a document to which reference was made during the oral proceedings pursuant to that provision and since it was difficult for the other Party and the Court to come to terms, at the late stage of the proceedings, with such an immense mass of documents, which in any case were in the public domain and could thus be consulted if necessary, the Court had decided that it was in the interests of the good administration of justice that the CD-ROM be withdrawn. By a letter dated 16 March 2006, the Agent of Bosnia and Herzegovina informed the Court that it had submitted on 7 March 2006.

56. On 17 March 2006, Bosnia and Herzegovina submitted a map for use during the statement to be made by one of its experts on the morning of 17 March 2006. On 20 March 2006, Bosnia and Herzegovina produced a folder of further documents to be used in the examination of that expert. Serbia and Montenegro objected strongly to the production of the documents at such a late stage since its counsel would not have time to prepare for cross-examination.

57. The following experts were called by Bosnia and Herzegovina and made their statements at public sittings on 17 and 20 March 2006: Mr. András J. Riedlmayer and General Sir Richard Dannatt. The experts were examined by
counsel for Bosnia and Herzegovina and cross-examined by counsel for Serbia and Montenegro. The experts were subsequently re-examined by counsel for Bosnia and Herzegovina. Questions were put to Mr. Riedlmayer by Judges Kreca, Tomka, Simma and the Vice-President and replies were given orally. Questions were put to General Dannatt by the President, Judge Koroma and Judge Tomka and replies were given orally.

58. The following witnesses and witness-expert were called by Serbia and Montenegro and gave evidence at public sittings on 23, 24, 27 and 28 March 2006: Mr. Vladimir Lukic; Mr. Vitomir Popovic; General Sir Michael Rose; Mr. Jean-Paul Sardon (witness-expert); Mr. Dušan Mihajlovic; Mr. Vladimir Milichevic; Mr. Dragoljub Micunovic. The witnesses and witness-expert were examined by counsel for Serbia and Montenegro and cross-examined by counsel for Bosnia and Herzegovina. General Rose, Mr. Mihajlovic and Mr. Milichevic were subsequently re-examined by counsel for Serbia and Montenegro. Questions were put to Mr. Lukic by Judges Ranjeva, Simma, Tomka and Bennouna and replies were given orally. Questions were put to General Rose by the Vice-President and Judges Owada and Simma and replies were given orally.

59. With the exception of General Rose and Mr. Jean-Paul Sardon, the above-mentioned witnesses called by Serbia and Montenegro gave their evidence in Serbian and, in accordance with Article 39, paragraph 3, of the Statute and Article 70, paragraph 2, of the Rules of Court, Serbia and Montenegro made the necessary arrangements for interpretation into one of the official languages of the Court and the Registry verified this interpretation. Mr. Stojsic conducted his examination of Mr. Dragoljub Micunovic in Serbian in accordance with the exchange of correspondence between Serbia and Montenegro and the Court on 21 and 22 February 2006 (see paragraph 49 above).

60. In the course of the hearings, questions were put by Members of the Court, to which replies were given orally and in writing, pursuant to Article 61, paragraph 4, of the Rules of Court.

61. By a letter of 8 May 2006, the Agent of Bosnia and Herzegovina requested the Court to allow the Deputy Agent to take the floor briefly on 9 May 2006, in order to correct an assertion about one of the counsel of and one of the experts called by Bosnia and Herzegovina which had been made by Serbia and Montenegro in its oral argument. By a letter dated 9 May 2006, the Agent of Serbia and Montenegro responded to the Court's decision in the particular circumstances of the case, to authorize the Deputy Agent of Bosnia and Herzegovina to make a very brief statement regarding the assertion made about its counsel.

62. By a letter dated 3 May 2006, the Agent of Bosnia and Herzegovina informed the Court that there had been a number of errors in references included in its oral argument presented on 2 March 2006 and provided the Court with the corrected references. By a letter dated 8 May 2006, the Agent of Serbia and Montenegro, "in light of the belated corrections by the Applicant, and for the sake of the equality between the parties", requested the Court to accept a paragraph of its draft oral argument of 2 May 2006 which responded to one of the corrections made by Bosnia and Herzegovina but had been left out of the final version of its oral argument "in order to fit the schedule of [Serbia and Montenegro's] presentations". By a letter dated 7 June 2006, the Parties were informed that the Court had taken due note of both the explanations given by the Agent of Bosnia and Herzegovina and the observations made in response by the Agent of Serbia and Montenegro.

63. In January 2007, Judge Parra-Aranguren, who had attended the oral proceedings in the case, and had participated in part of the deliberation, but had for medical reasons been prevented from participating in the later stages thereof, informed the President of the Court, pursuant to Article 24, paragraph 1, of the Statute, that he considered that he should not take part in the decision of the case. The President took the view that the Court should respect and accept Judge Parra-Aranguren's position, and so informed the Court.

* * *

64. In its Application, the following requests were made by Bosnia and Herzegovina:

(a) that Yugoslavia (Serbia and Montenegro) has breached, and is continuing to breach, its legal obligations toward the People and State of Bosnia and Herzegovina under Articles I, II (a), II (b), II (c), II (d), III (a), III (b), III (c), III (d), III (e), IV and V of the Genocide Convention;

(b) that Yugoslavia (Serbia and Montenegro) has violated and is continuing to violate its legal obligations toward the People and State of Bosnia and Herzegovina under the four Geneva Conventions of 1949, their Additional Protocol I of 1977, the customary international laws of war including the Hague Regulations on Land Warfare of 1907, and other fundamental principles of international humanitarian law;

(c) that Yugoslavia (Serbia and Montenegro) has violated and continues to violate Articles 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26 and 28 of the Universal Declaration of Human Rights with respect to the citizens of Bosnia and Herzegovina;

(d) that Yugoslavia (Serbia and Montenegro), in breach of its obligations under general and customary international law, has killed, murdered, wounded, raped, robbed, tortured, kidnapped, illegally detained, and exterminated the citizens of Bosnia and Herzegovina, and is continuing to do so;

(e) that in its treatment of the citizens of Bosnia and Herzegovina, Yugoslavia (Serbia and Montenegro) has violated, and is continuing to violate, its solemn obligations under Articles I (3), 55 and 56 of the United Nations Charter;

(f) that Yugoslavia (Serbia and Montenegro) has used and is continuing to use force and the threat of force against Bosnia and Herzegovina in violation of Articles 2 (1), 2 (2), 2 (3), 2 (4) and 33 (1), of the United Nations Charter;

(g) that Yugoslavia (Serbia and Montenegro), in breach of its obligations under general and customary international law, has used and is using force and the threat of force against Bosnia and Herzegovina;
(h) that Yugoslavia (Serbia and Montenegro), in breach of its obligations under general and customary international law, has violated and is violating the sovereignty of Bosnia and Herzegovina by:
   — armed attacks against Bosnia and Herzegovina by air and land;
   — aerial trespass into Bosnian airspace;
   — efforts by direct and indirect means to coerce and intimidate the Government of Bosnia and Herzegovina;

(i) that Yugoslavia (Serbia and Montenegro), in breach of its obligations under general and customary international law, has intervened and is intervening in the internal affairs of Bosnia and Herzegovina;

(j) that Yugoslavia (Serbia and Montenegro), in recruiting, training, arming, equipping, financing, supplying and otherwise encouraging, supporting, aiding, and directing military and paramilitary actions in and against Bosnia and Herzegovina by means of its agents and surrogates, has violated and is violating its express charter and treaty obligations to Bosnia and Herzegovina and, in particular, its charter and treaty obligations under Article 2 (4), of the United Nations Charter, as well as its obligations under general and customary international law;

(k) that under the circumstances set forth above, Bosnia and Herzegovina has the sovereign right to defend itself and its people under United Nations Charter Article 51 and customary international law, including by means of immediately obtaining military weapons, equipment, supplies and troops from other States;

(l) that under the circumstances set forth above, Bosnia and Herzegovina has the sovereign right under United Nations Charter Article 51 and customary international law to request the immediate assistance of any State to come to its defence, including by military means (weapons, equipment, supplies, troops, etc.);

(m) that Security Council resolution 713 (1991), imposing a weapons embargo upon the former Yugoslavia, must be construed in a manner that shall not impair the inherent right of individual or collective self-defence of Bosnia and Herzegovina under the terms of United Nations Charter Article 51 and the rules of customary international law;

(n) that all subsequent Security Council resolutions that refer to or reaffirm resolution 713 (1991) must be construed in a manner that shall not impair the inherent right of individual or collective self-defence of Bosnia and Herzegovina under the terms of United Nations Charter Article 51 and the rules of customary international law;

(o) that Security Council resolution 713 (1991) and all subsequent Security Council resolutions referring thereto or reaffirming thereof must not be construed to impose an arms embargo upon Bosnia and Herzegovina, as required by Articles 24 (1) and 51 of the United Nations Charter and in accordance with the customary doctrine of ultra vires;

(p) that pursuant to the right of collective self-defence recognized by United Nations Charter Article 51, all other States parties to the Charter have the right to come to the immediate defence of Bosnia and Herzegovina — at its request — including by means of immediately providing it with weapons, military equipment and supplies, and armed forces (soldiers, sailors, air-people, etc.);

(q) that Yugoslavia (Serbia and Montenegro) and its agents and surrogates are under an obligation to cease and desist immediately from its breaches of the foregoing legal obligations, and is under a particular duty to cease and desist immediately:
   — from its systematic practice of so-called ‘ethnic cleansing’ of the citizens and sovereign territory of Bosnia and Herzegovina;
   — from the murder, summary execution, torture, rape, kidnapping, mayhem, wounding, physical and mental abuse, and detention of the citizens of Bosnia and Herzegovina;
   — from the wanton devastation of villages, towns, districts, cities, and religious institutions in Bosnia and Herzegovina;
   — from the bombardment of civilian population centres in Bosnia and Herzegovina, and especially its capital, Sarajevo;
   — from continuing the siege of any civilian population centres in Bosnia and Herzegovina, and especially its capital, Sarajevo;
   — from the starvation of the civilian population in Bosnia and Herzegovina;
   — from the interruption of, interference with, or harassment of humanitarian relief supplies to the citizens of Bosnia and Herzegovina by the international community;
   — from all use of force — whether direct or indirect, overt or covert — against Bosnia and Herzegovina, and from all threats of force against Bosnia and Herzegovina;
   — from all violations of the sovereignty, territorial integrity or political independence of Bosnia and Herzegovina, including all intervention, direct or indirect, in the internal affairs of Bosnia and Herzegovina;
   — from all support of any kind — including the provision of training, arms, ammunition, finances, supplies, assistance, direction or any other form of support — to any nation, group, organization, movement or individual engaged or planning to engage in military or paramilitary actions in or against Bosnia and Herzegovina;

(r) that Yugoslavia (Serbia and Montenegro) has an obligation to pay Bosnia and Herzegovina, in its own right and as parens patriae for its citizens, reparations for damages to persons and property as well as to the Bosnian economy and environment caused by the foregoing violations of international law in a sum to be determined by the Court. Bosnia and Herzegovina reserves the right to introduce to the Court a precise evaluation of the damages caused by Yugoslavia (Serbia and Montenegro)."
65. In the written proceedings, the following submissions were presented by the Parties:

*On behalf of the Government of Bosnia and Herzegovina,*
in the Memorial:

“On the basis of the evidence and legal arguments presented in this Memorial, the Republic of Bosnia and Herzegovina, requests the International Court of Justice to adjudge and declare,

1. That the Federal Republic of Yugoslavia (Serbia and Montenegro), directly, or through the use of its surrogates, has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide, by destroying in part, and attempting to destroy in whole, national, ethnical or religious groups within the, but not limited to the, territory of the Republic of Bosnia and Herzegovina, including in particular the Muslim population, by
   — killing members of the group;
   — causing deliberate bodily or mental harm to members of the group;
   — deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
   — imposing measures intended to prevent births within the group;

2. That the Federal Republic of Yugoslavia (Serbia and Montenegro) has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide by conspiring to commit genocide, by complicity in genocide, by attempting to commit genocide and by incitement to commit genocide;

3. That the Federal Republic of Yugoslavia (Serbia and Montenegro) has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide by aiding and abetting individuals and groups engaged in acts of genocide;

4. That the Federal Republic of Yugoslavia (Serbia and Montenegro) has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide by virtue of having failed to prevent and to punish acts of genocide;

5. That the Federal Republic of Yugoslavia (Serbia and Montenegro) must immediately cease the above conduct and take immediate and effective steps to ensure full compliance with its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide;

6. That the Federal Republic of Yugoslavia (Serbia and Montenegro) must wipe out the consequences of its international wrongful acts and must restore the situation existing before the violations of the Convention on the Prevention and Punishment of the Crime of Genocide were committed;

7. That, as a result of the international responsibility incurred for the above violations of the Convention on the Prevention and Punishment of the Crime of Genocide, the Federal Republic of Yugoslavia (Serbia and Montenegro) is required to pay, and the Republic of Bosnia and Herzegovina is entitled to receive, in its own right and as parens patriae for its citizens, full compensation for the damages and losses caused, in the amount to be determined by the Court in a subsequent phase of the proceedings in this case.

The Republic of Bosnia and Herzegovina reserves its right to supplement or amend its submissions in the light of further pleadings.

The Republic of Bosnia and Herzegovina also respectfully draws the attention of the Court to the fact that it has not reiterated, at this point, several of the requests it made in its Application, on the formal assumption that the Federal Republic of Yugoslavia (Serbia and Montenegro) has accepted the jurisdiction of this Court under the terms of the Convention on the Prevention and Punishment of the Crime of Genocide. If the Respondent were to reconsider its acceptance of the jurisdiction of the Court under the terms of that Convention — which it is, in any event, not entitled to do — the Government of Bosnia and Herzegovina reserves its right to invoke also all or some of the other existing titles of jurisdiction and to revive all or some of its previous submissions and requests.”

*On behalf of the Government of Serbia and Montenegro,*
in the Counter-Memorial:

“The Federal Republic of Yugoslavia requests the International Court of Justice to adjudge and declare:

1. In view of the fact that no obligations established by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide have been violated with regard to Muslims and Croats,
   — since the acts alleged by the Applicant have not been committed at all, or not to the extent and in the way alleged by the Applicant, or
   — if some have been committed, there was absolutely no intention of committing genocide, and/or
   — they have not been directed specifically against the members of one ethnic or religious group, i.e. they have not been committed against individuals just because they belong to some ethnic or religious group, consequently, they cannot be qualified as acts of genocide or other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide; and/or

2. In view of the fact that the acts alleged by the Applicant in its submissions cannot be attributed to the Federal Republic of Yugoslavia,
   — since they have not been committed by the organs of the Federal Republic of Yugoslavia,
   — since they have not been committed on the territory of the Federal Republic of Yugoslavia,
   — since they have not been committed by the order or under control of the organs of the Federal Republic of Yugoslavia,
   — since there is no other grounds based on the rules of international law to consider them as acts of the Federal Republic of Yugoslavia,

3 to 6 relate to counter-claims which were subsequently withdrawn (see paragraphs 26 and 27 above).
therefore the Court rejects all claims of the Applicant; and

3. Bosnia and Herzegovina is responsible for the acts of genocide committed against the Serbs in Bosnia and Herzegovina and for other violations of the obligations established by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide,

— because it has incited acts of genocide by the 'Islamic Declaration', and in particular by the position contained in it that 'there can be no peace or coexistence between “Islamic faith” and “non-Islamic” social and political institutions',

— because it has incited acts of genocide by the Novi Vox, paper of the Muslim youth, and in particular by the verses of a 'Patriotic Song' which read as follows:

'Dear mother, I'm going to plant willows,
We'll hang Serbs from them.
Dear mother, I'm going to sharpen knives,
We'll soon fill pits again';

— because it has incited acts of genocide by the paper Zivaj od Bosne, and in particular by the sentence in an article published in it that 'Each Muslim must name a Serb and take oath to kill him';

— because public calls for the execution of Serbs were broadcast on radio 'Hajat' and thereby acts of genocide were incited;

— because the armed forces of Bosnia and Herzegovina, as well as other organs of Bosnia and Herzegovina have committed acts of genocide and other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, against the Serbs in Bosnia and Herzegovina, which have been stated in Chapter Seven of the Counter-Memorial;

— because Bosnia and Herzegovina has not prevented the acts of genocide and other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, against the Serbs on its territory, which have been stated in Chapter Seven of the Counter-Memorial;

4. Bosnia and Herzegovina has the obligation to punish the persons held responsible for the acts of genocide and other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide;

5. Bosnia and Herzegovina is bound to take necessary measures so that the said acts would not be repeated in the future;

6. Bosnia and Herzegovina is bound to eliminate all consequences of the violation of the obligations established by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and provide adequate compensation.”

On behalf of the Government of Bosnia and Herzegovina, in the Reply:

"Therefore the Applicant persists in its claims as presented to this Court on 14 April 1994, and recapitulates its Submissions in their entirety.

Bosnia and Herzegovina requests the International Court of Justice to adjudge and declare,

1. That the Federal Republic of Yugoslavia, directly, or through the use of its surrogates, has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide, by destroying in part, and attempting to destroy in whole, national, ethnic or religious groups within the, but not limited to the, territory of Bosnia and Herzegovina, including in particular the Muslim population, by

— killing members of the group;
— causing deliberate bodily or mental harm to members of the group;
— deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
— imposing measures intended to prevent births within the group;

2. That the Federal Republic of Yugoslavia has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide by conspiring to commit genocide, by complicity in genocide, by attempting to commit genocide and by incitement to commit genocide;

3. That the Federal Republic of Yugoslavia has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide by aiding and abetting individuals and groups engaged in acts of genocide;

4. That the Federal Republic of Yugoslavia has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide by virtue of having failed to prevent and to punish acts of genocide;

5. That the Federal Republic of Yugoslavia must immediately cease the above conduct and take immediate and effective steps to ensure full compliance with its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide;

6. That the Federal Republic of Yugoslavia must wipe out the consequences of its international wrongful acts and must restore the situation existing before the violations of the Convention on the Prevention and Punishment of the Crime of Genocide were committed;

7. That, as a result of the international responsibility incurred for the above violations of the Convention on the Prevention and Punishment of the Crime of Genocide, the Federal Republic of Yugoslavia is required to pay, and Bosnia and Herzegovina is entitled to receive, in its own right and as parens patriae for its citizens, full compensation for the damages and losses caused, in the amount to be determined by the Court in a subsequent phase of the proceedings in this case.

Bosnia and Herzegovina reserves its right to supplement or amend its submissions in the light of further pleadings;

8. On the very same grounds the conclusions and submissions of the Federal Republic of Yugoslavia with regard to the submissions of Bosnia and Herzegovina need to be rejected;

9. With regard to the Respondent's counter-claims the Applicant comes to the following conclusion. There is no basis in fact and no basis in law
for the proposition that genocidal acts have been committed against Serbs in Bosnia and Herzegovina. There is no basis in fact and no basis in law for the proposition that any such acts, if proven, would have been committed under the responsibility of Bosnia and Herzegovina or that such acts, if proven, would be attributable to Bosnia and Herzegovina. Also, there is no basis in fact and no basis in law for the proposition that Bosnia and Herzegovina has violated any of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide. On the contrary, Bosnia and Herzegovina has continuously done everything within its possibilities to adhere to its obligations under the Convention, and will continue to do so;

10. For these reasons, Bosnia and Herzegovina requests the International Court of Justice to reject the counter-claims submitted by the Respondent in its Counter-Memorial of 23 July 1997."

On behalf of the Government of Serbia and Montenegro,
in the Rejoinder:

"The Federal Republic of Yugoslavia requests the International Court of Justice to adjudge and declare:

1. In view of the fact that no obligations established by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide have been violated with regard to Muslims and Croats,
   — since the acts alleged by the Applicant have not been committed at all, or not to the extent and in the way alleged by the Applicant, or
   — if some have been committed, there was absolutely no intention of committing genocide, and/or
   — they have not been directed specifically against the members of one ethnic or religious group, i.e. they have not been committed against individuals just because they belong to some ethnic or religious group,
   consequently they cannot be qualified as acts of genocide or other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, and/or

2. In view of the fact that the acts alleged by the Applicant in its submissions cannot be attributed to the Federal Republic of Yugoslavia,
   — since they have not been committed by the organs of the Federal Republic of Yugoslavia,
   — since they have not been committed on the territory of the Federal Republic of Yugoslavia,
   — since they have not been committed by the order or under control of the organs of the Federal Republic of Yugoslavia,
   — since there are no other grounds based on the rules of international law to consider them as acts of the Federal Republic of Yugoslavia,

3. Bosnia and Herzegovina is responsible for the acts of genocide committed against Serbs in Bosnia and Herzegovina and for other violations of the obligations established by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide,
   — because it has incited acts of genocide by the 'Islamic Declaration', and in particular by the position contained in it that "there can be no peace or coexistence between "Islamic faith" and "non-Islamic" social and political institutions";
   — because it has incited acts of genocide by the Novi VoX, paper of the Muslim youth, and in particular by the verses of a 'Patriotic Song' which read as follows:
     'Dear mother, I'm going to plant willows, We'll hang Serbs from them.
     Dear mother, I'm going to sharpen knives, We'll soon fill pits again';
   — because it has incited acts of genocide by the paper Zmaj od Bosne, and in particular by the sentence in an article published in it that 'Each Muslim' must name a Serb and take oath to kill him;
   — because public calls for the execution of Serbs were broadcast on radio 'Hajat' and thereby acts of genocide were incited;
   — because the armed forces of Bosnia and Herzegovina, as well as other organs of Bosnia and Herzegovina have committed acts of genocide and other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (enumerated in Article III), against Serbs in Bosnia and Herzegovina, which have been stated in Chapter Seven of the Counter-Memorial;
   — because Bosnia and Herzegovina has not prevented the acts of genocide and other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (enumerated in Article III), against Serbs on its territory, which have been stated in Chapter Seven of the Counter-Memorial;

4. Bosnia and Herzegovina has the obligation to punish the persons held responsible for the acts of genocide and other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide;

5. Bosnia and Herzegovina is bound to take necessary measures so that the said acts would not be repeated in the future;

6. Bosnia and Herzegovina is bound to eliminate all the consequences of violation of the obligations established by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and to provide adequate compensation."

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

On behalf of the Government of Bosnia and Herzegovina,
at the hearing of 24 April 2006:
Bosnia and Herzegovina requests the International Court of Justice to adjudge and declare:

1. That Serbia and Montenegro, through its organs or entities under its control, has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by intentionally destroying, in part or in whole, the non-Serb national, ethnic or religious group within, but not limited to, the territory of Bosnia and Herzegovina, including in particular the Muslim population, by:

   (i) killing members of the group;
   (ii) perpetrating other acts of genocide.

2. Subsidiarily:

   (a) that Serbia and Montenegro shall immediately take effective steps to prevent the repetition of acts of genocide;
   (b) that Serbia and Montenegro shall provide specific guarantees and assurances that it will not repeat the wrongful acts complained of, the form of which guarantees and assurances is to be determined by the Court;
   (c) that the nature, form and amount of the compensation shall be determined by the Court, failing agreement thereon between the Parties one year after the Judgment of the Court, and that the Court shall reserve the subsequent procedure for that purpose.

3. That Serbia and Montenegro has violated its obligations under the Convention by conspiring to commit genocide and by inciting to commit genocide, as defined in paragraph 1 above.

4. That Serbia and Montenegro has violated its obligations under the Convention by destroying, in part or in whole, the non-Serb national, ethnic or religious group within, but not limited to, the territory of Bosnia and Herzegovina, including in particular the Muslim population, and to transfer individuals accused of genocide or any other act prohibited by the Convention to the International Criminal Tribunal for the former Yugoslavia and to fully co-operate with this Tribunal.

5. That Serbia and Montenegro has violated and is violating its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide for having failed to prevent genocide.

6. That the violations of international law set out in submissions 1 to 5 constitute wrongful acts attributable to Serbia and Montenegro which entail its international responsibility, and, accordingly, that Serbia and Montenegro must redress the consequences of its international wrongful acts and, as a result of the international responsibility incurred for the above violations of the Crime of Genocide, must pay, and/or otherwise ensure the survival of the group, by:

   (i) that Serbia and Montenegro shall provide specific guarantees and assurances that it will not repeat the wrongful acts complained of, the form of which guarantees and assurances is to be determined by the Court.
   (ii) that Serbia and Montenegro shall provide specific guarantees and assurances that it will not repeat the wrongful acts complained of, the form of which guarantees and assurances is to be determined by the Court.
   (iii) that the nature, form and amount of the compensation shall be determined by the Court, failing agreement thereon between the Parties one year after the Judgment of the Court, and that the Court shall reserve the subsequent procedure for that purpose.

7. That in failing to comply with the Orders for indication of provisional measures rendered by the Court on 8 April 1993 and 13 September 1993 Serbia and Montenegro has been in breach of its international obligations and is under an obligation to Bosnia and Herzegovina to provide for the latter violation symbolic compensation, the amount of which is to be determined by the Court.

On behalf of the Government of Serbia and Montenegro.
and Herzegovina relating to alleged violations of the obligations under the Convention on the Prevention and Punishment of the Crime of Genocide be rejected as lacking a basis either in law or in fact.

— In any event, that the acts and/or omissions for which the respondent State is alleged to be responsible are not attributable to the respondent State. Such attribution would necessarily involve breaches of the law applicable in these proceedings.

— Without prejudice to the foregoing, that the relief available to the applicant State in these proceedings, in accordance with the appropriate interpretation of the Convention on the Prevention and Punishment of the Crime of Genocide, is limited to the rendering of a declaratory judgment.

— Further, without prejudice to the foregoing, that any question of legal responsibility for alleged breaches of the Orders for the indication of provisional measures, rendered by the Court on 8 April 1993 and 13 September 1993, does not fall within the competence of the Court to provide appropriate remedies to an applicant State in the context of contentious proceedings, and, accordingly, the request in paragraph 7 of the Submissions of Bosnia and Herzegovina should be rejected.”

* * *

II. IDENTIFICATION OF THE RESPONDENT PARTY

67. The Court has first to consider a question concerning the identification of the Respondent Party before it in these proceedings. After the close of the oral proceedings, by a letter dated 3 June 2006, the President of the Republic of Serbia informed the Secretary-General of the United Nations that, following the Declaration of Independence adopted by the National Assembly of Montenegro on 3 June 2006, “the membership of the state union Serbia and Montenegro in the United Nations, including all organs and organisations of the United Nations system, [would] be continued by the Republic of Serbia on the basis of Article 60 of the Constitutional Charter of Serbia and Montenegro”. He further stated that “in the United Nations the name ‘Republic of Serbia’ [was] to be henceforth used instead of the name ‘Serbia and Montenegro’” and added that the Republic of Serbia “remain[ed] responsible in full for all the rights and obligations of the state union of Serbia and Montenegro under the UN Charter”.

68. By a letter of 16 June 2006, the Minister for Foreign Affairs of the Republic of Serbia informed the Secretary-General, *inter alia*, that “[t]he Republic of Serbia continue[d] to exercise its rights and honour its commitments deriving from international treaties concluded by Serbia and Montenegro” and requested that “the Republic of Serbia be considered a party to all international agreements in force, instead of Serbia and Montenegro”. By a letter addressed to the Secretary-General dated 30 June 2006, the Minister for Foreign Affairs confirmed the intention of the Republic of Serbia to continue to exercise its rights and honour its commitments deriving from international treaties concluded by Serbia and Montenegro. He specified that “all treaty actions undertaken by Serbia and Montenegro would continue in force with respect to the Republic of Serbia with effect from 3 June 2006”, and that, “all declarations, reservations and notifications made by Serbia and Montenegro would be maintained by the Republic of Serbia until the Secretary-General, as depositary, were duly notified otherwise”.

69. On 28 June 2006, by its resolution 60/264, the General Assembly admitted the Republic of Montenegro (hereinafter “Montenegro”) as a new Member of the United Nations.

70. By letters dated 19 July 2006, the Registrar requested the Agent of Bosnia and Herzegovina, the Agent of Serbia and Montenegro and the Foreign Minister of Montenegro to communicate to the Court the views of their Governments on the consequences to be attached to the above-mentioned developments in the context of the case. By a letter dated 26 July 2006, the Agent of Serbia and Montenegro explained that, in his Government’s opinion, “there was continuity between Serbia and Montenegro and the Republic of Serbia (on the grounds of Article 60 of the Constitutional Charter of Serbia and Montenegro)”. He noted that the entity which had been Serbia and Montenegro “had been replaced by two distinct States, one of them [was] Serbia, the other [was] Montenegro”. In those circumstances, the view of his Government was that “the Applicant had first to take a position, and to decide whether it wished[d] to maintain its original claim encompassing both Serbia and Montenegro, or whether it [chose] to do otherwise”.

71. By a letter to the Registrar dated 16 October 2006, the Agent of Bosnia and Herzegovina referred to the letter of 26 July 2006 from the Agent of Serbia and Montenegro, and observed that Serbia’s definition of itself as the continuator of the former Serbia and Montenegro had been accepted both by Montenegro and the international community. He continued however as follows:

“This acceptance cannot have, and does not have, any effect on the applicable rules of state responsibility. Obviously, these cannot be altered bilaterally or retroactively. At the time when genocide was committed and at the time of the initiation of this case, Serbia and Montenegro constituted a single state. Therefore, Bosnia and Herzegovina is of the opinion that both Serbia and Montenegro, jointly and severally, are responsible for the unlawful conduct that constitutes the cause of action in this case.”

72. By a letter dated 29 November 2006, the Chief State Prosecutor of Montenegro, after indicating her capacity to act as legal representative of the Republic of Montenegro, referred to the letter from the Agent of
The Court notes that Serbia has accepted "continuity between Serbia and Montenegro and the Republic of Serbia" (paragraph 70 above), and has assumed responsibility for its commitments deriving from International Treaties concluded by Serbia and Montenegro, such as the Genocide Convention. Parties to that Convention have undertaken to ensure punishment of genocide. The issue of international-law succession of the State union of Serbia and Montenegro is regulated in Article 60 of its Constitutional Charter, and according to that Article the legal successor of Montenegro is the Republic of Serbia. The Court has already held that the Republic of Montenegro is a party to the Genocide Convention. Parties to that Convention have undertaken to ensure punishment of genocide.

The Court further observed that in its judgment of 11 July 1996 (see paragraph 12 above), the Court found that such consent existed, for the purposes of the present case, on the part of the FRY, which nonetheless had not been the case of the previous letter of 16 October 2006. The Court then added that, as the case was brought before the Court in its capacity as the successor of Serbia and Montenegro, it had therefore become a respondent in this procedure.

The Court further observed that the Republic of Montenegro was a party to the Genocide Convention. Parties to that Convention have undertaken to ensure punishment of genocide. The issue of international-law succession of the State union of Serbia and Montenegro is regulated in Article 60 of its Constitutional Charter, and according to that Article the legal successor of Montenegro is the Republic of Serbia. The Court has already held that the Republic of Montenegro is a party to the Genocide Convention. Parties to that Convention have undertaken to ensure punishment of genocide.

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since been raised by the Initiative, and the Court has been asked to rule upon it (see paragraphs 26-28 above). The basis of jurisdiction asserted by the Applicant, and found applicable by the Court by the 1996 Judgment, is Article IX of the Genocide Convention. The Socialist Federal Republic of Yugoslavia (hereinafter “the SFRY”) became a party to that Convention on 29 August 1950. In substance, the central question now raised by the Respondent is whether at the time of the filing of the Application instituting the present proceedings the Respondent was or was not the continuator of the SFRY. The Respondent now contends that it was not a continuator State, and that therefore not only was it not a party to the Genocide Convention when the present proceedings were instituted, but it was not then a party to the Statute of the Court by virtue of membership in the United Nations; and that, not being such a party, it did not have access to the Court, with the consequence that the Court had no jurisdiction ratiorne personae over it.

81. This contention was first raised, in the context of the present case, by the “Initiative to the Court to Reconsider ex officio Jurisdiction over Yugoslavia” filed by the Respondent on 4 May 2001 (paragraph 26 above). The circumstances underlying that Initiative will be examined in more detail below (paragraphs 88-99). Briefly stated, the situation was that the Respondent, after claiming that since the break-up of the SFRY in 1992 it was the continuator of that State, and as such maintained the membership of the SFRY in the United Nations, had on 27 October 2000 applied, “in light of the implementation of the Security Council resolution 777 (1992)”, to be admitted as a new Member, thereby in effect relinquishing its previous claim. The Respondent contended that it had in 2000 become apparent that it had not been a Member of the United Nations in the period 1992-2000, and was thus not a party to the Statute at the date of the filing of the Application in this case; and that it was not a party to the Genocide Convention on that date. The Respondent concluded that “the Court has no jurisdiction over [the Respondent] ratiorne personae”. It requested the Court “to suspend proceedings regarding the merits of the Case until a decision on this Initiative is rendered”.

82. By a letter of 12 June 2003, the Registrar, acting on the instructions of the Court, informed the Respondent that the Court could not accede to the request made in that document, that the proceedings be suspended until a decision was rendered on the jurisdictional issues raised therein. The Respondent was informed, nevertheless, that the Court “[w]ould not give judgment on the merits in the present case unless it [was] satisfied that it [had] jurisdiction” and that, “[s]hould Serbia and Montenegro wish to present further argument to the Court on jurisdictional questions during the oral proceedings on the merits, it w[ould] be free to do so”. The Respondent accordingly raised, as an “issue of procedure”, the question whether the Respondent had access to the Court at the date of the Application, and each of the parties has now addressed argument to the Court on that question. It has however at the same time been argued by the Applicant that the Court may not deal with the question, or that the Respondent is debarred from raising it at this stage of the proceedings. These contentions will be examined below.

83. Subsequently, on 15 December 2004, the Court delivered judgment in eight cases brought by Serbia and Montenegro against Member States of NATO (cases concerning the Legality of Use of Force). The Applications instituting proceedings in those cases had been filed on 29 April 1999, that is to say prior to the admission of Serbia and Montenegro (then known as the Federal Republic of Yugoslavia) to the United Nations on 1 November 2000. In each of these cases, the Court held that it had no jurisdiction to entertain the claims made in the Application (see, for example, Legality of Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004, p. 328, para. 129), on the grounds that “Serbia and Montenegro did not, at the time of the institution of the present proceedings, have access to the Court under either paragraph 1 or paragraph 2 of Article 35 of the Statute” (ibid., p. 327, para. 127). It held, “in light of the legal consequences of the new development since 1 November 2000”, that “Serbia and Montenegro was not a Member of the United Nations, and in that capacity a State party to the Statute of the International Court of Justice, at the time of filing its Application . . . ” (ibid., p. 311, para. 79). No finding was made in those judgments on the question whether or not the Respondent was a party to the Genocide Convention at the relevant time.

84. Both Parties recognize that each of these Judgments has the force of res judicata in the specific case for the parties thereto; but they also recognize that these Judgments, not having been rendered in the present case, and involving as parties States not parties to the present case, do not constitute res judicata for the purposes of the present proceedings. In view however of the findings in the cases concerning the Legality of Use of Force as to the status of the FRY vis-à-vis the United Nations and the Court in 1999, the Respondent has invoked those decisions as supportive of its contentions in the present case.

85. The grounds upon which, according to Bosnia and Herzegovina, the Court should, at this late stage of the proceedings, decline to examine the questions raised by the Respondent as to the status of Serbia and Montenegro in relation to Article 35 of the Statute, and its status as a party to the Genocide Convention, are because the conduct of the Respondent in relation to the case has been such as to create a sort of forum prorogatun, or an estoppel, or to debar it, as a matter of good faith, from asserting at this stage of the proceedings that it had no access to the Court at the date the proceedings were instituted; and because the questions raised by the Respondent had already been resolved by the 1996 Judgment, with the authority of res judicata.
86. As a result of the Initiative of the Respondent (paragraph 81 above), and its subsequent argument on what it has referred to as an “issue of procedure”, the Court has before it what is essentially an objection by the Respondent to its jurisdiction, which is preliminary in the sense that, if it is upheld, the Court will not proceed to determine the merits. The Applicant objects in turn to the Court examining further the Respondent’s jurisdictional objection. These matters evidently require to be examined as preliminary points, and it was for this reason that the Court instructed the Registrar to write to the Parties the letter of 12 June 2003, referred to in paragraph 82 above. The letter was intended to convey that the Court would listen to any argument raised by the Initiative which might be put to it, but not as an indication of what its ruling might be on any such arguments.

87. In order to make clear the background to these issues, the Court will first briefly review the history of the relationship between the Respondent and the United Nations during the period from the break-up of the SFRY in 1992 to the admission of Serbia and Montenegro (then called the Federal Republic of Yugoslavia) to the United Nations on 1 November 2000. The previous decisions of the Court in this case, and in the Application for Revision case, have been briefly recalled above (paragraphs 4, 8, 12 and 31). They will be referred to more fully below (paragraphs 105-113) for the purpose of (in particular) an examination of the contentions of Bosnia and Herzegovina on the question of res judicata.

* * *

(2) History of the Status of the FRY with Regard to the United Nations

88. In the early 1990s the SFRY, a founding Member State of the United Nations, made up of Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia, began to disintegrate. On 25 June 1991 Croatia and Slovenia both declared independence, followed by Macedonia on 17 September 1991 and Bosnia and Herzegovina on 6 March 1992. On 22 May 1992, Bosnia and Herzegovina, Croatia and Slovenia were admitted as Members to the United Nations; as was the former Yugoslav Republic of Macedonia on 8 April 1993.

89. On 27 April 1992 the “participants of the joint session of the SFRY Assembly, the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro” had adopted a declaration, stating in pertinent parts:

90. An official Note dated 27 April 1992 from the Permanent Mission of Yugoslavia to the United Nations, addressed to the Secretary-General of the United Nations, stated inter alia that:


Strictly respecting the continuity of the international personality of Yugoslavia, the Federal Republic of Yugoslavia shall continue to fulfill all the rights conferred to, and obligations assumed by, the Socialist Federal Republic of Yugoslavia in international relations, including its membership in all international organizations and participation in international treaties ratified or acceded to by Yugoslavia.” (United Nations doc. A/46/915, Ann. I.)

91. On 30 May 1992, the Security Council adopted resolution 757 (1992), in which, inter alia, it noted that “the claim by the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations has not been generally accepted”.

92. On 19 September 1992, the Security Council adopted resolution 777 (1992) which read as follows:

“The Security Council,
Reaffirming its resolution 713 (1991) of 25 September 1991 and all subsequent relevant resolutions,
Considering that the state formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist,

Recalling in particular resolution 757 (1992) which notes that ‘the claim by the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations has not been generally accepted’,

1. Considers that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations; and therefore recommends to the General Assembly that it decide that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly;

2. Decides to consider the matter again before the end of the main part of the forty-seventh session of the General Assembly.”

The resolution was adopted by 12 votes in favour, none against, and 3 abstentions.

93. On 22 September 1992 the General Assembly adopted resolution 47/1, according to which:

“The General Assembly,

Having received the recommendation of the Security Council of 19 September 1992 that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly;

1. Considers that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations; and therefore decides that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly;

2. Takes note of the intention of the Security Council to consider the matter again before the end of the main part of the forty-seventh session of the General Assembly.”

The resolution was adopted by 127 votes to 6, with 26 abstentions.

94. On 25 September 1992, the Permanent Representatives of Bosnia and Herzegovina and Croatia addressed a letter to the Secretary-General, in which, with reference to Security Council resolution 777 (1992) and General Assembly resolution 47/1, they stated their understanding as follows: “At this moment, there is no doubt that the Socialist Federal Republic of Yugoslavia is not a member of the United Nations any more. At the same time, the Federal Republic of Yugoslavia is clearly not yet a member.” They concluded that “[t]he flag flying in front of the United Nations and the name-plaque bearing the name ‘Yugoslavia’ do not represent anything or anybody any more” and “kindly request[ed] that [the Secretary-General] provide a legal explanatory statement concerning the questions raised” (United Nations doc. A/47/474).

95. In response, on 29 September 1992, the Under-Secretary-General and Legal Counsel of the United Nations addressed a letter to the Permanent Representatives of Bosnia and Herzegovina and Croatia, in which he stated that the “considered view of the United Nations Secretariat regarding the practical consequences of the adoption by the General Assembly of resolution 47/1” was as follows:

“While the General Assembly has stated unequivocally that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot automatically continue the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations and that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations, the only practical consequence that the resolution draws is that the Federal Republic of Yugoslavia (Serbia and Montenegro) shall not participate in the work of the General Assembly. It is clear, therefore, that representatives of the Federal Republic of Yugoslavia (Serbia and Montenegro) can no longer participate in the work of the General Assembly, its subsidiary organs, nor conferences and meetings convened by it.

On the other hand, the resolution neither terminates nor suspends Yugoslavia’s membership in the Organization. Consequently, the seat and nameplate remain as before, but in Assembly bodies representatives of the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot sit behind the sign ‘Yugoslavia’. Yugoslav missions at United Nations Headquarters and offices may continue to function and may receive and circulate documents. At Headquarters, the Secretariat will continue to fly the flag of the old Yugoslavia as it is the last flag of Yugoslavia used by the Secretariat. The resolution does not take away the right of Yugoslavia to participate in the work of organs other than Assembly bodies. The admission to the United Nations of a new Yugoslavia under Article 4 of the Charter will terminate the situation created by resolution 47/1.” (United Nations doc. A/47/485; emphasis in the original.)
6. On 29 April 1993, the General Assembly, upon the recommendation of Bosnia and Herzegovina that the Court should not examine the question, raised a new objection in its Initiative (paragraph 83 above), attacking the jurisdiction of the Court in this case. This new objection, if successful, would mean that the Federal Republic of Yugoslavia (Serbia and Montenegro), as a Member of the United Nations, is under a duty to raise the issue of whether the application is admissible. It is further submitted by the Applicant that the Rule of res judicata, attaching to the decision of the Court in the case of Bosnia and Herzegovina v. the Former Yugoslav Federal Republic (July 2001), would mean that a respondent, after having asserted one or more preliminary objections, could still raise others, to the detriment of the effective administration of justice, the smooth conduct of proceedings, and in the present case, the doctrine of res judicata.

98. This situation, however, came to an end with a new development in the process of admission of the Federal Republic of Yugoslavia to the United Nations. On 24 September 2000, Mr. Koštunicë was elected President of the FRY. In that capacity, on 27 October 2000 he sent a letter to the Secretary-General requesting admission of the FRY to membership in the United Nations in light of the implementation of Resolution 777 (1992). On 1 November 2000, the General Assembly, by resolution S/RES/1326, decided to admit the FRY to membership in the United Nations.

99. Acting upon this application by the FRY for membership in the United Nations, the Security Council on 31 October 2000 "recommended that the Secretary-General request the admission of the Federal Republic of Yugoslavia to membership in the United Nations, in light of the implementation of Resolution 777 (1992)." The Secretary-General, in a letter dated 27 November 2000, requested the admission of the FRY to membership in the United Nations. The Security Council has since then recommended the admission of the FRY to membership in the United Nations.

100. The Court will now consider the Applicant's response to the jurisdictional objection raised by the Respondent, that is to say the contention that the Respondent is under a duty to raise the issue of whether the application is admissible.
reasons of good faith, including estoppel and the principle *allegans contraria nemo audietur*.

102. The Court does not however find it necessary to consider here whether the conduct of the Respondent could be held to constitute an acquiescence in the jurisdiction of the Court. Such acquiescence, if established, might be relevant to questions of consensual jurisdiction, and in particular jurisdiction *ratione materiae* under Article IX of the Genocide Convention, but not to the question whether a State has the capacity under the Statute to be a party to proceedings before the Court.

The latter question may be regarded as an issue prior to that of jurisdiction *ratione personae*, or as one constitutive element within the concept of jurisdiction *ratione personae*. Either way, unlike the majority of questions of jurisdiction, it is not a matter of the consent of the parties. As the Court observed in the cases concerning the *Legality of Use of Force*,

"a distinction has to be made between a question of jurisdiction that relates to the consent of a party and the question of the right of a party to appear before the Court under the requirements of the Statute, which is not a matter of consent. The question is whether as a matter of law Serbia and Montenegro was entitled to seise the Court as a party to the Statute at the time when it instituted proceedings in these cases. Since that question is independent of the views or wishes of the Parties, even if they were now to have arrived at a shared view on the point, the Court would not have to accept that view as necessarily the correct one. The function of the Court to enquire into the matter and reach its own conclusion is thus mandatory upon the Court irrespective of the consent of the parties and is in no way incompatible with the principle that the jurisdiction of the Court depends on consent." (*Legality of Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 295, para. 36; emphasis in the original.)

103. It follows that, whether or not the Respondent should be held to have acquiesced in the jurisdiction of the Court in this case, such acquiescence would in no way bar the Court from examining and ruling upon the question stated above. The same reasoning applies to the argument that the Respondent is estopped from raising the matter at this stage, or debarred from doing so by considerations of good faith. All such considerations can, at the end of the day, only amount to attributing to the Respondent an implied acceptance, or deemed consent, in relation to the jurisdiction of the Court; but, as explained above, *ad hoc* consent of a party is distinct from the question of its capacity to be a party to proceedings before the Court.

104. However Bosnia and Herzegovina’s second contention is that, objectively and apart from any effect of the conduct of the Respondent, the question of the application of Article 35 of the Statute in this case has already been resolved as a matter of *res judicata*, and that if the Court were to go back on its 1996 decision on jurisdiction, it would disregard fundamental rules of law. In order to assess the validity of this contention, the Court will first review its previous decisions in the present case in which its jurisdiction, or specifically the question whether Serbia and Montenegro could properly appear before the Court, has been in issue.

* * *

(4) Relevant Past Decisions of the Court

105. On 8 April 1993, the Court made an Order in this case indicating certain provisional measures. In that Order the Court briefly examined the circumstances of the break-up of the SFRY, and the claim of the Respondent (then known as “Yugoslavia (Serbia and Montenegro)”) to continuity with that State, and consequent entitlement to continued membership in the United Nations. It noted that “the solution adopted” within the United Nations was “not free from legal difficulties”, but concluded that “the question whether or not Yugoslavia is a Member of the United Nations and as such a party to the Statute of the Court is one which the Court does not need to determine definitively at the present stage of the proceedings” (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993, p. 295, para. 36 ; emphasis in the original.*)

106. In 1995 the Respondent raised seven preliminary objections (one of which was later withdrawn), three of which invited the Court to find that it had no jurisdiction in the case. None of these objections were however founded on a contention that the FRY was not a party to the Statute at the relevant time; that was not a contention specifically advanced in the proceedings on the preliminary objections. At the time of those
proceedings, the FRY was persisting in the claim, that it was continuing the membership of the former SFRY in the United Nations; and while that claim was opposed by a number of States, the position taken by the various organs gave rise to a "confused and complex state of affairs . . . within the United Nations" (Legality of Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004, p. 308, para. 73). Neither party raised the matter before the Court: Bosnia and Herzegovina as Applicant, while denying that the FRY was a Member of the United Nations as a continuator of the SFRY, was asserting before this Court that the FRY was nevertheless a party to the Statute, either under Article 35, paragraph 2, thereof, or on the basis of the membership of the former Yugoslavia. It also found that the Application was admissible, and stated that "the Court may now proceed to consider the merits of the case . . . " (ibid., p. 622, para. 46).

108. However, on 24 April 2001 Serbia and Montenegro (then known as the Federal Republic of Yugoslavia) filed an Application instituting proceedings seeking revision, under Article 61 of the Statute, of the Judgment of which the revision was sought. Those consequences, even supposing them to be established, cannot be regarded as facts within the meaning of Article 61. The FRY’s argument cannot accordingly be upheld." (ibid., pp. 30-31, para. 69.)

110. The Court did not consider that the admission of the FRY to membership was itself a "new fact", since it occurred after the date of the Judgment which it is asking to have revised. As to the argument that facts on which an application for revision could be based were "revealed" by the events of 2000, the Court ruled as follows:

"In advancing this argument, the FRY does not rely on facts that existed in 1996. In reality, it bases its Application for revision on the legal consequences which it seeks to draw from facts subsequent to the Judgment which it is asking to have revised. Those consequences, even supposing them to be established, cannot be regarded as facts within the meaning of Article 61. The FRY’s argument cannot accordingly be upheld." (I.C.J. Reports 2003, p. 30, paras. 66 and 69.)
ity of Use of Force, it did not, in its Judgment on the Application for revision,

“regard the alleged ‘decisive facts’ specified by Serbia and Montenegro as ‘facts that existed in 1996’ for the purpose of Article 61. The Court therefore did not have to rule on the question whether ‘the legal consequences’ could indeed legitimately be deduced from the later facts; in other words, it did not have to say whether it was correct that Serbia and Montenegro had not been a party to the Statute or to the Genocide Convention in 1996.” (Legality of Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004, p. 313, para. 87.)

112. In a subsequent paragraph of the 2003 Judgment on the Application for revision of the 1996 Judgment, the Court had stated:

“It follows from the foregoing that it has not been established that the request of the FRY is based upon the discovery of ‘some fact’ which was ‘when the judgment was given, unknown to the Court and also to the party claiming revision’. The Court therefore concludes that one of the conditions for the admissibility of an application for revision prescribed by paragraph 1 of Article 61 of the Statute has not been satisfied.” (I.C.J. Reports 2003, p. 31, para. 72.)

In its 2004 decisions in the Legality of Use of Force cases the Court further commented on this finding:

“The Court thus made its position clear that there could have been no retroactive modification of the situation in 2000, which would amount to a new fact, and that therefore the conditions of Article 61 were not satisfied. This, however, did not entail any finding by the Court, in the revision proceedings, as to what that situation actually was.” (Preliminary Objections, Judgment, I.C.J. Reports 2004, p. 314, para. 89.)

113. For the purposes of the present case, it is thus clear that the Judgment of 2003 on the Application by the FRY for revision, while binding between the parties, and final and without appeal, did not contain any finding on the question whether or not that State had actually been a Member of the United Nations in 1993. The question of the status of the FRY in 1993 formed no part of the issues upon which the Court pronounced judgment when dismissing that Application.

* * *

(5) The Principle of Res Judicata

114. The Court will now consider the principle of res judicata, and its application to the 1996 Judgment in this case. The Applicant asserts that the 1996 Judgment, whereby the Court found that it had jurisdiction under the Genocide Convention, “enjoys the authority of res judicata and is not susceptible of appeal” and that “any ruling whereby the Court reversed the 1996 Judgment . . . would be incompatible both with the res judicata principle and with Articles 59, 60 and 61 of the Statute”. The Applicant submits that, like its judgments on the merits, “the Court’s decisions on jurisdiction are res judicata”. It further observes that, pursuant to Article 60 of the Statute, the Court’s 1996 Judgment is “final and without appeal” subject only to the possibility of a request for interpretation and revision; and the FRY’s request for revision was rejected by the Court in its Judgment of 3 February 2003. The Respondent contends that jurisdiction once upheld may be challenged by new objections; and considers that this does not contravene the principle of res judicata or the wording of Article 79 of the Rules of Court. It emphasizes “the right and duty of the Court to act proprio motu” to examine its jurisdiction, mentioned in the case of the Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan) (see paragraph 118 below), and contends that the Court cannot “forfeit” that right by not having itself raised the issue in the preliminary objections phase.

115. There is no dispute between the Parties as to the existence of the principle of res judicata even if they interpret it differently as regards judgments deciding questions of jurisdiction. The fundamental character of that principle appears from the terms of the Statute of the Court and the Charter of the United Nations. The underlying character and purposes of the principle are reflected in the judicial practice of the Court. That principle signifies that the decisions of the Court are not only binding on the parties, but are final, in the sense that they cannot be reopened by the parties as regards the issues that have been determined, save by procedures, of an exceptional nature, specially laid down for that purpose. Article 59 of the Statute, notwithstanding its negative wording, has at its core the positive statement that the parties are bound by the decision of the Court in respect of the particular case. Article 60 of the Statute provides that the judgment is final and without appeal; Article 61 places close limits of time and substance on the ability of the parties to seek the revision of the judgment. The Court stressed those limits in 2003 when it found inadmissible the Application made by Serbia and Montenegro for revision of the 1996 Judgment in the Application for Revision case (I.C.J. Reports 2003, p. 12, para. 17).

116. Two purposes, one general, the other specific, underlie the principle of res judicata, internationally as nationally. First, the stability of legal relations requires that litigation come to an end. The Court’s function, according to Article 38 of its Statute, is to “decide”, that is, to bring to an end, “such disputes as are submitted to it”. Secondly, it is in the interest of each party that an issue which has already been adjudicated in favour of that party be not argued again. Article 60 of the Statute articu-
lates this finality of judgments. Depriving a litigant of the benefit of a judgment it has already obtained must in general be seen as a breach of the principles governing the legal settlement of disputes.

117. It has however been suggested by the Respondent that a distinction may be drawn between the application of the principle of *res judicata* to judgments given on the merits of a case, and judgments determining the Court's jurisdiction, in response to preliminary objections; specifically, the Respondent contends that “decisions on preliminary objections do not and cannot have the same consequences as decisions on the merits”. The Court will however observe that the decision on questions of jurisdiction, pursuant to Article 36, paragraph 6, of the Statute, is given by a judgment, and Article 60 of the Statute provides that “[i]f the judgment is final and without appeal”, without distinguishing between judgments on jurisdiction and admissibility, and judgments on the merits. In its Judgment of 25 March 1999 on the request for interpretation of the Judgment of 11 June 1998 in the case of the *Land and Maritime Boundary between Cameroon and Nigeria*, the Court expressly recognized that the 1998 Judgment, given on a number of preliminary objections to jurisdiction and admissibility, constituted *res judicata*, so that the Court could not consider a submission inconsistent with that judgment (*Judgment, I.C.J. Reports 1999 (I), p. 39, para. 16*). Similarly, in its Judgment of 3 February 2003 in the *Application for Revision* case, the Court began by examining whether the conditions for the opening of the revision procedure, laid down by Article 61 of the Statute, were satisfied, undoubtedly recognized that an application could be made for revision of a decision on preliminary objections; this could in turn only derive from a recognition that such a judgment is “final and without appeal”. Furthermore, the contention put forward by the Respondent would signify that the principle of *res judicata* would not prevent a judgment dismissing a preliminary objection from remaining open to further challenge indefinitely, while a judgment upholding such an objection, and putting an end to the case, would in the nature of things be final and determinative as regards that specific case.

118. The Court recalls that, as it has stated in the case of the *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, it “must however always be satisfied that it has jurisdiction, and must if necessary go into that matter *proprio motu*” (*Judgment, I.C.J. Reports 1972, p. 52, para. 13*). That decision in its context (in a case in which there was no question of reopening a previous decision of the Court) does not support the Respondent’s contention. It does not signify that jurisdictional decisions remain reviewable indefinitely, nor that the Court may, *proprio motu* or otherwise, reopen matters already decided with the force of *res judicata*. The Respondent has argued that there is a principle that “an international court may consider or reconsider the issue of juris-

diction at any stage of the proceedings”. It has referred in this connection both to the dictum just cited from the *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, and to the *Corfu Channel (United Kingdom v. Albania)* case. It is correct that the Court, having in the first phase of that case rejected Albania’s preliminary objection to jurisdiction, and having decided that proceedings on the merits were to continue (*Preliminary Objection, Judgment, I.C.J. Reports 1947-1948*, p. 15), did at the merits stage consider and rule on a challenge to its jurisdiction, in particular whether it had jurisdiction to assess compensation (*I.C.J. Reports 1949*, pp. 23-26; 171). But no reconsideration at all by the Court of its earlier Judgment was entailed in this because, following that earlier Judgment, the Parties had concluded a special agreement submitting to the Court, *inter alia*, the question of compensation. The later challenge to jurisdiction concerned only the scope of the jurisdiction conferred by that subsequent agreement.

119. The Respondent also invokes certain international conventions and the rules of other international tribunals. It is true that the European Court of Human Rights may reject, at any stage of the proceedings, an application which it considers inadmissible; and the International Criminal Court may, in exceptional circumstances, permit the admissibility of a case or the jurisdiction of the Court to be challenged after the commencement of the trial. However, these specific authorizations in the instruments governing certain other tribunals reflect their particular admissibility procedures, which are not identical with the procedures of the Court in the field of jurisdiction. They thus do not support the view that there exists a general principle which would apply to the Court, whose Statute not merely contains no such provision, but declares, in Article 60, the *res judicata* principle without exception. The Respondent has also cited certain jurisprudence of the European Court of Human Rights, and an arbitral decision of the German-Polish Mixed Arbitral Tribunal (*von Tiedemann* case); but, in the view of the Court, these too, being based on their particular facts, and the nature of the jurisdictions involved, do not indicate the existence of a principle of sufficient generality and weight to override the clear provisions of the Court’s Statute, and the principle of *res judicata*.

120. This does not however mean that, should a party to a case believe that elements have come to light subsequent to the decision of the Court, which tend to show that the Court’s conclusions may have been based on incorrect or insufficient facts, the decision must remain final, even if it is in apparent contradiction to reality. The Statute provides for only one procedure in such an event: the procedure under Article 61, which offers the possibility for the revision of judgments, subject to the restrictions stated in that Article. In the interests of the stability of legal relations, those restrictions must be rigorously applied. As noted above (para-
graph 110) the FRY’s Application for revision of the 1996 Judgment in this case was dismissed, as not meeting the conditions of Article 61. Subject only to this possibility of revision, the applicable principle is *res judicata pro veritate habetur*, that is to say that the findings of a judgment are, for the purposes of the case and between the parties, to be taken as correct, and may not be reopened on the basis of claims that doubt has been thrown on them by subsequent events.

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(6) Application of the Principle of Res Judicata to the 1996 Judgment

121. In the light of these considerations, the Court reverts to the effect and significance of the 1996 Judgment. That Judgment was essentially addressed, so far as questions of jurisdiction were concerned, to the question of the Court’s jurisdiction under the Genocide Convention. It resolved in particular certain questions that had been raised as to the status of Bosnia and Herzegovina in relation to the Convention; as regards the FRY, the Judgment stated simply as follows:

“the former Socialist Federal Republic of Yugoslavia . . . signed the Genocide Convention on 11 December 1948 and deposited its instrument of ratification, without reservation, on 29 August 1950. At the time of the proclamation of the Federal Republic of Yugoslavia, on 27 April 1992, a formal declaration was adopted on its behalf to the effect that:

“The Federal Republic of Yugoslavia, continuing the State, international legal and political personality of the Socialist Federal Republic of Yugoslavia, shall strictly abide by all the commitments that the Socialist Federal Republic of Yugoslavia assumed internationally.”

This intention thus expressed by Yugoslavia to remain bound by the international treaties to which the former Yugoslavia was party was confirmed in an official Note of 27 April 1992 from the Permanent Mission of Yugoslavia to the United Nations, addressed to the Secretary-General. The Court observes, furthermore, that it has not been contested that Yugoslavia was party to the Genocide Convention. Thus, Yugoslavia was bound by the provisions of the Convention on the date of the filing of the Application in the present case, namely, on 20 March 1993.” (Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia) Preliminary Objections, Judgment, I.C.J. Reports 1996 (II), p. 610, para. 17.)

122. Nothing was stated in the 1996 Judgment about the status of the FRY in relation to the United Nations, or the question whether it could participate in proceedings before the Court; for the reasons already mentioned above (paragraph 106), both Parties had chosen to refrain from asking for a decision on these matters. The Court however considers it necessary to emphasize that the question whether a State may properly come before the Court, on the basis of the provisions of the Statute, whether it be classified as a matter of capacity to be a party to the proceedings or as an aspect of jurisdiction *ratione personae*, is a matter which precedes that of jurisdiction *ratione materiae*, that is, whether that State has consented to the settlement by the Court of the specific dispute brought before it. The question is in fact one which the Court is bound to raise and examine, if necessary, ex officio, and if appropriate after notification to the parties. Thus if the Court considers that, in a particular case, the conditions concerning the capacity of the parties to appear before it are not satisfied, while the conditions of its jurisdiction *ratione materiae* are, it should, even if the question has not been raised by the parties, find that the former conditions are not met, and conclude that, for that reason, it could not have jurisdiction to decide the merits.

123. The operative part of a judgment of the Court possesses the force of *res judicata*. The operative part of the 1996 Judgment stated, in paragraph 47 (2) (a), that the Court found “that, on the basis of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, it has jurisdiction to decide upon the dispute”. That jurisdiction is thus established with the full weight of the Court’s judicial authority. For a party to assert today that, at the date the 1996 Judgment was given, the Court had no power to give it, because one of the parties can now be seen to have been unable to come before the Court is, for the reason given in the preceding paragraph, to call in question the force as *res judicata* of the operative clause of the Judgment. At first sight, therefore, the Court need not examine the Respondent’s objection to jurisdiction based on its contention as to its lack of status in 1993.

124. The Respondent has however advanced a number of arguments tending to show that the 1996 Judgment is not conclusive on the matter, and the Court will now examine these. The passage just quoted from the 1996 Judgment is of course not the sole provision of the operative clause of that Judgment: as, the Applicant has noted, the Court first dismissed *seriatim* the specific preliminary objections raised (and not withdrawn) by the Respondent; it then made the finding quoted in paragraph 123 above; and finally it dismissed certain additional bases of jurisdiction invoked by the Applicant. The Respondent suggests that, for the purposes of applying the principle of *res judicata* to a judgment of this kind on preliminary objections, the operative clause (dispositif) to be taken into account and given the force of *res judicata* is the decision rejecting specified preliminary objections, rather than “the broad ascertainment
upholding jurisdiction”. The Respondent has drawn attention to the provisions of Article 79, paragraph 7, of the 1978 Rules of Court, which provides that the judgment on preliminary objections shall, in respect of each objection “either uphold the objection, reject it, or declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character”. The Respondent suggests therefore that only the clauses of a judgment on preliminary objections that are directed to these ends have the force of res judicata, which is, it contends, consistent with the view that new objections may be raised subsequently.

125. The Court does not however consider that it was the purpose of Article 79 of the Rules of Court to limit the extent of the force of res judicata attaching to a judgment on preliminary objections, nor that, in the case of such judgment, such force is necessarily limited to the clauses of the dispositif specifically rejecting particular objections. There are many examples in the Court’s jurisprudence of decisions on preliminary objections which contain a general finding that the Court has jurisdiction, or that the application is admissible, as the case may be; and it would be going too far to suppose that all of these are necessarily superfluous conclusions. In the view of the Court, if any question arises as to the scope of res judicata attaching to a judgment, it must be determined in each case having regard to the context in which the judgment was given (cf. Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Tunïsia v. Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1985, pp. 218-219, para. 48).

126. For this purpose, in respect of a particular judgment it may be necessary to distinguish between, first, the issues which have been decided with the force of res judicata, or which are necessarily entailed in the decision of those issues; secondly any peripheral or subsidiary matters, or obiter dicta; and finally matters which have not been ruled upon at all. Thus an application for interpretation of a judgment under Article 60 of the Statute may well require the Court to settle “[a] difference of opinion [between the parties] as to whether a particular point has or has not been decided with binding force” (Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J. Series A, No. 13, pp. 11-12). If a matter has not in fact been determined, expressly or by necessary implication, then no force of res judicata attaches to it; and a general finding may have to be read in context in order to ascertain whether a particular matter is or is not contained in it.

127. In particular, the fact that a judgment may, in addition to rejecting specific preliminary objections, contain a finding that “the Court has jurisdiction” in the case does not necessarily prevent subsequent examination of any jurisdictional issues later arising that have not been resolved, with the force of res judicata, by such judgment. The Parties have each referred in this connection to the successive decisions in the Corfu Chan-

128. On the other hand, the fact that the Court has in these past cases dealt with jurisdictional issues after having delivered a judgment on jurisdiction does not support the contention that such a judgment can be reopened at any time, so as to permit reconsideration of issues already settled with the force of res judicata. The essential difference between the cases mentioned in the previous paragraph and the present case is this: the jurisdictional issues examined at a late stage in those cases were such that the decision on them would not contradict the finding of jurisdiction made in the earlier judgment. In the Fisheries Jurisdiction cases, the issues raised related to the extent of the jurisdiction already established in principle with the force of res judicata; in the Military and Paramilitary Activities case, the Court had clearly indicated in the 1984 Judgment that its finding in favour of jurisdiction did not extend to a definitive ruling on the interpretation of the United States reservation to its optional clause declaration. By contrast, the contentions of the Respondent in the present case would, if upheld, effectively reverse the 1996 Judgment; that indeed is its purpose.

129. The Respondent has contended that the issue whether the FRY had access to the Court under Article 35 of the Statute has in fact never been decided in the present case, so that no barrier of res judicata would prevent the Court from examining that issue at the present stage of the
proceedings. It has drawn attention to the fact that when commenting on the 1996 Judgment, in its 2004 Judgments in the cases concerning the 

*Legality of Use of Force*, the Court observed that “[t]he question of the status of the Federal Republic of Yugoslavia in relation to Article 35 of the Statute was not raised and the Court saw no reason to examine it” (see, for example, *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, *I.C.J. Reports* 2004, p. 311, para. 82), and that “in its pronouncements in incidental proceedings” in the present case, the Court “did not commit itself to a definitive position on the issue of the legal status of the Federal Republic of Yugoslavia in relation to the Charter and the Statute” (*ibid.*, pp. 308-309, para. 74).

130. That does not however signify that in 1996 the Court was unaware of the fact that the solution adopted in the United Nations to the question of continuation of the membership of the SFRY “was not free from legal difficulties”, as the Court had noted in its Order of 8 April 1993 indicating provisional measures in the case (*I.C.J. Reports* 1993, p. 14, para. 18; above, paragraph 105). The FRY was, at the time of the proceedings on its preliminary objections culminating in the 1996 Judgment, maintaining that it was the continuator State of the SFRY. As the Court indicated in its Judgments in the cases concerning the 

*Legality of Use of Force*,

“No specific assertion was made in the Application [of 1993, in the present case] that the Court was open to Serbia and Montenegro under Article 35, paragraph 1, of the Statute of the Court, but it was later made clear that the Applicant claimed to be a Member of the United Nations and thus a party to the Statute of the Court, by virtue of Article 93, paragraph 1, of the Charter, at the time of filing of the Application . . . [T]his position was expressly stated in the Memorial filed by Serbia and Montenegro on 4 January 2000 . . .” (*Legality of Use of Force (Serbia and Montenegro v. Belgium)*, *Preliminary Objections, Judgment, I.C.J. Reports* 2004, p. 299, para. 47.)

The question whether the FRY was a continuator or a successor State of the SFRY was mentioned in the Memorial of Bosnia and Herzegovina. The view of Bosnia and Herzegovina was that, while the FRY was not a Member of the United Nations, as a successor State of the SFRY which had expressly declared that it would abide by the international commitments of the SFRY, it was nevertheless a party to the Statute. It is also essential, when examining the text of the 1996 Judgment, to take note of the context in which it was delivered, in particular as regards the contemporary state of relations between the Respondent and the United Nations, as recounted in paragraphs 88 to 99 above.

131. The “legal difficulties” referred to were finally dissipated when in 2000 the FRY abandoned its former insistence that it was the continuator of the SFRY, and applied for membership in the United Nations (paragraph 98 above). As the Court observed in its 2004 Judgments in the cases concerning the 

*Legality of Use of Force*,

“the significance of this new development in 2000 is that it has clarified the thus far amorphous legal situation concerning the status of the Federal Republic of Yugoslavia vis-à-vis the United Nations. It is in that sense that the situation that the Court now faces in relation to Serbia and Montenegro is manifestly different from that which it faced in 1999. If, at that time, the Court had had to determine definitively the status of the Applicant vis-à-vis the United Nations, its task of giving such a determination would have been complicated by the legal situation, which was shrouded in uncertainties relating to that status. However, from the vantage point from which the Court now looks at the legal situation, and in light of the legal consequences of the new development since 1 November 2000, the Court is led to the conclusion that Serbia and Montenegro was not a Member of the United Nations, and in that capacity a State party to the Statute of the International Court of Justice, at the time of filing its Application to institute the present proceedings before the Court on 29 April 1999.” (*Legality of Use of Force (Serbia and Montenegro v. Belgium)*, *Preliminary Objections, Judgment, I.C.J. Reports* 2004, pp. 310-311, para. 79.)

As the Court here recognized, in 1999 — and even more so in 1996 — it was by no means so clear as the Court found it to be in 2004 that the Respondent was not a Member of the United Nations at the relevant time. The inconsistencies of approach expressed by the various United Nations organs are apparent from the passages quoted in paragraphs 91 to 96 above.

132. As already noted, the legal complications of the position of the Respondent in relation to the United Nations were not specifically mentioned in the 1996 Judgment. The Court stated, as mentioned in paragraph 121 above, that “Yugoslavia was bound by the provisions of the [Genocide] Convention on the date of the filing of the Application in the present case” (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, *Preliminary Objections, Judgment, I.C.J. Reports* 1996 (II), p. 610, para. 17), and found that “on the basis of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, it has jurisdiction to adjudicate upon the dispute” (*ibid.*, p. 623, para. 47 (2) (a)). Since, as observed above, the question of a State’s capacity to be a party to proceedings is a matter which precedes that of jurisdiction *ratione materiae*, and one which the Court must, if necessary, raise ex officio (see
A similar argument advanced by the Respondent is based on the principle that the jurisdiction of the Court derives from a treaty, namely the Statute. The Respondent questions whether the Statute could have endowed the 1996 Judgment with any effects at all, since the Respondent was, it alleges, not a party to the Statute. Counsel for the Respondent argued that the 1996 Judgment was based merely upon an assumption: an assumption of continuity between the SFRY and the FRY.

The Court did not commit itself to a definitive position on the issue of the Respondent's legal status, which was not then, nor is now, a matter of legal construction, and related to the question of jurisdiction. The force of res judicata could not extend to the proceedings in the 1996 Judgment, since in that case the Court did not, as it has in the present case, have to go on to consider what might be the unstated foundations of a judgment given in another case. The Court thus considers that the 1996 Judgment contained a finding, whether it be regarded as one of jurisdiction ratione personae or ratione materiae, that the Court had jurisdiction in the case in its comprehensive sense, that is to say, that the status of each of them was such as to comply with the provisions of the Statute concerning the capacity of the parties to appear before the Court. However, it has been argued by the Respondent that even so, the fundamental nature of access as a precondition for the exercise of the Court's judicial function means that positive findings on access cannot be taken as definitive and final until the final judgment is rendered in proceedings, because otherwise it would be possible for the Court to reopen and re-examine this issue until the end of the proceedings.
not represent a binding treaty provision providing a possible basis for deciding on jurisdiction with res judicata effects."

138. It appears to the Court that these contentions are inconsistent with the nature of the principle of res judicata. That principle signifies that once the Court has made a determination, whether on a matter of the merits of a dispute brought before it, or on a question of its own jurisdiction, that determination is definitive both for the parties to the case, in respect of the case (Article 59 of the Statute), and for the Court itself in the context of that case. However fundamental the question of the capacity of States to be parties in cases before the Court may be, it remains a question to be determined by the Court, in accordance with Article 36, paragraph 6, of the Statute, and once a finding in favour of jurisdiction has been pronounced with the force of res judicata, it is not open to question or re-examination, except by way of revision under Article 61 of the Statute. There is thus, as a matter of law, no possibility that the Court might render "its final decision with respect to a party over which it cannot exercise its judicial function", because the question whether a State is or is not a party subject to the jurisdiction of the Court is one which is reserved for the sole and authoritative decision of the Court.

139. Counsel for the Respondent contended further that, in the circumstances of the present case, reliance on the res judicata principle "would justify the Court's ultra vires exercise of its judicial functions contrary to the mandatory requirements of the Statute". However, the operation of the "mandatory requirements of the Statute" falls to be determined by the Court in each case before it; and once the Court has determined, with the force of res judicata, that it has jurisdiction, then for the purposes of that case no question of ultra vires action can arise; the Court having sole competence to determine such matters under the Statute. For the Court res judicata pro veritate habetur, and the judicial truth within the context of a case is as the Court has determined it, subject only to the provision in the Statute for revision of judgments. This result is required by the nature of the judicial function, and the universally recognized need for stability of legal relations.

* * *

(7) Conclusion: Jurisdiction Affirmed

140. The Court accordingly concludes that, in respect of the contention that the Respondent was not, on the date of filing of the Application instituting proceedings, a State having the capacity to come before the Court under the Statute, the principle of res judicata precludes any reopening of the decision embodied in the 1996 Judgment. The Respondent has however also argued that the 1996 Judgment is not res judicata as to the further question whether the FRY was, at the time of institution of proceedings, a party to the Genocide Convention, and has sought to show that at that time it was not, and could not have been, such a party. The Court however considers that the reasons given above for holding that the 1996 Judgment settles the question of jurisdiction in this case are applicable a fortiori as regards this contention, since on this point the 1996 Judgment was quite specific, as it was not on the question of capacity to come before the Court. The Court does not therefore find it necessary to examine the argument of the Applicant that the failure of the Respondent to advance at the time the case, in respect of the case (Article 59 of the Statute), and for the Court to the question whether Article 35, paragraphs 1 and 2, of the Statute apply equally to applicants and to respondents. This matter, being one of interpretation of the Statute, would be one for the Court to determine. However, in the light of the conclusion that the Court has reached as to the res judicata status of the 1996 decision, it does not find at present the necessity to do so.

* * *

IV. THE APPLICABLE LAW: THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

(1) The Convention in Brief

141. There has been some reference in the Parties' arguments before the Court to the question whether Article 35, paragraphs 1 and 2, of the Statute apply equally to applicants and to respondents. This matter, being one of interpretation of the Statute, would be one for the Court to determine. However, in the light of the conclusion that the Court has reached as to the res judicata status of the 1996 decision, it does not find at present the necessity to do so.

142. The Contracting Parties to the Convention, adopted on 9 December 1948, offer the following reasons for agreeing to its text:

"The Contracting Parties,

Having considered the declaration made by the General Assembly of the United Nations in its resolution 96 (I) dated 11 December 1946 that genocide is a crime under international law, contrary
to the spirit and aims of the United Nations and condemned by the civilized world,

Recognizing that at all periods of history genocide has inflicted great losses on humanity, and

Being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required,

Hereby agree as hereinafter provided . . .”

143. Under Article I “[t]he Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish”. Article II defines genocide in these terms:

“In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such:

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

Article III provides as follows:

“The following acts shall be punishable:

(a) Genocide;
(b) Conspiracy to commit genocide;
(c) Direct and public incitement to commit genocide;
(d) Attempt to commit genocide;
(e) Complicity in genocide.”

144. According to Article IV, persons committing any of those acts shall be punished whether they are constitutionally responsible rulers, public officials or private individuals. Article V requires the parties to enact the necessary legislation to give effect to the Convention, and, in particular, to provide effective penalties for persons guilty of genocide or other acts enumerated in Article III. Article VI provides that

“[p]ersons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction”.

Article VII provides for extradition.

145. Under Article VIII

“Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article III.”

146. Article IX provides for certain disputes to be submitted to the Court:

“Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.”

The remaining ten Articles are final clauses dealing with such matters as parties to the Convention and its entry into force.

147. The jurisdiction of the Court in this case is based solely on Article IX of the Convention. All the other grounds of jurisdiction invoked by the Applicant were rejected in the 1996 Judgment on jurisdiction (I.C.J. Reports 1996 (II), pp. 617-621, paras. 35-41). It follows that the Court may rule only on the disputes between the Parties to which that provision refers. The Parties disagree on whether the Court finally decided the scope and meaning of that provision in its 1996 Judgment and, if it did not, on the matters over which the Court has jurisdiction under that provision. The Court rules on those two matters in following sections of this Judgment. It has no power to rule on alleged breaches of other obligations under international law, not amounting to genocide, particularly those protecting human rights in armed conflict. That is so even if the alleged breaches are of obligations under peremptory norms, or of obligations which protect essential humanitarian values, and which may be owed erga omnes.

148. As it has in other cases, the Court recalls the fundamental distinction between the existence and binding force of obligations arising under international law and the existence of a court or tribunal with jurisdiction to resolve disputes about compliance with those obligations. The fact that there is not such a court or tribunal does not mean that the obligations do not exist. They retain their validity and legal force. States are required to fulfil their obligations under international law, including international humanitarian law, and they remain responsible for acts contrary to international law which are attributable to them (e.g. case concerning Armed Activities on the Territory of the Congo (New Appli-
by Article IX of the Convention, which contemplates the commission of an act of genocide by rulers or public officials.

In the light of the foregoing, the Court considers that it must reject the fifth preliminary objection of Yugoslavia. It would moreover observe that the Parties not only differ with respect to the facts of the case, their imputability and the applicability of the provisions of the Genocide Convention, but are moreover in disagreement with respect to the meaning and legal scope of several of those provisions, including the responsibility of a State for genocide, i.e., according to the form of words employed by the Applicant in its Application, for genocide, Article IX of the Convention. According to the Applicant, the Court in 1996 at the preliminary objections stage decided that it had jurisdiction under Article IX of the Convention to adjudicate upon the responsibility of the respondent State, as indicated in that Article, "for genocide or any of the acts enumerated in Article III", and that that reference "does not exclude any form of State responsibility". The issue, it says, is "res judicata". The Respondent supports a narrower interpretation of the Convention: the Court's jurisdiction is confined to giving a declaratory judgment relating to breaches of the duties to prevent and punish the commission of genocidal acts.

The Applicant relies in particular on the sentences in paragraph 32 which have been emphasized in the above quotation. The Respondent submits that the Court determined the issue and spoke emphatically on the matter in 1996. The Applicant also says that this present phase of the case "will provide an additional opportunity for this Court to rule on the important matter, not only for the guidance of the Parties here before you, but for the benefit of future generations that should not have to fear the immunity of States from responsibility for their wrongful acts.

The Court would observe that the reference to Article IX to "the responsibility of a State for genocide or any of the other acts enumerated in Article III", does not exclude any form of State responsibility.

The Court now comes to the second proposition advanced by Yugoslavia in support of one of its preliminary objections, regarding the type of State responsibility envisaged in Article IX of the Convention. According to the Respondent, the Court ruled in 1996 on the type of State responsibility envisaged by Article IX, and therefore excluded from the scope of the Convention the responsibility flowing from the failure of a State to fulfil its duties to prevent and punish the commission of genocide.

While submitting that the Court determined the issue and spoke emphatically on the matter in 1996 the Applicant also says that this present phase of the case "cannot reopen issues decided with that authority. Whether or not the issue now raised by the Respondent falls in that category, the Court

* * *
observes that the final part of paragraph 33 of that Judgment, quoted above, must be taken as indicating that “the meaning and legal scope” of Article IX and of other provisions of the Convention remain in dispute. In particular a dispute “exists” about whether the only obligations of the Contracting Parties for the breach of which they may be held responsible under the Convention are to legislate, and to prosecute or extradite, or whether the obligations extend to the obligation not to commit genocide and the other acts enumerated in Article III. That dispute “exists” and was left by the Court for resolution at the merits stage. In these circumstances, and taking into account the positions of the Parties, the Court will determine at this stage whether the obligations of the Parties under the Convention do so extend. That is to say, the Court will decide “the meaning and legal scope” of several provisions of the Convention, including Article IX with its reference to “the responsibility of a State for genocide or any of the other acts enumerated in Article III”.

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(3) The Court’s 1996 Decision about the Territorial Scope of the Convention

153. A second issue about the res judicata effect of the 1996 Judgment concerns the territorial limits, if any, on the obligations of the States parties to prevent and punish genocide. In support of one of its preliminary objections the Respondent argued that it did not exercise jurisdiction over the Applicant’s territory at the relevant time. In the final sentence of its reasons for rejecting this argument the Court said this: “[t]he Court notes that the obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention” (I.C.J. Reports 1996 (II), p. 616, para. 31).

154. The Applicant suggests that the Court in that sentence ruled that the obligation extends without territorial limit. The Court does not state the obligation in that positive way. The Court does not say that the obligation is “territorially unlimited by the Convention”. Further, earlier in the paragraph, it had quoted from Article VI (about the obligation of any State in the territory of which the act was committed to prosecute) as “the only provision relevant to” territorial “problems” related to the application of the Convention. The quoted sentence is therefore to be understood as relating to the undertaking stated in Article I. The Court did not in 1996 rule on the territorial scope of each particular obligation arising under the Convention. Accordingly the Court has still to rule on that matter. It is not res judicata.

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(4) The Obligations Imposed by the Convention on the Contracting Parties

155. The Applicant, in the words of its Agent, contends that “[i]t is State responsibility that seeks to establish the responsibilities of a State which, through its leadership, through its organs, committed the most brutal violations of one of the most sacred instruments of international law”. The Applicant has emphasized that in its view, the Genocide Convention “created a universal, treaty-based concept of State responsibility”, and that “[i]t is State responsibility for genocide that this legal proceeding is all about”. It relies in this respect on Article IX of the Convention, which, it argues, “quite explicitly imposes[es] on States a direct responsibility themselves not to commit genocide or to aid in the commission of genocide”. As to the obligation of prevention under Article I, a breach of that obligation, according to the Applicant, “is established — it might be said is ‘eclipsed’ — by the fact that [the Respondent] is itself responsible for the genocide committed; . . . a State which commits genocide has not fulfilled its commitment to prevent it” (emphasis in the original). The argument moves on from alleged breaches of Article I to “violations [by the Respondent] of its obligations under Article III . . . to which express reference is made in Article IX, violations which stand at the heart of our case. This fundamental provision establishes the obligations whose violation engages the responsibility of States parties.” It follows that, in the contention of the Applicant, the Court has jurisdiction under Article IX over alleged violations by a Contracting Party of those obligations.

156. The Respondent contends to the contrary that

“the Genocide Convention does not provide for the responsibility of States for acts of genocide as such. The duties prescribed by the Convention relate to ‘the prevention and punishment of the crime of genocide’ when this crime is committed by individuals: and the provisions of Articles V and VI [about enforcement and prescription] . . . make this abundantly clear.”

It argues that the Court therefore does not have jurisdiction ratione materiae under Article IX; and continues:

“[t]hese provisions [Articles I, V, VI and IX] do not extend to the responsibility of a Contracting Party as such for acts of genocide but [only] to responsibility for failure to prevent or to punish acts of genocide committed by individuals within its territory or . . . its control”.

The sole remedy in respect of that failure would, in the Respondent’s view, be a declaratory judgment.
157. As a subsidiary argument, the Respondent also contended that

“for a State to be responsible under the Genocide Convention, the facts must first be established. As genocide is a crime, it can only be established in accordance with the rules of criminal law, under which the first requirement to be met is that of individual responsibility. The State can incur responsibility only when the existence of genocide has been established beyond all reasonable doubt. In addition, it must then be shown that the person who committed the genocide can engage the responsibility of the State…”

(This contention went on to mention responsibility based on breach of the obligation to prevent and punish, matters considered later in this Judgment.)

158. The Respondent has in addition presented what it refers to as “alternative arguments concerning solely State responsibility for breaches of Articles II and III”. Those arguments addressed the necessary conditions, especially of intent, as well as of attribution. When presenting those alternative arguments, counsel for the Respondent repeated the principal submission set out above that “the Convention does not suggest in any way that States themselves can commit genocide”.

159. The Court notes that there is no disagreement between the Parties that the reference in Article IX to disputes about “the responsibility of a State” as being among the disputes relating to the interpretation, application or fulfilment of the Convention which come within the Court’s jurisdiction, indicates that provisions of the Convention do impose obligations on States in respect of which they may, in the event of breach, incur responsibility. Articles V, VI and VII requiring legislation, in particular providing effective penalties for persons guilty of genocide and the other acts enumerated in Article III, and for the prosecution and extradition of alleged offenders are plainly among them. Because those provisions regulating punishment also have a deterrent and therefore a preventive effect or purpose, they could be regarded as meeting and indeed exhausting the undertaking to prevent the crime of genocide stated in Article I and mentioned in the title. On that basis, in support of the Respondent’s principal position, that Article would rank as merely hortatory, introductory or purposive and as preambular to those specific obligations. The remaining specific provision, Article VIII about competent organs of the United Nations taking action, may be seen as completing the system by supporting both prevention and suppression, in this case at the political level rather than as a matter of legal responsibility.

160. The Court observes that what obligations the Convention imposes upon the parties to it depends on the ordinary meaning of the terms of the Convention read in their context and in the light of its object and purpose. To confirm the meaning resulting from that process or to remove ambiguity or obscurity or a manifest absurd or unreasonable result, the supplementary means of interpretation to which recourse may be had include the preparatory work of the Convention and the circumstances of its conclusion. Those propositions, reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, are well recognized as part of customary international law: see Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 174, para. 94; case concerning Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004, p. 48, para. 83; LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001, p. 501, para. 99; and Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002, p. 645, para. 37, and the other cases referred to in those decisions.

161. To determine what are the obligations of the Contracting Parties under the Genocide Convention, the Court will begin with the terms of its Article I. It contains two propositions. The first is the affirmation that genocide is a crime under international law. That affirmation is to be read in conjunction with the declaration that genocide is a crime under international law, unanimously adopted by the General Assembly two years earlier in its resolution 96 (I), and referred to in the Preamble to the Convention (paragraph 142, above). The affirmation recognizes the existing requirements of customary international law, a matter emphasized by the Court in 1951:

“The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as ‘a crime under international law’ involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (I) of the General Assembly, December 11th 1946). The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-operation required ‘in order to liberate mankind from such an odious scourge’ (Preamble to the Convention)…”

The objects of such a convention must also be considered. The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human
groups and on the other to confirm and endorse the most elementary principles of morality.” (Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 23.)

Later in that Opinion, the Court referred to “the moral and humanitarian principles which are its basis” (ibid., p. 24). In earlier phases of the present case the Court has also recalled resolution 96 (I) (I.C.J. Reports 1993, p. 23; see also pp. 348 and 440) and has quoted the 1951 statement (I.C.J. Reports 1996 (II), p. 616). The Court reaffirmed the 1951 and 1996 statements in its Judgment of 3 February 2006 in the case concerning Armed Activities on the Territory of the Congo (New Application 2002) (Democratic Republic of the Congo v. Rwanda), paragraph 64, when it added that the norm prohibiting genocide was assuredly a peremptory norm of international law (jus cogens).

162. Those characterizations of the prohibition on genocide and the purpose of the Convention are significant for the interpretation of the second proposition stated in Article I — the undertaking by the Contracting Parties to prevent and punish the crime of genocide, and particularly in this context the undertaking to prevent. Several features of that undertaking are significant. The ordinary meaning of the word “undertake” is to give a formal promise, to bind or engage oneself, to give a pledge or promise, to agree, to accept an obligation. It is a word regularly used in treaties setting out the obligations of the Contracting Parties (cf., for example, International Convention on the Elimination of All Forms of Racial Discrimination (7 March 1966), Art. 2, para. 1; International Covenant on Civil and Political Rights (16 December 1966), Art. 2, para. 1, and 3, for example). It is not merely hortatory or purposive. The undertaking is unqualified (a matter considered later in relation to the scope of the obligation of prevention); and it is not to be read merely as an introduction to later express references to legislation, prosecution and extradition. Those features support the conclusion that Article I, in particular its undertaking to prevent, creates obligations distinct from those which appear in the subsequent Articles. That conclusion is also supported by the purely humanitarian and civilizing purpose of the Convention.

163. The conclusion is confirmed by two aspects of the preparatory work of the Convention and the circumstances of its conclusion as referred to in Article 32 of the Vienna Convention. In 1947 the United Nations General Assembly, in requesting the Economic and Social Council to submit a report and a draft convention on genocide to the Third Session of the Assembly, declared “that genocide is an international crime entailing national and international responsibility on the part of individuals and States” (A/RES/180 (II)). That duality of responsibilities is also to be seen in two other associated resolutions adopted on the same day, both directed to the newly established International Law Commission (hereinafter “the ILC”): the first on the formulation of the Nuremberg principles, concerned with the rights (Principle V) and duties of individuals, and the second on the draft declaration on the rights and duties of States (A/RES/177 and A/RES/178 (II)). The duality of responsibilities is further considered later in this Judgment (paragraphs 173-174).
war" was inserted by 30 votes to 7 with 6 abstentions, the amended text of Article I was adopted by 57 votes to 5 with 6 abstentions (ibid., pp. 51 and 53).

165. For the Court both changes — the movement of the undertaking from the Preamble to the first operative Article and the removal of the linking clause ("in accordance with the following articles") — confirm that Article I does impose distinct obligations on the States parties. In particular, the Contracting Parties have a direct obligation not to commit genocide. Under Article I, States parties are bound to prevent, so far as within their power, commission of genocide by their organs or persons over whom they have such firm control that their conduct is attributable to the State and that their acts can be imputable to the State.

166. The Court next considers whether the Parties are also under an express or implied obligation, by virtue of any other provision of the Convention, to refrain from themselves committing genocide. The obligation is not confined to the States parties, but extends to all States, as confirmed by the inclusion of all States in the list included in Article III. They are referred to equally well known categories of criminal law and, as such, appear particularly well adapted to the exercise of the international responsibility of a State — even though quite different in nature from that of the individual, the responsibility in the circumstances to be described more specifically later in this Judgment, if it is to be ascribed to the States parties, must logically be undertaking not to commit the act so described. Secondly, the obligation requires committing an act of genocide or any of the other acts enumerated in Article IX, which confers on the Court jurisdiction over disputes as to the responsibility of a State for genocide or any of the acts mentioned in Article III. Since Article IX is essentially a jurisdictional provision, the Court considers that it should refer disputes as to the interpretation and application of the Convention to the Court. The determination of the Court as to whether the substantive obligation contained in Article IX is satisfied or not does not appear to be significant in this case. Article IX thus establishes a new right of a State to have recourse to the Court in order to establish its innocence or its guilt.

167. The conclusion that the Contracting Parties are bound in this way by the Convention not to commit genocide and the other acts enumerated in Article IX is confirmed by one unusual feature of the wording of the Convention. The phrase "including those relating to the responsibility of a State for genocide or any of the acts mentioned in Article III, and to prevent the commission of acts of genocide by or on the order of their responsible authorities" is used in order to cover the other acts of the Convention. This phrase, together with the use of the word "including", confirms that disputes relating to the responsibility of Contracting Parties for the acts of genocide or any of the other acts mentioned in Article III are to be decided by the Court. The responsibility of a party for genocide and the other acts enumerated in Article III of the Convention is essentially a jurisdictional provision, the Court considers that it should refer disputes as to the interpretation and application of Article III to the Court. The determination of the Court as to whether the substantive obligation contained in Article III is satisfied or not does not appear to be significant in this case. Article III thus establishes a new right of a State to have recourse to the Court in order to establish its innocence or its guilt.

168. The unusual feature of Article IX is the phrase "including those relating to the responsibility of a State for genocide or any of the acts mentioned in Article III, and to prevent the commission of acts of genocide by or on the order of their responsible authorities". The phrase "including" tends to confirm that disputes relating to the responsibility of Contracting Parties for the acts of genocide or any of the other acts mentioned in Article III are to be decided by the Court. The responsibility of a party for genocide and the other acts enumerated in Article III of the Convention is essentially a jurisdictional provision, the Court considers that it should refer disputes as to the interpretation and application of Article III to the Court. The determination of the Court as to whether the substantive obligation contained in Article III is satisfied or not does not appear to be significant in this case. Article III thus establishes a new right of a State to have recourse to the Court in order to establish its innocence or its guilt.

169. The unusual feature of Article IX is the phrase "including those relating to the responsibility of a State for genocide or any of the acts mentioned in Article III, and to prevent the commission of acts of genocide by or on the order of their responsible authorities". The phrase "including" tends to confirm that disputes relating to the responsibility of Contracting Parties for the acts of genocide or any of the other acts mentioned in Article III are to be decided by the Court. The responsibility of a party for genocide and the other acts enumerated in Article III of the Convention is essentially a jurisdictional provision, the Court considers that it should refer disputes as to the interpretation and application of Article III to the Court. The determination of the Court as to whether the substantive obligation contained in Article III is satisfied or not does not appear to be significant in this case. Article III thus establishes a new right of a State to have recourse to the Court in order to establish its innocence or its guilt.
170. The Court now considers three arguments, advanced by the Respondent which may be seen as contradicting the proposition that the Convention imposes a duty on the Contracting Parties not to commit genocide and the other acts enumerated in Article III. The first is that, as a matter of general principle, international law does not recognize the criminal responsibility of the State, and the Genocide Convention does not provide a vehicle for the imposition of such criminal responsibility. On the matter of principle the Respondent calls attention to the rejection by the ILC of the concept of international crimes when it prepared the final draft of its Articles on State Responsibility, a decision reflecting the strongly negative reactions of a number of States to any such concept. The Applicant accepts that general international law does not recognize the criminal responsibility of States. It contends, on the specific issue, that the obligation for which the Respondent may be held responsible, in the event of breach, in proceedings under Article IX, is simply an obligation arising under international law, in this case the provisions of the Convention. The Court observes that the obligations in question in this case, arising from the terms of the Convention, and the responsibilities of States that would arise from breach of such obligations, are obligations and responsibilities under international law. They are not of a criminal nature. This argument accordingly cannot be accepted.

171. The second argument of the Respondent is that the nature of the Convention is such as to exclude from its scope State responsibility for genocide and the other enumerated acts. The Convention, it is said, is a standard international criminal law convention focused essentially on the criminal prosecution and punishment of individuals and not on the responsibility of States. The emphasis of the Convention on the obligations and responsibility of individuals excludes any possibility of States being liable and responsible in the event of breach of the obligations reflected in Article III. In particular, it is said, that possibility cannot stand in the face of the references, in Article III to punishment (of individuals), and in Article IV to individuals being punished, and the requirement, in Article V for legislation in particular for effective penalties for persons guilty of genocide, the provision in Article VI for the prosecution of persons charged with genocide, and requirement in Article VII for extradition.

172. The Court is mindful of the fact that the famous sentence in the Nuremberg Judgment that “[c]rimes against international law are committed by men, not by abstract entities . . .” (Judgment of the International Military Tribunal, Trial of the Major War Criminals, 1947, Official Documents, Vol. 1, p. 223) might be invoked in support of the proposition that only individuals can breach the obligations set out in Article III. But the Court notes that that Tribunal was answering the argument that “international law is concerned with the actions of sovereign States, and provides no punishment for individuals” (Judgment of the International Military Tribunal, op. cit., p. 222), and that thus States alone were responsible under international law. The Tribunal rejected that argument in the following terms: “[t]hat international law imposes duties and liabilities upon individuals as well as upon States has long been recognized” (ibid., p. 223; the phrase “as well as upon States” is missing in the French text of the Judgment).

173. The Court observes that that duality of responsibility continues to be a constant feature of international law. This feature is reflected in Article 25, paragraph 4, of the Rome Statute for the International Criminal Court, now accepted by 104 States: “No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.” The Court notes also that the ILC’s Articles on the Responsibility of States for Internationally Wrongful Acts (Annex to General Assembly resolution 56/83, 12 December 2001), to be referred to hereinafter as “the ILC Articles on State Responsibility”, affirm in Article 58 the other side of the coin: “These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.” In its Commentary on this provision, the Commission said:

“Where crimes against international law are committed by State officials, it will often be the case that the State itself is responsible for the acts in question or for failure to prevent or punish them. In certain cases, in particular aggression, the State will by definition be involved. Even so, the question of individual responsibility is in principle distinct from the question of State responsibility. The State is not exempted from its own responsibility for internationally wrongful conduct by the prosecution and punishment of the State officials who carried it out.” (ILC Commentary on the Draft Articles on Responsibility of States for Internationally Wrongful Acts, ILC Report A/56/10, 2001, Commentary on Article 58, para. 3.)

The Commission quoted Article 25, paragraph 4, of the Rome Statute, and concluded as follows:

“Article 58 . . . [makes] it clear that the Articles do not address the question of the individual responsibility under international law of any person acting on behalf of a State. The term ‘individual responsibility’ has acquired an accepted meaning in light of the Rome Statute and other instruments: it refers to the responsibility of individual persons, including State officials, under certain rules of international law for conduct such as genocide, war crimes and crimes against humanity.”
117. The Court sees nothing in the wording or the structure of the provisions of the Convention relating to individual criminal liability which would displace the meaning of Article I, read with paragraphs (a) to (e) of Article III, so far as these provisions impose obligations on States distinct from the obligations which the Convention requires them to place on individuals. Furthermore, the fact that Articles V, VI and VII focus on individuals cannot itself establish that the Contracting Parties may not be subject to obligations not to commit genocide and the other acts enumerated in Article III.

118. The third and final argument of the Respondent against the proposition that the Contracting Parties are bound by the Convention not to commit genocide is based on the preparatory work of the Convention and particularly of Article IX. The Court has already used part of that work to confirm the operative significance of the undertaking in Article I (see paragraphs 164 and 165 above), an interpretation already determined from the terms of the Convention, its context and purpose.

119. The Respondent, claiming that the Convention and in particular Article IX is ambiguous, submits that the drafting history of the Convention, in the Sixth Committee of the General Assembly, shows that “there was no question of direct responsibility of the State for acts of genocide”. It claims that the responsibility of the State was related to the “key provisions” of Articles IV-VI: the Convention is about the criminal responsibility of individuals supported by the civil responsibility of States to prevent and punish. This argument against any wider responsibility for the Contracting Parties is based on the records of the discussion in the Sixth Committee, and is, it is contended, supported by the rejection of United Kingdom amendments to what became Articles IV and VI. Had the first amendment been adopted, Article IV, concerning the punishment of individuals committing genocide or any of the acts enumerated in Article III, would have been extended by the following additional sentence: “[Acts of genocide] committed by or on behalf of States or governments constitute a breach of the present Convention.” (A/C.6/236 and Corr. 1.) That amendment was defeated (United Nations, Official Records of the General Assembly, Third Session, Part I, Sixth Committee, Summary Records of the 96th Meeting, p. 355). What became Article VI would have been replaced by a provision conferring jurisdiction on the Court if an act of genocide is or is alleged to be the act of a State or government or its organs. The United Kingdom in response to objections that the proposal was out of order (because it meant going back on a decision already taken) withdrew the amendment in favour of the joint amendment to what became Article IX, submitted by the United Kingdom and Belgium (ibid., 100th Meeting, p. 394). In speaking to that joint amendment the United Kingdom delegate acknowledged that the debate had clearly shown the Committee’s decision to confine what is now Article VI to the responsibility of individuals (ibid., 100th Meeting, p. 430). The United Kingdom/Belgium amendment would have added the words “including disputes relating to the responsibility of a State for any of the acts enumerated in Articles II and IV [as the Convention was then drafted]”. The United Kingdom delegate explained that what was involved was civil responsibility, not criminal responsibility (United Nations, Official Records of the General Assembly, op. cit., 103rd Meeting, p. 440). A proposal to delete those words failed and the provision was adopted (ibid., 104th Meeting, p. 447), with style changes being made by the Drafting Committee.

120. At a later stage a Belgium/United Kingdom/United States proposal which would have replaced the disputed phrase by including “disputes arising from a charge by a Contracting Party that the crime of genocide or any other of the acts enumerated in article III has been committed within the jurisdiction of another Contracting Party” was ruled by the Chairman of the Sixth Committee as a change of substance and not to be subject to obligations not to commit genocide and the other acts enumerated in Article III. The Chairman gave the following reason for his ruling which was not challenged:

“it was provided in article IX that those disputes, among others, which concerned the responsibility of a State for genocide or for any of the acts enumerated in article III, should be submitted to the International Court of Justice. According to the joint amendment, on the other hand, the disputes would not be those which concerned the responsibility of the State but those which resulted from an accusation to the effect that the crime had been committed in the territory of one of the contracting parties.” (United Nations, Official Records of the General Assembly, Third Session, Part I, Sixth Committee, Summary Records of the 131st Meeting, p. 690.)

By that time in the deliberations of the Sixth Committee it was clear that only individuals could be held criminally responsible under the draft Convention for genocide. The Chairman was plainly of the view that the Article IX, as it had been modified, provided for State responsibility for genocide.

121. In the view of the Court, two points may be drawn from the drafting history just reviewed. The first is that much of it was concerned with proposals supporting the criminal responsibility of States; but those proposals were not adopted. The second is that the amendment which was adopted — to Article IX — is about jurisdiction in respect of the responsibility of States simpliciter. Consequently, the drafting history may be seen as supporting the conclusion reached by the Court in paragraph 167 above.

122. Accordingly, having considered the various arguments, the Court
affirms that the Contracting Parties are bound by the obligation under the Convention not to commit, through their organs or persons or groups whose conduct is attributable to them, genocide and the other acts enumerated in Article III. Thus if an organ of the State, or a person or group whose acts are legally attributable to the State, commits any of the acts proscribed by Article III of the Convention, the international responsibility of that State is incurred.

* * *

(5) Question Whether the Court May Make a Finding of Genocide by a State in the Absence of a Prior Conviction of an Individual for Genocide by a Competent Court

180. The Court observes that if a State is to be responsible because it has breached its obligation not to commit genocide, it must be shown that genocide as defined in the Convention has been committed. That will also be the case with conspiracy under Article III, paragraph (b), and complicity under Article III, paragraph (e); and, as explained below (paragraph 431) for purposes of the obligation to prevent genocide. The Respondent has raised the question whether it is necessary, as a matter of law, for the Court to be able to uphold a claim of the responsibility of a State for an act of genocide, or any other act enumerated in Article III, that there should have been a finding of genocide by a court or tribunal exercising criminal jurisdiction. According to the Respondent, the condition sine qua non for establishing State responsibility is the prior establishment, according to the rules of criminal law, of the individual responsibility of a perpetrator engaging the State’s responsibility.

181. The different procedures followed by, and powers available to, this Court and to the courts and tribunals trying persons for criminal offences, do not themselves indicate that there is a legal bar to the Court itself finding that genocide or the other acts enumerated in Article III have been committed. Under its Statute the Court has the capacity to undertake that task, while applying the standard of proof appropriate to charges of exceptional gravity (paragraphs 209-210 below). Turning to the terms of the Convention itself, the Court has already held that it has jurisdiction under Article IX to find a State responsible if genocide or other acts enumerated in Article III are committed by its organs, or persons or groups whose acts are attributable to it.

182. Any other interpretation could entail that there would be no legal recourse available under the Convention in some readily conceivable circumstances: genocide has allegedly been committed within a State by its leaders but they have not been brought to trial because, for instance, they are still very much in control of the powers of the State including the police, prosecution services and the courts and there is no international penal tribunal able to exercise jurisdiction over the alleged crimes; or the responsible State may have acknowledged the breach. The Court accordingly concludes that State responsibility can arise under the Convention for genocide and complicity, without an individual being convicted of the crime or an associated one.

* * *

(6) The Possible Territorial Limits of the Obligations

183. The substantive obligations arising from Articles I and III are not on their face limited by territory. They apply to a State wherever it may be acting or may be able to act in ways appropriate to meeting the obligations in question. The extent of that ability in law and fact is considered, so far as the obligation to prevent the crime of genocide is concerned, in the section of the Judgment concerned with that obligation (cf. paragraph 430 below). The significant relevant condition concerning the obligation not to commit genocide and the other acts enumerated in Article III is provided by the rules on attribution (paragraphs 379 ff. below).

184. The obligation to prosecute imposed by Article VI is by contrast subject to an express territorial limit. The trial of persons charged with genocide is to be in a competent tribunal of the State in the territory of which the act was committed (cf. paragraph 442 below), or by an international penal tribunal with jurisdiction (paragraphs 443 ff. below).

* * *

(7) The Applicant’s Claims in Respect of Alleged Genocide Committed Outside Its Territory against Non-Nationals

185. In its final submissions the Applicant requests the Court to make rulings about acts of genocide and other unlawful acts allegedly committed against “non-Serbs” outside its own territory (as well as within it) by the Respondent. Insofar as that request might relate to non-Bosnian victims, it could raise questions about the legal interest or standing of the Applicant in respect of such matters and the significance of the jus cogens character of the relevant norms, and the erga omnes character of the relevant obligations. For the reasons explained in paragraphs 368 and 369 below, the Court will not however need to address those questions of law.
The Question of Intent to Commit Genocide

The Court notes that genocide as defined in Article II of the Convention comprises “acts” and an “intent”. It is well established that the acts —

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

themselves include mental elements. “Killing” must be intentional, as must “causing serious bodily or mental harm”. Mental elements are made explicit in paragraphs (c) and (d) of Article II by the words “deliberately” and “intended”, quite apart from the implications of the words “inflicting” and “imposing”; and forcible transfer too requires deliberate intentional acts. The acts, in the words of the ILC, are by their very nature conscious, intentional or volitional acts (Commentary on Article 17 of the 1996 Draft Code of Crimes against the Peace and Security of Mankind, ILC Report 1996, Yearbook of the International Law Commission, 1996, Vol. II, Part Two, p. 44, para. 5).

In addition to those mental elements, Article II requires a further mental element. It requires the establishment of the “intent to destroy, in whole or in part, . . . [the protected] group, as such”. It is not enough to establish, for instance in terms of paragraph (a), that deliberate unlawful killings of members of the group have occurred. The additional intent must also be established, and is defined very precisely. It is often referred to as a special or specific intent or dolus specialis; in the present Judgment it will usually be referred to as the “specific intent (dolus specialis)”. It is not enough that the members of the group are targeted because they belong to that group, that is because the perpetrator has a discriminatory intent. Something more is required. The acts listed in Article II must be done with intent to destroy the group as such in whole or in part. The words “as such” emphasize that intent to destroy the protected group.

The specificity of the intent and its particular requirements are highlighted when genocide is placed in the context of other related criminal acts, notably crimes against humanity and persecution, as the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (hereinafter “ICTY” or “the Tribunal”) did in the Kupreškić et al. case:

189. The specific intent is also to be distinguished from other reasons or motives the perpetrator may have. Great care must be taken in finding in the facts a sufficiently clear manifestation of that intent.

Intent and “Ethnic Cleansing”

The term “ethnic cleansing” has frequently been employed to refer to the events in Bosnia and Herzegovina which are the subject of this case; see, for example, Security Council resolution 787 (1992), para. 2; resolution 827 (1993), Preamble; and the Report with that title attached as Annex IV to the Final Report of the United Nations Commission of Experts (S/1994/674/Add.2) (hereinafter “Report of the Commission of Experts”). General Assembly resolution 47/121 referred in its Preamble to “the abhorrent policy of ‘ethnic cleansing’, which is a form of genocide”, as being carried on in Bosnia and Herzegovina. It will be convenient at this point to consider what legal significance the expression may have. It is in practice used, by reference to a specific region or area, to mean “rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area” (S/35374 (1993), para. 55, Interim Report by the Commission of Experts). It does not appear in the Genocide Convention; indeed, a proposal
during the drafting of the Convention to include in the definition “measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment” was not accepted (A/C.6/234). It can only be a form of genocide within the meaning of the Convention, if it corresponds to or falls within one of the categories of acts prohibited by Article II of the Convention. Neither the intent, as a matter of policy, to render an area “ethnically homogeneous”, nor the operations that may be carried out to implement such policy, can as such be designated as genocide: the intent that characterizes genocide is “to destroy, in whole or in part” a particular group, and deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement. This is not to say that acts described as “ethnic cleansing” may never constitute genocide, if they are such as to be characterized as, for example, “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part”, contrary to Article II, paragraph (c), of the Convention, provided such action is carried out with the necessary specific intent (dolus specialis), that is to say with a view to the destruction of the group, as distinct from its removal from the region. As the ICTY has observed, while “there are obvious similarities between a genocidal policy and the policy commonly known as ‘ethnic cleansing’” (Krstić, IT-98-33-T, Trial Chamber Judgment, 2 August 2001, para. 562), yet “[a] clear distinction must be drawn between physical destruction and mere dissolution of a group. The expulsion of a group or part of a group does not in itself suffice for genocide.” (Stakić, IT-97-24-T, Trial Chamber Judgment, 31 July 2003, para. 519.) In other words, whether a particular operation described as “ethnic cleansing” amounts to genocide depends on the presence or absence of acts listed in Article II of the Genocide Convention, and of the intent to destroy the group as such. In fact, in the context of the Convention, the term “ethnic cleansing” has no legal significance of its own. That said, it is clear that acts of “ethnic cleansing” may occur in parallel to acts prohibited by Article II of the Convention, and may be significant as indicative of the presence of a specific intent (dolus specialis) inspiring those acts.

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191. When examining the facts brought before the Court in support of the accusations of the commission of acts of genocide, it is necessary to have in mind the identity of the group against which genocide may be considered to have been committed. The Court will therefore next consider the application in this case of the requirement of Article II of the Genocide Convention, as an element of genocide, that the proscribed acts be “committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such”. The Parties disagreed on aspects of the definition of the “group”. The Applicant in its final submission refers to “the non-Serb national, ethnical or religious group within, but not limited to, the territory of Bosnia and Herzegovina, including in particular the Muslim population” (paragraph 66 above). It thus follows what is termed the negative approach to the definition of the group in question. The Respondent sees two legal problems with that formulation:

> “First, the group targeted is not sufficiently well defined as such, since, according to the Applicant’s allegation, that group consists of the non-Serbs, thus an admixture of all the individuals living in Bosnia and Herzegovina except the Serbs, but more particularly the Muslim population, which accounts for only a part of the non-Serb population. Second, the intent to destroy concerned only a part of the non-Serb population, but the Applicant failed to specify which part of the group was targeted.”

In addition to those issues of the negative definition of the group and its geographic limits (or their lack), the Parties also discussed the choice between subjective and objective approaches to the definition. The Parties essentially agree that international jurisprudence accepts a combined subjective-objective approach. The issue is not in any event significant on the facts of this case and the Court takes it no further.

192. While the Applicant has employed the negative approach to the definition of a protected group, it places major, for the most part exclusive, emphasis on the Bosnian Muslims as the group being targeted. The Respondent, for instance, makes the point that the Applicant did not mention the Croats in its oral arguments relating to sexual violence, Srebrenica and Sarajevo, and that other groups including “the Jews, Roma and Yugoslavs” were not mentioned. The Applicant does however maintain the negative approach to the definition of the group in its final submissions and the Court accordingly needs to consider it.

193. The Court recalls first that the essence of the intent is to destroy the protected group, in whole or in part, as such. It is a group which must have particular positive characteristics — national, ethnical, racial or religious — and not the lack of them. The intent must also relate to the group “as such”. That means that the crime requires an intent to destroy
a collection of people who have a particular group identity. It is a matter of who those people are, not who they are not. The etymology of the word — killing a group — also indicates a positive definition; and Raphael Lemkin has explained that he created the word from the Greek *genos*, meaning race or tribe, and the termination “-cide”, from the Latin *caedere*, to kill (*Axis Rule in Occupied Europe* (1944), p. 79). In 1945 the word was used in the Nuremberg indictment which stated that the defendants “conducted deliberate and systematic genocide, viz., the extermination of racial and national groups . . . in order to destroy particular races and classes of people and national, racial or religious groups . . .” (Indictment, Trial of the Major War Criminals before the International Military Tribunal, *Official Documents*, Vol. 1, pp. 43 and 44). As the Court explains below (paragraph 198), when part of the group is targeted, that part must be significant enough for its destruction to have an impact on the group as a whole. Further, each of the acts listed in Article II require that the proscribed action be against members of the “group”.

194. The drafting history of the Convention confirms that a positive definition must be used. Genocide as “the denial of the existence of entire human groups” was contrasted with homicide, “the denial of the right to live of individual human beings” by the General Assembly in its 1946 resolution 96 (I) cited in the Preamble to the Convention. The drafters of the Convention also gave close attention to the positive identification of groups with specific distinguishing characteristics in deciding which groups they would include and which (such as political groups) they would exclude. The Court spoke to the same effect in 1951 in declaring as an object of the Convention the safeguarding of “the very existence of certain human groups” (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, *I.C.J. Reports 1951*, p. 23). Such an understanding of genocide requires a positive identification of the group. The rejection of proposals to include within the Convention political groups and cultural genocide also demonstrates that the drafters were giving close attention to the positive identification of groups with specific distinguishing well-established, some said immutable, characteristics. A negatively defined group cannot be seen in that way.

195. The Court observes that the ICTY Appeals Chamber in the *Staše-kić* case (IT-97-24-A, Judgment, 22 March 2006, paras. 20-28) also came to the conclusion that the group must be defined positively, essentially for the same reasons as the Court has given.

196. Accordingly, the Court concludes that it should deal with the matter on the basis that the targeted group must in law be defined positively, and thus not negatively as the “non-Serb” population. The Applicant has made only very limited reference to the non-Serb populations of Bosnia and Herzegovina other than the Bosnian Muslims, e.g. the Croats. The Court will therefore examine the facts of the case on the basis that genocide may be found to have been committed if an intent to destroy the Bosnian Muslims, as a group, in whole or in part, can be established.

197. The Parties also addressed a specific question relating to the impact of geographic criteria on the group as identified positively. The question concerns in particular the atrocities committed in and around Srebrenica in July 1995, and the question whether in the circumstances of that situation the definition of genocide in Article II was satisfied so far as the intent of destruction of the “group” “in whole or in part” requirement is concerned. This question arises because of a critical finding in the *Krstić* case. In that case the Trial Chamber was “ultimately satisfied that murders and infliction of serious bodily or mental harm were committed with the intent to kill all the Bosnian Muslim men of military age at Srebrenica” (IT-98-33, Judgment, 2 August 2001, para. 546). Those men were systematically targeted whether they were civilians or soldiers (*ibid.*). The Court addresses the facts of that particular situation later (paragraphs 278-297). For the moment, it considers how as a matter of law the “group” is to be defined, in territorial and other respects.

198. In terms of that question of law, the Court refers to three matters relevant to the determination of “part” of the “group” for the purposes of Article II. In the first place, the intent must be to destroy at least a substantial part of the particular group. That is demanded by the very nature of the crime of genocide: since the object and purpose of the Convention as a whole is to prevent the intentional destruction of groups, the part targeted must be significant enough to have an impact on the group as a whole. That requirement of substantiality is supported by consistent rulings of the ICTY and the International Criminal Tribunal for Rwanda (ICTR) and by the Commentary of the ILC to its Articles in the draft Code of Crimes against the Peace and Security of Mankind (e.g. *Krstić*, IT-98-33-A, Appeals Chamber Judgment, 19 April 2004, paras. 8-11 and the cases of *Kayishema, Byitishena, and Semanza* there referred to; and *Yearbook of the International Law Commission, 1996*, Vol. II, Part Two, p. 45, para. 8 of the Commentary to Article 17).

199. Second, the Court observes that it is widely accepted that genocide may be found to have been committed where the intent is to destroy the group within a geographically limited area. In the words of the ILC, “it is not necessary to intend to achieve the complete annihilation of a group from every corner of the globe” (*ibid.*). The area of the perpetrator’s activity and control are to be considered. As the ICTY Appeals
Chamber has said, and indeed as the Respondent accepts, the opportunity available to the perpetrators is significant (Krstić, IT-98-33-A, Judgment, 19 April 2004, para. 13). This criterion of opportunity must however be weighed against the first and essential factor of substantiality. It may be that the opportunity available to the alleged perpetrator is so limited that the substantiality criterion is not met. The Court observes that the ICTY Trial Chamber has indeed indicated the need for caution, lest this approach might distort the definition of genocide (Stakić, IT-97-24-T, Judgment, 31 July 2003, para. 523). The Respondent, while not challenging this criterion, does contend that the limit militates against the existence of the specific intent (dolus specialis) at the national or State level as opposed to the local level — a submission which, in the view of the Court, relates to attribution rather than to the “group” requirement.

200. A third suggested criterion is qualitative rather than quantitative. The Appeals Chamber in the Krstić case put the matter in these carefully measured terms:

“The number of individuals targeted should be evaluated not only in absolute terms, but also in relation to the overall size of the entire group. In addition to the numeric size of the targeted portion, its prominence within the group can be a useful consideration. If a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial within the meaning of Article 4 [of the Statute which exactly reproduces Article II of the Convention].” (IT-98-33-A, Judgment, 19 April 2004, para. 12; footnote omitted.)

Establishing the “group” requirement will not always depend on the substantiality requirement alone although it is an essential starting point. It follows in the Court’s opinion that the qualitative approach cannot stand alone. The Appeals Chamber in Krstić also expresses that view.

201. The above list of criteria is not exhaustive, but, as just indicated, the substantiality criterion is critical. They are essentially those stated by the Appeals Chamber in the Krstić case, although the Court does give this first criterion priority. Much will depend on the Court’s assessment of those and all other relevant factors in any particular case.

* * *

V. QUESTIONS OF PROOF: BURDEN OF PROOF, THE STANDARD OF PROOF, METHODS OF PROOF

202. When turning to the facts of the dispute, the Court must note that many allegations of fact made by the Applicant are disputed by the Respondent. That is so notwithstanding increasing agreement between the Parties on certain matters through the course of the proceedings. The disputes relate to issues about the facts, for instance the number of rapes committed by Serbs against Bosnian Muslims, and the day-to-day relationships between the authorities in Belgrade and the authorities in Pale, and the inferences to be drawn from, or the evaluations to be made of, facts, for instance about the existence or otherwise of the necessary specific intent (dolus specialis) and about the attributability of the acts of the organs of Republika Srpska and various paramilitary groups to the Respondent. The allegations also cover a very wide range of activity affecting many communities and individuals over an extensive area and over a long period. They have already been the subject of many accounts, official and non-official, by many individuals and bodies. The Parties drew on many of those accounts in their pleadings and oral argument.

203. Accordingly, before proceeding to an examination of the alleged facts underlying the claim in this case, the Court first considers, in this section of the Judgment, in turn the burden or onus of proof, the standard of proof, and the methods of proof.

204. On the burden or onus of proof, it is well established in general that the applicant must establish its case and that a party asserting a fact must establish it; as the Court observed in the case of Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), “it is the litigant seeking to establish a fact who bears the burden of proving it” (Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 437, para. 101). While the Applicant accepts that approach as a general proposition, it contends that in certain respects the onus should be reversed, especially in respect of the attributability of alleged acts of genocide to the Respondent, given the refusal of the Respondent to produce the full text of certain documents.

205. The particular issue concerns the “redacted” sections of documents of the Supreme Defence Council of the Respondent, i.e. sections in which parts of the text had been blacked out so as to be illegible. The documents had been classified, according to the Co-Agent of the Respondent, by decision of the Council as a military secret, and by a confidential decision of the Council of Ministers of Serbia and Montenegro as a matter of national security interest. The Applicant contends that the Court should draw its own conclusions from the failure of the Respondent to produce complete copies of the documents. It refers to the power of the Court, which it had invoked earlier (paragraph 44 above), to call for documents under Article 49 of the Statute, which provides that “[f]ormal note shall be taken of any refusal”. In the second round of oral argument the Applicant’s Deputy Agent submitted that

“Serbia and Montenegro should not be allowed to respond to our quoting the redacted SDC reports if it does not provide at the very same time the Applicant and the Court with copies of entirely
unredacted versions of all the SDC shorthand records and of all of
the minutes of the same. Otherwise, Serbia and Montenegro would
have an overriding advantage over Bosnia and Herzegovina with
respect to documents, which are apparently, and not in the last place
in the Respondent’s eyes, of direct relevance to winning or losing
the present case. We explicitly, Madam President, request the Court to
instruct the Respondent accordingly.” (Emphasis in the original.)

206. On this matter, the Court observes that the Applicant has exten-
sive documentation and other evidence available to it, especially from
the readily accessible ICTY records. It has made very ample use of it. In the
month before the hearings it submitted what must be taken to have been
careful selection of documents from the very many available from the
ICTY. The Applicant called General Sir Richard Dannatt, who, drawing
on a number of those documents, gave evidence on the relationship
between the authorities in the Federal Republic of Yugoslavia and those
in the Republika Srpska and on the matter of control and instruction.
Although the Court has not agreed to either of the Applicant’s requests
to be provided with unedited copies of the documents, it has not failed to
note the Applicant’s suggestion that the Court may be free to draw its
own conclusions.

207. On a final matter relating to the burden of proof, the Applicant
contends that the Court should draw inferences, notably about specific
intent (dolus specialis), from established facts, i.e., from what the Ap-
licant refers to as a “pattern of acts” that “speaks for itself”. The Court
considers that matter later in the Judgment (paragraphs 370-376 below).

208. The Parties also differ on the second matter, the standard of
proof. The Applicant, emphasizing that the matter is not one of criminal
law, says that the standard is the balance of evidence or the balance of
probabilities, inasmuch as what is alleged is breach of treaty obligations.
According to the Respondent, the proceedings “concern the most serious
issues of State responsibility and . . . a charge of such exceptional gravity
against a State requires a proper degree of certainty. The proofs should
be such as to leave no room for reasonable doubt.”

209. The Court has long recognized that claims against a State involv-
ing charges of exceptional gravity must be proved by evidence that is
fully conclusive (cf. Corfu Channel (United Kingdom v. Albania), Judg-
ment, I.C.J. Reports 1949, p. 17). The Court requires that it be fully
convincing that allegations made in the proceedings, that the crime of geno-
cide or the other acts enumerated in Article III have been committed,
have been clearly established. The same standard applies to the proof of
attribution for such acts.

210. In respect of the Applicant’s claim that the Respondent has
breached its undertakings to prevent genocide and to punish and extra-
dite persons charged with genocide, the Court requires proof at a high
level of certainty appropriate to the seriousness of the allegation.

211. The Court now turns to the third matter — the method of proof.
The Parties submitted a vast array of material, from different sources, to
the Court. It included reports, resolutions and findings by various United
Nations organs, including the Secretary-General, the General Assembly,
the Security Council and its Commission of Experts, and the Commis-
ion on Human Rights, the Sub-Commission on the Prevention of Dis-
crimination and Protection of Minorities and the Special Rapporteur on
Human Rights in the former Yugoslavia; documents from other inter-
governmental organizations such as the Conference for Security and Co-
operation in Europe; documents, evidence and decisions from the ICTY;
publications from governments; documents from non-governmental
organizations; media reports, articles and books. They also called wit-
nesses, experts and witness-experts (paragraphs 57-58 above).

212. The Court must itself make its own determination of the facts
which are relevant to the law which the Applicant claims the Respondent
has breached. This case does however have an unusual feature. Many of
the allegations before this Court have already been the subject of the
processes and decisions of the ICTY. The Court considers their signif-
cance later in this section of the Judgment.

213. The assessment made by the Court of the weight to be given to a
particular item of evidence may lead to the Court rejecting the item as
unreliable, or finding it probative, as appears from the practice followed
for instance in the case concerning United States Diplomatic and Consu-
lar Staff in Tehran, Judgment, I.C.J. Reports 1980, pp. 9-10, paras. 11-
13; Military and Paramilitary Activities in and against Nicaragua (Nicar-
agua v. United States of America), Merits, Judgment, I.C.J. Reports
1986, pp. 39-41, paras. 59-73; and Armed Activities on the Territory of
the Congo (Democratic Republic of the Congo v. Uganda), Judgment,
I.C.J. Reports 2005, pp. 200-201, paras. 57-61. In the most recent case
the Court said this:

“The Court will treat with caution evidentiary materials specially
prepared for this case and also materials emanating from a single
source. It will prefer contemporaneous evidence from persons with
direct knowledge. It will give particular attention to reliable evidence
acknowledging facts or conduct unfavourable to the State repre-
sented by the person making them (Military and Paramilitary Activi-
ties in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 41, para. 64). The Court will also give weight to evidence that has not, even before this litigation, been challenged by impartial persons for the correctness of what it contains. The Court moreover notes that evidence obtained by examination of persons directly involved, and who were subsequently cross-examined by judges skilled in examination and experienced in assessing large amounts of factual information, some of it of a technical nature, merits special attention. The Court thus will give appropriate consideration to the Report of the Porter Commission, which gathered evidence in this manner. The Court further notes that, since its publication, there has been no challenge to the credibility of this Report, which has been accepted by both Parties. (Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005, p. 35, para. 61. See also paras. 78-79, 114 and 237-242.)

214. The fact-finding process of the ICTY falls within this formulation, as “evidence obtained by examination of persons directly involved”, tested by cross-examination, the credibility of which has not been challenged subsequently. The Court has been referred to extensive documentation arising from the Tribunal’s processes, including indictments by the Prosecutor, various interlocutory decisions by judges and Trial Chambers, oral and written evidence, decisions of the Trial Chambers on guilt or innocence, sentencing judgments following a plea agreement and decisions of the Appeals Chamber.

215. By the end of the oral proceedings the Parties were in a broad measure of agreement on the significance of the ICTY material. The Applicant throughout has given and gives major weight to that material. At the written stage the Respondent had challenged the reliability of the Tribunal’s findings, the adequacy of the legal framework under which it operates, the adequacy of its procedures and its neutrality. At the stage of the oral proceedings, its position had changed in a major way. In its Agent’s words, the Respondent now based itself on the jurisprudence of the Tribunal and had “in effect” distanced itself from the opinions about the Tribunal expressed in its Rejoinder. The Agent was however careful to distinguish between different categories of material:

“[W]e do not regard all the material of the Tribunal for the former Yugoslavia as having the same relevance or probative value. We have primarily based ourselves upon the judgments of the Tribunal’s Trial and Appeals Chambers, given that only the judgments can be regarded as establishing the facts about the crimes in a credible way.”

And he went on to point out that the Tribunal has not so far, with the exception of Srebrenica, held that genocide was committed in any of the situations cited by the Applicant. He also called attention to the criticisms already made by Respondent’s counsel of the relevant judgment concerning General Krstić who was found guilty of aiding and abetting genocide at Srebrenica.

216. The Court was referred to actions and decisions taken at various stages of the ICTY processes:

(1) The Prosecutor’s decision to include or not certain changes in an indictment;
(2) The decision of a judge on reviewing the indictment to confirm it and issue an arrest warrant or not;
(3) If such warrant is not executed, a decision of a Trial Chamber (of three judges) to issue an international arrest warrant, provided the Chamber is satisfied that there are reasonable grounds for believing that the accused has committed all or any of the crimes charged;
(4) The decision of a Trial Chamber on the accused’s motion for acquittal at the end of the prosecution case;
(5) The judgment of a Trial Chamber following the full hearings;
(6) The sentencing judgment of a Trial Chamber following a guilty plea.

The Court was also referred to certain decisions of the Appeals Chamber.

217. The Court will consider these stages in turn. The Applicant placed some weight on indictments filed by the Prosecutor. But the claims made by the Prosecutor in the indictments are just that — allegations made by one party. They have still to proceed through the various phases outlined earlier. The Prosecutor may, instead, decide to withdraw charges of genocide or they may be dismissed at trial. Accordingly, as a general proposition the inclusion of charges in an indictment cannot be given weight. What may however be significant is the decision of the Prosecutor, either initially or in an amendment to an indictment, not to include or to exclude a charge of genocide.

218. The second and third stages, relating to the confirmation of the indictment, issues of arrest warrants and charges, are the responsibility of the judges (one in the second stage and three in the third) rather than the Prosecutor, and witnesses may also be called in the third, but the accused is generally not involved. Moreover, the grounds for a judge to act are, at the second stage, that a prima facie case has been established, and at the
third, that reasonable grounds exist for belief that the accused has committed crimes charged.

219. The accused does have a role at the fourth stage — motions for acquittal made by the defence at the end of the prosecution’s case and after the defence has had the opportunity to cross-examine the prosecution’s witnesses, on the basis that “there is no evidence capable of supporting a conviction”. This stage is understood to require a decision, not that the Chamber trying the facts would be satisfied beyond reasonable doubt by the prosecution’s evidence (if accepted), but rather that it could be so satisfied (Jelisić, IT-95-10-A, Appeals Chamber Judgment, 5 July 2001, para. 37). The significance of that lesser standard for present purposes appears from one case on which the Applicant relied. The Trial Chamber in August 2005 in Krajisnik dismissed the defence motion that the accused who was charged with genocide and other crimes had no case to answer (IT-00-39-T, transcript of 19 August 2005, pp. 17112-17132). But following the full hearing the accused was found not guilty of genocide nor of complicity in genocide. While the actus reus of genocide was established, the specific intent (dolus specialis) was not (Trial Chamber Judgment, 27 September 2006, paras. 867-869). Because the judge or the Chamber does not make definitive findings at any of the four stages described, the Court does not consider that it can give weight to those rulings. The standard of proof which the Court requires in this case would not be met.

220. The processes of the Tribunal at the fifth stage, leading to a judgment of the Trial Chamber following the full hearing are to be contrasted with those earlier stages. The processes of the Tribunal leading to final findings are rigorous. Accused are presumed innocent until proved guilty beyond reasonable doubt. They are entitled to listed minimum guarantees (taken from the International Covenant on Civil and Political Rights), including the right to counsel, to examine witness against them, to obtain the examination of witness on their behalf, and not to be compelled to testify against themselves or to confess guilt. The Tribunal has powers to require Member States of the United Nations to co-operate with it, among other things, in the taking of testimony and the production of evidence. Accused are provided with extensive pre-trial disclosure including materials gathered by the prosecution and supporting the indictment, relevant witness statements and the pre-trial brief summarizing the evidence against them. The prosecutor is also to disclose exculpatory material to the accused and to make available in electronic form the collections of relevant material which the prosecution holds.

221. In practice, now extending over ten years, the trials, many of important military or political figures for alleged crimes committed over long periods and involving complex allegations, usually last for months, even years, and can involve thousands of documents and numerous witnesses. The Trial Chamber may admit any relevant evidence which has probative value. The Chamber is to give its reasons in writing and separate and dissenting opinions may be appended.

222. Each party has a right of appeal from the judgment of the Trial Chamber to the Appeals Chamber on the grounds of error of law invalidating the decision or error of fact occasioning a miscarriage of justice. The Appeals Chamber of five judges does not re hear the evidence, but it does have power to hear additional evidence if it finds that it was not available at trial, is relevant and credible and could have been a decisive factor in the trial. It too is to give a reasoned opinion in writing to which separate or dissenting opinions may be appended.

223. In view of the above, the Court concludes that it should in principle accept as highly persuasive relevant findings of fact made by the Tribunal at trial, unless of course they have been upset on appeal. For the same reasons, any evaluation by the Tribunal based on the facts as so found for instance about the existence of the required intent, is also entitled to due weight.

224. There remains for consideration the sixth stage, that of sentencing judgments given following a guilty plea. The process involves a statement of agreed facts and a sentencing judgment. Notwithstanding the guilty plea the Trial Chamber must be satisfied that there is sufficient factual basis for the crime and the accused’s participation in it. It must also be satisfied that the guilty plea has been made voluntarily, is informed and is not equivocal. Accordingly the agreed statement and the sentencing judgment may when relevant be given a certain weight.

225. The Court will now comment in a general way on some of the other evidence submitted to it. Some of that evidence has been produced to prove that a particular statement was made so that the Party may make use of its content. In many of these cases the accuracy of the document as a record is not in doubt; rather its significance is. That is often the case for instance with official documents, such as the record of parliamentary bodies and budget and financial statements. Another instance is when the statement was recorded contemporaneously on audio or videotape. Yet another is the evidence recorded by the ICTY.
226. In some cases the account represents the speaker’s own knowledge of the fact to be determined or evaluated. In other cases the account may set out the speaker’s opinion or understanding of events after they have occurred and in some cases the account will not be based on direct observation but may be hearsay. In fact the Parties rarely disagreed about the authenticity of such material but rather about whether it was being accurately presented (for instance with contention that passages were being taken out of context) and what weight or significance should be given to it.

227. The Court was also referred to a number of reports from official or independent bodies, giving accounts of relevant events. Their value depends, among other things, on (1) the source of the item of evidence (for instance partisan, or neutral), (2) the process by which it has been generated (for instance an anonymous press report or the product of a careful court or court-like process), and (3) the quality or character of the item (such as statements against interest, and agreed or uncontested facts).

228. One particular instance is the comprehensive report, “The Fall of Srebrenica”, which the United Nations Secretary-General submitted in November 1999 to the General Assembly (United Nations doc. A/54/549). It was prepared at the request of the General Assembly, and covered the events from the establishing by the Security Council of the “safe area” on 16 April 1993 (Security Council resolution 819 (1993)) until the endorsement by the Security Council on 15 December 1995 of the Dayton Agreement. Member States and others concerned had been encouraged to provide relevant information. The Secretary-General was in a very good position to prepare a comprehensive report, some years after the events, as appears in part from this description of the method of preparation:

“This report has been prepared on the basis of archival research within the United Nations system, as well as on the basis of interviews with individuals who, in one capacity or another, participated in or had knowledge of the events in question. In the interest of gaining a clearer understanding of these events, I have taken the exceptional step of entering into the public record information from the classified files of the United Nations. In addition, I would like to record my thanks to those Member States, organizations and individuals who provided information for this report. A list of persons interviewed in this connection is attached as annex 1. While that list is fairly extensive, time, as well as budgetary and other constraints, precluded interviewing many other individuals who would be in a position to offer important perspectives on the subject at hand. In most cases, the interviews were conducted on a non-attribution basis to encourage as candid a disclosure as possible. I have also honoured the request of those individuals who provided information for this report on the condition that they not be identified.” (A/54/549, para. 8.)

229. The chapter, “Fall of Srebrenica: 6-11 July 1995”, is preceded by this note:

“The United Nations has hitherto not publicly disclosed the full details of the attack carried out on Srebrenica from 6 to 11 July 1995. The account which follows has now been reconstructed mainly from reports filed at that time by Dutchbat and the United Nations military observers. The accounts provided have also been supplemented with information contained in the Netherlands report on the debriefing of Dutchbat, completed in October 1995, and by information provided by Bosniac, Bosnian Serb and international sources. In order to independently examine the information contained in various secondary sources published over the past four years, as well to corroborate key information contained in the Netherlands debriefing report, interviews were conducted during the preparation of this report with a number of key personnel who were either in Srebrenica at the time, or who were involved in decision-making at higher levels in the United Nations chain of command.” (A/54/549, Chap. VII, p. 57.)

The introductory note to the next chapter, “The Aftermath of the fall of Srebrenica: 12-20 July 1995”, contains this description of the sources:

“The following section attempts to describe in a coherent narrative how thousands of men and boys were summarily executed and buried in mass graves within a matter of days while the international community attempted to negotiate access to them. It details how evidence of atrocities taking place gradually came to light, but too late to prevent the tragedy which was unfolding. In 1995, the details of the tragedy were told in piecemeal fashion, as survivors of the mass executions began to provide accounts of the horrors they had witnessed; satellite photos later gave credence to their accounts.

The first official United Nations report which signalled the possibility of mass executions having taken place was the report of the Special Rapporteur of the Commission on Human Rights, dated 22 August 1995 (E/CN.4/1996/9). It was followed by the Secretary-General’s reports to the Security Council, pursuant to resolution 1010 (1995), of 30 August (S/1995/755) and 27 November 1995 (S/1995/988). Those reports included information obtained from governmental and non-governmental organizations, as well as information that had appeared in the international and local press. By the end of 1995, however, the International Tribunal for the Former
Yugoslavia had still not been granted access to the area to corroborate the allegations of mass executions with forensic evidence.

The Tribunal first gained access to the crime scenes in January 1996. The details of many of their findings were made public in July 1996, during testimony under rule 60 of the Tribunal’s rules of procedure, in the case against Ratko Mladić and Radovan Karadžić. Between that time and the present, the Tribunal has been able to conduct further investigations in the areas where the executions were reported to have taken place and where the primary and secondary mass graves were reported to have been located. On the basis of the forensic evidence obtained during those investigations, the Tribunal has now been able to further corroborate much of the testimony of the survivors of the massacres. On 30 October 1998, the Tribunal indicted Radislav Krstić, Commander of the BSA’s Drina Corps, for his alleged involvement in those massacres. The text of the indictment provides a succinct summary of the information obtained to date on where and when the mass executions took place.

The aforementioned sources of information, coupled with certain additional confidential information that was obtained during the preparation of this report, form the basis of the account which follows. Sources are purposely not cited in those instances where such disclosure could potentially compromise the Tribunal’s ongoing work.” (A/54/549, Chap. VIII, p. 77.)

230. The care taken in preparing the report, its comprehensive sources and the independence of those responsible for its preparation all lend considerable authority to it. As will appear later in this Judgment, the Court has gained substantial assistance from this report.

* * *

VI. THE FACTS INVOKED BY THE APPLICANT, IN RELATION TO ARTICLE II

(1) The Background

231. In this case the Court is seised of a dispute between two sovereign States, each of which is established in part of the territory of the former State known as the Socialist Federal Republic of Yugoslavia, concerning the application and fulfilment of an international convention to which they are parties, the Convention on the Prevention and Punishment of the Crime of Genocide. The task of the Court is to deal with the legal claims and factual allegations advanced by Bosnia and Herzegovina against Serbia and Montenegro; the counter-claim advanced earlier in the proceedings by Serbia and Montenegro against Bosnia and Herzegovina has been withdrawn.

232. Following the death on 4 May 1980 of President Tito, a rotating presidency was implemented in accordance with the 1974 Constitution of the SFRY. After almost ten years of economic crisis and the rise of nationalism within the republics and growing tension between different ethnic and national groups, the SFRY began to break up. On 25 June 1991, Slovenia and Croatia declared independence, followed by Macedonia on 17 September 1991. (Slovenia and Macedonia are not concerned in the present proceedings; Croatia has brought a separate case against Serbia and Montenegro, which is still pending on the General List.) On the eve of the war in Bosnia and Herzegovina which then broke out, according to the last census (31 March 1991), some 44 per cent of the population of the country described themselves as Muslims, some 31 per cent as Serbs and some 17 per cent as Croats (Krajišnik, IT-00-39-T and 40-T, Trial Chamber Judgment, 27 September 2006, para. 15).

233. By a “sovereignty” resolution adopted on 14 October 1991, the Parliament of Bosnia and Herzegovina declared the independence of the Republic. The validity of this resolution was contested at the time by the Serbian community of Bosnia and Herzegovina (Opinion No. 1 of the Arbitration Commission of the Conference on Yugoslavia (the Badinter Commission), p. 3). On 24 October 1991, the Serb Members of the Bosnian Parliament proclaimed a separate Assembly of the Serb Nation/Assembly of the Serb People of Bosnia and Herzegovina. On 9 January 1992, the Republic of the Serb People of Bosnia and Herzegovina (subsequently renamed the Republika Srpska on 12 August 1992) was declared with the proviso that the declaration would come into force upon international recognition of the Republic of Bosnia and Herzegovina. On 28 February 1992, the Constitution of the Republic of the Serb People of Bosnia and Herzegovina was adopted. The Republic of the Serb People of Bosnia and Herzegovina (and subsequently the Republika Srpska) was not and has not been recognized internationally as a State; it has however enjoyed some de facto independence.

234. On 29 February and 1 March 1992, a referendum was held on the question of independence in Bosnia and Herzegovina. On 6 March 1992, Bosnia and Herzegovina officially declared its independence. With effect from 7 April 1992, Bosnia and Herzegovina was recognized by the European Community. On 7 April 1992, Bosnia and Herzegovina was recognized by the United States. On 27 April 1992, the Constitution of the Federal Republic of Yugoslavia was adopted consisting of the Republic of Serbia and the Republic of Montenegro. As explained above (paragraph 67), Montenegro declared its independence on 3 June 2006. All three States have been admitted to membership of the United Nations: Bosnia and Herzegovina on 22 May 1992; Serbia and Montenegro, under the name of the Federal Republic of Yugoslavia on 1 November 2000; and the Republic of Montenegro on 28 June 2006.

* * *
235. It will be convenient next to define the institutions, organizations or groups that were the actors in the tragic events that were to unfold in Bosnia and Herzegovina. Of the independent sovereign States that had emerged from the break-up of the SFRY, two are concerned in the present proceedings: on the one side, the FRY (later to be called Serbia and Montenegro), which was composed of the two constituent republics of Serbia and Montenegro; on the other, the Republic of Bosnia and Herzegovina. At the time when the latter State declared its independence (15 October 1991), the independence of two other entities had already been declared: in Croatia, the Republika Srpska Krajina, on 26 April 1991, and the Republic of the Serb People of Bosnia and Herzegovina, later to be called the Republika Srpska, on 9 January 1992 (paragraph 233 above). The Republika Srpska never attained international recognition as a sovereign State, but it had de facto control of substantial territory, and the loyalty of large numbers of Bosnian Serbs.

236. The Parties both recognize that there were a number of entities at a lower level the activities of which have formed part of the factual issues in the case, though they disagree as to the significance of those activities. Of the military and paramilitary units active in the hostilities, there were in April 1992 five types of armed formations involved in Bosnia: first, the Yugoslav People's Army (JNA), subsequently the Yugoslav Army (VJ); second, volunteer units supported by the JNA and later by the VJ, and the Ministry of the Interior (MUP) of the FRY; third, municipal Bosnian Serb Territorial Defence (TO) detachments; and, fourth, police forces of the Bosnian Serb Ministry of the Interior. The MUP of the Republika Srpska controlled the police and the security services, and operated, according to the Applicant, in close co-operation and co-ordination with the MUP of the FRY. On 15 April 1992, the Bosnian Government established a military force, based on the former Territorial Defence of the Republic, the Army of the Republic of Bosnia and Herzegovina (ARBiH), merging several non-official forces, including a number of paramilitary defence groups, such as the Green Berets, and the Patriotic League, being the military wing of the Muslim Party of Democratic Action. The Court does not overlook the evidence suggesting the existence of Muslim organizations involved in the conflict, such as foreign Mujahideen, although as a result of the withdrawal of the Respondent's counter-claims, the activities of these bodies are not the subject of specific claims before the Court.

237. The Applicant has asserted the existence of close ties between the Government of the Respondent and the authorities of the Republika Srpska, of a political and financial nature, and also as regards administra-
Fry army — only the label changed; according to the Respondent, there is no evidence for this last allegation. The Court takes note however of the comprehensive description of the processes involved set out in paragraphs 113 to 117 of the Judgment of 7 May 1997 of the ICTY Trial Chamber in the Tadić case (IT-94-1-T) quoted by the Applicant which mainly corroborate the account given by the latter. Insofar as the Respondent does not deny the fact of these developments, it insists that they were normal reactions to the threat of civil war, and there was no premeditated plan behind them.

239. The Court further notes the submission of the Applicant that the VRS was armed and equipped by the Respondent. The Applicant contends that when the JNA formally withdrew on 19 May 1992, it left behind all its military equipment which was subsequently taken over by the VRS. This claim is supported by the Secretary-General’s report of 3 December 1992 in which he concluded that “[t]hough the JNA has completely withdrawn from Bosnia and Herzegovina, former members of Bosnian Serb origin have been left behind with their equipment and constitute the Army of the ‘Serb Republic’” (A/47774, para. 11). Moreover, the Applicant submits that Belgrade actively supplied the VRS with arms and equipment throughout the war in Bosnia and Herzegovina. On the basis of evidence produced before the ICTY, the Applicant contended that up to 90 per cent of the material needs of the VRS were supplied by Belgrade. General Dannatt, one of the experts called by the Applicant (paragraph 57 above), testified that, according to a “consumption review” given by General Mladić at the Bosnian Serb Assembly on 16 April 1995, 42.2 per cent of VRS supplies of infantry ammunition were inherited from the former JNA and 47 per cent of VRS requirements were supplied by the VJ. For its part, the Respondent generally denies that it supplied and equipped the VRS but maintains that, even if that were the case, such assistance “is very familiar and is an aspect of numerous treaties of mutual security, both bilateral and regional”. The Respondent adds that moreover it is a matter of public knowledge that the armed forces of Bosnia and Herzegovina received external assistance from friendly sources. However, one of the witnesses called by the Respondent, Mr. Vladimir Lukić, who was the Prime Minister of the Republika Srpska from 20 January 1993 to 18 August 1994 testified that the army of the Republika Srpska was supplied from different sources “including but not limited to the Federal Republic of Yugoslavia” but asserted that the Republika Srpska “mainly paid for the military materiel which it obtained” from the States that supplied it.

240. As regards effective links between the two Governments in the financial sphere, the Applicant maintains that the economies of the FRY, the Republika Srpska, and the Republika Srpska Krajina were integrated through the creation of a single economic entity, thus enabling the FRY Government to finance the armies of the two other bodies in addition to its own. The Applicant argued that the National Banks of the Republika Srpska and of the Republika Srpska Krajina were set up as under the control of, and directly subordinate to, the National Bank of Yugoslavia in Belgrade. The national budget of the FRY was to a large extent financed through primary issues from the National Bank of Yugoslavia, which was said to be entirely under governmental control, i.e. in effect through creating money by providing credit to the FRY budget for the use of the JNA. The same was the case for the budgets of the Republika Srpska and the Republika Srpska Krajina, which according to the Applicant had virtually no independent sources of income; the Respondent asserts that income was forthcoming from various sources, but has not specified the extent of this. The National Bank of Yugoslavia was making available funds (80 per cent of those available from primary issues) for “special purposes”, that is to say “to avoid the adverse effects of war on the economy of the Serbian Republic of Bosnia and Herzegovina”. The Respondent has denied that the budget deficit of the Republika Srpska was financed by the FRY but has not presented evidence to show how it was financed. Furthermore, the Respondent emphasizes that any financing supplied was simply on the basis of credits, to be repaid, and was therefore quite normal, particularly in view of the economic isolation of the FRY, the Republika Srpska and the Republika Srpska Krajina; it also suggested that any funds received would have been under the sole control of the recipient, the Republika Srpska or the Republika Srpska Krajina.

241. The Court finds it established that the Respondent was thus making its considerable military and financial support available to the Republika Srpska, and had it withdrawn that support, this would have greatly constrained the options that were available to the Republika Srpska authorities.

* * *

(3) Examination of Factual Evidence: Introduction

242. The Court will therefore now examine the facts alleged by the Applicant, in order to satisfy itself, first, whether the alleged atrocities occurred; secondly, whether such atrocities, if established, fall within the scope of Article II of the Genocide Convention, that is to say whether the facts establish the existence of an intent, on the part of the perpetrators of those atrocities, to destroy, in whole or in part, a defined group (dolus specialis). The group taken into account for this purpose will, for the reasons explained above (paragraphs 191-196), be that of the Bosnian Muslims; while the Applicant has presented evidence said to relate to the wider group of non-Serb Bosnians, the Bosnian Muslims formed such a substantial part of this wider group that that evidence appears to have equal probative value as regards the facts, in relation to the more restricted
245. Article II (a) of the Convention deals with acts of killing members of the protected group. The Court will first examine the evidence of killings of members of the group, and ascertain whether there is evidence of dolus specialis in one or more of them. The Court will then consider under this heading the evidence of the killing of members of the protected group in Sarajevo. The Court finds it sufficient to examine those facts that would illuminate the question of intent, or illustrate the claim by the Applicant of a pattern of acts committed against members of the group, such as to lead to an inference from such pattern of the existence of a specific intent (dolus specialis).

246. The Court notes that the Applicant refers repeatedly to killings, particularly in Sarajevo, of Muslim civilians. The Respondent in its pleadings opposed such an interpretation on the ground that the Applicant has failed to prove that any of the alleged perpetrators of atrocities, as alleged by the Applicant, who killed Muslim civilians in Sarajevo, did so with the intention to exterminate or摧毁 the Muslim population of Sarajevo. The Court notes that the Respondent is correct in the sense that the Respondent is not necessarily to examine every single incident reported by the Applicant, nor is it necessary to make an exhaustive list of the allegations; the Court finds it sufficient to examine the claim by the Applicant of a pattern of acts committed against members of the group, such as to lead to an inference from such pattern of the existence of a specific intent (dolus specialis).

247. The Court will examine the evidence following the categories of prohibited acts to be found in Article II of the Convention. The nature of these categories is such that there is considerable overlap between them. Thus, for example, the conditions of life in the camps to which members of the protected group were confined have been presented by the Applicant as violations of Article II, paragraph (a), of the Convention (the deliberate infliction of destructive conditions of life), but since numerous inmates of the camps died, allegedly as a result of those conditions, or were killed there, the camps fall to be mentioned also under paragraph (a), (b) or (c).

248. The Trial Chamber of the ICTY, in its Judgment of 5 December 2003 in the Galić case examined specific incidents in the area of Sarajevo, for instance the shelling of the Markale market in May 1994, which resulted in the killing of 60 persons. The majority of the Trial
Chamber found that "civilians in ARBiH-held areas of Sarajevo were directly or indiscriminately attacked from SRK-controlled territory during the Indictment Period, and that as a result and as a minimum, hundreds of civilians were killed and thousands others were injured." (Galić, IT-98-29-T, Judgment, 5 December 2003, para. 591), the Trial Chamber further concluded that “[i]n sum, the Majority of the Trial Chamber finds that each of the crimes alleged in the Indictment — crime of terror, attacks on civilians, murder and inhumane acts — were committed by SRK forces during the Indictment Period” (ibid., para. 600).

249. In this connection, the Respondent makes the general point that in a civil war it is not always possible to differentiate between military personnel and civilians. It does not deny that crimes were committed during the siege of Sarajevo, crimes that “could certainly be characterized as war crimes and certain even as crimes against humanity”, but it does not accept that there was a strategy of targeting civilians.

Drina River Valley

(a) Zvornik

250. The Applicant made a number of allegations with regard to killings that occurred in the area of Drina River Valley. The Applicant, relying on the Report of the Commission of Experts, claims that at least 2,500 Muslims died in Zvornik from April to May 1992. The Court notes that the findings of the Report of the Commission of Experts are based on individual witness statements and one declassified United States State Department document No. 94-11 (Vol. V, Ann. X, para. 387; Vol. IV, Ann. VIII, p. 342 and para. 2884; Vol. I, Ann. III.A, para. 578). Further, a video reporting on massacres in Zvornik was shown during the oral proceedings (excerpts from “The Death of Yugoslavia”, BBC documentary). With regard to specific incidents, the Applicant alleges that Serb soldiers shot 36 Muslims and mistreated 27 Muslim children in the local hospital of Zvornik in the second half of May 1992.

251. The Respondent contests those allegations and contends that all three sources used by the Applicant are based solely on the account of one witness. It considers that the three reports cited by the Applicant cannot be used as evidence before the Court. The Respondent produced the statement of a witness made before an investigating judge in Zvornik which claimed that the alleged massacre in the local hospital of Zvornik had never taken place. The Court notes that the Office of the Prosecutor of the ICTY had never indicted any of the accused for the alleged massacre in the hospital.

(b) Camps

(i) Sušica camp

252. The Applicant further presents claims with regard to killings perpetrated in detention camps in the area of Drina River Valley. The Report of the Commission of Experts includes the statement of an eyewitness at the Sušica camp who personally witnessed 3,000 Muslims being killed (Vol. IV, Ann. VIII, p. 334) and the execution of the last 200 surviving detainees (Vol. I, Ann. IV, pp. 31-32). In proceedings before the ICTY, the Commander of that camp, Dragan Nikolić, pleaded guilty to murdering nine non-Serb detainees and, according to the Sentencing Judgment of 18 December 2003, “the Accused persecuted Muslim and other non-Serb detainees by subjecting them to murders, rapes and torture as charged specifically in the Indictment” (Nikolić, IT-94-2-S, para. 67).

(ii) Foča Kazneno-Popravní Dom camp

253. The Report of the Commission of Experts further mentions numerous killings at the camp of Foča Kazneno-Popravní Dom (Foča KP Dom). The Experts estimated that the number of prisoners at the camp fell from 570 to 130 over two months (Vol. IV, Ann. VIII, p. 129). The United States State Department reported one eye-witness statement of regular executions in July 1992 and mass graves at the camp.

254. The Trial Chamber of the ICTY made the following findings on several killings at this camp in its Judgment in the Krnojelac case:

“The Trial Chamber is satisfied beyond reasonable doubt that all but three of the persons listed in Schedule C to the Indictment were killed at the KP Dom. The Trial Chamber is satisfied that these persons fell within the pattern of events that occurred at the KP Dom during the months of June and July 1992, and that the only reasonable explanation for the disappearance of these persons since that time is that they died as a result of acts or omissions, with the relevant state of mind [sc. that required to establish murder], at the KP Dom.” (IT-97-25-T, Judgment, 15 March 2002, para. 330.)

(iii) Batković camp

255. As regards the detention camp of Batković, the Applicant claims that many prisoners died at this camp as a result of mistreatment by the Serb guards. The Report of the Commission of Experts reports one witness statement according to which there was a mass grave located next to the Batković prison camp. At least 15 bodies were buried next to a cow stable, and the prisoners neither knew the identity of those buried at the stable nor the circumstances of their deaths (Report of the Commission

“[b]ecause of the level of mistreatment, many prisoners died. One man stated that during his stay, mid-July to mid-August, 13 prisoners were beaten to death. Another prisoner died because he had gangrene which went untreated. Five more may have died from hunger. Allegedly, 20 prisoners died prior to September.” (Vol. IV, Ann. VIII, p. 63.)

Killings at the Batković camp are also mentioned in the Dispatch of the United States State Department of 19 April 1993. According to a witness, several men died as a result of bad conditions and beatings at the camp (United States Dispatch, 19 April 1993, Vol. 4, No. 30, p. 538).

256. On the other hand, the Respondent stressed that, when the United Nations Special Rapporteur visited the Batković prison camp, he found that: “The prisoners did not complain of ill-treatment and, in general appeared to be in good health.” (Report of 17 November 1992, para. 29) However, the Applicant contends that “it is without any doubt that Mazowiecki was shown a ‘model’ camp”.

Prijedor

(a) Kozarac and Hambarine

257. With regard to the area of the municipality of Prijedor, the Applicant has placed particular emphasis on the shelling and attacks on Kozarac, 20 km east of Prijedor, and on Hambarine in May 1992. The Applicant contends that after the shelling, Serb forces shot people in their homes and that those who surrendered were taken to a soccer stadium in Kozarac where some men were randomly shot. The Report of the Commission of Experts (Vol. I, Ann. III, pp. 154-155) states that:

“The attack on Kozarac lasted three days and caused many villagers to flee to the forest while the soldiers were shooting at ‘every moving thing’. Survivors calculated that at least 2,000 villagers were killed in that period. The villagers’ defence fell on 26 May . . .

Serbs then reportedly announced that the villagers had 10 minutes to reach the town’s soccer stadium. However, many people were shot in their homes before given a chance to leave. One witness reported that several thousand people tried to surrender by carrying white flags, but three Serb tanks opened fire on them, killing many.”

258. As regards Hambarine, the Report of the Commission of Experts (Vol. I, p. 39) states that:

“Following an incident in which less than a handful of Serb[ian] soldiers were shot dead under unclear circumstances, the village of Hambarine was given an ultimatum to hand over a policeman who lived where the shooting had occurred. As it was not met, Hambarine was subjected to several hours of artillery bombardment on 23 May 1992.

The shells were fired from the aerodrome Urije just outside Prijedor town. When the bombardment stopped, the village was stormed by infantry, including paramilitary units, which sought out the inhabitants in every home. Hambarine had a population of 2,499 in 1991.”

The Respondent submits that the number of killings is exaggerated and that “there was severe fighting in Kozarac, which took place on 25 and 26 May, and naturally, it should be concluded that a certain number of the victims were Muslim combatants”.

259. The Report of the Special Rapporteur of 17 November 1992, states that:

“Between 23 and 25 May, the Muslim village of Hambarine, 5 km south of Prijedor, received an ultimatum: all weapons must be surrendered by 11 a.m. Then, alleging that a shot was fired at a Serbian patrol, heavy artillery began to shell the village and tanks appeared, firing at homes. The villagers fled to Prijedor. Witnesses reported many deaths, probably as many as 1,000.” (Periodic Report of 17 November 1992, p. 8, para. 17 (c).)

The Respondent says, citing the indictment in the Stakić case, that “merely 11 names of the victims are known” and that it is therefore impossible that the total number of victims in Hambarine was “as many as 1,000”.

260. The Applicant also claimed that killings of members of the protected group were perpetrated in Prijedor itself. The Report of the Commission of Experts, as well as the United Nations Special Rapporteur collected individual witness statements on several incidents of killing in the town of Prijedor (Report of the Commission of Experts, Vol. I, Ann. V, pp. 54 et seq.). In particular, the Special Rapporteur received
testimony “from a number of reliable sources” that 200 people were killed in Prijedor on 29 May 1992 (Report of 17 November 1992, para. 17).

261. In the Stakić case, the ICTY Trial Chamber found that “many people were killed during the attacks by the Bosnian Serb army on predominantly Bosnian Muslim villages and towns throughout the Prijedor municipality and several massacres of Muslims took place”, and that “a comprehensive pattern of atrocities against Muslims in Prijedor municipality in 1992 had been proved beyond reasonable doubt” (IT-97-24-T, Judgment, 31 July 2003, paras. 544 and 546). Further, in the Brdanin case, the Trial Chamber was satisfied that “at least 80 Bosnian Muslim civilians were killed when Bosnian Serb soldiers and police entered the villages of the Kozarac area” (IT-99-36, Judgment, 1 September 2004, para. 403).

(b) Camps

(i) Omarska camp

262. With respect to the detention camps in the area of Prijedor, the Applicant has stressed that the camp of Omarska was “arguably the cruellest camp in Bosnia and Herzegovina”. The Report of the Commission of Experts gives an account of seven witness statements reporting between 1,000 to 3,000 killings (Vol. IV, Ann. VIII, p. 222). The Report noted that

“[s]ome prisoners estimate that on an average there may have been 10 to 15 bodies displayed on the grass each morning, when the first prisoners went to receive their daily food rations. But there were also other dead bodies observed in other places at other times. Some prisoners died from their wounds or other causes in the rooms where they were detained. Constantly being exposed to the death and suffering of fellow prisoners made it impossible for anyone over any period of time to forget in what setting he or she was. Given the length of time Logor Omarska was used, the numbers of prisoners detained in the open, and the allegations that dead bodies were exhibited there almost every morning.”

The Report of the Commission of Experts concludes that “all information available . . . seems to indicate that [Omarska] was more than anything else a death camp” (Vol. I, Ann. V, p. 80). The United Nations Secretary-General also received submissions from Canada, Austria and the United States, containing witness statements about the killings at Omarska.

263. In the Opinion and Judgment of the Trial Chamber in the Tadić case, the ICTY made the following findings on Omarska: “Perhaps the most notorious of the camps, where the most horrific conditions existed, was the Omarska camp.” (IT-94-1-T, Judgment, 7 May 1997, para. 155.) “The Trial Chamber heard from 30 witnesses who survived the brutality to which they were systematically subjected at Omarska. By all accounts, the conditions at the camp were horrendous; killings and torture were frequent.” (Ibid., para. 157.) The Trial Chamber in the Stakić Judgment found that “over a hundred people were killed in late July 1992 in the Omarska camp” and that

“[a]round late July 1992, 44 people were taken out of Omarska and put in a bus. They were told that they would be exchanged in the direction of Bosanska Krupa; they were never seen again. During the exhumation in Jama Lisac, 56 bodies were found: most of them had died from gunshot injuries.” (IT-97-24-T, Judgment, 31 July 2003, paras. 208 and 210).

At least 120 people detained at Omarska were killed after having been taken away by bus.

“The corpses of some of those taken away on the buses were later found in Hrastova Glavica and identified. A large number of bodies, 126, were found in this area, which is about 30 kilometres away from Prijedor. In 121 of the cases, the forensic experts determined that the cause of death was gunshot wounds.” (Ibid., para. 212.)

264. In the Brdanin case, the Trial Chamber, in its Judgment of 1 September 2004 held that between 28 May and 6 August, a massive number of people were killed at Omarska camp. The Trial Chamber went on to say specifically that “[a]s of late May 1992, a camp was set up at Omarska, where evidence shows that several hundred Bosnian Muslim and Bosnian Croat civilians from the Prijedor area were detained, and where killings occurred on a massive scale” (IT-99-36-T, Trial Chamber Judgment, 1 September 2004, para. 441). “The Trial Chamber is unable to precisely identify all detainees that were killed at Omarska camp. It is satisfied beyond reasonable doubt however that, at a minimum, 94 persons were killed, including those who disappeared.” (Ibid., para. 448.)

(ii) Keraterm camp

265. A second detention camp in the area of Prijedor was the Keraterm camp where, according to the Applicant, killings of members of the protected group were also perpetrated. Several corroborating accounts of a mass execution on the morning of 25 July 1992 in Room 3 at Keraterm camp were presented to the Court. This included the United States Dispatch of the State Department and a letter from the Permanent Repre-
sentative of Austria to the United Nations dated 5 March 1993, addressed
to the Secretary-General. The Report of the Commission of Experts
cites three separate witness statements to the effect that ten prisoners were
killed per day at Keraterm over three months (Vol. IV, para. 1932; see

266. The Trial Chamber of the ICTY, in the Sikirica et al. case, con-
cerning the Commander of Keraterm camp, found that 160 to 200 men
were killed or wounded in the so-called Room 3 massacre (IT-95-8-S,
Sentencing Judgment, 13 November 2001, para. 103). According to the
Judgment, Sikirica himself admitted that there was considerable evidence
“concerning the murder and killing of other named individuals at Kera-
term during the period of his duties”. There was also evidence that
“others were killed because of their rank and position in society and their
membership of a particular ethnic group or nationality” (ibid., para. 122).
In the Stakić case, the Trial Chamber found that “from 30 April 1992 to
30 September 1992 . . . killings occurred frequently in the Omarska,
Keraterm and Trnopolje camps” (IT-97-24-T, Judgment, 31 July 2003,
para. 544).

(iii) Trnopolje camp

267. The Applicant further contends that there is persuasive evidence
of killing at Trnopolje camp, with individual eye-witnesses corroborating
each other. The Report of the Commission of Experts found that “[i]n
Trnopolje, the regime was far better than in Omarska and Keraterm.
Nonetheless, harassment and malnutrition was a problem for all the
inmates. Rapes, beatings and other kinds of torture, and even killings,
were not rare.” (Report of the Commission of Experts, Vol. IV, Ann. V,
p. 10.)

“The first period was allegedly the worst in Trnopolje, with the
highest numbers of inmates killed, raped, and otherwise mistreated
and tortured . . .

The people killed in the camp were usually removed soon after by
some camp inmates who were ordered by the Serbs to take them
away and bury them . . .

Albeit Logor Trnopolje was not a death camp like Logor Omarska
or Logor Keraterm, the label ‘concentration camp’ is none the
less justified for Logor Trnopolje due to the regime prevailing in the

268. With regard to the number of killings at Trnopolje, the ICTY
considered the period between 25 May and 30 September 1992, the
relevant period in the Stakić case (IT-97-24-T, Trial Chamber Judgment,
31 July 2003, paras. 226–227). The Trial Chamber came to the conclusion
that “killings occurred frequently in the Omarska, Keraterm and Trno-
polje camps and other detention centres” (IT-97-24-T, para. 544). In the
Judgment in the Bratim case, the Trial Chamber found that in the
period from 28 May to October 1992,

“numerous killings occurred in Trnopolje camp. A number of
detainees died as a result of the beatings received by the guards.
Others were killed by camp guards with rifles. The Trial Chamber
also [found] that at least 20 inmates were taken outside the
camp and killed there.” (IT-97-36-T, Judgment, 1 September 2004,
para. 450.)

269. In response to the allegations of killings at the detention camps
in the area of Prijedor, the Respondent questions the number of victims, but
not the fact that killings occurred. It contends that killings in Prijedor
“were committed sporadically and against individuals who were not a
significant part of the group”. It further observed that the ICTY had not
characterized the acts committed in the Prijedor region as genocide.

Banja Luka

Manjaća camp

270. The Applicant further contends that killings were also frequent at
Manjaća camp in Banja Luka. The Court notes that multiple witness
accounts of killings are contained in the Report of the Commission of
Experts (Vol. IV, paras. 370–376) and a mass grave of 540 bodies, “pre-
sumably” from prisoners at Manjaća, is mentioned in a report on missing
persons submitted by Manfred Nowak, the United Nations Expert on
Missing Persons:

“In September 1995, mass graves were discovered near Krasulje in
northwest Bosnia and Herzegovina. The Government has exhumed
540 bodies of persons who were presumably detained at Manjaća
concentration camp in 1992. In January 1996, a mass grave containing
27 bodies of Bosnian Muslims was discovered near Sanski Most; the
victims were reportedly killed in July 1992 during their transfer
from Sanski Most to Manjaća concentration camp (near Banja

Brčko

Luka camp

271. The Applicant claims that killings of members of the protected
group were also perpetrated at Luka camp and Brčko. The Report of
the Commission of Experts confirms these allegations. One witness reported
that “[s]hootings often occurred at 4.00 a.m. The witness estimates that
during his first week at Luka more than 2,000 men were killed and
thrown into the Sava River.” (Report of the Commission of Experts Vol. IV, Ann. VIII, p. 93.) The Report further affirms that “[a]pparently, murder and torture were a daily occurrence” (ibid., p. 96), and that it was reported that

“[t]he bodies of the dead or dying internees were often taken to the camp dump or moved behind the prisoner hangars. Other internees were required to move the bodies. Sometimes the prisoners who carried the dead were killed while carrying such bodies to the dump. The dead were also taken and dumped outside the Serbian Police Station located on Majevićka Brigadia Road in Brčko.” (Ibid)

These findings are corroborated by evidence of a mass grave being found near the site (Report of the Commission of Experts, Vol. IV, Ann. VIII, p. 101, and United States State Department Dispatch).

272. In the Jelisic case, eight of the 13 murders to which the accused pleaded guilty were perpetrated at Luka camp and five were perpetrated at the Brčko police station (IT-95-10-T, Trial Chamber Judgment, 14 December 1999, paras. 37-38). The Trial Chamber further held that “although the Trial Chamber is not in a position to establish the precise number of victims ascribable to Goran Jelisic for the period in the indictment, it notes that, in this instance, the material element of the crime of genocide has been satisfied” (ibid., para. 65).

273. In the Milošević Decision on Motion for Judgment of Acquittal, the Trial Chamber found that many Muslims were detained in Luka camp in May and June 1992 and that many killings were observed by witnesses (IT-02-54-T, Decision on Motion for Judgment of Acquittal, 16 June 2004, paras. 159, 160-168), it held that “[t]he conditions and treatment to which the detainees at Luka Camp were subjected were terrible and included regular beatings, rapes, and killings” (ibid., para. 159).

“...At Luka Camp... The witness personally moved about 12 to 15 bodies and saw approximately 100 bodies stacked up like firewood at Luka Camp; each day a refrigerated meat truck from the local Bimeks Company in Brčko would come to take away the dead bodies.” (Ibid., para. 161.)

274. The Court notes that the Brdanin Trial Chamber Judgment of 1 September 2004 made a general finding as to killings of civilians in camps and municipalities at Banja Luka, Prijedor, Sanski Most, Ključ, Kotor Varoš and Bosanski Novi. It held that:

“In sum, the Trial Chamber is satisfied beyond reasonable doubt that, considering all the incidents described in this section of the judgment, at least 1,669 Bosnian Muslims and Bosnian Croats were killed by Bosnian Serb forces, all of whom were non-combatants.” (IT-99-36-T, Judgment, 1 September 2004, para. 465.)

275. The Court further notes that several resolutions condemn specific incidents. These resolutions, inter alia, condemn “the Bosnian Serb forces for their continued offensive against the safe area of Goražde, which has resulted in the death of numerous civilians” (Security Council resolution 913 (1994), Preamble, para. 5); condemn ethnic cleansing “perpetrated in Banja Luka, Bijeljina and other areas of the Republic of Bosnia and Herzegovina under the control of Bosnian Serb forces” (Security Council resolution 941 (1994), para. 2); express concern at “grave violations of international humanitarian law and of human rights in and around Srebrenica, and in the areas of Banja Luka and Sanski Most, including reports of mass murder” (Security Council resolution 1019 (1995), Preamble, para. 2); and condemn “the indiscriminate shelling of civilians in the safe areas of Sarajevo, Tuzla, Bihać and Goražde and the use of cluster bombs on civilian targets by Bosnian Serb and Croatian Serb forces” (General Assembly resolution 50/193 (1995) para. 5).

276. On the basis of the facts set out above, the Court finds that it is established by overwhelming evidence that massive killings in specific areas and detention camps throughout the territory of Bosnia and Herzegovina were perpetrated during the conflict. Furthermore, the evidence presented shows that the victims were in large majority members of the protected group, which suggests that they may have been systematically targeted by the killings. The Court notes in fact that, while the Respondent contested the veracity of certain allegations, and the number of victims, or the motives of the perpetrators, as well as the circumstances of the killings and their legal qualification, it never contested, as a matter of fact, that members of the protected group were indeed killed in Bosnia and Herzegovina. The Court thus finds that it has been established by conclusive evidence that massive killings of members of the protected group occurred and that therefore the requirements of the material element, as defined by Article II (a) of the Convention, are fulfilled. At this stage of its reasoning, the Court is not called upon to list the specific killings, nor even to make a conclusive finding on the total number of victims.
277. The Court is however not convinced, on the basis of the evidence before it, that it has been conclusively established that the massive killings of members of the protected group were committed with the specific intent \( (dolus\ specialis) \) on the part of the perpetrators to destroy, in whole or in part, the group as such. The Court has carefully examined the criminal proceedings of the ICTY and the findings of its Chambers, cited above, and observes that none of those convicted were found to have acted with specific intent \( (dolus\ specialis) \). The killings outlined above may amount to war crimes and crimes against humanity, but the Court has no jurisdiction to determine whether this is so. In the exercise of its jurisdiction under the Genocide Convention, the Court finds that it has not been established by the Applicant that the killings amounted to acts of genocide prohibited by the Convention. As to the Applicant's contention that the specific intent \( (dolus\ specialis) \) can be inferred from the overall pattern of acts perpetrated throughout the conflict, examination of this must be reserved until the Court has considered all the other alleged acts of genocide prohibited by the Convention. To the Applicant's contention that the specific intent \( (dolus\ specialis) \) can be inferred from the overall pattern of acts perpetrated throughout the conflict, examination of this must be reserved until the Court has considered all the other alleged acts of genocide prohibited by the Convention. (see paragraph 370 below).

* * *

(5) The Massacre at Srebrenica

278. The atrocities committed in and around Srebrenica are nowhere better summarized than in the first paragraph of the Judgment of the Trial Chamber in the Krstić case:

“The events surrounding the Bosnian Serb take-over of the United Nations ('UN') ‘safe area’ of Srebrenica in Bosnia and Herzegovina, in July 1995, have become well known to the world. Despite a UN Security Council resolution declaring that the enclave was to be 'free from armed attack or any other hostile act', units of the Bosnian Serb Army ('VRS') launched an attack and captured the town. Within a few days, approximately 25,000 Bosnian Muslims, most of them women, children and elderly people who were living in the area, were uprooted and, in an atmosphere of terror, loaded onto overcrowded buses by the Bosnian Serb forces and transported across the confrontation lines into Bosnian Muslim-held territory. The military-aged Bosnian Muslim men of Srebrenica, however, were consigned to a separate fate. As thousands of them attempted to flee the area, they were taken prisoner, detained in brutal conditions and then executed. More than 7,000 people were never seen again.” (IT-98-33-T, Judgment, 2 August 2001, para. 1; footnotes omitted.)

279. The Applicant contends that the planning for the final attack on Srebrenica must have been prepared quite some time before July 1995. It refers to a report of 4 July 1994 by the commandant of the Bratunac Brigade. He outlined the “final goal” of the VRS: “an entirely Serbian Podrinje. The enclaves of Srebrenica, Žepa and Gorazde must be militarily defeated.” The report continued:

“We must continue to arm, train, discipline, and prepare the RS Army for the execution of this crucial task — the expulsion of Muslims from the Srebrenica enclave. There will be no retreat when it comes to the Srebrenica enclave, we must advance. The enemy’s life has to be made unbearable and their temporary stay in the enclave impossible so that they leave en masse as soon as possible, realising that they cannot survive there.”

The Chamber in the Blagojević case mentioned testimony showing that some “members of the Bratunac Brigade... did not consider this report to be an order. Testimony of other witnesses and documentary evidence show that the strategy was in fact implemented.” (IT-02-60-T, Trial Chamber Judgment, 17 January 2005, para. 104; footnotes omitted.) The Applicant sees the “final goal” described here as “an entirely Serbian Podrinje”, in conformity with the objective of a Serbian region 50 km to the west of the Drina river identified in an April or a May 1991 meeting of the political and State leadership of Yugoslavia. The Court observes that the object stated in the report, like the 1992 Strategic Objectives, does not envisage the destruction of the Muslims in Srebrenica, but rather their departure. The Chamber did not give the report any particular significance.

280. The Applicant, like the Chamber, refers to a meeting on 7 March 1995 between the Commander of the United Nations Protection Force (UNPROFOR) and General Mladić, at which the latter expressed dissatisfaction with the safe area régime and indicated that he might take military action against the eastern enclaves. He gave assurances however for the safety of the Bosnian Muslim population of those enclaves. On the following day, 8 March 1995, President Karadžić issued the Directive for Further Operations 7, also quoted by the Chamber and the Applicant: “Planned and well-thought-out combat operations' were
to create ‘an unbearable situation of total insecurity with no hope of further survival or life for the inhabitants of both enclaves’.” The Blagojević Chamber continues as follows:

“The separation of the Srebrenica and Žepa enclaves became the task of the Drina Corps. As a result of this directive, General Ratko Mladić on 31 March 1995 issued Directive for Further Operations, Operative No. 7/1, which further directive specified the Drina Corps’ tasks.” (IT-02-60-T, pp. 38-39, para. 106.)

281. Counsel for the Applicant asked in respect of the first of those directives “[w]hat could be a more clear-cut definition of the genocidal intent to destroy on the part of the authorities in Pale?”. As with the July 1994 report, the Court observes that the expulsion of the inhabitants would achieve the purpose of the operation. That observation is supported by the ruling of the Appeals Chamber in the Krstić case that the directives were “insufficiently clear” to establish specific intent (dolus specialis) on the part of the members of the Main Staff who issued them. “Indeed, the Trial Chamber did not even find that those who issued Directives 7 and 7.1 had genocidal intent, concluding instead that the genocidal plan crystallized at a later stage.” (IT-98-33-A, Judgment, 19 April 2004, para. 90.)

282. A Netherlands Battalion (Dutchbat) was deployed in the Srebrenica safe area. Within that area in January 1995 it had about 600 personnel. By February and through the spring the VRS was refusing to allow the return of Dutch soldiers who had gone on leave, causing their numbers to drop by at least 150, and were restricting the movement of international convoys of aid and supplies to Srebrenica and to other enclaves. It was estimated that without new supplies about half of the population of Srebrenica would be without food after mid-June.

283. On 2 July the Commander of the Drina Corps issued an order for active combat operations; its stated objective on the Srebrenica enclave was to reduce “the enclave to its urban area”. The attack began on 6 July with rockets exploding near the Dutchbat headquarters in Potočari; 7 and 8 July were relatively quiet because of poor weather, but the shelling intensified around 9 July. Srebrenica remained under fire until 11 July when it fell, with the Dutchbat observation posts having been taken by the VRS. Contrary to the expectations of the VRS, the Bosnia and Herzegovina army showed very little resistance (Blagojević, IT-02-60-T, Trial Chamber Judgment, 17 January 2005, para. 125). The United Nations Secretary-General’s report quotes an assessment made by United Nations military observers on the afternoon of 9 July which concluded as follows:

Consistently with that conclusion, the Chamber in the Blagojević case says this:

“As the operation progressed its military object changed from ‘reducing the enclave to the urban area’ [the objective stated in a Drina Corps order of 2 July] to the taking-over of Srebrenica town and the enclave as a whole. The Trial Chamber has heard no direct evidence as to the exact moment the military objective changed. The evidence does show that President Karadžić was ‘informed of successful combat operations around Srebrenica . . . which enable them to occupy the very town of Srebrenica’ on 9 July. According to Miroslav Deronjić, the President of the Executive Board of the Bratunac Municipality, President Karadžić told him on 9 July that there were two options in relation to the operation, one of which was the complete take-over of Srebrenica. Later on 9 July, President Karadžić ‘agreed with continuation of operations for the takeover of Srebrenica’. By the morning of 11 July the change of objective of the ‘Krivaja 95’ operation had reached the units in the field; and by the middle of the afternoon, the order to enter Srebrenica had reached the Bratunac Brigade’s IKM in Pribićevac and Colonel Blagojević. Miroslav Deronjić visited the Bratunac Brigade IKM in Pribićevac on 11 July. He briefly spoke with Colonel Blagojević about the Srebrenica operation. According to Miroslav Deronjić, the VRS had just received the order to enter Srebrenica town.” (IT-02-60-T, Trial Chamber Judgment, 17 January 2005, para. 130.)

284. The Chamber then begins an account of the dreadful aftermath of the fall of Srebrenica. A Dutchbat Company on 11 July started directing the refugees to the UNPROFOR headquarters in Potočari which was
considered to be the only safe place for them. Not all the refugees went towards Potočari; many of the Bosnian Muslim men took to the woods. Refugees were soon shelled and shot at by the VRS despite attempts to find a safe route to Potočari where, to quote the ICTY, chaos reigned:

"The crowd outside the UNPROFOR compound grew by the thousands during the course of 11 July. By the end of the day, an estimated 20,000 to 30,000 Bosnian Muslims were in the surrounding area and some 4,000 to 5,000 refugees were in the UNPROFOR compound."

(b) Conditions in Potočari

The standards of hygiene within Potočari had completely deteriorated. Many of the refugees seeking shelter in the UNPROFOR headquarters were injured. Medical assistance was given to the extent possible; however, there was a dramatic shortage of medical supplies. As a result of the VRS having prevented aid convoys from getting through during the previous months, there was hardly any fresh food in the Dutchbat headquarters. There was some running water available outside the compound. From 11 to 13 July 1995 the temperature was very high, reaching 35 degrees centigrade and this small water supply was insufficient for the 20,000 to 30,000 refugees who were outside the UNPROFOR compound." (IT-02-60-T, paras. 146-147.)

The Tribunal elaborates on those matters and some efforts made by Bosnian Serb and Serbian authorities, i.e., the local Municipal Assembly, the Bratunac Brigade and the Drina Corps, as well as UNHCR, to assist the Bosnian Muslim refugees (ibid., para. 148).

285. On 10 July at 10.45 p.m., according to the Secretary-General’s 1999 Report, the delegate in Belgrade of the Secretary-General’s Special Representative telephoned the Representative to say that he had seen President Milošević who had responded that not much should be expected of him because “the Bosnian Serbs did not listen to him” (A/54/549, para. 292). At 3 p.m. the next day, the President rang the Special Representative and, according to the same report, “stated that the Dutchbat soldiers in Serb-held areas had retained their weapons and equipment, and were free to move about. This was not true.” (Ibid., para. 307.) About 20 minutes earlier two NATO aircraft had dropped two bombs on what were thought to be Serb vehicles advancing towards the town from the south. The Secretary-General’s report gives the VRS reaction:

"Immediately following this first deployment of NATO close air support, the BSA radioed a message to Dutchbat. They threatened to shell the town and the compound where thousands of inhabitants had begun to gather, and to kill the Dutchbat soldiers being held hostage, if NATO continued with its use of air power. The Special Representative of the Secretary-General recalled having received a telephone call from the Netherlands Minister of Defence at this time, requesting that the close air support action be discontinued, because Serb soldiers on the scene were too close to Netherlands troops, and their safety would be jeopardized. The Special Representative considered that he had no choice but to comply with this request.” (A/54/549, para. 306.)

286. The Trial Chamber in the Blagojević case recorded that on 11 July at 8 p.m. there was a meeting between a Dutch colonel and General Mladić and others. The former said that he had come to negotiate the withdrawal of the refugees and to ask for food and medicine for them. He sought assurances that the Bosnian Muslim population and Dutchbat would be allowed to withdraw from the area. General Mladić said that the civilian population was not the target of his actions and the goal of the meeting was to work out an arrangement. He then said “‘you can all leave, all stay, or all die here’ . . . ‘we can work out an agreement for all this to stop and for the issues of the civilian population, your soldiers and the Muslim military to be resolved in a peaceful way’” (Blagojević, IT-02-60-T, Trial Chamber Judgment, 17 January 2005, paras. 150-152). Later that night at a meeting beginning at 11 p.m., attended by a representative of the Bosnian Muslim community, General Mladić said:

"‘Number one, you need to lay down your weapons and I guarantee that all those who lay down their weapon will live. I give you my word, as a man and a General, that I will use my influence to help the innocent Muslim population which is not the target of the combat operations carried out by the VRS . . . In order to make a decision as a man and a Commander, I need to have a clear position of the representatives of your people on whether you want to survive . . . stay or vanish. I am prepared to receive here tomorrow at 10 a.m. hrs. a delegation of officials from the Muslim side with whom I can discuss the salvation of your people from . . . the former enclave of Srebrenica . . . Nesib [a Muslim representative], the future of your people is in your hands, not only in this territory . . . Bring the people who can secure the surrender of weapons and save your people from destruction.’

The Trial Chamber finds, based on General Mladić’s comments, that he was unaware that the Bosnian Muslim men had left the Srebrenica enclave in the column.

General Mladić also stated that he would provide the vehicles to transport the Bosnian Muslims out of Potočari. The Bosnian
Muslim and Bosnian Serb sides were not on equal terms and Nesib Mandžić felt his presence was only required to put up a front for the international public. Nesib Mandžić felt intimidated by General Mladić. There was no indication that anything would happen the next day.” (IT-02-60-T, paras. 156-158.)

287. A third meeting was held the next morning, 12 July. The Tribunal in the Blagojević case gives this account:

“After the Bosnian Muslim representatives had introduced themselves, General Mladić stated:

‘I want to help you, but I want absolute co-operation from the civilian population because your army has been defeated. There is no need for your people to get killed, your husband, your brothers or your neighbours . . . . As I told this gentleman last night, you can either survive or disappear. For your survival, I demand that all your armed men, even those who committed crimes, and many did, against our people, surrender their weapons to the VRS . . . . You can choose to stay or you can choose to leave. If you wish to leave, you can go anywhere you like. When the weapons have been surrendered every individual will go where they say they want to go. The only thing is to provide the needed gasoline. You can pay for it if you have the means. If you can’t pay for it, UNPROFOR should bring four or five tanker trucks to fill up trucks . . .’

Čamilja Omanović [one of the Muslim representatives] interpreted this to mean that if the Bosnian Muslim population left they would be saved, but that if they stayed they would die. General Mladić did not give a clear answer in relation to whether a safe transport of the civilian population out of the enclave would be carried out. General Mladić stated that the male Bosnian Muslim population from the age of 16 to 65 would be screened for the presence of war criminals. He indicated that after this screening, the men would be returned to the enclave. This was the first time that the separation of men from the rest of the population was mentioned. The Bosnian Muslim representatives had the impression that ‘everything had been prepared in advance, that there was a team of people working together in an organized manner’ and that ‘Mladić was the chief organizer.’

The third Hotel Fontana meeting ended with an agreement that the VRS would transport the Bosnian Muslim civilian population out of the enclave to ARBiH-held territory, with the assistance of UNPROFOR to ensure that the transportation was carried out in a humane manner.” (Ibid., paras. 160-161.)

288. The VRS and MUP of the Republika Srpska from 12 July separated men aged 16 to approximately 60 or 70 from their families. The Bosnian Muslim men were directed to various locations but most were sent to a particular house (“The White House”) near the UNPROFOR headquarters in Potočari, where they were interrogated. During the afternoon of 12 July a large number of buses and other vehicles arrived in Potočari including some from Serbia. Only women, children and the elderly were allowed to board the buses bound for territory held by the Bosnia and Herzegovina military. Dutchbat vehicles escorted convoys to begin with, but the VRS stopped that and soon after stole 16-18 Dutchbat jeeps, as well as around 100 small arms, making further escorts impossible. Many of the Bosnian Muslim men from Srebrenica and its surroundings including those who had attempted to flee through the woods were detained and killed.

289. Mention should also be made of the activities of certain paramilitary units, the “Red Berets” and the “Scorpions”, who are alleged by the Applicant to have participated in the events in and around Srebrenica. The Court was presented with certain documents by the Applicant, which were said to show that the “Scorpions” were indeed sent to the Trnovo area near Srebrenica and remained there through the relevant time period. The Respondent cast some doubt on the authenticity of these documents (which were copies of intercepts, but not originals) without ever formally denying their authenticity. There was no denial of the fact of the relocation of the “Scorpions” to Trnovo. The Applicant during the oral proceedings presented video material showing the execution by paramilitaries of six Bosnian Muslims, in Trnovo, in July 1995.

290. The Trial Chambers in the Krstić and Blagojević cases both found that Bosnian Serb forces killed over 7,000 Bosnian Muslim men following the takeover of Srebrenica in July 1995 (Krstić, IT-98-33-T, Judgment, 2 August 2001, paras. 426-427 and Blagojević, IT-02-60-T, Judgment, 17 January 2005, para. 643). Accordingly they found that the actus reus of killings in Article II (a) of the Convention was satisfied. Both also found that actions of Bosnian Serb forces also satisfied the actus reus of causing serious bodily or mental harm, as defined in Article II (b) of the Convention — both to those who where about to be executed, and to the others who were separated from them in respect of their forced displacement and the loss suffered by survivors among them (Krstić, ibid., para. 543, and Blagojević, ibid., paras. 644-654).

291. The Court is fully persuaded that both killings within the terms of Article II (a) of the Convention, and acts causing serious bodily or men-
The Court has already quoted (paragraph 281) the passage from the Judgment of the Appeals Chamber in the Krstić case rejecting the Prosecutor's attempted reliance on the Directives given earlier in July, 1994. The Appeals Chamber concluded this part of its Judgment as follows:

"The gravity of genocide is reflected in the stringent requirements which must be satisfied before this conviction is imposed. These requirements — the demanding proof of specific intent and the showing that the group was targeted for destruction in its entirety or in substantial part — guard against a danger that convictions for this crime will be imposed lightly. Where the requirements are satisfied, however, the law must not shy away from referring to the crime committed by its proper name: genocide. By seeking to eliminate a part of the Bosnian Muslims, the Bosnian Serb forces committed genocide. They targeted for extinction the forty thousand Bosnian Muslims who were emblematic of the Bosnian Muslim minority living in Srebrenica, a group which was emblematic of the Bosnian Muslims in Srebrenica. They stripped all the male Muslim prisoners, military and civilian, elderly and young, of their personal belongings, 

"Evidently in concluding that some members of the VRS Main Staff intended to destroy the Bosnian Muslims of Srebrenica, the Trial Chamber was relying on the evidential value of the ICTY's Judgment in the Krstić case. The ICTY's Judgment is relevant because it is the only other case where the court has found genocide of the type committed in Srebrenica. In Krstić, the court found that "the Bosnian Serb forces committed genocide. They targeted for extinction the forty thousand Bosnian Muslims who were emblematic of the Bosnian Muslim minority living in Srebrenica, a group which was emblematic of the Bosnian Muslims in Srebrenica. They stripped all the male Muslim prisoners, military and civilian, elderly and young, of their personal belongings, and identification cards, of their military uniforms, and of their identity. The Bosnian Serb forces were aware, when they embarked on this genocidal venture, that the harm they caused would continue to plague the Bosnian Muslims. The Appeals Chamber states unequivocally that the law condemns, in their name. The Bosnian Serb forces were aware, when they embarked on this genocidal venture, that the harm they caused would continue to plague the Bosnian Muslims. The Appeals Chamber states unequivocally that the law condemns, in their name. The Bosnian Serb forces were aware, when they embarked on this genocidal venture, that the harm they caused would continue to plague the Bosnian Muslims. The Appeals Chamber states unequivocally that the law condemns, in their name. The Bosnian Serb forces were aware, when they embarked on this genocidal venture, that the harm they caused would continue to plague the Bosnian Muslims. The Appeals Chamber states unequivocally that the law condemns, in their name. The Bosnian Serb forces were aware, when they embarked on this genocidal venture, that the harm they caused would continue to plague the Bosnian Muslims. The Appeals Chamber states unequivocally that the law condemns, in their name. The Bosnian Serb forces were aware, when they embarked on this genocidal venture, that the harm they caused would continue to plague the Bosnian Muslims. The Appeals Chamber states unequivocally that the law condemns, in their name. The Bosnian Serb forces were aware, when they embarked on this genocidal venture, that the harm they caused would continue to plague the Bosnian Muslims. The Appeals Chamber states unequivocally that the law condemns, in their name. The Bosnian Serb forces were aware, when they embarked on this genocidal venture, that the harm they caused would continue to plague the Bosnian Muslims. The Appeals Chamber states unequivocally that the law condemns, in their name. The Bosnian Serb forces were aware, when they embarked on this genocidal venture, that the harm they caused would continue to plague the Bosnian Muslims. The Appeals Chamber states unequivocally that the law condemns, in their name. The Bosnian Serb forces were aware, when they embarked on this genocidal venture, that the harm they caused would continue to plague the Bosnian Muslims. The Appeals Chamber states unequivocally that the law condemns, in their name. The Bosnian Serb forces were aware, when they embarked on this genocidal venture, that the harm they caused would continue to plague the Bosnian Muslims. The Appeals Chamber states unequivocally that the law condemns, in their name. The Bosnian Serb forces were aware, when they embarked on this genocidal venture, that the harm they caused would continue to plag...
did not depart from the legal requirements for genocide. The Defence appeal on this issue is dismissed.” (Ibid., paras. 37-38.)

294. On one view, taken by the Applicant, the Blagojević Trial Chamber decided that the specific intent (\textit{dolus specialis}) was formed earlier than 12 or 13 July, the time chosen by the Krstić Chamber. The Court has already called attention to that Chamber’s statement that at some point (it could not determine “the exact moment”) the military objective in Srebrenica changed, from “reducing the enclave to the urban area” (stated in a Drina Corps order of 2 July 1995 referred to at times as the “Krivaja 95 operation”) to taking over Srebrenica town and the enclave as a whole. Later in the Judgment, under the heading “Findings: was genocide committed?” the Chamber refers to the 2 July document:

“The Trial Chamber is convinced that the criminal acts committed by the Bosnian Serb forces were all parts of one single scheme to commit genocide of the Bosnian Muslims of Srebrenica, as reflected in the ‘Krivaja 95 operation’, the ultimate objective of which was to eliminate the enclave and, therefore, the Bosnian Muslim community living there.” (Blagojević, IT-02-60-T, Judgment, 17 January 2005, para. 674.)

The Chamber immediately goes on to refer only to the events — the massacres and the forcible transfer of the women and children — after the fall of Srebrenica, that is sometime after the change of military objective on 9 or 10 July. The conclusion on intent is similarly focused:

“The Trial Chamber has no doubt that all these acts constituted a single operation executed with the intent to destroy the Bosnian Muslim population of Srebrenica. The Trial Chamber finds that the Bosnian Serb forces not only knew that the combination of the killings of the men with the forcible transfer of the women, children and elderly, would inevitably result in the physical disappearance of the Bosnian Muslim population of Srebrenica, but clearly intended through these acts to physically destroy this group.” (Ibid., para. 677.) (See similarly all but the first item in the list in paragraph 786.)

295. The Court’s conclusion, fortified by the Judgments of the Trial Chambers in the Krstić and Blagojević cases, is that the necessary intent was not established until after the change in the military objective and after the takeover of Srebrenica, on about 12 or 13 July. This may be significant for the application of the obligations of the Respondent under the Convention (paragraph 423 below). The Court has no reason to depart from the Tribunal’s determination that the necessary specific intent (\textit{dolus specialis}) was established and that it was not established until that time.

296. The Court now turns to the requirement of Article II that there must be the intent to destroy a protected “group” in whole or in part. It recalls its earlier statement of the law and in particular the three elements there discussed: substantiality (the primary requirement), relevant geographic factors and the associated opportunity available to the perpetrators, and emblematic or qualitative factors (paragraphs 197-201). Next, the Court recalls the assessment it made earlier in the Judgment of the persuasiveness of the ICTY’s findings of facts and its evaluation of them (paragraph 223). Against that background it turns to the findings in the Krstić case (IT-98-33-T, Trial Chamber Judgment, 2 August 2001, paras. 551-599 and IT-98-33-A, Appeals Chamber Judgment, 19 April 2004, paras. 6-22), in which the Appeals Chamber endorsed the findings of the Trial Chamber in the following terms:

“In this case, having identified the protected group as the national group of Bosnian Muslims, the Trial Chamber concluded that the part the VRS Main Staff and Radislav Krstić targeted was the Bosnian Muslims of Srebrenica, or the Bosnian Muslims of Eastern Bosnia. This conclusion comports with the guidelines outlined above. The size of the Bosnian Muslim population in Srebrenica prior to its capture by the VRS forces in 1995 amounted to approximately forty thousand people. This represented not only the Muslim inhabitants of the Srebrenica municipality but also many Muslim refugees from the surrounding region. Although this population constituted only a small percentage of the overall Muslim population of Bosnia and Herzegovina at the time, the importance of the Muslim community of Srebrenica is not captured solely by its size.” (IT-98-33-A, Judgment, 19 April 2004, para. 15; footnotes omitted.)

The Court sees no reason to disagree with the concordant findings of the Trial Chamber and the Appeals Chamber.

297. The Court concludes that the acts committed at Srebrenica falling within Article II (\textit{a}) and (\textit{b}) of the Convention were committed with the specific intent to destroy in part the group of the Muslims of Bosnia and Herzegovina as such; and accordingly that these were acts of genocide, committed by members of the VRS in and around Srebrenica from about 13 July 1995.

* * *
(6) Article II (b): Causing Serious Bodily or Mental Harm to Members of the Protected Group

298. The Applicant contends that besides the massive killings, systematic serious harm was caused to the non-Serb population of Bosnia and Herzegovina. The Applicant includes the practice of terrorizing the non-Serb population, the infliction of pain and the administration of torture as well as the practice of systematic humiliation into this category of acts of genocide. Further, the Applicant puts a particular emphasis on the issue of systematic rapes of Muslim women, perpetrated as part of genocide against the Muslims in Bosnia during the conflict.

299. The Respondent does not dispute that, as a matter of legal qualification, the crime of rape may constitute an act of genocide, causing serious bodily or mental harm. It disputes, however, that the rapes in the territory of Bosnia and Herzegovina were part of a genocide perpetrated therein. The Respondent, relying on the Report of the Commission of Experts, maintains that the rapes and acts of sexual violence committed during the conflict, were not part of genocide, but were committed on all sides of the conflict, without any specific intent (dolus specialis).

300. The Court notes that there is no dispute between the Parties that rapes and sexual violence could constitute acts of genocide, if accompanied by a specific intent to destroy the protected group. It notes also that the ICTR, in its Judgment of 2 September 1998 in the Akayesu case, addressed the issue of acts of rape and sexual violence as acts of genocide in the following terms:

“Indeed, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of inflicting harm on the victim as he or she suffers both bodily and mental harm.” (ICTR-96-4-T, Trial Chamber Judgment, 2 September 1998, para. 731.)

The ICTY, in its Judgment of 31 July 2003 in the Stakić case, recognized that:

“'Causing serious bodily and mental harm' in subparagraph (b) [of Article 4 (2) of the Statute of the ICTY] is understood to mean, inter alia, acts of torture, inhumane or degrading treatment, sexual violence including rape, interrogations combined with beatings, threats of death, and harm that damages health or causes disfigurement or injury. The harm inflicted need not be permanent and irremediable.” (IT-97-24-T, Trial Chamber Judgment, 31 July 2003, para. 516.)

301. The Court notes furthermore that Security Council and General Assembly resolutions contemporary with the facts are explicit in referring to sexual violence. These resolutions were in turn based on reports before the General Assembly and the Security Council, such as the Reports of the Secretary-General, the Commission of Experts, the Special Rapporteur for Human Rights, Tadeusz Mazowiecki, and various United Nations agencies in the field. The General Assembly stressed the “extraordinary suffering of the victims of rape and sexual violence” (General Assembly resolution 48/143 (1993), Preamble; General Assembly resolution 50/192 (1995), para. 8). In resolution 48/143 (1993), the General Assembly declared it was:

“Appalled at the recurring and substantiated reports of widespread rape and abuse of women and children in the areas of armed conflict in the former Yugoslavia, in particular its systematic use against the Muslim women and children in Bosnia and Herzegovina by Serbian forces” (Preamble, para. 4).

302. Several Security Council resolutions expressed alarm at the “massive, organised and systematic detention and rape of women”, in particular Muslim women in Bosnia and Herzegovina (Security Council resolutions 798 (1992), Preamble, para. 2; resolution 820 (1993), para. 6; 827 (1993), Preamble, para. 3). In terms of other kinds of serious harm, Security Council resolution 1034 (1995) condemned

“in the strongest possible terms the violations of international humanitarian law and of human rights by Bosnian Serb and paramilitary forces in the areas of Srebrenica, Žepa, Banja Luka and Sanski Most as described in the report of the Secretary-General of 27 November 1995 and showing a consistent pattern of summary executions, rape, mass expulsions, arbitrary detentions, forced labour and large-scale disappearances” (para. 2).

The Security Council further referred to a “persistent and systematic campaign of terror” in Banja Luka, Bijeljina and other areas under the control of Bosnian Serb forces (Security Council resolution 941 (1994), Preamble, para. 4). It also expressed concern at reports of mass murder, unlawful detention and forced labour, rape and deportation of civilians in Banja Luka and Sanski Most (Security Council resolution 1019 (1995), Preamble, para. 2).

303. The General Assembly also condemned specific violations including torture, beatings, rape, disappearances, destruction of houses, and other acts or threats of violence aimed at forcing individuals to leave their homes (General Assembly resolution 47/147 (1992), para. 4; see also General Assembly resolution 49/10 (1994), Preamble, para. 14, and General Assembly resolution 50/193 (1995), para. 2).
304. The Court will now examine the specific allegations of the Applicant under this heading, in relation to the various areas and camps identified as having been the scene of acts causing "bodily or mental harm" within the meaning of the Convention. As regards the events of Srebrenica, the Court has already found it to be established that such acts were committed (paragraph 291 above).

**Drina River Valley**

(a) **Zvornik**

305. As regards the area of the Drina River Valley, the Applicant has stressed the perpetration of acts and abuses causing serious bodily or mental harm in the events at Zvornik. In particular, the Court has been presented with a report on events at Zvornik which is based on eyewitness accounts and extensive research (Hannes Tretter *et al.*, “‘Ethnic cleansing’ Operations in the Northeast Bosnian-City of Zvornik from April through June 1992”, Ludwig Boltzmann Institute of Human Rights (1994), p. 48). The report of the Ludwig Boltzmann Institute gives account of a policy of terrorization, forced relocation, torture, rape during the takeover of Zvornik in April-June 1992. The Report of the Commission of Experts received 35 reports of rape in the area of Zvornik in May 1992 (Vol. V, Ann. IX, p. 54).

(b) **Foča**

306. Further acts causing serious bodily and mental harm were perpetrated in the municipality of Foča. The Applicant, relying on the Judgment in the *Kunarac et al.* case (IT-96-23-T and IT-96-23/1-T, Trial Chamber Judgment, 22 February 2001, paras. 574 and 592), claims, in particular, that many women were raped repeatedly by Bosnian Serb soldiers or policemen in the city of Foča.

(c) **Camps**

(i) **Batković camp**

307. The Applicant further claims that in Batković camp, prisoners were frequently beaten and mistreated. The Report of the Commission of Experts gives an account of a witness statement according to which “prisoners were forced to perform sexual acts with each other, and sometimes with guards”. The Report continues: “Reports of the frequency of beatings vary from daily beatings to beatings 10 times each day.” (Report of the Commission of Experts, Vol. IV, Ann. VIII, p. 62, para. 469.) Individual witness accounts reported by the Commission of Experts (Report of the Commission of Experts, Vol. IV, Ann. VIII, pp. 62-63, and Ann. X, p. 9) provide second-hand testimony that beatings occurred and prisoners lived in terrible conditions. As already noted above (paragraph 256), however, the periodic Report of Special Rapporteur Mazowiecki of 17 November 1992 stated that “[t]he prisoners . . . appeared to be in good health” (p. 13); but according to the Applicant, Mazowiecki was shown a “model” camp and therefore his impression was inaccurate. The United States Department of State Dispatch of 19 April 1993 (Vol. 4, No. 16), alleges that in Batković camp, prisoners were frequently beaten and mistreated. In particular, the Dispatch records two witness statements according to which “[o]n several occasions, they and other prisoners were forced to remove their clothes and perform sex acts on each other and on some guards”.

(ii) **Sušica camp**

308. According to the Applicant, rapes and physical assaults were also perpetrated at Sušica camp; it pointed out that in the proceedings before the ICTY, in the “Rule 61 Review of the Indictment” and the Sentencing Judgment, in the *Nikolić* case, the accused admitted that many Muslim women were raped and subjected to degrading physical and verbal abuse in the camp and at locations outside of it (*Nikolić*, IT-94-2-T, Sentencing Judgment, 18 December 2003, paras. 87-90), and that several men were tortured in that same camp.

(iii) **Foča Kazneno-Popravni Dom camp**

309. With regard to the Foča Kazneno-Popravni Dom camp, the Applicant asserts that beatings, rapes of women and torture were perpetrated. The Applicant bases these allegations mainly on the Report of the Commission of Experts and the United States State Department Dispatch. The Commission of Experts based its findings on information provided by a Helsinki Watch Report. A witness claimed that some prisoners were beaten in Foča KP Dom (Report of the Commission of Experts, Vol. IV, pp. 128-132); similar accounts are contained in the United States State Department Dispatch. One witness stated that "Those running the center instilled fear in the Muslim prisoners by selecting certain prisoners for beatings. From his window in Room 13, the witness saw prisoners regularly being taken to a building where beatings were conducted. This building was close enough for him to hear the screams of those who were being beaten." (Dispatch of the United States Department of State, 19 April 1993, No. 16, p. 262.)

310. The ICTY Trial Chamber, in its *Kunarac* Judgment of 22 February 2001, described the statements of several witnesses as to the poor and brutal living conditions in Foča KP Dom. These seem to confirm that the Muslim men and women from Foča, Gacko and Kalinovik municipalities were arrested, rounded up, separated from each other, and imprisoned or detained at several detention centres like the Foča KP
Dom where some of them were killed, raped or severely beaten (Kumarac et al, IT-96-23-T and IT-96-23/1-T, Trial Chamber Judgment, 22 February 2001).

Prijedor

(a) Municipality

311. Most of the allegations of abuses said by the Applicant to have occurred in Prijedor have been examined in the section of the present Judgment concerning the camps situated in Prijedor. However, the Report of the Commission of Experts refers to a family of nine found dead in Stara Rijeka in Prijedor, who had obviously been tortured (Vol. V, Ann. X, p. 41). The Trial Chamber of the ICTY, in its Judgment in the Tadić case made the following factual finding as to an attack on two villages in the Kozarac area, Jaskići and Sivci:

“On 14 June 1992 both villages were attacked. In the morning the approaching sound of shots was heard by the inhabitants of Sivci and soon after Serb tanks and Serb soldiers entered the village . . . There they were made to run along that road, hands clasped behind their heads, to a collecting point in the yard of one of the houses. On the way there they were repeatedly made to stop, lie down on the road and be beaten and kicked by soldiers as they lay there, before being made to get up again and run some distance further, where the whole performance would be repeated . . . In all some 350 men, mainly Muslims but including a few Croats, were treated in this way in Sivci.

On arrival at the collecting point, beaten and in many cases covered with blood, some men were called out and questioned about others, and were threatened and beaten again. Soon buses arrived, five in all, and the men were made to run to them, hands again behind the head, and to crowd on to them. They were then taken to the Keraterm camp.

The experience of the inhabitants of the smaller village of Jaskići, which contained only 11 houses, on 14 June 1992 was somewhat similar but accompanied by the killing of villagers. Like Sivci, Jaskići had received refugees after the attack on Kozarac but by 14 June 1992 many of these refugees had left for other villages. In the afternoon of 14 June 1992 gunfire was heard and Serb soldiers arrived in Jaskići and ordered men out of their homes and onto the village street, their hands clasped behind their heads; there they were made to lie down and were severely beaten.” (IT-94-1-T, Judgment, 7 May 1997, paras. 346-348.)

(b) Camps

(i) Omarska camp

312. As noted above in connection with the killings (paragraph 262), the Applicant has been able to present abundant and persuasive evidence of physical abuses causing serious bodily harm in Omarska camp. The Report of the Commission of Experts contains witness accounts regarding the “white house” used for physical abuses, rapes, torture and, occasionally, killings, and the “red house” used for killings (Vol. IV, Ann. VIII, pp. 207-222). Those accounts of the sadistic methods of killing are corroborated by United States submissions to the Secretary-General. The most persuasive and reliable source of evidence may be taken to be the factual part of the Opinion and Judgment of the ICTY in the Tadić case (IT-94-1-T, Trial Chamber Judgment, 7 May 1997). Relying on the statements of 30 witnesses, the Tadić Trial Judgment made findings as to interrogations, beatings, rapes, as well as the torture and humiliation of Muslim prisoners in Omarska camp (in particular: ibid., paras. 155-158, 163-167). The Trial Chamber was satisfied beyond reasonable doubt of the fact that several victims were mistreated and beaten by Tadić and suffered permanent harm, and that he had compelled one prisoner to sexually mutilate another (ibid., paras. 194-206). Findings of mistreatment, torture, rape and sexual violence at Omarska camp were also made by the ICTY in other cases; in particular, the Trial Judgment of 2 November 2001 in the Kvočka et al. case (IT-98-30/1-T, Trial Chamber Judgment, paras. 21-50, and 98-108) — upheld on appeal, the Trial Judgment of 1 September 2004 in the Brdanin case (IT-99-36-T, Trial Chamber Judgment, paras. 515-517) and the Trial Judgment of 31 July 2003 in the Stakić case (IT-97-24-T, Trial Chamber Judgment, paras. 229-336).

(ii) Keraterm camp

313. The Applicant also pointed to evidence of beatings and rapes at Keraterm camp. Several witness accounts are reported in the Report of the Commission of Experts (Vol. IV, Ann. VIII, pp. 225, 231, 233, 238) and corroborated by witness accounts reported by the Permanent Mission of Austria to the United Nations and Helsinki Watch. The attention of the Court has been drawn to several judgments of the ICTY which also document the severe physical abuses, rapes and sexual violence that occurred at this camp. The Trial Judgment of 1 September 2004 in the Brdanin case found that:

“At Keraterm camp, detainees were beaten on arrival . . . Beatings were carried out with wooden clubs, baseball bats, electric cables and police batons . . .
In some cases the beatings were so severe as to result in serious injury and death. Beatings and humiliation were often administered in front of other detainees. Female detainees were raped in Keraterm camp.” (IT-99-36-T, Trial Chamber Judgment, paras. 851-852.)

The Trial Chamber in its Judgment of 31 July 2003 in the Stakić case found that

“the detainees at the Keraterm camp were subjected to terrible abuse. The evidence demonstrates that many of the detainees at the Keraterm camp were beaten on a daily basis. Up until the middle of July, most of the beatings happened at night. After the detainees from Brdo arrived, around 20 July 1992, there were ‘no rules’, with beatings committed both day and night. Guards and others who entered the camp, including some in military uniforms carried out the beatings. There were no beatings in the rooms since the guards did not enter the rooms — people were generally called out day and night for beatings.” (IT-97-24-T, Trial Chamber Judgment, para. 237.)

The Chamber also found that there was convincing evidence of further beatings and rape perpetrated in Keraterm camp (ibid., paras. 238-241).

In the Trial Judgment in the Kvočka et al. case, the Chamber held that, in addition to the “dreadful” general conditions of life, detainees at Keraterm camp were “mercilessly beaten” and “women were raped” (IT-98-30/1-T, Trial Chamber Judgment, 2 November 2001, para. 114).

(iii) Trnopolje camp

314. The Court has furthermore been presented with evidence that beatings and rapes occurred at Trnopolje camp. The rape of 30-40 prisoners on 6 June 1992 is reported by both the Report of the Commission of Experts (Vol. IV, Ann. VIII, pp. 251-253) and a publication of the United States State Department. In the Tadić case the Trial Chamber of the ICTY concluded that at Trnopolje camp beatings occurred and that “[b]ecause this camp housed the largest number of women and girls, there were more rapes at this camp than at any other” (IT-94-1-T, Judgment, 7 May 1997, paras. 172-177 (para. 175)). These findings concerning beatings and rapes are corroborated by other Judgments of the ICTY, such as the Trial Judgment in the Stakić case where it found that,

“although the scale of the abuse at the Trnopolje camp was less than that in the Omarska camp, mistreatment was commonplace. The Serb soldiers used baseball bats, iron bars, rifle butts and their hands and feet or whatever they had at their disposal to beat the detainees. Individuals were who took out for questioning would often return bruised or injured” (IT-97-24-T, Trial Chamber Judgment, 31 July 2003, para. 242);

and that, having heard the witness statement of a victim, it was satisfied beyond reasonable doubt “that rapes did occur in the Trnopolje camp” (ibid., para. 244). Similar conclusions were drawn in the Judgment of the Trial Chamber in the Brdanin case (IT-99-36-T, 1 September 2004, paras. 513-514 and 854-857).

Banja Luka

Manjača camp

315. With regard to the Manjača camp in Banja Luka, the Applicant alleges that beatings, torture and rapes were occurring at this camp. The Applicant relies mainly on the witnesses cited in the Report of the Commission of Experts (Vol. IV, Ann. VIII, pp. 50-54). This evidence is corroborated by the testimony of a former prisoner at the Joint Hearing before the Select Committee on Intelligence in the United States Senate on 9 August 1995, and a witness account reported in the Memorial of the Applicant (United States State Department Dispatch, 2 November 1992, p. 806). The Trial Chamber, in its Decision on Motion for Judgment of Acquittal of 16 June 2004, in the Milošević case reproduced the statement of a witness who testified that,

“at the Manjača camp, they were beaten with clubs, cables, bats, or other similar items by the military police. The men were placed in small, bare stables, which were overcrowded and contained no toilet facilities. While at the camp, the detainees received inadequate food and water. Their heads were shaved, and they were severely beaten during interrogations.” (IT-02-54-T, Decision on Motion for Judgment of Acquittal, 16 June 2004, para. 178.)

316. The Applicant refers to the Report of the Commission of Experts, which contains reports that the Manjača camp held a limited number of women and that during their stay they were “raped repeatedly”. Muslim male prisoners were also forced to rape female prisoners (Report of the Commission of Experts, Vol. IV, Annex VIII, pp. 53-54). The Respondent points out that the Brdanin Trial Judgment found no evidence had been presented that detainees were subjected to “acts of sexual degradation” in Manjača.
317. The Applicant alleges that torture, rape and beatings occurred at Luka camp (Brčko). The Report of the Commission of Experts contains multiple witness accounts, including the evidence of a local guard forced into committing rape (Vol. IV, Ann. VIII, pp. 93-97). The account of the rapes is corroborated by multiple sources (United States Department Dispatch, 19 April 1993). The Court notes in particular the findings of the ICTY Trial Chamber in the Češić case, with regard to acts perpetrated in the Luka camp. In his plea agreement the accused admitted several grave incidents, such as beatings and compelling two Muslim brothers to perform sexual acts with each other (IT-95-10/1-S, Sentencing Judgment, 11 March 2004, paras. 8-17). These findings are corroborated by witness statements and the guilty plea in the Jelisic case.

318. The Respondent does not deny that the camps in Bosnia and Herzegovina were “in breach of humanitarian law and, in most cases, in breach of the law of war”, but argues that the conditions in all the camps were not of the kind described by the Applicant. It stated that all that had been demonstrated was “the existence of serious crimes, committed in a particularly complex situation, in a civil and fratricidal war”, but not the requisite specific intent (dolus specialis).

319. Having carefully examined the evidence presented before it, and taken note of that presented to the ICTY, the Court considers that it has been established by fully conclusive evidence that members of the protected group were systematically victims of massive mistreatment, beatings, rape and torture causing serious bodily and mental harm, during the conflict and, in particular, in the detention camps. The requirements of the material element, as defined by Article II (b) of the Convention are thus fulfilled. The Court finds, however, on the basis of the evidence before it, that it has not been conclusively established that those atrocities, although they too may amount to war crimes and crimes against humanity, were committed with the specific intent (dolus specialis) to destroy the protected group, in whole or in part, required for a finding that genocide has been perpetrated.

* * *

320. Article II (c) of the Genocide Convention concerns the deliberate infliction on the group of conditions of life calculated to bring about its physical destruction in whole or in part. Under this heading, the Applicant first points to an alleged policy by the Bosnian Serb forces to encircle civilians of the protected group in villages, towns or entire regions and to subsequently shell those areas and cut off all supplies in order to starve the population. Secondly, the Applicant claims that Bosnian Serb forces attempted to deport and expel the protected group from the areas which those forces occupied. Finally, the Applicant alleges that Bosnian Serb forces attempted to eradicate all traces of the culture of the protected group through the destruction of historical, religious and cultural property.

321. The Respondent argues that the events referred to by the Applicant took place in a context of war which affected the entire population, whatever its origin. In its view, “it is obvious that in any armed conflict the conditions of life of the civilian population deteriorate”. The Respondent considers that, taking into account the civil war in Bosnia and Herzegovina which generated inhuman conditions of life for the entire population in the territory of that State, “it is impossible to speak of the deliberate infliction on the Muslim group alone or the non-Serb group alone of conditions of life calculated to bring about its destruction”.

322. The Court will examine in turn the evidence concerning the three sets of claims made by the Applicant: encirclement, shelling and starvation; deportation and expulsion; destruction of historical, religious and cultural property. It will also go on to consider the evidence presented regarding the conditions of life in the detention camps already extensively referred to above (paragraphs 252-256, 262-273, 307-310 and 312-318).

Alleged encirclement, shelling and starvation

323. The principal incident referred to by the Applicant in this regard is the siege of Sarajevo by Bosnian Serb forces. Armed conflict broke out in Sarajevo at the beginning of April 1992 following the recognition by the European Community of Bosnia and Herzegovina as an independent State. The Commission of Experts estimated that, between the beginning of April 1992 and 28 February 1994, in addition to those killed or missing in the city (paragraph 247 above), 56,000 persons had been wounded (Report of the Commission of Experts, Vol. II, Ann. VI, p. 8). It was further estimated that, “over the course of the siege, the city [was] hit by an average of approximately 329 shell impacts per day, with a high of 3,777 shell impacts on 22 July 1993” (ibid.). In his report of 28 August 1992, the Special Rapporteur observed that:
“The city is shelled on a regular basis . . . Snipers shoot innocent civilians . . .

The civilian population lives in a constant state of anxiety, leaving their homes or shelters only when necessary . . . The public systems for distribution of electrical power and water no longer function. Food and other basic necessities are scarce, and depend on the airlift organized by UNHCR and protected by UNPROFOR.” (Report of 28 August 1992, paras. 17-18.)

324. The Court notes that, in resolutions adopted on 16 April and 6 May 1993, the Security Council declared Sarajevo, together with Tuzla, Žepa, Goražde, Bihać and Srebrenica, to be “safe areas” which should be free from any armed attack or any other hostile act and fully accessible to UNPROFOR and international humanitarian agencies (resolutions 819 of 16 April 1993 and 824 of 6 May 1993). However, these resolutions were not adhered to by the parties to the conflict. In his report of 26 August 1993, the Special Rapporteur noted that

“Since May 1993 supplies of electricity, water and gas to Sarajevo have all but stopped . . . a significant proportion of the damage caused to the supply lines has been deliberate, according to United Nations Protection Force engineers who have attempted to repair them. Repair crews have been shot at by both Bosnian Serb and government forces . . .” (Report of 26 August 1993, para. 6.)

He further found that UNHCR food and fuel convoys had been “obstructed or attacked by Bosnian Serb and Bosnian Croat forces and sometimes also by governmental forces” (Report of 26 August 1993, para. 15). The Commission of Experts also found that the “blockade of humanitarian aid ha[d] been used as an important tool in the siege” (Report of the Commission of Experts, Ann. VI, p. 17). According to the Special Rapporteur, the targeting of the civilian population by shelling and sniping continued and even intensified throughout 1994 and 1995 (Report of 4 November 1994, paras. 27-28; Report of 16 January 1995, para. 13; Report of 5 July 1995, paras. 67-70). The Special Rapporteur noted that

“[a]ll sides are guilty of the use of military force against civilian populations and relief operations in Sarajevo. However, one cannot lose sight of the fact that the main responsibility lies with the [Bosnian Serb] forces, since it is they who have adopted the tactic of laying siege to the city.” (Report of 17 November 1992, para. 42.)

325. The Court notes that in the Galić case, the Trial Chamber of the ICTY found that the Serb forces (the SRK) conducted a campaign of sniping and shelling against the civilian population of Sarajevo (Galić, IT-98-29-T, Judgment, 5 December 2003, para. 583). It was

“convinced by the evidence in the Trial Record that civilians in ARBiH-held areas of Sarajevo were directly or indiscriminately attacked from SRK-controlled territory . . . and that as a result and as a minimum, hundreds of civilians were killed and thousands others were injured” (ibid., para. 591).

These findings were subsequently confirmed by the Appeals Chamber (Galić, IT-98-29-A, Judgment, 30 November 2006, paras. 107-109). The ICTY also found that the shelling which hit the Markale market on 5 February 1994, resulting in 60 persons killed and over 140 injured, came from behind Bosnian Serb lines, and was deliberately aimed at civilians (ibid., paras. 333 and 335 and Galić, IT-98-29-T, Trial Chamber Judgment, 5 December 2003, para. 496).

326. The Respondent argues that the safe areas proclaimed by the Security Council had not been completely disarmed by the Bosnian army. For instance, according to testimony given in the Galić case by the Deputy Commander of the Bosnian army corps covering the Sarajevo area, the Bosnian army had deployed 45,000 troops within Sarajevo. The Respondent also pointed to further testimony in that case to the effect that certain troops in the Bosnian army were wearing civilian clothes and that the Bosnian army was using civilian buildings for its bases and positioning its tanks and artillery in public places. Moreover, the Respondent observes that, in his book, Fighting for Peace, General Rose was of the view that military equipment was installed in the vicinity of civilians, for instance, in the grounds of the hospital in Sarajevo and that “[t]he Bosnians had evidently chosen this location with the intention of attracting Serb fire, in the hope that the resulting carnage would further tilt international support in their favour” (Michael Rose, Fighting for Peace, 1998, p. 254).

327. The Applicant also points to evidence of sieges of other towns in Bosnia and Herzegovina. For instance, with regard to Goražde, the Special Rapporteur found that the enclave was being shelled and had been denied convoys of humanitarian aid for two months. Although food was being air-dropped, it was insufficient (Report of 5 May 1992, para. 42). In a later report, the Special Rapporteur noted that, as of spring 1994, the town had been subject to a military offensive by Bosnian Serb forces, during which civilian objects including the hospital had been targeted and the water supply had been cut off (Report of 10 June 1994, paras. 7-12). Humanitarian convoys were harassed including by the detention of UNPROFOR personnel and the theft of equipment (Report of

The Applicant claims that deportations and expulsions occurred systematically all over Bosnia and Herzegovina. With regard to Banja Luka, the Special Rapporteur noted that since late November 1993, there had been a “sharp rise in repossessions of apartments, whereby Muslim and Croat tenants were summarily evicted” and that “a form of housing agency had been established . . . which chooses accommodation for incoming Serb displaced persons, evicts Muslim or Croat residents and reputedly receives payment for its services in the form of possessions left behind by those who have been evicted” (Report of 21 February 1994, para. 8). In a report dated 21 April 1995 dedicated to the situation in Banja Luka, the Special Rapporteur observed that since the beginning of the war, there had been a 90 per cent reduction in the local Muslim population (Report of 21 April 1995, para. 4). He noted that a forced labour obligation imposed by the de facto authorities in Banja Luka, as well as “the virulence of the ongoing campaign of violence” had resulted in “practically all non-Serbs fervently wishing to leave the Banja Luka area” (Report of 21 April 1995, para. 24). Those leaving Banja Luka were required to pay fees and to relinquish in writing their claim to their homes, without reimbursement (Report of 21 April 1995, para. 26). The displacements were “often very well organized, involving the bussing of people to the Croatian border, and involve[d] large numbers of people” (Report of 4 November 1994, para. 23). According to the Special Rapporteur, “[o]n one day alone in mid-June 1994, some 460 Muslims and Croats were displaced” (ibid.).

These findings were not overruled by the judgment of the Appeals Chamber of 30 November 2006 (Galić, IT-98-29-A, Judgment: see e.g., paras. 107-109, 335 and 386-390). The Special Rapporteur of the United Nations Commission on Human Rights was of the view that “[t]he siege, including the shelling of population centres and the cutting off of supplies of food and other essential goods, is another tactic used to force Muslims and ethnic Croats to flee” (Report of 28 August 1992, para. 17). The Court thus finds that it has not been conclusively established that the acts were committed with the specific intent (dolus specialis) to destroy the protected group in whole or in part.
wig Boltzmann Institute of Human Rights, “‘Ethnic Cleansing Operations’ in the northeast Bosnian city of Zvornik from April through June 1992”, pp. 28-29). According to the study, forced deportations of Bosnian Muslims began in May/June 1992 by bus to Mali Zvornik and from there to the Bosnian town of Tuđa or to Subotica on the Serbian-Hungarian border (ibid., pp. 28 and 35-36). The Special Rapporteur’s report of 10 February 1993 supports this account, stating that deportees from Zvornik had been “ordered, some at gunpoint, to board buses and trucks and later trains”, provided with Yugoslav passports and subsequently taken to the Hungarian border to be admitted as refugees (Report of 10 February 1993, para. 99).

332. According to the Trial Chamber of the ICTY in its review of the indictment in the cases against Karadžić and Mladić, “[t]housands of civilians were unlawfully expelled or deported to other places inside and outside the Republic of Bosnia and Herzegovina” and “[t]he result of these expulsions was the partial or total elimination of Muslims and Bosnian Croats in some of [the] Bosnian Serb-held regions of Bosnia and Herzegovina”. The Chamber further stated that “[i]n the municipalities of Prijedor, Foča, Vlasenica, Brčko and Bosanski Samac, to name but a few, the once non-Serbian majority was systematically exterminated or expelled by force or intimidation” (Karadžić and Mladić, IT-95-5-R61 and IT-95-18-R61, Review of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996, para. 16).

333. The Respondent argues that displacements of populations may be necessary according to the obligations set down in Articles 17 and 49, paragraph 2, of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, for instance if the security of the population or imperative military reasons so demand. It adds that the displacement of populations has always been a way of settling certain conflicts between opposing parties and points to a number of examples of forced population displacements in history following an armed conflict. The Respondent also argues that the mere expulsion of a group cannot be characterized as genocide, but that, according to the ICTY Judgment in the Stakic case, “[a] clear distinction must be drawn between physical destruction and mere dissolution of a group” and “[t]he expulsion of a group or part of a group does not in itself suffice for genocide” (Stakic, IT-97-24-T, Trial Chamber Judgment, 31 July 2003, para. 519).

334. The Court considers that there is persuasive and conclusive evidence that deportations and expulsions of members of the protected group occurred in Bosnia and Herzegovina. With regard to the Respondent’s argument that in time of war such deportations or expulsions may be justified under the Geneva Convention, or may be a normal way of settling a conflict, the Court would observe that no such justification could be accepted in the face of proof of specific intent (dolus specialis). However, even assuming that deportations and expulsions may be categorized as falling within Article II, paragraph (c), of the Genocide Convention, the Court cannot find, on the basis of the evidence presented to it, that it is conclusively established that such deportations and expulsions were accompanied by the intent to destroy the protected group in whole or in part (see paragraph 190 above).

Destruction of historical, religious and cultural property

335. The Applicant claims that throughout the conflict in Bosnia and Herzegovina, Serb forces engaged in the deliberate destruction of historical, religious and cultural property of the protected group in “an attempt to wipe out the traces of their very existence”.

336. In the Tadić case, the ICTY found that “[n]on-Serb cultural and religious symbols throughout the region were targeted for destruction” in the Banja Luka area (Tadić, IT-94-1-T, Trial Chamber Judgment, 7 May 1997, para. 149). Further, in reviewing the indictments of Karadžič and Mladić, the Trial Chamber stated that:

“Throughout the territory of Bosnia and Herzegovina under their control, Bosnian Serb forces . . . destroyed, quasi-systematically, the Muslim and Catholic cultural heritage, in particular, sacred sites. According to estimates provided at the hearing by an expert witness, Dr. Kaiser, a total of 1,123 mosques, 504 Catholic churches and five synagogues were destroyed or damaged, for the most part, in the absence of military activity or after the cessation thereof.

This was the case in the destruction of the entire Islamic and Catholic heritage in the Banja Luka area, which had a Serbian majority and the nearest area of combat to which was several dozen kilometres away. All of the mosques and Catholic churches were destroyed. Some mosques were destroyed with explosives and the ruins were then levelled and the rubble thrown in the public dumps in order to eliminate any vestige of Muslim presence.

Aside from churches and mosques, other religious and cultural symbols like cemeteries and monasteries were targets of the attacks.” (Karadžič and Mladić, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996, para. 15.)

In the Brdanin case, the Trial Chamber was “satisfied beyond reasonable doubt that there was wilful damage done to both Muslim and Roman Catholic religious buildings and institutions in the relevant municipalities by Bosnian Serb forces” (Brdanin, IT-99-36-T, Judgment, 1 September 2004, paras. 640 and 658). On the basis of the findings regarding a number of incidents in various regions of Bosnia and Herzegovina, the
Trial Chamber concluded that a “campaign of devastation of institutions dedicated to religion took place throughout the conflict” but “intensified in the summer of 1992” and that this concentrated period of significant damage was “indicative that the devastation was targeted, controlled and deliberate” (Brečkinić, IT-99-36-T, paras. 642-657). For instance, the Trial Chamber found that the Bosanska Krupa town mosque was mined by Bosnian Serb forces in April 1992, that two mosques in Bosanski Petrovac were destroyed by Bosnian Serb forces in July 1992 and that the mosques in Staro Šipovo, Bešijevo and Pljeva were destroyed on 7 August 1992 (ibid., paras. 644, 647 and 656).

337. The Commission of Experts also found that religious monuments especially mosques and churches had been destroyed by Bosnian Serb forces (Report of the Commission of Experts, Vol. I, Ann. IV, pp. 5, 9, 21 ff.). In its report on the Prijedor region, the Commission found that at least five mosques and associated buildings in Prijedor town had been destroyed and noted that it was claimed that all 16 mosques in the Kozarac area had been destroyed and that not a single mosque, or other Muslim religious building, remained intact in the Prijedor region (Report of the Commission of Experts, Vol. I, Ann. V, p. 106). The report noted that those buildings were “allegedly not desecrated, damaged and destroyed for any military purpose nor as a side-effect of the military operations as such” but rather that the destruction “was due to later separate operations of dynamiting” (ibid.).

338. The Special Rapporteur found that, during the conflict, “many mosques, churches and other religious sites, including cemeteries and monasteries, have been destroyed or profaned” (Report of 17 November 1992, para. 26). He singled out the “systematic destruction and profanation of mosques and Catholic churches in areas currently or previously under [Bosnian Serb] control” (Report of 17 November 1992, para. 26).

339. Bosnia and Herzegovina called as an expert Mr. András Riedlmayer, who had carried out a field survey on the destruction of cultural heritage in 19 municipalities in Bosnia and Herzegovina for the Prosecutor of the ICTY in the Milošević case and had subsequently studied seven further municipalities in two other cases before the ICTY (“Destruction of Cultural Heritage in Bosnia and Herzegovina, 1992-1996: A Post-war Survey of Selected Municipalities”. Milošević, IT-02-54-T, Exhibit Number P486). In his report prepared for the Milošević case, Mr. Riedlmayer documented 392 sites, 60 per cent of which were inspected first hand while for the other 40 per cent his assessment was based on photographs and information obtained from other sources judged to be reliable and where there was corroborating documentation (Riedlmayer Report, p. 5).

340. The report compiled by Mr. Riedlmayer found that of the 277 mosques surveyed, none were undamaged and 136 were almost or entirely destroyed (Riedlmayer Report, pp. 9-10). The report found that:

“The damage to these monuments was clearly the result of attacks directed against them, rather than incidental to the fighting. Evidence of this includes signs of blast damage indicating explosives placed inside the mosques or inside the stairwells of minarets; many mosques [were] burnt out. In a number of towns, including Bijeljina, Janja (Bijeljina municipality), Foča, Banja Luka, Sanski Most, Zvornik and others, the destruction of mosques took place while the area was under the control of Serb forces, at times when there was no military action in the immediate vicinity.” (Ibid., p. 11.)

The report also found that, following the destruction of mosques:

“the ruins [of the mosques] were razed and the sites levelled with heavy equipment, and all building materials were removed from the site . . . Particularly well-documented instances of this practice include the destruction and razing of 5 mosques in the town of Bijeljina; of 2 mosques in the town of Janja (in Bijeljina municipality); of 12 mosques and 4 turbes in Banja Luka; and of 3 mosques in the city of Brčko.” (Ibid., p. 12.)

Finally, the Report noted that the sites of razed mosques had been “turned into rubbish tips, bus stations, parking lots, automobile repair shops, or flea markets” (ibid., p. 14), for example, a block of flats and shops had been erected on the site of the Zamlaz Mosque in Zvornik and a new Serbian Orthodox church was built on the site of the destroyed Divic Mosque (ibid., p. 14).

341. Mr. Riedlmayer’s report together with his testimony before the Court and other corroborative sources detail the destruction of the cultural and religious heritage of the protected group in numerous locations in Bosnia and Herzegovina. For instance, according to the evidence before the Court, 12 of the 14 mosques in Mostar were destroyed or damaged and there are indications from the targeting of the minaret that the destruction or damage was deliberate (Council of Europe, Information Report: The Destruction by War of the Cultural Heritage in Croatia and Bosnia-Herzegovina, Parliamentary Assembly doc. 6756, 2 February 1993, paras. 129 and 155). In Foča, the town’s 14 historic mosques were allegedly destroyed by Serb forces. In Banja Luka, all 16 mosques were destroyed by Serb forces including the city’s two largest mosques,

342. The Court notes that archives and libraries were also subjected to attacks during the war in Bosnia and Herzegovina. On 17 May 1992, the Institute for Oriental Studies in Sarajevo was bombarded with incendiary munitions and burnt, resulting in the loss of 200,000 documents including a collection of over 5,000 Islamic manuscripts (Riedlmayer Report, p. 18; Council of Europe, Parliamentary Assembly, Second Information Report on War Damage to the Cultural Heritage in Croatia and Bosnia-Herzegovina, doc. 6869, 17 June 1993, p. 11, Ann. 38). On 25 August 1992, Bosnia’s National Library was bombarded and an estimated 1.5 million volumes were destroyed (Riedlmayer Report, p. 19). The Court observes that, although the Respondent considers that there is no certainty as to who shelled these institutions, there is evidence that both the Institute for Oriental Studies in Sarajevo and the National Library were bombarded from Serb positions.

343. The Court notes that, in cross-examination of Mr. Riedlmayer, counsel for the Respondent pointed out that the municipalities included in Mr. Riedlmayer’s report only amounted to 25 per cent of the territory of Bosnia and Herzegovina. Counsel for the Respondent also called into question the methodology used by Mr. Riedlmayer in compiling his report. However, having closely examined Mr. Riedlmayer’s report and having listened to his testimony, the Court considers that Mr. Riedlmayer’s findings do constitute persuasive evidence as to the destruction of historical, cultural and religious heritage in Bosnia and Herzegovina albeit in a limited geographical area.

344. In light of the foregoing, the Court considers that there is conclusive evidence of the deliberate destruction of the historical, cultural and religious heritage of the protected group during the period in question. The Court takes note of the submission of the Applicant that the destruction of such heritage was “an essential part of the policy of ethnic purification” and was “an attempt to wipe out the traces of [the] very existence” of the Bosnian Muslims. However, in the Court’s view, the destruction of historical, cultural and religious heritage cannot be considered to constitute the deliberate infliction of conditions of life calculated to bring about the physical destruction of the group. Although such destruction may be highly significant inasmuch as it is directed to the elimination of all traces of the cultural or religious presence of a group, and contrary to other legal norms, it does not fall within the categories of acts of genocide set out in Article II of the Convention. In this regard, the Court observes that, during its consideration of the draft text of the Convention, the Sixth Committee of the General Assembly decided not to include cultural genocide in the list of punishable acts. Moreover, the ILC subsequently confirmed this approach, stating that:

“As clearly shown by the preparatory work for the Convention . . ., the destruction in question is the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group.” (Report of the International Law Commission on the work of its Forty-eighth Session, Yearbook of the International Law Commission 1996, Vol. II, Part Two, pp. 45-46, para. 12.)

Furthermore, the ICTY took a similar view in the Krstić case, finding that even in customary law, “despite recent developments”, the definition of acts of genocide is limited to those seeking the physical or biological destruction of a group (Krstić, IT-98-33-T, Trial Chamber Judgment, 2 August 2001, para. 580). The Court concludes that the destruction of historical, religious and cultural heritage cannot be considered to be a genocidal act within the meaning of Article II of the Genocide Convention. At the same time, it also endorses the observation made in the Krstić case that “where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group” (ibid.)..

Camps

345. The Court notes that the Applicant has presented substantial evidence as to the conditions of life in the detention camps and much of this evidence has already been discussed in the sections regarding Articles II (a) and (b). The Court will briefly examine the evidence presented by the Applicant which relates specifically to the conditions of life in the principal camps.

(a) Drina River Valley

(i) Sušica camp

346. In the Sentencing Judgment in the case of Dragan Nikolić, the Commander of Sušica camp, the ICTY found that he subjected detainees to inhumane living conditions by depriving them of adequate food, water, medical care, sleeping and toilet facilities (Nikolić, IT-94-2-S, Sentencing Judgment, 18 December 2003, para. 69).
347. In the Krnojelac case, the ICTY Trial Chamber made the following findings regarding the conditions at the camp:

"the non-Serb detainees were forced to endure brutal and inadequate living conditions while being detained at the KP Dom, as a result of which numerous individuals have suffered lasting physical and psychological problems. Non-Serbs were locked in their rooms or in solitary confinement at all times except for meals and work duty, and kept in overcrowded rooms even though the prison had not reached its capacity. Because of the overcrowding, not everyone had a bed or even a mattress, and there were insufficient blankets. Hygienic conditions were poor. Access to baths or showers, with no hot water, was irregular at best. There were insufficient hygienic products and toiletries. The rooms in which the non-Serbs were held did not have sufficient heating during the harsh winter of 1992. Heaters were deliberately not placed in the rooms, windowpanes were left broken and clothes made from blankets to combat the cold were confiscated. Non-Serb detainees were fed starvation rations leading to severe weight loss and other health problems. They were not allowed to receive visits after April 1992 and therefore could not supplement their meagre food rations and hygienic supplies". (Krnojelac, IT-97-25-T, Judgment, 15 March 2002, para. 440.)

349. The Stakić Trial Judgment contained the following description of conditions in the Keraterm camp based on multiple witness accounts:

"The detainees slept on wooden pallets used for the transport of goods or on bare concrete in a big storage room. The conditions were cramped and people often had to sleep on top of each other. In June 1992, Room 1, which according to witness statements was slightly larger than Courtroom 2 of this Tribunal (98.6 m²), held 320 people and the number continued to grow. The detainees were given one meal a day, made up of two small slices of bread and some sort of stew. The rations were insufficient for the detainees. Although families tried to deliver food and clothing every day they rarely succeeded. The detainees could see their families walking to the camp and leaving empty-handed, so in all likelihood someone at the gates of the camp took the food and prevented it from being distributed to the detainees." (Stakić, IT-97-24-T, Trial Chamber Judgment, 31 July 2003, para. 163.)
According to ICTY Trial Chamber in the *Plavšić* Sentencing Judgment:

"the sanitary conditions in Manjača were ‘disastrous . . . inhuman and really brutal’: the concept of sanitation did not exist. The temperature inside was low, the inmates slept on the concrete floor and they relieved themselves in the compound or in a bucket placed by the door at night. There was not enough water, and any water that became available was contaminated. In the first three months of Adil Draganović’s detention, Manjača was a ‘camp of hunger’ and when there was food available, it was of a very poor quality. The inmates were given two small meals per day, which usually consisted of half a cup of warm tea, which was more like warm water, and a small piece of thin, ‘transparent’ bread. Between two and a half thousand men there were only 90 loaves of bread, with each loaf divided into 20 or 40 pieces. Most inmates lost between 20 and 30 kilograms of body weight while they were detained at Manjača. The witness believes that had the ICRC and UNHCR not arrived, the inmates would have died of starvation." (*Plavšić*, IT-00-39-S and 40/1-S, Sentencing Judgment, 27 February 2003, para. 48.)

In its Judgment in the *Simić* case, the Trial Chamber made the following findings:

"the detainees who were imprisoned in the detention centres in Bosanski Šamac were confined under inhumane conditions. The prisoners were subjected to humiliation and degradation. The forced singing of ‘Chetnik’ songs and the verbal abuse of being called ‘ustasha’ or ‘balija’ were forms of such abuse and humiliation of the detainees. They did not have sufficient space, food or water. They suffered from unhygienic conditions, and they did not have appropriate access to medical care. These appalling detention conditions, the cruel and inhumane treatment through beatings and the acts of torture caused severe physical suffering, thus attacking the very fundamentals of human dignity . . . This was done because of the non-Serb ethnicity of the detainees." (*Simić*, IT-95-9-T, Judgment, 17 October 2003, para. 773.)

The Respondent does not deny that the camps in Bosnia and Herzegovina were in breach of humanitarian law and, in most cases, in breach of the law of war. However, it notes that, although a number of detention camps run by the Serbs in Bosnia and Herzegovina were the subject of investigation and trials at the ICTY, no conviction for genocide was handed down on account of any criminal acts committed in those camps. With specific reference to the Manjača camp, the Respondent points out that the Special Envoy of the United Nations Secretary-General visited the camp in 1992 and found that it was being run correctly and that a Muslim humanitarian organization also visited the camp and found that “material conditions were poor, especially concerning hygiene [but] there were no signs of maltreatment or execution of prisoners”.

On the basis of the elements presented to it, the Court considers that there is convincing and persuasive evidence that terrible conditions were inflicted upon detainees of the camps. However, the evidence presented has not enabled the Court to find that those acts were accompanied by specific intent (*dolus specialis*) to destroy the protected group, in whole or in part. In this regard, the Court observes that, in none of the ICTY cases concerning camps cited above, has the Tribunal found that the accused acted with such specific intent (*dolus specialis*).

The Applicant invoked several arguments to show that measures were imposed to prevent births, contrary to the provision of Article II, paragraph (d), of the Genocide Convention. First, the Applicant claimed that

"forced separation of male and female Muslims in Bosnia and Herzegovina, as systematically practised when various municipalities were occupied by the Serb forces . . . in all probability entailed a decline in the birth rate of the group, given the lack of physical contact over many months").

The Court notes that no evidence was provided in support of this statement.

Secondly, the Applicant submitted that rape and sexual violence against women led to physical trauma which interfered with victims’ reproductive functions and in some cases resulted in infertility. However, the only evidence adduced by the Applicant was the indictment in the *Gagović* case before the ICTY in which the Prosecutor stated that one witness could no longer give birth to children as a result of the sexual abuse she suffered (*Gagović et al.*, IT-96-23-I, Initial Indictment, 26 June 1996, para. 7.10). In the Court’s view, an indictment by the Prosecutor
does not constitute persuasive evidence (see paragraph 217 above). Moreover, it notes that the Gagovic case did not proceed to trial due to the death of the accused.

357. Thirdly, the Applicant referred to sexual violence against men which prevented them from procreating subsequently. In support of this assertion, the Applicant noted that, in the Tadić case, the Trial Chamber found that, in Omarska camp, the prison guards forced one Bosnian Muslim man to bite off the testicles of another Bosnian Muslim man (Tadić, IT-94-1-T, Judgment, 7 May 1997, para. 198). The Applicant also cited a report in the newspaper, Le Monde, on a study by the World Health Organization and the European Union on sexual assaults on men during the conflict in Bosnia and Herzegovina, which alleged that sexual violence against men was practically always accompanied by threats to the effect that the victim would no longer produce Muslim children. The article in Le Monde also referred to a statement by the President of a non-governmental organization called the Medical Centre for Human Rights to the effect that approximately 5,000 non-Serb men were the victims of sexual violence. However, the Court notes that the article in Le Monde is only a secondary source. Moreover, the results of the World Health Organization and European Union study were only preliminary, and there is no indication as to how the Medical Centre for Human Rights arrived at the figure of 5,000 male victims of sexual violence.

358. Fourthly, the Applicant argued that rape and sexual violence against men and women led to psychological trauma which prevented victims from forming relationships and founding a family. In this regard, the Applicant noted that in the Akayesu case, the ICTR considered that “rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate” (Akayesu, ICTR-96-4-T, Trial Chamber Judgment, 2 September 1998, para. 508). However, the Court notes that the Applicant presented no evidence that this was the case for women in Bosnia and Herzegovina.

359. Fifthly, the Applicant considered that Bosnian Muslim women who suffered sexual violence might be rejected by their husbands or not be able to find a husband. Again, the Court notes that no evidence was presented in support of this statement.

360. The Respondent considers that the Applicant “alleges no fact, puts forward no serious argument, and submits no evidence” for its allegations that rapes were committed in order to prevent births within a group and notes that the Applicant’s contention that there was a decline in births within the protected group is not supported by any evidence concerning the birth rate in Bosnia and Herzegovina either before or after the war.

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(9) Article II (e): Forcibly Transferring Children of the Protected Group to Another Group

361. Having carefully examined the arguments of the Parties, the Court finds that the evidence placed before it by the Applicant does not enable it to conclude that Bosnian Serb forces committed acts which could be qualified as imposing measures to prevent births in the protected group within the meaning of Article II (d) of the Convention.

362. The Applicant claims that rape was used “as a way of affecting the demographic balance by impregnating Muslim women with the sperm of Serb males” or, in other words, as “procreative rape”. The Applicant argues that children born as a result of these “forced pregnancies” would not be considered to be part of the protected group and considers that the intent of the perpetrators was to transfer the unborn children to the group of Bosnian Serbs.

363. As evidence for this claim, the Applicant referred to a number of sources including the following. In the indictment in the Gagović et al. case, the Prosecutor alleged that one of the witnesses was raped by two Bosnian Serb soldiers and that “[b]oth perpetrators told her that she would now give birth to Serb babies” (Gagović et al., IT-96-23-I, Initial Indictment, 26 June 1996, para. 9.3). However, as in paragraph 356 above, the Court notes that an indictment cannot constitute persuasive evidence for the purposes of the case now before it and that the Gagović case did not proceed to trial. The Applicant further referred to the Report of the Commission of Experts which stated that one woman had been detained and raped daily by three or four soldiers and that “[s]he was told that she would give birth to a chetnik boy” (Report of the Commission of Experts, Vol. I, p. 59, para. 248).

364. The Applicant also cited the Review of the Indictment in the Karadžić and Mladić cases in which the Trial Chamber stated that “[s]ome camps were specially devoted to rape, with the aim of forcing the birth of Serbian offspring, the women often being interned until it was too late to undergo an abortion” and that “[i]t would seem that the aim of many rapes was enforced impregnation” (Karadžić and Mladić, IT-95-5-R61 and IT-95-18-R61, Review of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996, para. 64). However, the Court notes that this finding of the Trial Chamber was based only on the testimony of one amicus curiae and on the above-mentioned incident reported by the Commission of Experts (ibid., para. 64, footnote 154).
Finally, the Applicant noted that in the Kunarac case, the ICTY Trial Chamber found that, after raping one of the witnesses, the accused had told her that “she would now carry a Serb baby and would not know who the father would be” (Kunarac et al. cases, Nos. IT-96-23-T and IT-96-23/1-T, Judgment, 22 February 2001, para. 583).

366. The Respondent points out that Muslim women who had been raped gave birth to their babies in Muslim territory and consequently the babies would have been brought up not by Serbs but, on the contrary, by Muslims. Therefore, in its view, it cannot be claimed that the children were transferred from one group to the other.

367. The Court, on the basis of the foregoing elements, finds that the evidence placed before it by the Applicant does not establish that there was any form of policy of forced pregnancy, nor that there was any aim to transfer children of the protected group to another group within the meaning of Article II (e) of the Convention.

368. In the submissions in its Reply, the Applicant has claimed that the Respondent has violated its obligations under the Genocide Convention “by destroying in part, and attempting to destroy in whole, national, ethnic or religious groups within the, but not limited to the, territory of Bosnia and Herzegovina, including in particular the Muslim population . . .” (emphasis added). The Applicant devoted a section in its Reply to the contention that acts of genocide, for which the Respondent was allegedly responsible, also took place on the territory of the FRY; these acts were similar to those perpetrated on Bosnian territory, and the constituent elements of “ethnic cleansing as a policy” were also found in the territory of the FRY. This question of genocide committed within the FRY was not actively pursued by the Applicant in the course of the oral argument before the Court; however, the submission quoted above was maintained in the final submissions presented at the hearings, and the Court must therefore address it. It was claimed by the Applicant that the genocidal policy was aimed not only at citizens of Bosnia and Herzegovina, but also at Albanians, Sandžak Muslims, Croats, Hungarians and other minorities; however, the Applicant has not established to the satisfaction of the Court any facts in support of that allegation. The Court has already found (paragraph 196 above) that, for purposes of establishing genocide, the targeted group must be defined positively, and not as a “non-Serb” group.

369. The Applicant has not in its arguments dealt separately with the question of the nature of the specific intent (dolus specialis) alleged to accompany the acts in the FRY complained of. It does not appear to be contending that actions attributable to the Respondent, and committed on the territory of the FRY, were accompanied by a specific intent (dolus specialis), peculiar to or limited to that territory, in the sense that the objective was to eliminate the presence of non-Serbs in the FRY itself. The Court finds in any event that the evidence offered does not in any way support such a contention. What the Applicant has sought to do is to convince the Court of a pattern of acts said to evidence specific intent (dolus specialis) inspiring the actions of Serb forces in Bosnia and Herzegovina, involving the destruction of the Bosnian Muslims in that territory; and that same pattern lay, it is contended, behind the treatment of Bosnian Muslims in the camps established in the FRY, so that that treatment supports the pattern thesis. The Applicant has emphasized that the same treatment was meted out to those Bosnian Muslims as was inflicted on their compatriots in Bosnia and Herzegovina. The Court will thus now turn to the question whether the specific intent (dolus specialis) can be deduced, as contended by the Applicant, from the pattern of actions against the Bosnian Muslims taken as a whole.

370. In the light of its review of the factual evidence before it of the atrocities committed in Bosnia and Herzegovina in 1991-1995, the Court has concluded that, save for the events of July 1995 at Srebrenica, the necessary intent required to constitute genocide has not been conclusively shown in relation to each specific incident. The Applicant however relies on the alleged existence of an overall plan to commit genocide, indicated by the pattern of genocidal or potentially acts of genocide committed throughout the territory, against persons identified everywhere and in each case on the basis of their belonging to a specified group. In the case, for example, of the conduct of Serbs in the various camps (described in paragraphs 252-256, 262-273, 307-310 and 312-318 above), it suggests that “[t]he genocidal intent of the Serbs becomes particularly clear in the description of camp practices, due to their striking similarity all over the territory of Bosnia and Herzegovina”. Drawing attention to the similarities between actions attributed to the Serbs in Croatia, and the later events at, for example, Kosovo, the Applicant observed that “it is not surprising that the picture of the takeovers and the following human and cultural destruction looks indeed similar from 1991
through 1999. These acts were perpetrated as the expression of one single project, which basically and effectively included the destruction in whole or in part of the non-Serb group, wherever this ethnically and religiously defined group could be conceived as obstructing the all-Serbs-in-one-State group concept.”

371. The Court notes that this argument of the Applicant moves from the intent of the individual perpetrators of the alleged acts of genocide complained of to the intent of higher authority, whether within the VRS or the Republika Srpska, or at the level of the Government of the Respondent itself. In the absence of an official statement of aims reflecting such an intent, the Applicant contends that the specific intent (*dolus specialis*) of those directing the course of events is clear from the consistency of practices, particularly in the camps, showing that the pattern was of acts committed “within an organized institutional framework”. However, something approaching an official statement of an overall plan is, the Applicant contends, to be found in the Decision on Strategic Goals issued on 12 May 1992 by Momčilo Krajišnik as the President of the National Assembly of Republika Srpska, published in the *Official Gazette* of the Republika Srpska, and the Court will first consider what significance that Decision may have in this context. The English translation of the Strategic Goals presented by the Parties during the hearings, taken from the Report of Expert Witness Donia in the *Milošević* case before the ICTY, Exhibit No. 537, reads as follows:

“**DECISION ON THE STRATEGIC GOALS OF THE SERBIAN PEOPLE IN BOSNIA AND HERZEGOVINA**

The Strategic Goals, i.e., the priorities, of the Serbian people in Bosnia and Herzegovina are:

1. Separation as a state from the other two ethnic communities.
3. The establishment of a corridor in the Drina River valley, i.e., the elimination of the border between Serbian states.
4. The establishment of a border on the Una and Neretva rivers.
5. The division of the city of Sarajevo into a Serbian part and a Muslim part, and the establishment of effective state authorities within each part.
6. An outlet to the sea for the Republika Srpska.”

While the Court notes that this document did not emanate from the Government of theRespondent, evidence before the Court of intercepted exchanges between President Milošević of Serbia and President Karadžić of the Republika Srpska is sufficient to show that the objectives defined represented their joint view.

372. The Parties have drawn the Court’s attention to statements in the Assembly by President Karadžić which appear to give conflicting interpretations of the first and major goal of these objectives, the first on the day they were adopted, the second two years later. On that first occasion, the Applicant contended, he said: “It would be much better to solve this situation by political means. It would be best if a truce could be established right away and the borders set up, even if we lose something.” Two years later he said (according to the translation of his speech supplied by the Applicant):

“We certainly know that we must give up something — that is beyond doubt in so far as we want to achieve our first strategic goal: to drive our enemies by the force of war from their homes, that is the Croats and Muslims, so that we will no longer be together [with them] in a State.”

The Respondent disputes the accuracy of the translation, claiming that the stated goal was not “to drive our enemies by the force of war from their homes” but “to free the homes from the enemy”. The 1992 objectives do not include the elimination of the Bosnian Muslim population. The 1994 statement even on the basis of the Applicant’s translation, however shocking a statement, does not necessarily involve the intent to destroy in whole or in part the Muslim population in the enclaves. The Applicant’s argument does not come to terms with the fact that an essential motive of much of the Bosnian Serb leadership — to create a larger Serb State, by a war of conquest if necessary — did not necessarily require the destruction of the Bosnian Muslims and other communities, but their expulsion. The 1992 objectives, particularly the first one, were capable of being achieved by the displacement of the population and by territory being acquired, actions which the Respondent accepted (in the latter case at least) as being unlawful since they would be at variance with the inviolability of borders and the territorial integrity of a State which had just been recognized internationally. It is significant that in cases in which the Prosecutor has put the Strategic Goals in issue, the ICTY has characterized them as genocidal (see *Brđanin*, IT-99-36-T, Trial Chamber Judgment, 1 September 2004, para. 303, and *Stakić*, IT-97-24-T, Trial Chamber Judgment, 31 July 2003, paras. 546-561 (in particular para. 548)). The Court does not see the 1992 Strategic Goals as establishing the specific intent.

373. Turning now to the Applicant’s contention that the very pattern of the atrocities committed over many communities, over a lengthy period, focused on Bosnian Muslims and also Croats, demonstrates the necessary intent, the Court cannot agree with such a broad proposition. The *dolus specialis*, the specific intent to destroy the group in whole or in part, has to be convincingly shown by reference to particular circumstances, unless a general plan to that end can be convincingly demon-
strated to exist; and for a pattern of conduct to be accepted as evidence of its existence, it would have to be such that it could only point to the existence of such intent.

374. Furthermore, and again significantly, the proposition is not consistent with the findings of the ICTY relating to genocide or with the actions of the Prosecutor, including decisions not to charge genocide offences in possibly relevant indictments, and to enter into plea agreements, as in the Plavšić and Šturić et al. cases (IT-00-40 and IT-95-8), by which the genocide-related charges were withdrawn. Those actions of the Prosecution and the Tribunal can be conveniently enumerated here. Prosecutions for genocide and related crimes before the ICTY can be grouped in the following way:

(a) convictions in respect of charges involving genocide relating to Srebrenica in July 1995: Krstić (IT-98-33) (conviction of genocide at trial was reduced to aiding and abetting genocide on appeal) and Blagojević (IT-02-60) (conviction of complicity in genocide “through aiding and abetting” at trial is currently on appeal);

(b) plea agreements in which such charges were withdrawn, with the accused pleading guilty to crimes against humanity: Obrenović (IT-02-60/2) and Momir Nikolić (IT-02-60/1);

(c) acquittals on genocide-related charges in respect of events occurring elsewhere: Krajišnik (paragraph 219 above) (on appeal), Jelisić (IT-95-10) (completed), Stakić (IT-97-24) (completed), Brkanin (IT-99-36) (on appeal) and Šturić (IT-95-8) (completed);

(d) cases in which genocide-related charges in respect of events occurring elsewhere were withdrawn: Plavšić (IT-00-39 and 40/1) (plea agreement), Župljanin (IT-99-36) (genocide-related charges withdrawn) and Mejakić (IT-95-4) (genocide-related charges withdrawn);

(e) case in which the indictment charged genocide and related crimes in Srebrenica and elsewhere in which the accused died during the proceedings: Milošević (IT-02-54);

(f) cases in which indictments charge genocide or related crimes in respect of events occurring elsewhere, in which accused have died before or during proceedings: Kovačević and Držača (IT-97-24) and Talić (IT-99-36/1);

(g) pending cases in which the indictments charge genocide and related crimes in Srebrenica and elsewhere: Karadžić and Mladić (IT-95-S/18); and

(h) pending cases in which the indictments charge genocide and related crimes in Srebrenica: Popović, Beara, Draško Nikolić, Borovčanin, Pandurević and Trbić (IT-05-88/1) and Tolimir (IT-05-88/2).

375. In the cases of a number of accused, relating to events in July 1995 in Srebrenica, charges of genocide or its related acts have not been brought: Erdemović (IT-96-22) (completed), Jokić (IT-02-60) (on appeal), Milić and Gvero (IT-05-88, part of the Popović et al. proceeding referred to in paragraph 374 (h) above), Perišić (IT-04-81) (pending) and Stanišić and Stanatović (IT-03-69) (pending).

376. The Court has already concluded above that — save in the case of Srebrenica — the Applicant has not established that any of the widespread and serious atrocities, complained of as constituting violations of Article II, paragraphs (a) to (e), of the Genocide Convention, were accompanied by the necessary specific intent (dolus specialis) on the part of the perpetrators. It also finds that the Applicant has not established the existence of that intent on the part of the Respondent, either on the basis of a concerted plan, or on the basis that the events reviewed above reveal a consistent pattern of conduct which could only point to the existence of such intent. Having however concluded (paragraph 297 above), in the specific case of the massacres at Srebrenica in July 1995, that acts of genocide were committed in operations led by members of the VRS, the Court now turns to the question whether those acts are attributable to the Respondent.

* * *

VII. THE QUESTION OF RESPONSIBILITY FOR EVENTS AT SREBRENICA UNDER ARTICLE III, PARAGRAPH (a), OF THE GENOCIDE CONVENTION

(1) The Alleged Admission

377. The Court first notes that the Applicant contends that the Respondent has in fact recognized that genocide was committed at Srebrenica, and has accepted legal responsibility for it. The Applicant called attention to the following official declaration made by the Council of Ministers of the Respondent on 15 June 2005, following the showing on a Belgrade television channel on 2 June 2005 of a video-recording of the murder by a paramilitary unit of six Bosnian Muslim prisoners near Srebrenica (paragraph 289 above). The statement reads as follows:

“Those who committed the killings in Srebrenica, as well as those who ordered and organized that massacre represented neither Serbia
nor Montenegro, but an undemocratic regime of terror and death, against whom the majority of citizens of Serbia and Montenegro put up the strongest resistance.

Our condemnation of crimes in Srebrenica does not end with the direct perpetrators. We demand the criminal responsibility of all who committed war crimes, organized them or ordered them, and not only in Srebrenica.

Criminals must not be heroes. Any protection of the war criminals, for whatever reason, is also a crime.”

The Applicant requests the Court to declare that this declaration “be regarded as a form of admission and as having decisive probative force regarding the attributable to the Yugoslav State of the Srebrenica massacre”.

378. It is for the Court to determine whether the Respondent is responsible for any acts of genocide which may be established. For purposes of a finding of this kind the Court may take into account any statements made by either party that appear to bear upon the matters in issue, and have been brought to its attention (cf. Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974, pp. 263 ff., paras. 32 ff., and Nuclear Tests (New Zealand v. France), Judgment, I.C.J. Reports 1974, pp. 465 ff., paras. 27 ff.; Frontier Dispute (Burkina Faso v. Republic of Mali), Judgment, I.C.J. Reports 1986, pp. 573-574, paras. 38-39), and may accord to them such legal effect as may be appropriate. However, in the present case, it appears to the Court that the declaration of 15 June 2005 was of a political nature; it was clearly not intended as an admission, which would have had a legal effect in complete contradiction to the submissions made by the Respondent before this Court, both at the time of the declaration and subsequently. The Court therefore does not find the statement of 15 June 2005 of assistance to it in determining the issues before it in the case.

* * *

(2) The Test of Responsibility

379. In view of the foregoing conclusions, the Court now must ascertain whether the international responsibility of the Respondent can have been incurred, on whatever basis, in connection with the massacres committed in the Srebrenica area during the period in question. For the reasons set out above, those massacres constituted the crime of genocide within the meaning of the Convention. For this purpose, the Court may be required to consider the following three issues in turn. First, it needs to be determined whether the acts of genocide could be attributed to the Respondent under the rules of customary international law of State responsibility; this means ascertaining whether the acts were committed by persons or organs whose conduct is attributable, specifically in the case of the events at Srebrenica, to the Respondent. Second, the Court will need to ascertain whether acts of the kind referred to in Article III of the Convention, other than genocide itself, were committed by persons or organs whose conduct is attributable to the Respondent under those same rules of State responsibility: that is to say, the acts referred to in Article III, paragraphs (b) to (e), one of these being complicity in genocide. Finally, it will be for the Court to rule on the issue as to whether the Respondent complied with its twofold obligation deriving from Article I of the Convention to prevent and punish genocide.

380. These three issues must be addressed in the order set out above, because they are so interrelated that the answer on one point may affect the relevance or significance of the others. Thus, if and to the extent that consideration of the first issue were to lead to the conclusion that some acts of genocide are attributable to the Respondent, it would be unnecessary to determine whether it may also have incurred responsibility under Article III, paragraphs (b) to (e), of the Convention for the same acts. Even though it is theoretically possible for the same acts to result in the attribution to a State of acts of genocide (contemplated by Art. III, para. (a)), conspiracy to commit genocide (Art. III, para. (b)), and direct and public incitement to commit genocide (Art. III, para. (c)), there would be little point, where the requirements for attribution are fulfilled under (a), in making a judicial finding that they are also satisfied under (b) and (c), since responsibility under (a) absorbs that under the other two. The idea of holding the same State responsible by attributing to it acts of “genocide” (Art. III, para. (a)), “attempt to commit genocide” (Art. III, para. (d)), and “complicity in genocide” (Art. III, para. (e)), in relation to the same actions, must be rejected as untenable both logically and legally.

381. On the other hand, there is no doubt that a finding by the Court that no acts that constitute genocide, within the meaning of Article II and Article III, paragraph (a), of the Convention, can be attributed to the Respondent will not free the Court from the obligation to determine whether the Respondent’s responsibility may nevertheless have been incurred through the attribution to it of the acts, or some of the acts, referred to in Article III, paragraphs (b) to (e). In particular, it is clear that acts of complicity in genocide can be attributed to a State to which no act of genocide could be attributed under the rules of State responsibility, the content of which will be considered below.

382. Furthermore, the question whether the Respondent has complied with its obligations to prevent and punish genocide arises in different terms, depending on the replies to the two preceding questions. It is only if the Court answers the first two questions in the negative that it will have to consider whether the Respondent fulfilled its obligation of pre-
vention, in relation to the whole accumulation of facts constituting genocide. If a State is held responsible for an act of genocide (because it was committed by a person or organ whose conduct is attributable to the State), or for one of the other acts referred to in Article III of the Convention (for the same reason), then there is no point in asking whether it complied with its obligation of prevention in respect of the same acts, because logic dictates that a State cannot have satisfied an obligation to prevent genocide in which it actively participated. On the other hand, it is self-evident, as the Parties recognize, that if a State is not responsible for any of the acts referred to in Article III, paragraphs (a) to (e), of the Convention, this does not mean that its responsibility cannot be sought for a violation of the obligation to prevent genocide and the other acts referred to in Article III.

383. Finally, it should be made clear that, while, as noted above, a State's responsibility deriving from any of those acts renders moot the question whether it satisfied its obligation of prevention in respect of the same conduct, it does not necessarily render superfluous the question whether the State complied with its obligation to punish the perpetrators of the acts in question. It is perfectly possible for a State to incur responsibility at once for an act of genocide (or complicity in genocide, incitement to commit genocide, or any of the other acts enumerated in Article III) committed by a person or organ whose conduct is attributable to it, and for the breach by the State of its obligation to punish the perpetrator of the act: these are two distinct internationally wrongful acts attributable to the State, and both can be asserted against it as bases for its international responsibility.

384. Having thus explained the interrelationship among the three issues set out above (paragraph 379), the Court will now proceed to consider the first of them. This is the question whether the massacres committed at Srebrenica during the period in question, which constitute the crime of genocide within the meaning of Articles II and III, paragraph (a), of the Convention, are attributable, in whole or in part, to the Respondent. This question has in fact two aspects, which the Court must consider separately. First, it should be ascertained whether the acts committed at Srebrenica were perpetrated by organs of the Respondent, i.e., by persons or entities whose conduct is necessarily attributable to it, because they are in fact the instruments of its action. Next, if the preceding question is answered in the negative, it should be ascertained whether the acts in question were committed by persons who, while not organs of the Respondent, did nevertheless act on the instructions of, or under the direction or control of, the Respondent.

385. The first of these two questions relates to the well-established rule, one of the cornerstones of the law of State responsibility, that the conduct of any State organ is to be considered an act of the State under international law, and therefore gives rise to the responsibility of the State if it constitutes a breach of an international obligation of the State. This rule, which is one of customary international law, is reflected in Article 4 of the ILC Articles on State Responsibility as follows:

"Article 4

Conduct of organs of a State

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State."

386. When applied to the present case, this rule first calls for a determination whether the acts of genocide committed in Srebrenica were perpetrated by "persons or entities" having the status of organs of the Federal Republic of Yugoslavia (as the Respondent was known at the time) under its internal law, as then in force. It must be said that there is nothing which could justify an affirmative response to this question. It has not been shown that the FRY army took part in the massacres, nor that the political leaders of the FRY had a hand in preparing, planning or in any way carrying out the massacres. It is true that there is much evidence of direct or indirect participation by the official army of the FRY, along with the Bosnian Serb armed forces, in military operations in Bosnia and Herzegovina in the years prior to the events at Srebrenica. That participation was repeatedly condemned by the political organs of the United Nations, which demanded that the FRY put an end to it (see, for example, Security Council resolutions 752 (1992), 757 (1992), 762 (1992), 819 (1993), 838 (1993)). It has however not been shown that there was any such participation in relation to the massacres committed at Srebrenica (see also paragraphs 278 to 297 above). Further, neither the Republika Srpska, nor the VRS were de jure organs of the FRY, since none of them had the status of organ of that State under its internal law.

387. The Applicant has however claimed that all officers in the VRS, including General Mladić, remained under FRY military administration, and that their salaries were paid from Belgrade right up to 2002, and...
The Respondent argues that General Mladic was one of those officers who was "administered" from Belgrade, but the Court is unable to find that the "Scorpions" were, in mid-1995, an organ of the FRY. Nor has it been conclusively established that General Mladic was one of those officers; and even on the basis that he might have been, the Court does not consider that he would, for that reason alone, have been considered an organ of the FRY in the context of the application of the rules of State responsibility. There is no doubt that the functions of the VRS officers, including General Mladic, were to act on behalf of the Republika Srpska and the VRS, as well as for the parapolitical militias known as the “Scorpions,” the “Red Berets,” the “Tigers,” and the “White Eagles” (cf. paragraph 241 above), and that one of the forms that support took was the appointment of Mladic as a general officer. The Court observes that neither of these communications was addressed to Belgrade. Judging on the basis of these materials, the Court is unable to find that the promotion of General Mladic to the rank of Colonel General on 24 June 1994 was handled in Belgrade, but the Respondent emphasizes that this was merely a verification for administrative purposes of a promotion decided by the authorities of the Republika Srpska. The particular situation of General Mladic, or de facto officers of the VRS, was not therefore such as to lead the Court to modify the conclusion reached in the previous paragraph.

390. The first issue raised by this argument is whether it is possible in principle to attribute to a State conduct of persons or groups of persons — who while they do not have the legal status of State organs, in fact act under such strict control by the State that they must be treated as de jure organs of that State — if their acts are considered to be attributable to the FRY for the purposes of application of the rules of State responsibility. The Respondent relies on the Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 (the Convention) and its Article 4, which provides that "...the expression "State organ" as used in customary international law and in the present Convention shall not be considered an act of that State if the organ was placed at the disposal of another public authority, in particular at the time in question, so that all of their acts, and specifically the massacre at Srebrenica, must be treated as acts of the Republika Srpska. The particular situation of General Mladic, or de facto officers of the VRS, was not therefore such as to lead the Court to modify the conclusion reached in the previous paragraph.
be regarded as mere instruments through which the FR Yugoslavia was acting, and not as persons, groups or entities which were exercising such control as to justify a conclusion that the FR Yugoslavia was, in fact, responsible for these acts.

395. The Court now turns to the question whether the “Scorpions” and the “Special Utility Police” should be regarded as mere instruments through which the Federal Republic of Yugoslavia was acting, and not as persons, groups or entities which were exercising such control as to justify a conclusion that the Federal Republic of Yugoslavia was, in fact, responsible for these acts. The Court has not been presented with materials to indicate that the Federal Republic of Yugoslavia had some qualified, but real, margin of independence of the Federal Republic of Yugoslavia authorities and of the Vojno Ratno Zbor (VRS) leadership. While the political, military and logistical relations between the Yugoslav army and the VRS had been strong in previous years, they were, at the relevant time, not such that the Bosnian Serbs’ political and military organizations could be equated with organs of the Federal Republic of Yugoslavia. It is even true that differences over strategic options emerged at the time between Yugoslav authorities and Bosnian Serb leaders. It is also important that the Federal Government’s support for those activities, as well as the actual activities themselves, were not conducted in such a way as to justify a conclusion that the Federal Government should be regarded as acting on its behalf.

396. As noted above (paragraph 389), the Court cannot draw further conclusions as to this case remains at the indictment stage. In this respect, the Court recalls that it can only form its opinion on the basis of the information which has been brought to its notice at the time when it gives its decision, and which emerges from the pleadings and documents in the case file, and the arguments of the Parties during the oral exchanges.

* * *
though not having the status of organs of the Respondent, nevertheless acted on its instructions or under its direction or control, as the Applicant argues in the alternative; the Respondent denies that such was the case.

397. The Court must emphasize, at this stage in its reasoning, that the question just stated is not the same as those dealt with thus far. It is obvious that it is different from the question whether the persons who committed the acts of genocide had the status of organs of the Respondent under its internal law; nor however, and despite some appearance to the contrary, is it the same as the question whether those persons should be equated with State organs de facto, even though not enjoying that status under internal law. The answer to the latter question depends, as previously explained, on whether those persons were in a relationship of such complete dependence on the State that they cannot be considered otherwise than as organs of the State, so that all their actions performed in such capacity would be attributable to the State for purposes of international responsibility. Having answered that question in the negative, the Court now addresses a completely separate issue: whether, in the specific circumstances surrounding the events at Srebrenica the perpetrators of genocide were acting on the Respondent’s instructions, or under its direction or control. An affirmative answer to this question would in no way imply that the perpetrators should be characterized as organs of the FRY, or equated with such organs. It would merely mean that the FRY’s international responsibility would be incurred owing to the conduct of those of its own organs which gave the instructions or exercised the control resulting in the commission of acts in breach of its international obligations. In other words, it is no longer a question of ascertaining whether the persons who directly committed the genocide were acting as organs of the FRY, or could be equated with those organs — this question having already been answered in the negative. What must be determined is whether FRY organs — incontestably having that status under the FRY’s internal law — originated the genocide by issuing instructions to the perpetrators or exercising direction or control, and whether, as a result, the conduct of organs of the Respondent, having been the cause of the commission of acts in breach of its international obligations, constituted a violation of those obligations.

398. On this subject the applicable rule, which is one of customary law of international responsibility, is laid down in Article 8 of the ILC Articles on State Responsibility as follows:

“Article 8
Conduct directed or controlled by a State

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.”

399. This provision must be understood in the light of the Court’s jurisprudence on the subject, particularly that of the 1986 Judgment in the case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) referred to above (paragraph 391). In that Judgment the Court, as noted above, after having rejected the argument that the contras were to be equated with organs of the United States because they were “completely dependent” on it, added that the responsibility of the Respondent could still arise if it were proved that it had itself “directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State” (I.C.J. Reports 1986, p. 64, para. 115); this led to the following significant conclusion:

“For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.” (Ibid., p. 65.)

400. The test thus formulated differs in two respects from the test — described above — to determine whether a person or entity may be equated with a State organ even if not having that status under internal law. First, in this context it is not necessary to show that the persons who performed the acts alleged to have violated international law were in general in a relationship of “complete dependence” on the respondent State; it has to be proved that they acted in accordance with that State’s instructions or under its “effective control”. It must however be shown that this “effective control” was exercised, or that the State’s instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations.

401. The Applicant has, it is true, contended that the crime of genocide has a particular nature, in that it may be composed of a considerable number of specific acts separate, to a greater or lesser extent, in time and space. According to the Applicant, this particular nature would justify, among other consequences, assessing the “effective control” of the State allegedly responsible, not in relation to each of these specific acts, but in relation to the whole body of operations carried out by the direct perpetrators of the genocide. The Court is however of the view that the particular characteristics of genocide do not justify the Court in departing from the criterion elaborated in the Judgment in the case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (see paragraph 399 above). The rules
for attributing alleged internationally wrongful conduct to a State do not vary with the nature of the wrongful act in question in the absence of a clearly expressed lex specialis. Genocide will be considered as attributable to a State if and to the extent that the physical acts constitutive of genocide that have been committed by organs or persons other than the State’s own agents were carried out, wholly or in part, on the instructions or directions of the State, or under its effective control. This is the state of customary international law, as reflected in the ILC Articles on State Responsibility.

402. The Court notes however that the Applicant has further questioned the validity of applying, in the present case, the criterion adopted in the Military and Paramilitary Activities Judgment. It has drawn attention to the Judgment of the ICTY Appeals Chamber in the Tadić case (IT-94-1-A, Judgment, 15 July 1999). In that case the Chamber did not follow the jurisprudence of the Court in the Military and Paramilitary Activities case: it held that the appropriate criterion, applicable in its view both to the characterization of the armed conflict in Bosnia and Herzegovina as international, and to imputing the acts committed by Bosnian Serbs to the FRY under the law of State responsibility, was that of the “overall control” exercised over the Bosnian Serbs by the FRY; and further that that criterion was satisfied in the case (on this point, ibid., para. 145). In other words, the Appeals Chamber took the view that acts committed by Bosnian Serbs could give rise to international responsibility of the FRY on the basis of the overall control exercised by the FRY over the Republika Srpska and the VRS, without there being any need to prove that each operation during which acts were committed in breach of international law was carried out on the FRY’s instructions, or under its effective control.

403. The Court has given careful consideration to the Appeals Chamber’s reasoning in support of the foregoing conclusion, but finds itself unable to subscribe to the Chamber’s view. First, the Court observes that the ICTY was not called upon in the Tadić case, nor is it in general called upon, to rule on questions of State responsibility, since its jurisdiction is criminal and extends over persons only. Thus, in that Judgment the Tribunal addressed an issue which was not indispensable for the exercise of its jurisdiction. As stated above, the Court attaches the utmost importance to the factual and legal findings made by the ICTY in ruling on the criminal liability of the accused before it and, in the present case, the Court takes fullest account of the ICTY’s trial and appellate judgments dealing with the events underlying the dispute. The situation is not the same for positions adopted by the ICTY on issues of general international law which do not lie within the specific purview of its jurisdiction and, moreover, the resolution of which is not always necessary for deciding the criminal cases before it.

404. This is the case of the doctrine laid down in the Tadić Judgment. Insofar as the “overall control” test is employed to determine whether or not an armed conflict is international, which was the sole question which the Appeals Chamber was called upon to decide, it may well be that the test is applicable and suitable; the Court does not however think it appropriate to take a position on the point in the present case, as there is no need to resolve it for purposes of the present Judgment. On the other hand, the ICTY presented the “overall control” test as equally applicable under the law of State responsibility for the purpose of determining — as the Court is required to do in the present case — when a State is responsible for acts committed by paramilitary units, armed forces which are not among its official organs. In this context, the argument in favour of that test is unpersuasive.

405. It should first be observed that logic does not require the same test to be adopted in resolving the two issues, which are very different in nature: the degree and nature of a State’s involvement in an armed conflict on another State’s territory which is required for the conflict to be characterized as international, can very well, and without logical inconsistency, differ from the degree and nature of involvement required to give rise to that State’s responsibility for a specific act committed in the course of the conflict.

406. It must next be noted that the “overall control” test has the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf. That is true of acts carried out by its official organs, and also by persons or entities which are not formally recognized as official organs under international law but which must nevertheless be equated with State organs because they are in a relationship of complete dependence on the State. Apart from these cases, a State’s responsibility can be incurred for acts committed by persons or groups of persons — neither State organs nor to be equated with such organs — only if, assuming those acts to be internationally wrongful, they are attributable to it under the rule of customary international law reflected in Article 8 cited above (paragraph 398). This is so where an organ of the State gave the instructions or provided the direction pursuant to which the perpetrators of the wrongful act acted or where it exercised effective control over the action during which the wrong was committed. In this regard the “overall control” test is unsuitable, for it stretches too far, almost to breaking point, the connection which must exist between the conduct of a State’s organs and its international responsibility.

407. Thus it is on the basis of its settled jurisprudence that the Court will determine whether the Respondent has incurred responsibility under
the rule of customary international law set out in Article 8 of the ILC Articles on State Responsibility.

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408. The Respondent has emphasized that in the final judgments of the Chambers of the ICTY relating to genocide in Srebrenica, none of its leaders have been found to have been implicated. The Applicant does not challenge that reading, but makes the point that that issue has not been before the ICTY for decision. The Court observes that the ICTY has indeed not up to the present been directly concerned in final judgments with the question whether those leaders might bear responsibility in that respect. The Court notes the fact that the report of the United Nations Secretary-General does not establish any direct involvement by President Milošević with the massacre. The Court has already recorded the contacts between Milošević and the United Nations on 10 and 11 July (paragraph 285). On 14 July, as recorded in the Secretary-General’s Report,

“the European Union negotiator, Mr. Bildt, travelled to Belgrade to meet with President Milošević. The meeting took place at Dobarovci, the hunting lodge outside Belgrade, where Mr. Bildt had met President Milošević and General Mladic one week earlier. According to Mr. Bildt’s public account of that second meeting, he pressed the President to arrange immediate access for UNHCR to assist the people of Srebrenica, and for ICRC to start to register those who were being treated by the BSA as prisoners of war. He also insisted that the Netherlands soldiers be allowed to leave at will. Mr. Bildt added that the international community would not tolerate an attack on Gorazde, and that a ‘green light’ would have to be secured for free and unimpeded access to the enclaves. He also demanded that the road between Kiseljak and Sarajevo (’Route Swan’) be opened to all non-military transport. President Milošević apparently acceded to the various demands, but also claimed that he did not have control over the matter. Milošević had also apparently explained, earlier in the meeting, that the whole incident had been provoked by escalating Muslim attacks from the enclave, in violation of the 1993 demilitarization agreement.

A few hours into the meeting, General Mladic arrived at Dobarovci. Mr. Bildt noted that General Mladic readily agreed to most of the demands on Srebrenica, but remained opposed to some of the arrangements pertaining to the other enclaves, Sarajevo in particular. Eventually, with President Milošević’s intervention, it appeared that an agreement in principle had been reached. It was decided that another meeting would be held the next day in order to confirm the arrangements. Mr. Bildt had already arranged with Mr. Stoltenberg and Mr. Akashi [the Special Representative of the Secretary-General] that they would join him in Belgrade. He also requested that the UNPROFOR Commander also come to Belgrade in order to finalize some of the military details with Mladic.” (A/54/549, paras. 372-373.)

409. By 19 July, on the basis of the Belgrade meeting, Mr. Akashi was hopeful that both President Milošević and General Mladic might show some flexibility. The UNPROFOR Commander met with Mladic on 19 July and throughout the meeting kept in touch with Mr. Bildt who was holding parallel negotiations with President Milošević in Belgrade. Mladic gave his version of the events of the preceding days (his troops had “finished [it] in a correct way”; some “unfortunate small incidents’ had occurred”). The UNPROFOR Commander and Mladic then signed an agreement which provided for

“ICRC access to all ‘reception centres’ where the men and boys of Srebrenica were being held, by the next day:

UNHCR and humanitarian aid convoys to be given access to Srebrenica;

The evacuation of wounded from Potoci, as well as the hospital in Bratunac;

The return of Dutchbat weapons and equipment taken by the BSA;

The transfer of Dutchbat out of the enclave commencing on the afternoon of 21 July, following the evacuation of the remaining women, children and elderly who wished to leave.

Subsequent to the signing of this agreement, the Special Representative wrote to President Milošević, reminding him of the agreement, that had not yet been honoured, to allow ICRC access to Srebrenica. The Special Representative later also telephoned President Milošević to reiterate the same point.” (Ibid., para. 392.)

410. The Court was referred to other evidence supporting or denying the Respondent’s effective control over, participation in, or influence over the events in and around Srebrenica in July 1995. The Respondent quotes two substantial reports prepared seven years after the events, both of which are in the public domain, and readily accessible. The first, Srebrenica — a “Safe” Area, published in 2002 by the Netherlands Institute for War Documentation was prepared over a lengthy period by an expert team. The Respondent has drawn attention to the fact that this report contains no suggestion that the FRY leadership was involved in planning the attack or inciting the killing of non-Serbs; nor
any hard evidence of assistance by the Yugoslav army to the armed forces of the Republika Srpska before the attack; nor any suggestion that the Belgrade Government had advance knowledge of the attack. The Respondent also quotes this passage from point 10 of the Epilogue to the Report relating to the “mass slaughter” and “the executions” following the fall of Srebrenica: “There is no evidence to suggest any political or military liaison with Belgrade, and in the case of this mass murder such a liaison is highly improbable.” The Respondent further observes that the Applicant’s only response to this submission is to point out that “the report, by its own admission, is not exhaustive”, and that this Court has been referred to evidence not used by the authors.

411. The Court observes, in respect of the Respondent’s submissions, that the authors of the Report do conclude that Belgrade was aware of the intended attack on Srebrenica. They record that the Dutch Military Intelligence Service and another Western intelligence service concluded that the July 1995 operations were co-ordinated with Belgrade (Part III, Chap. 7, Sect. 7). More significantly for present purposes, however, the authors state that “there is no evidence to suggest participation in the preparations for executions on the part of Yugoslav military personnel or the security agency (RDB). In fact there is some evidence to support the opposite view . . .” (Part IV, Chap. 2, Sect. 20). That supports the passage from point 10 of the Epilogue quoted by the Respondent, which was preceded by the following sentence: “Everything points to a central decision by the General Staff of the VRS.”

412. The second report is Balkan Battlegrounds, prepared by the United States Central Intelligence Agency, also published in 2002. The first volume under the heading “The Possibility of Yugoslav involvement” arrives at the following conclusion:

“No basis has been established to implicate Belgrade’s military or security forces in the post-Srebrenica atrocities. While there are indications that the VJ or RDB [the Serbian State Security Department] may have contributed elements to the Srebrenica battle, there is no similar evidence that Belgrade-directed forces were involved in any of the subsequent massacres. Eyewitness accounts by survivors may be imperfect recollections of events, and details may have been overlooked. Narrations and other available evidence suggest that only Bosnian Serb troops were employed in the atrocities and executions that followed the military conquest of Srebrenica.” (Balkan Battlegrounds, p. 353.)

The response of the Applicant was to quote an earlier passage which refers to reports which “suggest” that VJ troops and possibly elements of the Serbian State Security Department may have been engaged in the battle in Srebrenica — as indeed the second sentence of the passage quoted by the Respondent indicates. It is a cautious passage, and significantly gives no indication of any involvement by the Respondent in the post-conflict atrocities which are the subject of genocide-related convictions. Counsel for the Respondent also quoted from the evidence of the Deputy Commander of Dutchbat, given in the Milošević trial, in which the accused put to the officer the point quoted earlier from the Epilogue to the Netherlands report. The officer responded:

“At least for me, I did not have any evidence that it was launched in co-operation with Belgrade. And again, I read all kinds of reports and opinions and papers where all kinds of scenarios were analysed, and so forth. Again, I do not have any proof that the action, being the attack on the enclave, was launched in co-operation with Belgrade.”

The other evidence on which the Applicant relied relates to the influence, rather than the control, that President Milošević had or did not have over the authorities in Pale. It mainly consists of the evidence given at the Milošević trial by Lord Owen and General Wesley Clark and also Lord Owen’s publications. It does not establish a factual basis for finding the Respondent responsible on a basis of direction or control.

* * *

(5) Conclusion as to Responsibility for Events at Srebrenica under Article III, Paragraph (a), of the Genocide Convention

413. In the light of the information available to it, the Court finds, as indicated above, that it has not been established that the massacres at Srebrenica were committed by persons or entities ranking as organs of the Respondent (see paragraph 395 above). It finds also that it has not been established that those massacres were committed on the instructions or under the direction of organs of the respondent State, nor that the Respondent exercised effective control over the operations in the course of which those massacres, which, as indicated in paragraph 297 above, constituted the crime of genocide, were perpetrated.

The Applicant has not proved that instructions were issued by the federal authorities in Belgrade, or by any other organ of the FRY, to commit the massacres, still less that any such instructions were given with the specific intent (dolus specialis) characterizing the crime of genocide, which would have had to be present in order for the Respondent to be held responsible on this basis. All indications are to the contrary: that the
decision to kill the adult male population of the Muslim community in Srebrenica was taken by some members of the VRS Main Staff, but without instructions from or effective control by the FRY.

As for the killings committed by the “Scorpions” paramilitary militias, notably at Trnovo (paragraph 289 above), even if it were accepted that they were an element of the genocide committed in the Srebrenica area, which is not clearly established by the decisions thus far rendered by the ICTY (see, in particular, the Trial Chamber’s decision of 12 April 2006 in the Stanišić and Simatović case, IT-03-69), it has not been proved that they took place either on the instructions or under the control of organs of the FRY.

414. Finally, the Court observes that none of the situations, other than those referred to in Articles 4 and 8 of the ILC’s Articles on State Responsibility, in which specific conduct may be attributed to a State, matches the circumstances of the present case in regard to the possibility of attributing the genocide at Srebrenica to the Respondent. The Court does not see itself required to decide at this stage whether the ILC’s Articles dealing with attribution, apart from Articles 4 and 8, express present customary international law, it being clear that none of them apply in this case. The acts constituting genocide were not committed by persons or entities which, while not being organs of the FRY, were empowered by it to exercise elements of the governmental authority (Art. 5), nor by organs placed at the Respondent’s disposal by another State (Art. 6), nor by persons in fact exercising elements of the governmental authority in the absence or default of the official authorities of the Respondent (Art. 9); finally, the Respondent has not acknowledged and adopted the conduct of the perpetrators of the acts of genocide as its own (Art. 11).

415. The Court concludes from the foregoing that the acts of those who committed genocide at Srebrenica cannot be attributed to the Respondent under the rules of international law of State responsibility: thus, the international responsibility of the Respondent is not engaged on this basis.

* * *

VIII. THE QUESTION OF RESPONSIBILITY, IN RESPECT OF SREBRENICA, FOR ACTS ENUMERATED IN ARTICLE III, PARAGRAPHS (b) TO (e), OF THE GENOCIDE CONVENTION

416. The Court now comes to the second of the questions set out in paragraph 379 above, namely, that relating to the Respondent’s possible responsibility on the ground of one of the acts related to genocide enumerated in Article III of the Convention. These are: conspiracy to commit genocide (Art. III, para. (b)), direct and public incitement to commit genocide (Art. III, para. (d)), attempt to commit genocide (Art. III, para. (c)), and complicity in genocide (Art. III, para. (e)). For the reasons already stated (paragraph 380 above), the Court must make a finding on this matter inasmuch as it has replied in the negative to the previous question, that of the Respondent’s responsibility in the commission of the genocide itself.

417. It is clear from an examination of the facts of the case that subparagraph (b) and (c) of Article III are irrelevant in the present case. It has not been proved that organs of the FRY, or persons acting on the instructions or under the effective control of that State, committed acts that could be characterized as “[c]onspiracy to commit genocide” or “[d]irect and public incitement to commit genocide” (Art. III, para. (c)), if one considers, as is appropriate, only the events in Srebrenica. As regards paragraph (b), what was said above regarding the attribution to the Respondent of acts of genocide, namely that the massacres were perpetrated by persons and groups of persons (the VRS in particular) who did not have the character of organs of the Respondent, and did not act on the instructions or under the effective control of the Respondent, is sufficient to exclude the latter’s responsibility in this regard. As regards subparagraph (c), none of the information brought to the attention of the Court is sufficient to establish that organs of the Respondent, or persons acting on its instructions or under its effective control, directly and publicly incited the commission of the genocide in Srebrenica; nor is it proven, for that matter, that such organs or persons incited the commission of acts of genocide anywhere else on the territory of Bosnia and Herzegovina. In this respect, the Court must only accept precise and incontrovertible evidence, of which there is clearly none.

418. A more delicate question is whether it can be accepted that acts which could be characterized as “complicity in genocide”, within the meaning of Article III, paragraph (e), can be attributed to organs of the Respondent or to persons acting under its instructions or under its effective control.

This question calls for some preliminary comment.

419. First, the question of “complicity” is to be distinguished from the question, already considered and answered in the negative, whether the perpetrators of the acts of genocide committed in Srebrenica acted on the instructions of or under the direction or effective control of the organs of the FRY. It is true that in certain national systems of criminal law, giving instructions or orders to persons to commit a criminal act is considered as the mark of complicity in the commission of that act. However, in the particular context of the application of the law of international responsibility in the domain of genocide, if it were established that a genocidal act had been committed on the instructions or under the direction of a
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421. Before the Court turns to an examination of the facts, one further comment is required. It concerns the links between the specific intent (\emph{dolus specialis}) which characterizes the crime of genocide and the motives which inspire the actions of an accomplice (meaning a person providing aid or assistance to the direct perpetrators of the crime); the question arises whether complicity presupposes that the accomplice shares the specific intent (\emph{dolus specialis}) of the principal perpetrator. But whatever the reply to this question, there is no doubt that the conduct of an organ or a person furnishing aid or assistance to a perpetrator of the crime of genocide cannot be treated as complicity in genocide unless at least the organ or person acted knowingly, that is to say, in particular, was aware of the specific intent (\emph{dolus specialis}) of the principal perpetrator. If that condition is not fulfilled, that is sufficient to exclude categorization as complicity. The Court will thus first consider whether this latter condition is met in the present case. It is only if it replies to that question of fact in the affirmative that it will need to determine the legal point referred to above.

422. The Court is not convinced by the evidence furnished by the Applicant that the above conditions were met. Undoubtedly, the quite substantial aid of a political, military and financial nature provided by the FRY to the Republika Srpska and the VRS, beginning long before the tragic events of Srebrenica, continued during those events. There is thus little doubt that the atrocities in Srebrenica were committed, at least in part, with the resources which the perpetrators of those acts possessed as a result of the general policy of aid and assistance pursued towards them by the FRY. However, the sole task of the Court is to establish the legal responsibility of the Respondent, a responsibility which is subject to very specific conditions. One of those conditions is not fulfilled, because it is not established beyond any doubt in the argument between the Parties whether the authorities of the FRY supplied — and continued to supply — the VRS leaders who decided upon and carried out those acts of genocide with their aid and assistance, at a time when those authorities were clearly aware that genocide was about to take place or was under way; in other words that not only were massacres about to be carried out or already under way, but that their perpetrators had the specific intent characterizing genocide, namely, the intent to destroy, in whole or in part, a human group, as such.

423. A point which is clearly decisive in this connection is that it was not conclusively shown that the decision to eliminate physically the adult male population of the Muslim community from Srebrenica was brought to the attention of the Belgrade authorities when it was taken; the Court has found (paragraph 295 above) that that decision was taken shortly before it was actually carried out, a process which took a very short time (essentially between 13 and 16 July 1995), despite the exceptionally high number of victims. It has therefore not been conclusively established
that, at the crucial time, the FRY supplied aid to the perpetrators of the
obligation to punish, which is therefore the only duty the performance of
which may be subject to review by the Court. The obligation on each
State to prevent genocide is both normative and compelling. It is not
merged in the duty to punish, nor can it be regarded as simply a
duty to prevent genocide. In the light of this finding, and of the findings
above relating to the other paragraphs of Article III, the international
responsibility of the Respondent is not engaged under Article III as a
whole.

425. The Court now turns to the third and last of the questions set out
in paragraph 379 above: has the respondent State complied with its
obligations to prevent and punish genocide under Article I of the Convention?

426. It is true, almost by its wording, Article I of the Convention
brings out the close link between the duty to prevent genocide and the
duty to punish its perpetrators: these are, in the view of the Court, two
distinct yet connected obligations, each of which must be considered in
turn. Despite the close links between these two obligations, the Court
must always keep in mind that, under the Convention, the obligation to
prevent has a separate legal existence of its own; that it is, as it were,
absorbed by the United Nations Charter and any decisions that may have
been taken by its competent organs.
determination is necessary to the decision to be given on the dispute before it. This will, of course, not absolve it of the need to refer, if need be, to the rules of law whose scope extends beyond the specific field covered by the Convention.

430. Secondly, it is clear that the obligation in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide as far as possible. A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide. In this area the notion of "due diligence", which calls for an assessment in concreto, is of critical importance. Various parameters operate when assessing whether a State has duly discharged the obligation concerned. The first, which varies greatly from one State to another, is clearly the capacity to influence effectively the action of persons likely to commit, or already committing, genocide. This capacity itself depends, among other things, on the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events. The State's capacity to influence may vary depending on its particular legal position vis-à-vis the situations and persons facing the danger, or the reality, of genocide. On the other hand, it is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide. As well as being generally difficult to prove, this is irrelevant to the breach of the obligation of conduct in question, the more so since the possibility remains that the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result — averting the commission of genocide — which the efforts of only one State were insufficient to produce.

431. Thirdly, a State can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed. It is at the time when commission of the prohibited act (genocide or any of the other acts listed in Article III of the Convention) begins that the breach of an obligation of prevention occurs. In this respect, the Court refers to a general rule of the law of State responsibility, stated by the ILC in Article 14, paragraph 3, of its Articles on State Responsibility:

" . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .

3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation."

This obviously does not mean that the obligation to prevent genocide only comes into being when perpetration of genocide commences; that would be absurd, since the whole point of the obligation is to prevent, or attempt to prevent, the occurrence of the act. In fact, a State's obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed. From that moment onwards, if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent (dolus specialis), it is under a duty to make such use of these means as the circumstances permit. However, if neither genocide nor any of the other acts listed in Article III of the Convention are ultimately carried out, then a State that omitted to act when it could have done so cannot be held responsible a posteriori, since the event did not happen which, under the rule set out above, must occur for there to be a violation of the obligation to prevent.

In consequence, in the present case the Court will have to consider the Respondent's conduct, in the light of its duty to prevent, solely in connection with the massacres at Srebrenica, because these are the only acts in respect of which the Court has concluded in this case that genocide was committed.

432. Fourth and finally, the Court believes it especially important to lay stress on the differences between the requirements to be met before a State can be held to have violated the obligation to prevent genocide — within the meaning of Article I of the Convention — and those to be satisfied in order for a State to be held responsible for "complicity in genocide" — within the meaning of Article III, paragraph (e) — as previously discussed. There are two main differences; they are so significant as to make it impossible to treat the two types of violation in the same way.

In the first place, as noted above, complicity always requires that some positive action has been taken to furnish aid or assistance to the perpetrators of the genocide, while a violation of the obligation to prevent
results from mere failure to adopt and implement suitable measures to prevent genocide from being committed. In other words, while complicity results from commission, violation of the obligation to prevent results from omission; this is merely the reflection of the notion that the ban on genocide and the other acts listed in Article III, including complicity, places States under a negative obligation, the obligation not to commit the prohibited acts, while the duty to prevent places States under positive obligations, to do their best to ensure that such acts do not occur.

In the second place, as also noted above, there cannot be a finding of complicity against a State unless at the least its organs were aware that genocide was about to be committed or was under way, and if the aid and assistance supplied, from the moment they became so aware onwards, to the perpetrators of the criminal acts or to those who were on the point of committing them, enabled or facilitated the commission of the acts. In other words, an accomplice must have given support in perpetrating the genocide with full knowledge of the facts. By contrast, a State may be found to have violated its obligation to prevent even though it had no certainty, at the time when it should have acted, but failed to do so, that genocide was about to be committed or was under way; for it to incur responsibility on this basis it is enough that the State was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed. As will be seen below, this latter difference could prove decisive in the present case in determining the responsibility incurred by the Respondent.

433. In light of the foregoing, the Court will now consider the facts of the case. For the reasons stated above (paragraph 431), it will confine itself to the FRY’s conduct vis-à-vis the Srebrenica massacres.

434. The Court would first note that, during the period under consideration, the FRY was in a position of influence over the Bosnian Serbs who devised and implemented the genocide in Srebrenica, unlike that of any of the other States parties to the Genocide Convention owing to the strength of the political, military and financial links between the FRY on the one hand and the Republika Srpska and the VRS on the other, which, though somewhat weaker than in the preceding period, nonetheless remained very close.

435. Secondly, the Court cannot but note that, on the relevant date, the FRY was bound by very specific obligations by virtue of the two Orders indicating provisional measures delivered by the Court in 1993. In particular, in its Order of 8 April 1993, the Court stated, inter alia, that although not able, at that early stage in the proceedings, to make “definitive findings of fact or of imputability” (I.C.J. Reports 1993, p. 22, para. 44) the FRY was required to ensure:

“that any military, paramilitary or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, do not commit any acts of genocide, of conspiracy to commit genocide, of direct and public incitement to commit genocide, or of complicity in genocide . . .” (I.C.J. Reports 1993, p. 24, para. 52 A (2)).

The Court’s use, in the above passage, of the term “influence” is particularly revealing of the fact that the Order concerned not only the persons or entities whose conduct was attributable to the FRY, but also all those with whom the Respondent maintained close links and on which it could exert a certain influence. Although in principle the two issues are separate, and the second will be examined below, it is not possible, when considering the way the Respondent discharged its obligation of prevention under the Convention, to fail to take account of the obligation incumbent upon it, albeit on a different basis, to implement the provisional measures indicated by the Court.

436. Thirdly, the Court recalls that although it has not found that the information available to the Belgrade authorities indicated, as a matter of certainty, that genocide was imminent (which is why complicity in genocide was not upheld above: paragraph 424), they could hardly have been unaware of the serious risk of it once the VRS forces had decided to occupy the Srebrenica enclave. Among the documents containing information clearly suggesting that such an awareness existed, mention should be made of the above-mentioned report (see paragraphs 283 and 285 above) of the United Nations Secretary-General prepared pursuant to General Assembly resolution 53/35 on the “fall of Srebrenica” (United Nations doc. A/54/549), which recounts the visit to Belgrade on 14 July 1995 of the European Union negotiator Mr. Bildt to meet Mr. Milošević. Mr. Bildt, in substance, informed Mr. Milošević of his serious concern and

“pressed the President to arrange immediate access for the UNHCR to assist the people of Srebrenica, and for the ICRC to start to register those who were being treated by the BSA [Bosnian Serb Army] as prisoners of war”.

437. The Applicant has drawn attention to certain evidence given by General Wesley Clark before the ICTY in the Milošević case. General Clark referred to a conversation that he had had with Milošević during the negotiation of the Dayton Agreement. He stated that

“I went to Milošević and I asked him. I said, ‘If you have so much influence over these [Bosnian] Serbs, how could you have allowed
General Mladic to have killed all those people at Srebrenica?’ And he looked to me — at me. His expression was very grave. He paused before he answered, and he said, ‘Well, General Clark, I warned him not to do this, but he didn’t listen to me.’ And it was in the context of all the publicity at the time about the Srebrenica massacre.” (Milošević, IT-02-54-T, Transcript, 16 December 2003, pp. 30494-30495).

General Clark gave it as his opinion, in his evidence before the ICTY, that the circumstances indicated that Milošević had foreknowledge of what was to be “a military operation combined with a massacre” (ibid., p. 30497). The ICTY record shows that Milošević denied ever making the statement to which General Clark referred, but the Trial Chamber nevertheless relied on General Clark’s testimony in its Decision of 16 June 2004 when rejecting the Motion for Judgment of Acquittal (Milošević, IT-02-54-T, Decision on Motion for Judgment of Acquittal, 16 June 2004, para. 280).

438. In view of their undeniable influence and of the information, voicing serious concern, in their possession, the Yugoslav federal authorities should, in the view of the Court, have made the best efforts within their power to try and prevent the tragic events then taking shape, whose scale, though it could not have been foreseen with certainty, might at least have been surmised. The FRY leadership, and President Milošević above all, were fully aware of the climate of deep-seated hatred which reigned between the Bosnian Serbs and the Muslims in the Srebrenica region. As the Court has noted in paragraph 423 above, it has not been shown that the decision to eliminate physically the whole of the adult male population of the Muslim community of Srebrenica was brought to the attention of the Belgrade authorities. Nevertheless, given all the international concern about what looked likely to happen at Srebrenica, given Milošević’s own observations to Mladic, which made it clear that the dangers were known and that these dangers seemed to be of an order that could suggest intent to commit genocide, unless brought under control, it must have been clear that there was a serious risk of genocide in Srebrenica. Yet the Respondent has not shown that it took any initiative to prevent what happened, or any action on its part to avert the atrocities which were committed. It must therefore be concluded that the organs of the Respondent did nothing to prevent the Srebrenica massacres, claiming that they were powerless to do so, which hardly tallies with their known influence over the VRS. As indicated above, for a State to be held responsible for breaching its obligation of prevention, it does not need to be proven that the State concerned definitely had the power to prevent the genocide; it is sufficient that it had the means to do so and that it manifestly refrained from using them.

439. The Court now turns to the question of the Respondent’s compliance with its obligation to punish the crime of genocide stemming from Article I and the other relevant provisions of the Convention.

440. In its fifth final submission, Bosnia and Herzegovina requests the Court to adjudge and declare:

“5. That Serbia and Montenegro has violated and is violating its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide for having failed and for failing to punish acts of genocide or any other act prohibited by the Convention on the Prevention and Punishment of the Crime of Genocide, and for having failed and for failing to transfer individuals accused of genocide or any other act prohibited by the Convention to the International Criminal Tribunal for the former Yugoslavia and to fully co-operate with this Tribunal.”

441. This submission implicitly refers to Article VI of the Convention, according to which:

“Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.”

442. The Court would first recall that the genocide in Srebrenica, the commission of which it has established above, was not carried out in the Respondent’s territory. It concludes from this that the Respondent cannot be charged with not having tried before its own courts those accused of having participated in the Srebrenica genocide, either as principal perpetrators or as accomplices, or of having committed one of the other acts mentioned in Article III of the Convention in connection with the Srebrenica genocide. Even if Serbian domestic law granted jurisdiction to its criminal courts to try those accused, and even supposing such proceedings were compatible with Serbia’s other international obligations, inter alia its obligation to co-operate with the ICTY, to which the Court will revert below, an obligation to try the perpetrators of the Srebrenica massacre in Serbia’s domestic courts cannot be deduced from Article VI. Article VI only obliges the Contracting Parties to institute and exercise
APPLICATION OF GENOCIDE CONVENTION (JUDGMENT)

443. It is thus to the obligation for States parties to co-operate with the ICTY, and in the case of the FRY, under Article VI of the Genocide Convention, that the Court must now turn its attention. For it is certain that once a State has established an international criminal court within its territory, it must co-operate with it by arresting and handing over to the Tribunal any persons accused of genocide who are in its territory. Even if, as in the case of the FRY, the court that has been established by virtue of the Security Council resolution which established it has not begun operating, the fact that it will be an international criminal court, and particularly one of direct relevance in the present case, justifies the Respondent to consider itself as having an obligation to co-operate with the ICTY within the meaning of Article VI of the Convention. This fact is sufficient for the Court to conclude that the FRY’s obligation to co-operate had any legal basis besides the Dayton Agreement. Needless to say, the admission of the FRY to the United Nations in 2000 provided a further basis for its obligation to co-operate: its admission as a Member of the United Nations, at any event from 14 December 1995 onwards.

444. In order to determine whether the Respondent has fulfilled its obligations under Article VI of the Convention, the Court must first answer two preliminary questions: does the ICTY constitute an ‘international penal tribunal’ as having ‘accepted the jurisdiction’ of the tribunal within the meaning of that provision? And must the Respondent be regarded as having ‘accepted the jurisdiction’ of the ICTY within the meaning of Article VI of the Convention? This fact is sufficient for the Court in its consideration of the present case, since its task is to rule upon the Respondent’s compliance with the obligation resulting from Article VI of the Convention in relation to the Srebrenica genocide, from when it was perpetrated to the present day, and since the Applicant has not invoked any failure to respect the obligation to co-operate alleged to have occurred specifically between July and December 1995. Similarly, the Respondent has not argued that it was released from its obligation to co-operate with the ICTY in July 1995 on the basis of the FRY’s admission to the United Nations, at any event from 14 December 1995 onwards.

445. As regards the first question, the Court considers that the reply must definitely be in the affirmative. The notion of an ‘international penal tribunal’ within the meaning of Article VI must at least cover all international criminal courts created after the adoption of the Convention, and competent to try the perpetrators of genocide or any of the other acts enumerated in Article III. The nature of the legal instrument by which such a court is established is without importance in this respect. Whether it is established by treaty or by resolution, such a court will be created by virtue of the Security Council resolution which established it, and must be regarded as having ‘accepted the jurisdiction’ of the ICTY within the meaning of Article VI of the Convention. Yet, it would be contrary to the object and purpose of this provision to interpret the notion of ‘international penal tribunal’ in the manner in which, as in the case of the International Criminal Tribunal for the former Yugoslavia (the ICTY), was created pursuant to a United Nations Security Council resolution adopted under Chapter VII of the United Nations Charter, or from another norm of international law compatible with international law, in particular the nationality of the accused, it does not oblige them to do so.

446. The question whether the Respondent must be regarded as having accepted the jurisdiction of the ICTY, and to co-operate with the Tribunal on that basis, was thereby confirmed, but did not change the scope of the obligation. There is therefore no need to go beyond the purposes of assessing how the Respondent has fulfilled its obligations after its admission to the United Nations. In this connection, the Court asserted first that the Respondent’s obligation to co-operate had any legal basis besides the Dayton Agreement. Needless to say, the admission of the FRY to the United Nations in 2000 provided a further basis for its obligation to co-operate: its admission as a Member of the United Nations, at any event from 14 December 1995 onwards.

447. For the purposes of the present case, the Court only has to determine whether the FRY was under an obligation to co-operate with the ICTY, and if so, on what basis. To that end, suffice it to note that the FRY was committed to cooperate with the ICTY at the latest date of the signing and entry into force of the Dayton Agreement, between Bosnia and Herzegovina, Croatia, and the FRY. It is thus to the obligation for States parties to co-operate with the ICTY, and in the case of the FRY, under Article VI of the Genocide Convention, that the Court must now turn its attention. For it is certain that once a State has established an international criminal court within its territory, it must co-operate with it by arresting and handing over to the Tribunal any persons accused of genocide who are in its territory. Even if, as in the case of the FRY, the court that has been established by virtue of the Security Council resolution which established it has not begun operating, the fact that it will be an international criminal court, and particularly one of direct relevance in the present case, justifies the Respondent to consider itself as having an obligation to co-operate with the ICTY within the meaning of Article VI of the Convention. This fact is sufficient for the Court to conclude that the FRY’s obligation to co-operate had any legal basis besides the Dayton Agreement. Needless to say, the admission of the FRY to the United Nations in 2000 provided a further basis for its obligation to co-operate: its admission as a Member of the United Nations, at any event from 14 December 1995 onwards.
organs of the FRY before the régime change however engages the Respondent’s international responsibility just as much as it does that of its State authorities from that date. Further, the Court cannot but attach a certain weight to the plentiful, and mutually corroborative, information suggesting that General Mladic, indicted by the ICTY for genocide, as one of those principally responsible for the Srebrenica massacres, was on the territory of the Respondent at least on several occasions and for substantial periods during the last few years and is still there now, without the Serb authorities doing what they could and can reasonably do to ascertain exactly where he is living and arrest him. In particular, counsel for the Applicant referred during the hearings to recent statements made by the Respondent’s Minister for Foreign Affairs, reproduced in the national press in April 2006, and according to which the intelligence services of that State knew where Mladic was living in Serbia, but refrained from informing the authorities competent to order his arrest because certain members of those services had allegedly remained loyal to the fugitive. The authenticity and accuracy of those statements has not been disputed by the Respondent at any time.

449. It therefore appears to the Court sufficiently established that the Respondent failed in its duty to co-operate fully with the ICTY. This failure constitutes a violation by the Respondent of its duties as a party to the Dayton Agreement, and as a Member of the United Nations, and accordingly a violation of its obligations under Article VI of the Genocide Convention. The Court is of course without jurisdiction in the present case to declare that the Respondent has breached any obligations other than those under the Convention. But as the Court has jurisdiction to declare a breach of Article VI insofar as it obliges States to co-operate with the “international penal tribunal”, the Court may find for that purpose that the requirements for the existence of such a breach have been met. One of those requirements is that the State whose responsibility is in issue must have “accepted [the] jurisdiction” of that “international penal tribunal”; the Court thus finds that the Respondent was under a duty to co-operate with the tribunal concerned pursuant to international instruments other than the Convention, and failed in that duty. On this point, the Applicant’s submissions relating to the violation by the Respondent of Articles I and VI of the Convention must therefore be upheld.

450. It follows from the foregoing considerations that the Respondent failed to comply both with its obligation to prevent and its obligation to punish genocide deriving from the Convention, and that its international responsibility is thereby engaged.

* * *

X. The Question of Responsibility for Breach of the Court’s Orders Indicating Provisional Measures

451. In its seventh submission Bosnia and Herzegovina requests the Court to adjudge and declare:

"7. That in failing to comply with the Orders for indication of provisional measures rendered by the Court on 8 April 1993 and 13 September 1993 Serbia and Montenegro has been in breach of its international obligations and is under an obligation to Bosnia and Herzegovina to provide for the latter violation symbolic compensation, the amount of which is to be determined by the Court."

452. The Court observes that its “orders on provisional measures under Article 41 [of the Statute] have binding effect” (LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001, p. 506, para. 109). Although the Court only had occasion to make such a finding in a judgment subsequent to the Orders that it made in the present dispute, this does not affect the binding nature of those Orders, since in the Judgment referred to the Court did no more than give the provisions of the Statute the meaning and scope that they had possessed from the outset. It notes that provisional measures are aimed at preserving the rights of each of the parties pending the final decision of the Court. The Court’s Orders of 8 April and 13 September 1993 indicating provisional measures created legal obligations which both Parties were required to satisfy.

453. The Court indicated the following provisional measures in the dispositif, paragraph 52, of its Order of 8 April 1993:

"A. (1). . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .

The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) should immediately, in pursuance of its undertaking in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, take all measures within its power to prevent commission of the crime of genocide;

(2). . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .

The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) should in particular ensure that any military, paramilitary or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, do not commit any acts of genocide, of conspiracy to commit genocide, of direct and public incitement to commit genocide, or of complicity in genocide, whether directed against the Muslim population of Bosnia and Herzegovina or against any other national, ethnical, racial or religious group;
XI. THE QUESTION OF REPARATION

459. Having thus found that the Respondent has failed to comply with its obligations under the Genocide Convention in respect of the prevention and punishment of genocide, the Court turns to the question of reparation. The Applicant, in its final submissions, has asked the Court to decide that the Respondent “must redress the consequences of its international wrongful acts and, as a result of the international responsibility incurred for . . . violations of the Convention on the Prevention and Punishment of the Crime of Genocide, must pay, and Bosnia and Herzegovina is entitled to receive, in its own right and as parens patriae for its citizens, full compensation for the damages and losses caused” (submission 6 (b)).

The Applicant also asks the Court to decide that the Respondent “shall immediately take effective steps to ensure full compliance with its obligation to punish acts of genocide under the Convention on the Prevention and Punishment of the Crime of Genocide or any other act prohibited by the Convention and to transfer individuals accused of genocide or any other act prohibited by the Convention to the International Criminal Tribunal for the former Yugoslavia and to fully co-operate with this Tribunal” (submission 6 (a)), and that the Respondent “shall provide specific guarantees and assurances that it will not repeat the wrongful acts complained of, the form of which guarantees and assurances is to be determined by the Court” (submission 6 (d)). These submissions, and in particular that relating to compensation, were however predicated on the basis that the Court would have upheld, not merely that part of the Applicant’s claim as relates to the obligation of prevention and punishment, but also the claim that the Respondent has violated its substantive obligation not to commit genocide, as well as the ancillary obligations under the Convention concerning complicity, conspiracy and incitement, and the claim that the Respondent has aided and abetted genocide. The Court has now to consider what is the appropriate form of reparation for the other forms of violation of the Convention which have been alleged against the Respondent and which the Court has found to have been established, that is to say breaches of the obligations to prevent and punish.

460. The principle governing the determination of reparation for an internationally wrongful act is as stated by the Permanent Court of International Justice in the Factory at Chorzów case: that “reparation must, so 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” (P.C.I.J., Series A, No. 17, p. 47; see...
also Article 31 of the ILC’s Articles on State Responsibility). In the circumstances of this case, as the Applicant recognizes, it is inappropriate to ask the Court to find that the Respondent is under an obligation of restitution in integrum. Insofar as restitution is not possible, as the Court stated in the case of the Gabčíkovo-Nagymaros Project (Hungary/Slovakia), “[i]t is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it” (I.C.J. Reports 1997, p. 81, para. 152; cf. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 198, paras. 152-153; see also Article 36 of the ILC’s Articles on State Responsibility). It is therefore appropriate to consider what were the consequences of the failure of the Respondent to comply with its obligations under the Genocide Convention to prevent and punish the crime of genocide, committed in Bosnia and Herzegovina, and what damage can be said to have been caused thereby.

461. The Court has found that the authorities of the Respondent could not have been unaware of the grave risk of genocide once the VRS forces had decided to take possession of the Srebrenica enclave, and that in view of its influence over the events, the Respondent must be held to have had the means of action by which it could seek to prevent genocide, and to have manifestly refrained from employing them (paragraph 438). To that extent therefore it failed to comply with its obligation of prevention under the Convention. The obligation to prevent the commission of the crime of genocide is imposed by the Genocide Convention on any State party which, in a given situation, has it in its power to contribute to restraining in any degree the commission of genocide. To make this finding, the Court did not have to decide whether the acts of genocide committed at Srebrenica would have occurred anyway even if the Respondent had done as it should have and employed the means available to it. This is because, as explained above, the obligation to prevent genocide places a State under a duty to act which is not dependent on the certainty that the action to be taken will succeed in preventing the commission of acts of genocide, or even on the likelihood of that outcome. It therefore does not follow from the Court’s reasoning above in finding a violation by the Respondent of its obligation of prevention that the atrocious suffering caused by the genocide committed at Srebrenica would not have occurred had the violation not taken place.

462. The Court cannot however leave it at that. Since it now has to rule on the claim for reparation, it must ascertain whether, and to what extent, the injury asserted by the Applicant is the consequence of wrongful conduct by the Respondent with the consequence that the Respondent should be required to make reparation for it, in accordance with the principle of customary international law stated above. In this context, the question just mentioned, whether the genocide at Srebrenica would have taken place even if the Respondent had attempted to prevent it by employing all means in its possession, becomes directly relevant, for the definition of the extent of the obligation of reparation borne by the Respondent as a result of its wrongful conduct. The question is whether there is a sufficiently direct and certain causal nexus between the wrongful act, the Respondent’s breach of the obligation to prevent genocide, and the injury suffered by the Applicant, consisting of all damage of any type, material or moral, caused by the acts of genocide. Such a nexus could be considered established only if the Court were able to conclude from the case as a whole and with a sufficient degree of certainty that the genocide at Srebrenica would in fact have been averted if the Respondent had acted in compliance with its legal obligations. However, the Court clearly cannot do so. As noted above, the Respondent did have significant means of influencing the Bosnian Serb military and political authorities which it could, and therefore should, have employed in an attempt to prevent the atrocities, but it has not been shown that, in the specific context of these events, those means would have sufficed to achieve the result which the Respondent should have sought. Since the Court cannot therefore regard as proven a causal nexus between the Respondent’s violation of its obligation of prevention and the damage resulting from the genocide at Srebrenica, financial compensation is not the appropriate form of reparation for the breach of the obligation to prevent genocide.

463. It is however clear that the Applicant is entitled to reparation in the form of satisfaction, and this may take the most appropriate form, as the Applicant itself suggested, of a declaration in the present Judgment that the Respondent has failed to comply with the obligation imposed by the Convention to prevent the crime of genocide. As in the Corfu Channel (United Kingdom v. Albania) case, the Court considers that a declaration of this kind is “in itself appropriate satisfaction” (Merits, Judgment, I.C.J. Reports 1949, pp. 35, 36), and it will, as in that case, include such a declaration in the operative clause of the present Judgment. The Applicant acknowledges that this failure is no longer continuing, and accordingly has withdrawn the request made in the Reply that the Court declare that the Respondent “has violated and is violating the Convention” (emphasis added).

464. The Court now turns to the question of the appropriate reparation for the breach by the Respondent of its obligation under the Convention to punish acts of genocide; in this respect, the Applicant asserts the existence of a continuing breach, and therefore maintains (inter alia) its request for a declaration in that sense. As noted above (paragraph 440), the Applicant includes under this heading the failure “to transfer individuals accused of genocide or any other act prohibited by the Conven-
tion to the International Criminal Tribunal for the former Yugoslavia and to fully co-operate with this Tribunal”; and the Court has found that in that respect the Respondent is indeed in breach of Article VI of the Convention (paragraph 449 above). A declaration to that effect is therefore one appropriate form of satisfaction, in the same way as in relation to the breach of the obligation to prevent genocide. However, the Applicant asks the Court in this respect to decide more specifically that

“Serbia and Montenegro shall immediately take effective steps to ensure full compliance with its obligation to punish acts of genocide under the Convention on the Prevention and Punishment of the Crime of Genocide or any other act prohibited by the Convention and to transfer individuals accused of genocide or any other act prohibited by the Convention to the International Criminal Tribunal for the former Yugoslavia and to fully co-operate with this Tribunal.”

465. It will be clear from the Court’s findings above on the question of the obligation to punish under the Convention that it is satisfied that the Respondent has outstanding obligations as regards the transfer to the ICTY of persons accused of genocide, in order to comply with its obligations under Articles I and VI of the Genocide Convention, in particular in respect of General Ratko Mladić (paragraph 448). The Court will therefore make a declaration in these terms in the operative clause of the present Judgment, which will in its view constitute appropriate satisfaction.

466. In its final submissions, the Applicant also requests the Court to decide “that Serbia and Montenegro shall provide specific guarantees and assurances that it will not repeat the wrongful acts complained of, the form of which guarantees and assurances is to be determined by the Court”. As presented, this submission relates to all the wrongful acts, i.e. breaches of the Genocide Convention, attributed by the Applicant to the Respondent, thus including alleged breaches of the Respondent’s obligation not itself to commit genocide, as well as the ancillary obligations under the Convention concerning complicity, conspiracy and incitement. Insofar as the Court has not upheld these claims, the submission fails. There remains however the question whether it is appropriate to direct that the Respondent provide guarantees and assurances of non-repetition in relation to the established breaches of the obligations to prevent and punish genocide. The Court notes the reasons advanced by counsel for the Applicant at the hearings in support of the submission, which relate for the most part to “recent events [of] which cannot fail to cause concern as to whether movements in Serbia and Montenegro calling for genocide have disappeared”. It considers that these indications do not constitute sufficient grounds for requiring guarantees of non-repetition. The Applicant also referred in this connection to the question of non-compliance with provisional measures, but this matter has already been examined above (paragraphs 451 to 458), and will be mentioned further below. In the circumstances, the Court considers that the declaration referred to in paragraph 465 above is sufficient as regards the Respondent’s continuing duty of punishment, and therefore does not consider that this is a case in which a direction for guarantees of non-repetition would be appropriate.

467. Finally, the Applicant has presented the following submission:

“That in failing to comply with the Orders for indication of provisional measures rendered by the Court on 8 April 1993 and 13 September 1993 Serbia and Montenegro has been in breach of its international obligations and is under an obligation to Bosnia and Herzegovina to provide for the latter violation symbolic compensation, the amount of which is to be determined by the Court.”

The provisional measures indicated by the Court’s Order of 8 April 1993, and reiterated by the Order of 13 September 1993, were addressed specifically to the Respondent’s obligation “to prevent commission of the crime of genocide” and to certain measures which should “in particular” be taken to that end (I.C.J. Reports 1993, p. 24, para. 52 (A) (1) and (2)).

468. Provisional measures under Article 41 of the Statute are indicated “pending [the] final decision” in the case, and the measures indicated in 1993 will thus lapse on the delivery of the present Judgment (cf. Anglo-Iranian Oil Co. (United Kingdom v. Iran), Preliminary Objections, Judgment, I.C.J. Reports 1952, p. 114; Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 442, para. 112). However, as already observed (paragraph 452 above), orders made by the Court indicating provisional measures under Article 41 of the Statute have binding effect, and their purpose is to protect the rights of either party, pending the final decision in the case.

469. The Court has found above (paragraph 456) that, in respect of the massacres at Srebrenica in July 1995, the Respondent failed to take measures which would have satisfied the requirements of paragraphs 52 (A) (1) and (2) of the Court’s Order of 8 April 1993 (reaffirmed in the Order of 13 September 1993). The Court however considers that, for purposes of reparation, the Respondent’s non-compliance with the provisional measures ordered is an aspect of, or merges with, its breaches of the substantive obligations of prevention and punishment laid upon it by the Convention. The Court does not therefore find it appropriate to give effect to the Applicant’s request for an order for symbolic compensation in this respect. The Court will however include in the operative clause of the present Judgment, by way of satisfaction, a declaration that the Respondent has failed to comply with the Court’s Orders indicating provisional measures.
470. The Court further notes that one of the provisional measures indicated in the Order of 8 April and reaffirmed in that of 13 September 1993 was addressed to both Parties. The Court’s findings in paragraphs 456 to 457 and 469 are without prejudice to the question whether the Applicant did not also fail to comply with the Orders indicating provisional measures.

**XII. Operative Clause**

471. For these reasons,

**The Court,**

(1) by ten votes to five,

Rejects the objections contained in the final submissions made by the Respondent to the effect that the Court has no jurisdiction; and affirms that it has jurisdiction, on the basis of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, to adjudicate upon the dispute brought before it on 20 March 1993 by the Republic of Bosnia and Herzegovina;

in favour: President Higgins; Vice-President Al-Khasawneh; Judges Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna; Judge ad hoc Mahiou;

against: Judges Ranjeva, Shi, Koroma, Skotnikov; Judge ad hoc Krecá;

(2) by thirteen votes to two,

Finds that Serbia has not committed genocide, through its organs or persons whose acts engage its responsibility under customary international law, in violation of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide;

in favour: President Higgins; Vice-President Al-Khasawneh; Judges Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judge ad hoc Krecá;

against: Judges Ranjeva, Shi, Koroma, Skotnikov; Judge ad hoc Krecá;

(3) by thirteen votes to two,

Finds that Serbia has not conspired to commit genocide, nor incited the commission of genocide, in violation of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide;

in favour: President Higgins; Judges Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judge ad hoc Krecá;

against: Vice-President Al-Khasawneh; Judge ad hoc Mahiou;

(4) by eleven votes to four,

Finds that Serbia has not been complicit in genocide, in violation of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide;

in favour: President Higgins; Judges Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Sepúlveda-Amor, Skotnikov; Judge ad hoc Krecá;

against: Vice-President Al-Khasawneh; Judges Keith, Bennouna; Judge ad hoc Mahiou;

(5) by twelve votes to three,

Finds that Serbia has violated the obligation to prevent genocide, in respect of the genocide that occurred in Srebrenica in July 1995;

in favour: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Owada, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna; Judge ad hoc Mahiou;

against: Judges Tomka, Skotnikov; Judge ad hoc Krecá;

(6) by fourteen votes to one,

Finds that Serbia has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by having failed to transfer Ratko Mladić, indicted for genocide and complicity in genocide, for trial by the International Criminal Tribunal for the former Yugoslavia, and thus having failed fully to co-operate with that Tribunal;

in favour: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Owada, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judge ad hoc Mahiou;

against: Judge ad hoc Krecá;

(7) by thirteen votes to two,

Finds that Serbia has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by having failed to take all measures within its power to prevent genocide in Srebrenica in July 1995;

in favour: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna; Judge ad hoc Mahiou;

against: Judge ad hoc Krecá;

(8) by fourteen votes to one,

Decides that Serbia shall immediately take effective steps to ensure full compliance with its obligation under the Convention on the Prevention
and Punishment of the Crime of Genocide to punish acts of genocide as defined by Article II of the Convention, or any of the other acts prescribed by Article III of the Convention, and to transfer individuals accused of genocide or any of those other acts for trial by the International Criminal Tribunal for the former Yugoslavia, and to co-operate fully with that Tribunal;

**IN FAVOUR:** President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judge ad hoc Mahiou;

**AGAINST:** Judge ad hoc Kreča;

(9) by thirteen votes to two,

_Finds that, as regards the breaches by Serbia of the obligations referred to in subparagraphs (5) and (7) above, the Court’s findings in those paragraphs constitute appropriate satisfaction, and that the case is not one in which an order for payment of compensation, or, in respect of the violation referred to in subparagraph (5), a direction to provide assurances and guarantees of non-repetition, would be appropriate._

**IN FAVOUR:** President Higgins; Judges Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judge ad hoc Mahiou;

**AGAINST:** Judge Al-Khasawneh; Judge ad hoc Mahiou.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-sixth day of February, two thousand and seven, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of Bosnia and Herzegovina and the Government of Serbia, respectively.

(Initialled) Rosalyn HIGGINS,
President.

(Initialled) Philippe COUVREUR,
Registrar.

Vice-President Al-Khasawneh appends a dissenting opinion to the Judgment of the Court; Judges Ranjeva, Shi and Koroma append a joint dissenting opinion to the Judgment of the Court; Judge Ranjeva appends a separate opinion to the Judgment of the Court; Judges Shi and Koroma append a joint declaration to the Judgment of the Court; Judges Owada and Tomka append separate opinions to the Judgment of the Court; Judges Keith, Bennouna and Skotnikov append declarations to the Judgment of the Court; Judge ad hoc Mahiou appends a dissenting opinion to the Judgment of the Court; Judge ad hoc Kreča appends a separate opinion to the Judgment of the Court.
International Court of Justice

Gabčíkovo-Nagymaros Project
(Hungary/Slovakia)
Judgment

I.C.J. Reports 1997
INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

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

JUDGMENT OF 25 SEPTEMBER 1997

1997

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

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

ARRÊT DU 25 SEPTEMBRE 1997

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YEAR 1997

25 September 1997

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

Treaty of 16 September 1977 concerning the construction and operation of the Gabčíkovo-Nagyamaros System of Locks — “Related instruments”.

Suspension and abandonment by Hungary, in 1989, of works on the Project — Applicability of the Vienna Convention of 1969 on the Law of Treaties — Law of treaties and law of State responsibility — State of necessity as a ground for precluding the wrongfulness of an act — “Essential interest” of the State committing the act — Environment — “Grave and imminent peril” — Act having to constitute the “only means” of safeguarding the interest threatened — State having “contributed to the occurrence of the state of necessity”.

Czechoslovakia’s proceeding, in November 1991, to “Variant C” and putting into operation, from October 1992, this Variant — Arguments drawn from a proposed principle of approximate application — Respect for the limits of the Treaty — Right to an equitable and reasonable share of the resources of an international watercourse — Commission of a wrongful act and prior conduct of a preparatory character — Obligation to mitigate damages — Principle concerning only the calculation of damages — Countermeasures — Response to an internationally wrongful act — Proportionality — Assumption of unilateral control of a shared resource.

Notification by Hungary, on 19 May 1992, of the termination of the 1977 Treaty and related instruments — Legal effects — Matter falling within the law of treaties — Articles 60 to 62 of the Vienna Convention on the Law of Treaties — Customary law — Impossibility of performance — Permanent disappearance or destruction of an “object” indispensable for execution — Impossibility of performance resulting from the breach, by the party invoking it, of an obligation under the Treaty — Fundamental change of circumstances — Essential basis of the consent of the parties — Extent of obligations still to be performed — Stability of treaty relations — Material breach of the Treaty — Date on which the breach occurred and date of notification of termination — Victim of a breach having itself committed a prior breach of the Treaty — Emergence of new norms of environmental law — Sustainable development — Treaty provisions permit-

JUDGMENT

Present: President Schwelb; Vice-President Weeramantry; Judges Oda, Bedjaiou, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchegin, Parra-Aranguren, Kooymans, Rezek; Judge ad hoc Skubiczewski; Registrar Valencia-Ospina.

In the case concerning the Gabčíkovo-Nagyamaros Project, between

the Republic of Hungary,

represented by

H.E. Mr. György Szénási, Ambassador, Head of the International Law Department, Ministry of Foreign Affairs, as Agent and Counsel;

H.E. Mr. Denes Tomaj, Ambassador of the Republic of Hungary to the Netherlands, as Co-Agent;

Mr. James Crawford, Whewell Professor of International Law, University of Cambridge,

Mr. Pierre-Marie Dupuy, Professor at the University Panthéon-Assas (Paris II) and Director of the Institut des hautes études internationales of Paris,

Mr. Alexandre Kiss, Director of Research, Centre national de la recherche scientifique (red.),

Mr. László Valki, Professor of International Law, Eötvös Loránd University, Budapest,

ing the parties, by mutual consent, to take account of those norms — Repudiation of the Treaty — Reciprocal non-compliance — Integrity of the rule pacta sunt servanda — Treaty remaining in force until terminated by mutual consent.

Legal consequences of the Judgment of the Court — Dissolution of Czechoslovakia — Article 12 of the Vienna Convention of 1978 on Succession of States in respect of Treaties — Customary law — Succession of States without effect on a treaty creating rights and obligations “attaching” to the territory — Irregular state of affairs as a result of failure of both Parties to comply with their treaty obligations — Ex injuria jus non oritur — Objectives of the Treaty — Obligations overtaken by events — Positions adopted by the parties after conclusion of the Treaty — Good faith negotiations — Effects of the Project on the environment — Agreed solution to be found by the Parties — Joint régime — Reparation for acts committed by both Parties — Co-operation in the use of shared water resources — Damages — Succession in respect of rights and obligations relating to the Project — Intersecting wrongs — Settlement of accounts for the construction of the works.
Mr. Boldizsár Nagy, Associate Professor of International Law, Eötvös Loránd University, Budapest,
Mr. Philippe Sands, Reader in International Law, University of London, School of Oriental and African Studies, and Global Professor of Law, New York University,
Ms Katherine Gorove, consulting Attorney,
as Counsel and Advocates;
Dr. Howard Wheater, Professor of Hydrology, Imperial College, London,
Dr. Gábor Vida, Professor of Biology, Eötvös Loránd University, Budapest, Member of the Hungarian Academy of Sciences,
Dr. Roland Carbiener, Professor emeritus of the University of Strasbourg,
Dr. Klaus Kern, consulting Engineer, Karlsruhe,
as Advocates;
Mr. Edward Helgeson,
Mr. Stuart Oldham,
Mr. Péter Molnár,
as Advisers;
Dr. György Kovács,
Mr. Timothy Walsh,
Mr. Zoltán Kovács,
as Technical Advisers;
Dr. Attila Nyikos,
as Assistant;
Mr. Axel Gosseries, LL.M.,
as Translator;
Ms Éva Kocsis,
Ms Katinka Tompa,
as Secretaries,

and

the Slovak Republic,
represented by
H.E. Dr. Peter Tomka, Ambassador, Legal Adviser of the Ministry of Foreign Affairs,
as Agent;
Dr. Václav Mikulka, Member of the International Law Commission,
as Co-Agent, Counsel and Advocate;
Mr. Derek W. Bowett, C.B.E., Q.C., F.B.A., Whewell Professor emeritus of International Law at the University of Cambridge, former Member of the International Law Commission,
as Counsel;
Mr. Stephen C. McCaffrey, Professor of International Law at the University of the Pacific, McGeorge School of Law, Sacramento, United States of America, former Member of the International Law Commission,
Mr. Alain Pellet, Professor at the University of Paris X-Nanterre and at the

Institute of Political Studies, Paris, Member of the International Law Commission,
Mr. Walter D. Sohier, Member of the Bar of the State of New York and of the District of Columbia,
Sir Arthur Watts, K.C.M.G., Q.C., Barrister, Member of the Bar of England and Wales,
Mr. Samuel S. Wordsworth, avocat à la cour d'appel de Paris, Solicitor of the Supreme Court of England and Wales, Frere Cholmeley, Paris,
as Counsel and Advocates;
Mr. Igor Mucha, Professor of Hydrogeology and Former Head of the Groundwater Department at the Faculty of Natural Sciences of Comenius University in Bratislava,
Mr. Karra Venkateswara Rao, Director of Water Resources Engineering, Department of Civil Engineering, City University, London,
as Counsel and Experts;
Dr. Cecilia Kandráčová, Director of Department, Ministry of Foreign Affairs,
Mr. Luděk Krajhanzl, Attorney at Law, Vyrobal Krajhanzl Skácel and Partners, Prague,
Mr. Miroslav Liška, Head of the Division for Public Relations and Expertise, Water Resources Development State Enterprise, Bratislava,
Dr. Peter Vršanský, Minister-Counsellor, Chargé d'affaires a.i., of the Embassy of the Slovak Republic, The Hague,
as Counsellors;
Miss Anouche Beaudouin, allocataire de recherche at the University of Paris X-Nanterre,
Ms Cheryl Dunn, Frere Cholmeley, Paris,
Ms Nikoleta Glindová, attaché, Ministry of Foreign Affairs,
Mr. Drahoslav Štefánik, attaché, Ministry of Foreign Affairs,
as Legal Assistants,

THE COURT,

composed as above,
after deliberation,
delivers the following Judgment:

1. By a letter dated 2 July 1993, filed in the Registry of the Court on the same day, the Ambassador of the Republic of Hungary (hereinafter called "Hungary") to the Netherlands and the Chargé d'affaires ad interim of the Slovak Republic (hereinafter called "Slovakia") to the Netherlands jointly notified to the Court a Special Agreement in English that had been signed at Brussels on 7 April 1993 and had entered into force on 28 June 1993, on the date of the exchange of instruments of ratification.
2. The text of the Special Agreement reads as follows:
“The Republic of Hungary and the Slovak Republic,

Considering that differences have arisen between the Czech and Slovak Federal Republic and the Republic of Hungary regarding the implementation and the termination of the Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System signed in Budapest on 16 September 1977 and related instruments (hereinafter referred to as ‘the Treaty’), and on the construction and operation of the ‘provisional solution’;

Bearing in mind that the Slovak Republic is one of the two successor States of the Czech and Slovak Federal Republic and the sole successor State in respect of rights and obligations relating to the Gabčíkovo-Nagymaros Project;

Recognizing that the Parties concerned have been unable to settle these differences by negotiations;

Having in mind that both the Czechoslovak and Hungarian delegations expressed their commitment to submit the differences connected with the Gabčíkovo-Nagymaros Project in all its aspects to binding international arbitration or to the International Court of Justice;

Desiring that these differences should be settled by the International Court of Justice;

Recalling their commitment to apply, pending the Judgment of the International Court of Justice, such a temporary water management régime of the Danube as shall be agreed between the Parties;

Desiring further to define the issues to be submitted to the International Court of Justice.

Have agreed as follows:

Article 1

The Parties submit the questions contained in Article 2 to the International Court of Justice pursuant to Article 40, paragraph 1, of the Statute of the Court.

Article 2

(1) The Court is requested to decide on the basis of the Treaty and rules and principles of general international law, as well as such other treaties as the Court may find applicable,

(a) whether the Republic of Hungary was entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabčíkovo Project for which the Treaty attributed responsibility to the Republic of Hungary;

(b) whether the Czech and Slovak Federal Republic was entitled to proceed, in November 1991, to the ‘provisional solution’ and to put into operation from October 1992 this system, described in the Report of the Working Group of Independent Experts of the Commission of the European Communities, the Republic of Hungary and the Czech and Slovak Federal Republic dated 23 November 1992 (damming up of the Danube at river kilometre 1851.7 on Czechoslovak territory and resulting consequences on water and navigation course);

(c) what are the legal effects of the notification, on 19 May 1992, of the termination of the Treaty by the Republic of Hungary.

(2) The Court is also requested to determine the legal consequences, including the rights and obligations for the Parties, arising from its Judgment on the questions in paragraph 1 of this Article.

Article 3

(1) All questions of procedure and evidence shall be regulated in accordance with the provisions of the Statute and the Rules of Court.

(2) However, the Parties request the Court to order that the written proceedings should consist of:

(a) a Memorial presented by each of the Parties not later than ten months after the date of notification of this Special Agreement to the Registrar of the International Court of Justice;

(b) a Counter-Memorial presented by each of the Parties not later than seven months after the date on which each has received the certified copy of the Memorial of the other Party;

(c) a Reply presented by each of the Parties within such time-limits as the Court may order.

(d) The Court may request additional written pleadings by the Parties if it so determines.

(3) The above-mentioned parts of the written proceedings and their annexes presented to the Registrar will not be transmitted to the other Party until the Registrar has received the corresponding part of the proceedings from the said Party.

Article 4

(1) The Parties agree that, pending the final Judgment of the Court, they will establish and implement a temporary water management régime for the Danube.

(2) They further agree that, in the period before such a régime is established or implemented, if either Party believes its rights are endangered by the conduct of the other, it may request immediate consultation and reference, if necessary, to experts, including the Commission of the European Communities, with a view to protecting those rights; and that protection shall not be sought through a request to the Court under Article 41 of the Statute.

(3) This commitment is accepted by both Parties as fundamental to the conclusion and continuing validity of the Special Agreement.

Article 5

(1) The Parties shall accept the Judgment of the Court as final and binding upon them and shall execute it in its entirety and in good faith.

(2) Immediately after the transmission of the Judgment the Parties shall enter into negotiations on the modalities for its execution.

(3) If they are unable to reach agreement within six months, either Party may request the Court to render an additional Judgment to determine the modalities for executing its Judgment.

Article 6

(1) The present Special Agreement shall be subject to ratification.
(2) The instruments of ratification shall be exchanged as soon as possible in Brussels.
(3) The present Special Agreement shall enter into force on the date of exchange of instruments of ratification. Thereafter it will be notified jointly to the Registrar of the Court.

In witness whereof the undersigned being duly authorized thereto, have signed the present Special Agreement and have affixed thereto their seals."

3. Pursuant to Article 40, paragraph 3, of the Statute and Article 42 of the Rules of Court, copies of the notification of the Special Agreement were transmitted by the Registrar to the Secretary-General of the United Nations, Members of the United Nations and other States entitled to appear before the Court.

4. Since the Court included upon the Bench no judge of Slovak nationality, Slovakia exercised its right under Article 31, paragraph 2, of the Statute to choose a judge ad hoc to sit in the case: it chose Mr. Krzyżtof Jan Skubiszewski.

5. By an Order dated 14 July 1993, the Court fixed 2 May 1994 as the time-limit for the filing by each of the Parties of a Memorial and 5 December 1994 for the filing by each of the Parties of a Counter-Memorial, having regard to the provisions of Article 3, paragraph 2 (a) and (b), of the Special Agreement. Those pleadings were duly filed within the prescribed time-limits.

6. By an Order dated 20 December 1994, the President of the Court, having heard the Agents of the Parties, fixed 20 June 1995 as the time-limit for the filing of the Replies, having regard to the provisions of Article 3, paragraph 2 (c), of the Special Agreement. The Replies were duly filed within the time-limit thus prescribed and, as the Court had not asked for the submission of additional pleadings, the case was then ready for hearing.

7. By letters dated 27 January 1997, the Agent of Slovakia, referring to the provisions of Article 56, paragraph 1, of the Rules of Court, expressed his Government's wish to produce two new documents: by a letter dated 10 February 1997, the Agent of Hungary declared that his Government objected to their production. On 26 February 1997, after having duly ascertained the views of the two Parties, the Court decided, in accordance with Article 56, paragraph 2, of the Rules of Court, to authorize the production of those documents under certain conditions of which the Parties were advised. Within the time-limit fixed by the Court to that end, Hungary submitted comments on one of those documents under paragraph 3 of that same Article. The Court authorized Slovakia to comment in turn upon those observations, as it had expressed a wish to do so; its comments were received within the time-limit prescribed for that purpose.

8. Moreover, each of the Parties asked to be allowed to show a video cassette in the course of the oral proceedings. The Court agreed to those requests, provided that the cassettes in question were exchanged in advance between the Parties, through the intermediary of the Registry. That exchange was effected accordingly.

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

10. By a letter dated 16 June 1995, the Agent of Slovakia invited the Court to visit the locality to which the case relates and there to exercise its functions with regard to the obtaining of evidence, in accordance with Article 66 of the Rules of Court. For his part, the Agent of Hungary indicated, by a letter dated 28 June 1995, that, if the Court should decide that a visit of that kind would be useful, his Government would be pleased to co-operate in organizing it. By a letter dated 14 November 1995, the Agents of the Parties jointly notified to the Court the text of a Protocol of Agreement, concluded in Budapest and New York the same day, with a view to proposing to the Court the arrangements that might be made for such a visit in situ; and, by a letter dated 3 February 1997, they jointly notified to it the text of Agreed Minutes drawn up in Budapest and New York the same day, which supplemented the Protocol of Agreement of 14 November 1995. By an Order dated 5 February 1997, the Court decided to accept the invitation to exercise its functions with regard to the obtaining of evidence at a place to which the case relates and, to that end, to adopt the arrangements proposed by the Parties. The Court visited the area from 1 to 4 April 1997; it visited a number of locations along the Danube and took note of the technical explanations given by the representatives who had been designated for the purpose by the Parties.

11. The Court held a first round of ten public hearings from 3 to 7 March and from 24 to 27 March 1997, and a second round of four public hearings on 10, 11, 14 and 15 April 1997, after having made the visit in situ referred to in the previous paragraph. During those hearings, the Court heard the oral arguments and replies of:

For Hungary: H.E. Mr. Szénnási, Professor Valki, Professor Kiss, Professor Vida, Professor Carbiener, Professor Crawford, Professor Nagy, Dr. Kern, Professor Wheeler, Ms Gorove, Professor Dupuy, Professor Sands.

For Slovakia: H.E. Dr. Tomka, Dr. Mikulka, Mr. Wordsworth, Professor McCaffrey, Professor Mucha, Professor Pellet, Mr. Rejsgaard, Sir Arthur Watts.

12. The Parties replied orally and in writing to various questions put by Members of the Court. Referring to the provisions of Article 72 of the Rules of Court, each of the Parties submitted to the Court its comments upon the replies given by the other Party to some of those questions.

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

On behalf of Hungary,
in the Memorial, the Counter-Memorial and the Reply (mutatis mutandis identical texts):

"On the basis of the evidence and legal argument presented in the Memorial, Counter-Memorial and this Reply, the Republic of Hungary

Requests the Court to adjudge and declare

First, that the Republic of Hungary was entitled to suspend and subsequently abandon the works on the Nagymaros Project and on the part of the Gabčíkovo Project for which the Treaty attributed responsibility to the Republic of Hungary;

Second, that the Czech and Slovak Federal Republic was not entitled to proceed to the 'provisional solution' (damming up of the Danube at river kilometre 1851.7 on Czechoslovak territory and resulting consequences on water and navigation course);


Requests the Court to adjudge and declare further

that the legal consequences of these findings and of the evidence and the arguments presented to the Court are as follows:

1. that the Treaty of 16 September 1977 has never been in force between the Republic of Hungary and the Slovak Republic;

2. that the Slovak Republic bears responsibility to the Republic of Hungary for maintaining in operation the 'provisional solution' referred to above;

3. that the Slovak Republic is internationally responsible for the damage and loss suffered by the Republic of Hungary and by its nationals as a result of the 'provisional solution';

4. that the Slovak Republic is under an obligation to make reparation in respect of such damage and loss, the amount of such reparation, if it cannot be agreed by the Parties within six months of the date of the Judgment of the Court, to be determined by the Court;

5. that the Slovak Republic is under the following obligations:

(a) to return the waters of the Danube to their course along the international frontier between the Republic of Hungary and the Slovak Republic, that is to say the main navigable channel as defined by applicable treaties;

(b) to restore the Danube to the situation it was in prior to the putting into effect of the provisional solution; and

(c) to provide appropriate guarantees against the repetition of the damage and loss suffered by the Republic of Hungary and by its nationals;"

On behalf of Slovakia,
in the Memorial, the Counter-Memorial and the Reply (mutatis mutandis identical texts):

"On the basis of the evidence and legal arguments presented in the Slovak Memorial, Counter-Memorial and in this Reply, and reserving the right to supplement or amend its claims in the light of further written pleadings, the Slovak Republic

Requests the Court to adjudge and declare:

1. That the Treaty between Czechoslovakia and Hungary of 16 September 1977 concerning the construction and operation of the Gabčíkovo/Nagymaros System of Locks, and related instruments, and to which the Slovak Republic is the acknowledged successor, is a treaty in force and has been so from the date of its conclusion; and that the notification of termination by the Republic of Hungary on 19 May 1992 was without legal effect.

2. That the Republic of Hungary was not entitled to suspend and subsequently abandon the works on the Nagymaros Project and on that part of the Gabčíkovo Project for which the 1977 Treaty attributed responsibility to the Republic of Hungary.

3. That the act of proceeding with and putting into operation Variant C, the 'provisional solution', was lawful.

4. That the Republic of Hungary must therefore cease forthwith all conduct which impedes the full and bona fide implementation of the 1977 Treaty and must take all necessary steps to fulfill its own obligations under the Treaty without further delay in order to restore compliance with the Treaty.

5. That, in consequence of its breaches of the 1977 Treaty, the Republic of Hungary is liable to pay, and the Slovak Republic is entitled to receive, full compensation for the loss and damage caused to the Slovak Republic by those breaches, plus interest and loss of profits, in the amounts to be determined by the Court in a subsequent phase of the proceedings in this case."

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

On behalf of Hungary,
at the hearing of 11 April 1997:

The submissions read at the hearing were mutatis mutandis identical to those presented by Hungary during the written proceedings.

On behalf of Slovakia,
at the hearing of 15 April 1997:

"On the basis of the evidence and legal arguments presented in its written and oral pleadings, the Slovak Republic,

Requests the Court to adjudge and declare:

1. That the Treaty, as defined in the first paragraph of the Preamble to the Compromises between the Parties, dated 7 April 1993, concerning the construction and operation of the Gabčíkovo/Nagymaros System of Locks and related instruments, concluded between Hungary and
Czechoslovakia and with regard to which the Slovak Republic is the successor State, has never ceased to be in force and so remains, and that the notification of 19 May 1992 of purported termination of the Treaty by the Republic of Hungary was without legal effect;

2. That the Republic of Hungary was not entitled to suspend and subsequently abandon the works on the Nagymaros Project and on that part of the Gabčíkovo Project for which the 1977 Treaty attributes responsibility to the Republic of Hungary;

3. That the Czech and Slovak Federal Republic was entitled, in November 1991, to proceed with the 'provisional solution' and to put this system into operation from October 1992; and that the Slovak Republic was, and remains, entitled to continue the operation of this system;

4. That the Republic of Hungary shall therefore cease forthwith with all conduct which impedes the bona fide implementation of the 1977 Treaty and shall take all necessary steps to fulfil its own obligations under the Treaty without further delay in order to restore compliance with the Treaty, subject to any amendments which may be agreed between the Parties;

5. That the Republic of Hungary shall give appropriate guarantees that it will not impede the performance of the Treaty, and the continued operation of the system;

6. That, in consequence of its breaches of the 1977 Treaty, the Republic of Hungary shall, in addition to immediately resuming performance of its Treaty obligations, pay to the Slovak Republic full compensation for the loss and damage, including loss of profits, caused by those breaches together with interest thereon;

7. That the Parties shall immediately begin negotiations with a view, in particular, to adopting a new timetable and appropriate measures for the implementation of the Treaty by both Parties, and to fixing the amount of compensation due by the Republic of Hungary to the Slovak Republic; and that, if the Parties are unable to reach an agreement within six months, either one of them may request the Court to render an additional Judgment to determine the modalities for executing its Judgment."

15. The present case arose out of the signature, on 16 September 1977, by the Hungarian People’s Republic and the Czechoslovak People’s Republic, of a treaty “concerning the construction and operation of the Gabčíkovo-Nagymaros System of Locks” (hereinafter called the “1977 Treaty”). The names of the two contracting States have varied over the years; hereinafter they will be referred to as Hungary and Czechoslovakia. The 1977 Treaty entered into force on 30 June 1978.

It provides for the construction and operation of a System of Locks by the parties as a “joint investment”. According to its Preamble, the barrage system was designed to attain

“the broad utilization of the natural resources of the Bratislava-Budapest section of the Danube river for the development of water resources, energy, transport, agriculture and other sectors of the national economy of the Contracting Parties”.

The joint investment was thus essentially aimed at the production of hydroelectricity, the improvement of navigation on the relevant section of the Danube and the protection of the areas along the banks against flooding. At the same time, by the terms of the Treaty, the contracting parties undertook to ensure that the quality of water in the Danube was not impaired as a result of the Project, and that compliance with the obligations for the protection of nature arising in connection with the construction and operation of the System of Locks would be observed.

16. The Danube is the second longest river in Europe, flowing along or across the borders of nine countries in its 2,860-kilometre course from the Black Forest eastwards to the Black Sea. For 142 kilometres, it forms the boundary between Slovakia and Hungary. The sector with which this case is concerned is a stretch of approximately 200 kilometres, between Bratislava in Slovakia and Budapest in Hungary. Below Bratislava, the river gradient decreases markedly, creating an alluvial plain of gravel and sand sediment. This plain is delimited to the north-east, in Slovak territory, by the Malý Danube and to the south-west, in Hungarian territory, by the Mosoni Danube. The boundary between the two States is constituted, in the major part of that region, by the main channel of the river. The area lying between the Malý Danube and that channel, in Slovak territory, constitutes the Žitný Ostrov; the area between the main channel and the Mosoni Danube, in Hungarian territory, constitutes the Szigetköz. Cunovo and, further downstream, Gabčíkovo, are situated in this sector of the river on Slovak territory. Cunovo on the right bank and Gabčíkovo on the left. Further downstream, after the confluence of the various branches, the river enters Hungarian territory and the topography becomes hillier. Nagymaros lies in a narrow valley at a bend in the Danube just before it turns south, enclosing the large river island of Szentendre before reaching Budapest (see sketch-map No. 1, p. 19 below).

17. The Danube has always played a vital part in the commercial and economic development of its riparian States, and has underlined and reinforced their interdependence, making international co-operation essential. Improvements to the navigation channel have enabled the Danube, now linked by canal to the Main and thence to the Rhine, to become an important navigational artery connecting the North Sea to the Black Sea. In the stretch of river to which the case relates, flood protection measures have been constructed over the centuries, farming and forestry practised, and, more recently, there has been an increase in population and industrial activity in the area. The cumulative effects on the river and on the environment of various human activities over the years have not all been favourable, particularly for the water régime.
Only by international co-operation could action be taken to alleviate these problems. Water management projects along the Danube have frequently sought to combine navigational improvements and flood protection with the production of electricity through hydroelectric power plants. The potential of the Danube for the production of hydroelectric power has been extensively exploited by some riparian States. The history of attempts to harness the potential of the particular stretch of the river at issue in these proceedings extends over a 25-year period culminating in the signature of the 1977 Treaty.

18. Article 1, paragraph 1, of the 1977 Treaty describes the principal works to be constructed in pursuance of the Project. It provided for the building of two series of locks, one at Gabčíkovo (in Czechoslovak territory) and the other at Nagymaros (in Hungarian territory), to constitute “a single and indivisible operational system of works” (see sketch-map No. 2, p. 21 below). The Court will subsequently have occasion to revert in more detail to those works, which were to comprise, *inter alia*, a reservoir upstream of Dunakiliti, in Hungarian and Czechoslovak territory; a dam at Dunakiliti, in Hungarian territory; a bypass canal, in Czechoslovak territory, on which was to be constructed the Gabčíkovo System of Locks (together with a hydroelectric power plant with an installed capacity of 720 megawatts (MW)); the deepening of the bed of the Danube downstream of the place at which the bypass canal was to rejoin the old bed of the river; a reinforcement of flood-control works along the Danube upstream of Nagymaros; the Nagymaros System of Locks, in Hungarian territory (with a hydroelectric power plant of a capacity of 158 MW); and the deepening of the bed of the Danube downstream.

Article 1, paragraph 4, of the Treaty further provided that the technical specifications concerning the system would be included in the “Joint Contractual Plan” which was to be drawn up in accordance with the Agreement signed by the two Governments for this purpose on 6 May 1976; Article 4, paragraph 1, for its part, specified that “the joint investment [would] be carried out in conformity with the joint contractual plan”.

According to Article 3, paragraph 1:

“Operations connected with the realization of the joint investment and with the performance of tasks relating to the operation of the System of Locks shall be directed and supervised by the Governments of the Contracting Parties through . . . ( . . . ‘government delegates’).”

Those delegates had, *inter alia*, “to ensure that construction of the System of Locks is . . . carried out in accordance with the approved joint contractual plan and the project work schedule”. When the works were brought into operation, they were moreover “To establish the operating
and operational procedures of the System of Locks and ensure compliance therewith.”

Article 4, paragraph 4, stipulated that:

“Operations relating to the joint investment [should] be organized by the Contracting Parties in such a way that the power generation plants [would] be put into service during the period 1986-1990.”

Article 5 provided that the cost of the joint investment would be borne by the contracting parties in equal measure. It specified the work to be carried out by each one of them. Article 8 further stipulated that the Dunakiliti dam, the bypass canal and the two series of locks at Gabčikovo and Nagymaros would be “jointly owned” by the contracting parties “in equal measure”. Ownership of the other works was to be vested in the State on whose territory they were constructed.

The parties were likewise to participate in equal measure in the use of the system put in place, and more particularly in the use of the base-load and peak-load power generated at the hydroelectric power plants (Art. 9).

According to Article 10, the works were to be managed by the State on whose territory they were located, “in accordance with the jointly-agreed operating and operational procedures”, while Article 12 stipulated that the operation, maintenance (repair) and reconstruction costs of jointly owned works of the System of Locks were also to be borne jointly by the contracting parties in equal measure.

According to Article 14,

“The discharge specified in the water balance of the approved joint contractual plan shall be ensured in the bed of the Danube [between Dunakiliti and Sap] unless natural conditions or other circumstances temporarily require a greater or smaller discharge.”

Paragraph 3 of that Article was worded as follows:

“In the event that the withdrawal of water in the Hungarian-Czechoslovak section of the Danube exceeds the quantities of water specified in the water balance of the approved joint contractual plan and the excess withdrawal results in a decrease in the output of electric power, the share of electric power of the Contracting Party benefiting from the excess withdrawal shall be correspondingly reduced.”

Article 15 specified that the contracting parties

“shall ensure, by the means specified in the joint contractual plan, that the quality of the water in the Danube is not impaired as a result of the construction and operation of the System of Locks”.”
Article 16 set forth the obligations of the contracting parties concerning the maintenance of the bed of the Danube.

Article 18, paragraph 1, provided as follows:

“The Contracting Parties, in conformity with the obligations previously assumed by them, and in particular with article 3 of the Convention concerning the regime of navigation on the Danube, signed at Belgrade on 18 August 1948, shall ensure uninterrupted and safe navigation on the international fairway both during the construction and during the operation of the System of Locks.”

It was stipulated in Article 19 that:

“The Contracting Parties shall, through the means specified in the joint contractual plan, ensure compliance with the obligations for the protection of nature arising in connection with the construction and operation of the System of Locks.”

Article 20 provided for the contracting parties to take appropriate measures, within the framework of their national investments, for the protection of fishing interests in conformity with the Convention concerning Fishing in the Waters of the Danube, signed at Bucharest on 29 January 1958.

According to Article 22, paragraph 1, of the Treaty, the contracting parties had, in connection with the construction and operation of the System of Locks, agreed on minor revision to the course of the State frontier between them as follows:

“(d) In the Dunakiliti-Hrusov head-water area, the State frontier shall run from boundary point 161.V.O.á. to boundary stone No. I.5. in a straight line in such a way that the territories affected, to the extent of about 10-10 hectares shall be offset between the two States.”

It was further provided, in paragraph 2, that the revision of the State frontier and the exchange of territories so provided for should be effected “by the Contracting Parties on the basis of a separate treaty”. No such treaty was concluded.

Finally a dispute settlement provision was contained in Article 27, worded as follows:

“1. The settlement of disputes in matters relating to the realization and operation of the System of Locks shall be a function of the government delegates.

2. If the government delegates are unable to reach agreement on the matters in dispute, they shall refer them to the Governments of the Contracting Parties for decision.”

19. The Joint Contractual Plan, referred to in the previous paragraph, set forth, on a large number of points, both the objectives of the system and the characteristics of the works. In its latest version it specified in paragraph 6.2 that the Gabčíkovo bypass canal would have a discharge capacity of 4,000 cubic metres per second (m³/s). The power plant would include “Eight . . . turbines with 9.20 m diameter running wheels” and would “mainly operate in peak-load time and continuously during high water”. This type of operation would give an energy production of 2,650 gigawatt-hours (GWh) per annum. The Plan further stipulated in paragraph 4.4.2:

“The low waters are stored every day, which ensures the peak-load time operation of the Gabčíkovo hydropower plant . . . a minimum of 50 m³/s additional water is provided for the old bed [of the Danube] besides the water supply of the branch system.”

The Plan further specified that, in the event that the discharge into the bypass canal exceeded 4,000-4,500 m³/s, the excess amounts of water would be channeled into the old bed. Lastly, according to paragraph 7.7 of the Plan:

“The common operational regulation stipulates that concerning the operation of the Dunakiliti barrage in the event of need during the growing season 200 m³/s discharge must be released into the old Danube bed, in addition to the occasional possibilities for rinsing the bed.”

The Joint Contractual Plan also contained “Preliminary Operating and Maintenance Rules”, Article 23 of which specified that “The final operating rules [should] be approved within a year of the setting into operation of the system.” (Joint Contractual Plan, Summary Documentation, Vol. O-1-A.)

Nagymaros, with six turbines, was, according to paragraph 6.3 of the Plan, to be a “hydropower station . . . type of a basic power-station capable of operating in peak-load time for five hours at the discharge interval between 1,000-2,500 m³/s” per day. The intended annual production was to be 1,025 GWh (i.e., 38 per cent of the production of Gabčíkovo, for an installed power only equal to 21 per cent of that of Gabčíkovo).

20. Thus, the Project was to have taken the form of an integrated joint project with the two contracting parties on an equal footing in respect of the financing, construction and operation of the works. Its single and indivisible nature was to have been realized through the Joint Contractual Plan which complemented the Treaty. In particular, Hungary would have had control of the sluices at Dunakiliti and the works at Nagymaros, whereas Czechoslovakia would have had control of the works at Gabčíkovo.

21. The schedule of work had for its part been fixed in an Agreement on mutual assistance signed by the two parties on 16 September 1977, at
the same time as the Treaty itself. The Agreement moreover made some adjustments to the allocation of the works between the parties as laid down by the Treaty.

Work on the Project started in 1978. On Hungary’s initiative, the two parties first agreed, by two Protocols signed on 10 October 1983 (one amending Article 4, paragraph 4, of the 1977 Treaty and the other the Agreement on mutual assistance), to slow the work down and to postpone putting into operation the power plants, and then, by a Protocol signed on 6 February 1989 (which amended the Agreement on mutual assistance), to accelerate the Project.

22. As a result of intense criticism which the Project had generated in Hungary, the Hungarian Government decided on 13 May 1989 to suspend the works at Nagymaros pending the completion of various studies which the competent authorities were to finish before 31 July 1989. On 21 July 1989, the Hungarian Government extended the suspension of the works at Nagymaros until 31 October 1989, and, in addition, suspended the works at Dunakiliti until the same date. Lastly, on 27 October 1989, Hungary decided to abandon the works at Nagymaros and to maintain the status quo at Dunakiliti.

23. During this period, negotiations were being held between the parties. Czechoslovakia also started investigating alternative solutions. One of them, subsequently known as “Variant C”, entailed a unilateral diversion of the Danube by Czechoslovakia on its territory some 10 kilometres upstream of Dunakiliti (see sketch-map No. 3, p. 26 below). In its final stage, Variant C included the construction at Čunovo of an overflow dam and a levee linking that dam to the south bank of the bypass canal. The corresponding reservoir was to have a smaller surface area and provide approximately 30 per cent less storage than the reservoir initially contemplated. Provision was made for ancillary works, namely: an intake structure to supply the Mosoni Danube; a weir to enable, inter alia, floodwater to be directed along the old bed of the Danube; an auxiliary shiplock; and two hydroelectric power plants (one capable of an annual production of 4 GWh on the Mosoni Danube, and the other with a production of 174 GWh on the old bed of the Danube). The supply of water to the side-arms of the Danube on the Czechoslovak bank was to be secured by means of two intake structures in the bypass canal at Dobrohošt and Gabčíkovo. A solution was to be found for the Hungarian bank. Moreover, the question of the deepening of the bed of the Danube at the confluence of the bypass canal and the old bed of the river remained outstanding.

On 23 July 1991, the Slovak Government decided “to begin, in September 1991, construction to put the Gabčíkovo Project into operation by the provisional solution”. That decision was endorsed by the Federal Czechoslovak Government on 25 July. Work on Variant C began in November 1991. Discussions continued between the two parties but to no avail, and, on 19 May 1992, the Hungarian Government transmitted
to the Czechoslovak Government a Note Verbale terminating the 1977 Treaty with effect from 25 May 1992. On 15 October 1992, Czechoslovakia began work to enable the Danube to be closed and, starting on 23 October, proceeded to the damming of the river.

24. On 23 October 1992, the Court was seised of an “Application of the Republic of Hungary v. The Czech and Slovak Federal Republic on the Diversion of the Danube River”; however, Hungary acknowledged that there was no basis on which the Court could have founded its jurisdiction to entertain that application, on which Czechoslovakia took no action. In the meanwhile, the Commission of the European Communities had offered to mediate and, during a meeting of the two parties with the Commission held in London on 28 October 1992, the parties entered into a series of interim undertakings. They principally agreed that the dispute would be submitted to the International Court of Justice, that a tripartite fact-finding mission should report on Variant C not later than 31 October, and that a tripartite group of independent experts would submit suggestions as to emergency measures to be taken.

25. On 1 January 1993 Slovakia became an independent State. On 7 April 1993, the “Special Agreement for Submission to the International Court of Justice of the Differences between the Republic of Hungary and the Slovak Republic concerning the Gabčíkovo-Nagymaros Project” was signed in Brussels, the text of which is reproduced in paragraph 2 above. After the Special Agreement was notified to the Court, Hungary informed the Court, by a letter dated 9 August 1993, that it considered its “initial Application [to be] now without object, and . . . lapsed”.

According to Article 4 of the Special Agreement, “The Parties [agreed] that, pending the final Judgment of the Court, they [would] establish and implement a temporary water management régime for the Danube.” However, this régime could not easily be settled. The filling of the Cunovo dam had rapidly led to a major reduction in the flow and in the level of the downstream waters in the old bed of the Danube as well as in the side-arms of the river. On 26 August 1993, Hungary and Slovakia reached agreement on the setting up of a tripartite group of experts (one expert designated by each party and three independent experts designated by the Commission of the European Communities)

“In order to provide reliable and undisputed data on the most important effects of the current water discharge and the remedial measures already undertaken as well as to make recommendations for appropriate measures.”

On 1 December 1993, the experts designated by the Commission of the European Communities recommended the adoption of various measures to remedy the situation on a temporary basis. The Parties were unable to agree on these recommendations. After lengthy negotiations, they finally concluded an Agreement “concerning Certain Temporary Technical Measures and Discharges in the Danube and Mosoni branch of the Danube”,

on 19 April 1995. That Agreement raised the discharge of water into the Mosoni Danube to 43 m³/s. It provided for an annual average of 400 m³/s in the old bed (not including flood waters). Lastly, it provided for the construction by Hungary of a partially underwater weir near to Dunakiliti with a view to improving the water supply to the side-arms of the Danube on the Hungarian side. It was specified that this temporary agreement would come to an end 14 days after the Judgment of the Court.

* * *

26. The first subparagraph of the Preamble to the Special Agreement covers the disputes arising between Czechoslovakia and Hungary concerning the application and termination, not only of the 1977 Treaty, but also of “related instruments”; the subparagraph specifies that, for the purposes of the Special Agreement, the 1977 Treaty and the said instruments shall be referred to as “the Treaty”. “The Treaty” is expressly referred to in the wording of the questions submitted to the Court in Article 2, paragraph 1, subparagraphs (a) and (c), of the Special Agreement.

The Special Agreement however does not define the concept of “related instruments”, nor does it list them. As for the Parties, they gave some consideration to that question — essentially in the written proceedings — without reaching agreement as to the exact meaning of the expression or as to the actual instruments referred to. The Court notes however that the Parties seemed to agree to consider that that expression covers at least the instruments linked to the 1977 Treaty which implement it, such as the Agreement on mutual assistance of 16 September 1977 and its amending Protocols dated, respectively, 10 October 1983 and 6 February 1989 (see paragraph 21 above), and the Agreement as to the common operational regulations of Plenipotentiaries fulfilling duties related to the construction and operation of the Gabčíkovo-Nagymaros Barrage System signed in Bratislava on 11 October 1979. The Court notes that Hungary, unlike Slovakia, declined to apply the description of related instruments to the 1977 Treaty to the Joint Contractual Plan (see paragraph 19 above), which it refused to see as “an agreement at the same level as the other . . . related Treaties and inter-State agreements”.

Lastly the Court notes that the Parties, in setting out the replies which should in their view be given to the questions put in the Special Agreement, concentrated their reasoning on the 1977 Treaty; and that they would appear to have extended their arguments to “related instruments” in considering them as accessories to a whole treaty system, whose fate was in principle linked to that of the main part, the 1977 Treaty. The Court takes note of the positions of the Parties and considers that it does not need to go into this matter further at this juncture.

* * *
27. The Court will now turn to a consideration of the questions submitted by the Parties. In terms of Article 2, paragraph 1 (a), of the Special Agreement, the Court is requested to decide first whether the Republic of Hungary was entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabčíkovo Project for which the Treaty attributed responsibility to the Republic of Hungary.

28. The Court would recall that the Gabčíkovo-Nagymaros System of Locks is characterized in Article 1, paragraph 1, of the 1977 Treaty as a "single and indivisible operational system of works". The principal works which were to constitute this system have been described in general terms above (see paragraph 18). Details of them are given in paragraphs 2 and 3 of Article 1 of the Treaty.

For Gabčíkovo, paragraph 2 lists the following works:

(a) the Dunakiliti-Hrusov head-water installations in the Danube sector at r.km. (river kilometre(s)) 1860-1842, designed for a maximum flood stage of 131.10 m.B. (metres above sea-level, Baltic system), in Hungarian and Czechoslovak territory;

(b) the Dunakiliti dam and auxiliary navigation lock at r.km. 1842, in Hungarian territory;

(c) the by-pass canal (head-water canal and tail-water canal) at r.km. 1842-1811, in Czechoslovak territory;

(d) series of locks on the by-pass canal, in Czechoslovak territory, consisting of a hydroelectric power plant with installed capacity of 720 MW, double navigation locks and appurtenances thereto;

(e) improved old bed of the Danube at r.km. 1842-1811, in the joint Hungarian-Czechoslovak section;

(f) deepened and regulated bed of the Danube at r.km. 1811-1791, in the joint Hungarian-Czechoslovak section."

For Nagymaros, paragraph 3 specifies the following works:

(a) head-water installations and flood-control works in the Danube sector at r.km. 1791-1696.25 and in the sectors of tributaries affected by flood waters, designed for a maximum flood stage of 107.83 m.B., in Hungarian and Czechoslovak territory;

(b) series of locks at r.km. 1696.25, in Hungarian territory, consisting of a dam, a hydroelectric power plant with installed capacity of 158 MW, double navigation locks and appurtenances thereto;

(c) deepened and regulated bed of the Danube, in both its branches, at r.km. 1696.25-1657, in the Hungarian section.

29. Moreover, the precise breakdown of the works incumbent on each party was set out in Article 5, paragraph 5, of the 1977 Treaty, as follows:

"5. The labour and supplies required for the realization of the joint investment shall be apportioned between the Contracting Parties in the following manner:

(a) The Czechoslovak Party shall be responsible for:

(1) the Dunakiliti-Hrusov head-water installations on the left bank, in Czechoslovak territory;

(2) the head-water canal of the by-pass canal, in Czechoslovak territory;

(3) the Gabčíkovo series of locks, in Czechoslovak territory;

(4) the flood-control works of the Nagymaros head-water installations, in Czechoslovak territory, with the exception of the lower Ipel district;

(5) restoration of vegetation in Czechoslovak territory;

(b) The Hungarian Party shall be responsible for:

(1) the Dunakiliti-Hrusov head-water installations on the right bank, in Czechoslovak territory, including the connecting weir and the diversionary weir;

(2) the Dunakiliti-Hrusov head-water installations on the right bank, in Hungarian territory;

(3) the Dunakiliti dam, in Hungarian territory;

(4) the tail-water canal of the by-pass canal, in Czechoslovak territory;

(5) deepening of the bed of the Danube below Palkovičovo, in Hungarian and Czechoslovak territory;

(6) improvement of the old bed of the Danube, in Hungarian and Czechoslovak territory;

(7) operational equipment of the Gabčíkovo system of locks (transport equipment, maintenance machinery), in Czechoslovak territory;

(8) the flood-control works of the Nagymaros head-water installations in the lower Ipel district, in Czechoslovak territory;

(9) the flood-control works of the Nagymaros head-water installations, in Hungarian territory;

(10) the Nagymaros series of locks, in Hungarian territory;

(11) deepening of the tail-water bed below the Nagymaros system of locks, in Hungarian territory;

(12) operational equipment of the Nagymaros system of locks (transport equipment, maintenance machinery), in Hungarian territory;

(13) restoration of vegetation in Hungarian territory."
30. As the Court has already indicated (see paragraph 18 above), Article 1, paragraph 4, of the 1977 Treaty stipulated in general terms that the “technical specifications” concerning the System of Locks would be included in the “joint contractual plan”. The schedule of work had for its part been fixed in an Agreement on mutual assistance signed by the two parties on 16 September 1977 (see paragraph 21 above). In accordance with the provisions of Article 1, paragraph 1, of that Agreement, the whole of the works of the barrage system were to have been completed in 1991. As indicated in paragraph 2 of that same article, a summary construction schedule was appended to the Agreement, and provision was made for a more detailed schedule to be worked out in the Joint Contractual Plan. The Agreement of 16 September 1977 was twice amended further. By a Protocol signed on 10 October 1983, the parties agreed first to postpone the works and the putting into operation of the power plants for four more years; then, by a Protocol signed on 6 February 1989, the parties decided, conversely, to bring them forward by 15 months, the whole system having to be operational in 1994. A new summary construction schedule was appended to each of those Protocols; these schedules were in turn to be implemented by means of new detailed schedules, included in the Joint Contractual Plan.

31. In spring 1989, the work on the Gabčíkovo sector was well advanced: the Dunakiliti dam was 90 per cent complete, the Gabčíkovo dam was 85 per cent complete, and the bypass canal was between 60 per cent complete (downstream of Gabčíkovo) and 95 per cent complete (upstream of Gabčíkovo) and the dykes of the Dunakiliti-Hrušov reservoir were between 70 and 98 per cent complete, depending on the location. This was not the case in the Nagymaros sector where, although dykes had been built, the only structure relating to the dam itself was the coffer-dam which was to facilitate its construction.

32. In the wake of the profound political and economic changes which occurred at this time in central Europe, the Gabčíkovo-Nagymaros Project was the object, in Czechoslovakia and more particularly in Hungary, of increasing apprehension, both within a section of public opinion and in some scientific circles. The uncertainties not only about the economic viability of the Project, but also, and more so, as to the guarantees it offered for preservation of the environment, engendered a climate of growing concern and opposition with regard to the Project.

33. It was against this background that, on 13 May 1989, the Government of Hungary adopted a resolution to suspend works at Nagymaros, and ordered

“the Ministers concerned to commission further studies in order to place the Council of Ministers in a position where it can make well-founded suggestions to the Parliament in connection with the amendment of the international treaty on the investment. In the interests of

the above, we must examine the international and legal consequences, the technical considerations, the obligations related to continuous navigation on the Danube and the environmental/ecological and seismic impacts of the eventual stopping of the Nagymaros investment. To be further examined are the opportunities for the replacement of the lost electric energy and the procedures for minimizing claims for compensation.”

The suspension of the works at Nagymaros was intended to last for the duration of these studies, which were to be completed by 31 July 1989. Czechoslovakia immediately protested and a document defining the position of Czechoslovakia was transmitted to the Ambassador of Hungary in Prague on 15 May 1989. The Prime Ministers of the two countries met on 24 May 1989, but their talks did not lead to any tangible result. On 2 June, the Hungarian Parliament authorized the Government to begin negotiations with Czechoslovakia for the purpose of modifying the 1977 Treaty.

34. At a meeting held by the Plenipotentiaries on 8 and 9 June 1989, Hungary gave Czechoslovakia a number of assurances concerning the continuation of works in the Gabčíkovo sector, and the signed Protocol which records that meeting contains the following passage:

“The Hungarian Government Commissioner and the Hungarian Plenipotentiary stated, that the Hungarian side will complete construction of the Gabčíkovo Project in the agreed time and in accordance with the project plans. Directives have already been given to continue works suspended in the area due to misunderstanding.”

These assurances were reiterated in a letter that the Commissioner of the Government of Hungary addressed to the Czechoslovak Plenipotentiary on 9 June 1989.

35. With regard to the suspension of work at Nagymaros, the Hungarian Deputy Prime Minister, in a letter dated 24 June 1989 addressed to his Czechoslovak counterpart, expressed himself in the following terms:

“The Hungarian Academy of Sciences (HAS) has studied the environmental, ecological and water quality as well as the seismological impacts of abandoning or implementing the Nagymaros Barrage of the Gabčíkovo-Nagymaros Barrage System (GNBS).

Having studied the expected impacts of the construction in accordance with the original plan, the Committee [ad hoc] of the Academy [set up for this purpose] came to the conclusion that we do not have adequate knowledge of the consequences of environmental risks. In its opinion, the risk of constructing the Barrage System in accordance with the original plan cannot be considered acceptable. Of course, it cannot be stated either that the adverse impacts will
Nagymaros dam and to leave in place the measures previously adopted for suspending the works at Dunakiliti. Thirdly, by the end of November 1989, Hungary proposed to Czechoslovakia a draft treaty incorporating its earlier proposals, eliminating peak power operation of the Nagymaros dam, and terminating the construction of the Dunakiliti dam. The government of Hungary declared its agreement to the necessary changes. It then informed the General Assembly of the United Nations of its decision, and a decision was communicated to the United Nations in full accordance with the provisions of article 106 of the Charter. On 21 December 1989, Hungary thus initiated negotiations with the Czechoslovak government on the terms and conditions for the termination of all bilateral agreements relating to the Dunakiliti dam. According to the agreement, the costs of the dam and the compensation for the damage to the environment were to be borne by the Czechoslovak government, while Hungary would bear the costs of the measures to be taken immediately to protect the environment. The negotiations were initiated with the agreement that the river would be dammed at Dunakiliti until the agreement on the terms and conditions was reached.

In January 1990, the new Hungarian government announced that it would initiate negotiations with the Czechoslovak government on the terms and conditions for the termination of all bilateral agreements relating to the Dunakiliti dam. The government stated that it was ready to proceed immediately with the implementation of the national policies of the Czechoslovak government, as well as provisions to be taken to protect the environment. The negotiations were initiated with the agreement that the river would be dammed at Dunakiliti until the agreement on the terms and conditions was reached.

On 15 February 1991, the Hungarian government initiated the negotiations with the Czechoslovak government on the terms and conditions for the termination of all bilateral agreements relating to the Dunakiliti dam. The government stated that the agreement should be concluded on the principle of mutual consent and without any financial obligations. The negotiations were initiated with the agreement that the river would be dammed at Dunakiliti until the agreement on the terms and conditions was reached.

During the negotiations, the Hungarian government expressed its willingness to consider the Czechoslovak government's proposal to dam the river at Dunakiliti in order to protect the environment. The Hungarian government agreed to consider the proposal if the Czechoslovak government would be prepared to bear the costs of the measures to be taken immediately to protect the environment.

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39. The two Parties to this case concur in recognizing that the 1977 Treaty, the above-mentioned Agreement on mutual assistance of 1977 and the Protocol of 1989 were validly concluded and were duly in force when the facts recounted above took place.

Further, they do not dispute the fact that, however flexible they may have been, these texts did not envisage the possibility of the signatories unilaterally suspending or abandoning the work provided for therein, or even carrying it out according to a new schedule not approved by the two partners.

40. Throughout the proceedings, Hungary contended that, although it did suspend or abandon certain works, on the contrary, it never suspended the application of the 1977 Treaty itself. To justify its conduct, it relied essentially on a “state of ecological necessity”.

Hungary contended that the various installations in the Gabčíkovo-Nagymaros System of Locks had been designed to enable the Gabčíkovo power plant to operate in peak mode. Water would only have come through the plant twice each day, at times of peak power demand. Operation in peak mode required the vast expanse (60 km²) of the planned reservoir at Dunakiliti, as well as the Nagymaros dam, which was to alleviate the tidal effects and reduce the variation in the water level downstream of Gabčíkovo. Such a system, considered to be more economically profitable than using run-of-the-river plants, carried ecological risks which it found unacceptable.

According to Hungary, the principal ecological dangers which would have been caused by this system were as follows. At Gabčíkovo/Dunakiliti, under the original Project, as specified in the Joint Contractual Plan, the residual discharge into the old bed of the Danube was limited to 50 m³/s, in addition to the water provided to the system of side-arms. That volume could be increased to 200 m³/s during the growing season. Additional discharges, and in particular a number of artificial floods, could also be affected, at unspecified rate. In these circumstances, the groundwater level would have fallen in most of the Szigetköz. Furthermore, the groundwater would then no longer have been supplied by the Danube — which, on the contrary, would have acted as a drain — but by the reservoir of stagnant water at Dunakiliti and the side-arms which would have become silted up. In the long term, the quality of water would have been seriously impaired. As for the surface water, risks of eutrophication would have arisen, particularly in the reservoir: instead of the old Danube there would have been a river choked with sand, where only a relative trickle of water would have flowed. The network of arms would have been for the most part cut off from the principal bed. The fluvial fauna and flora, like those in the alluvial plains, would have been condemned to extinction.

As for Nagymaros, Hungary argued that, if that dam had been built, the bed of the Danube upstream would have silted up and, consequently, the quality of the water collected in the bank-filtered wells would have deteriorated in this sector. What is more, the operation of the Gabčíkovo power plant in peak mode would have occasioned significant daily variations in the water level in the reservoir upstream, which would have constituted a threat to aquatic habitats in particular. Furthermore, the construction and operation of the Nagymaros dam would have caused the erosion of the riverbed downstream, along Szentendre Island. The water level of the river would therefore have fallen in this section and the yield of the bank-filtered wells providing two-thirds of the water supply of the city of Budapest would have appreciably diminished. The filter layer would also have shrunk or perhaps even disappeared, and fine sediments would have been deposited in certain pockets in the river. For this twofold reason, the quality of the infiltrating water would have been severely jeopardized.

From all these predictions, in support of which it quoted a variety of scientific studies, Hungary concluded that a “state of ecological necessity” did indeed exist in 1989.

41. In its written pleadings, Hungary also accused Czechoslovakia of having violated various provisions of the 1977 Treaty from before 1989 — in particular Articles 15 and 19 relating, respectively, to water quality and nature protection — in refusing to take account of the now evident ecological dangers and insisting that the works be continued, notably at Nagymaros. In this context Hungary contended that, in accordance with the terms of Article 3, paragraph 2, of the Agreement of 6 May 1976 concerning the Joint Contractual Plan, Czechoslovakia bore responsibility for research into the Project’s impact on the environment. Hungary stressed that the research carried out by Czechoslovakia had not been conducted adequately, the potential effects of the Project on the environment of the construction having been assessed by Czechoslovakia only from September 1990. However, in the final stage of its argument, Hungary does not appear to have sought to formulate this complaint as an independent ground formally justifying the suspension and abandonment of the works for which it was responsible under the 1977 Treaty. Rather, it presented the violations of the Treaty prior to 1989, which it impunes to Czechoslovakia, as one of the elements contributing to the emergence of a state of necessity.

42. Hungary moreover contended from the outset that its conduct in the present case should not be evaluated only in relation to the law of treaties. It also observed that, in accordance with the provisions of Article 4, the Vienna Convention of 23 May 1969 on the Law of Treaties could not be applied to the 1977 Treaty, which was concluded before that Convention entered into force as between the parties. Hungary has indeed acknowledged, with reference to the jurisprudence of the Court, that in many respects the Convention reflects the existing customary law. Hungary nonetheless stressed the need to adopt a cautious attitude, while
suggesting that the Court should consider, in each case, the conformity of
the prescriptions of the Convention with customary international law.

43. Slovakia, for its part, denied that the basis for suspending or aban-
donning the performance of a treaty obligation can be found outside the
law of treaties. It acknowledged that the 1969 Vienna Convention could
not be applied as such to the 1977 Treaty, but at the same time stressed
that a number of its provisions are a reflection of pre-existing rules of
customary international law and specified that this is, in particular, the
case with the provisions of Part V relating to invalidity, termination and
suspension of the operation of treaties. Slovakia has moreover observed
that, after the Vienna Convention had entered into force for both parties,
Hungary affirmed its accession to the substantive obligations laid down
by the 1977 Treaty when it signed the Protocol of 6 February 1989 that
cut short the schedule of work; and this led it to conclude that the Vienna
Convention was applicable to the "contractual legal régime" constituted
by the network of interrelated agreements of which the Protocol of 1989
was a part.

44. In the course of the proceedings, Slovakia argued at length that the
state of necessity upon which Hungary relied did not constitute a reason
for the suspension of a treaty obligation recognized by the law of treaties.
At the same time, it cast doubt upon whether "ecological necessity" or
"ecological risk" could, in relation to the law of State responsibility, con-
stitute a circumstance precluding the wrongfulness of an act.

In any event, Slovakia denied that there had been any kind of "eco-
logical state of necessity" in this case either in 1989 or subsequently. It
invoked the authority of various scientific studies when it claimed that
Hungary had given an exaggeratedly pessimistic description of the situ-
ation. Slovakia did not, of course, deny that ecological problems could
have arisen. However, it asserted that they could to a large extent have
been remedied. It accordingly stressed that no agreement had been
reached with respect to the modalities of operation of the Gabčíkovo
power plant in peak mode, and claimed that the apprehensions of Hun-
gary related only to operating conditions of an extreme kind. In the same
way, it contended that the original Project had undergone various modi-
fications since 1977 and that it would have been possible to modify it
even further, for example with respect to the discharge of water reserved
for the old bed of the Danube, or the supply of water to the side-arms by
means of underwater weirs.

45. Slovakia moreover denied that it in any way breached the 1977
Treaty — particularly its Articles 15 and 19 — and maintained, inter alia,
that according to the terms of Article 3, paragraph 2, of the Agreement
of 6 May 1976 relating to the Joint Contractual Plan, research into the
impact of the Project on the environment was not the exclusive respon-
sibility of Czechoslovakia but of either one of the parties, depending on
the location of the works.

Lastly, in its turn, it reproached Hungary with having adopted its uni-
lateral measures of suspension and abandonment of the works in viola-
tion of the provisions of Article 27 of the 1977 Treaty (see paragraph 18
above), which it submits required prior recourse to the machinery for dis-
pute settlement provided for in that Article.

* * *

46. The Court has no need to dwell upon the question of the applica-
bility in the present case of the Vienna Convention of 1969 on the Law of
Treaties. It needs only to be mindful of the fact that it has several times
had occasion to hold that some of the rules laid down in that Convention
might be considered as a codification of existing customary law. The
Court takes the view that in many respects this applies to the provisions
of the Vienna Convention concerning the termination and the suspension
of the operation of treaties, set forth in Articles 60 to 62 (see Legal
Consequences for States of the Continued Presence of South Africa in Namibia
(South West Africa) notwithstanding Security Council Resolution 276
Jurisdiction (United Kingdom v. Iceland), Jurisdiction of the Court,
Judgment, I.C.J. Reports 1973, p. 18; see also Interpretation of the
Agreement of 25 March 1951 between the WHO and Egypt, Advisory

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

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

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

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

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

* * *

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

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

"Article 33. State of Necessity"

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

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

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

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

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

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

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

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

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

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

51. The Court considers, first of all, that the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation. It observes moreover that such ground for precluding wrongfulness can only be accepted on an exceptional basis. The International Law Commission was of the same opinion when it explained that it had opted for a negative form of words in Article 33 of its Draft

"in order to show, by this formal means also, that the case of invocation of a state of necessity as a justification must be considered as really constituting an exception — and one even more rarely admissible than the case with the other circumstances precluding wrongfulness . . ." (*ibid.*, p. 51, para. 40).

Thus, according to the Commission, the state of necessity can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met.

52. In the present case, the following basic conditions set forth in Draft Article 33 are relevant: it must have been occasioned by an "essential interest" of the State which is the author of the act conflicting with one of its international obligations; that interest must have been threatened by a "grave and imminent peril"; the act being challenged must
have been the "only means" of safeguarding that interest; that act must
not have "seriously impaired" an essential interest" of the State towards
which the obligation existed; and the State which is the author of that act
must not have "contributed to the occurrence of the state of necessity".
Those conditions reflect customary international law.

The Court will now endeavour to ascertain whether those conditions
had been met at the time of the suspension and abandonment, by Hun-
gary, of the works that it was to carry out in accordance with the 1977
Treaty.

53. The Court has no difficulty in acknowledging that the concerns
expressed by Hungary for its natural environment in the region affected
by the Gabčíkovo-Nagymaros Project related to an "essential interest" of
that State, within the meaning given to that expression in Article 33 of
the Draft of the International Law Commission.

The Commission, in its Commentary, indicated that one should not, in
that context, reduce an "essential interest" to a matter only of the "exis-
tence" of the State, and that the whole question was, ultimately, to be
judged in the light of the particular case (see Yearbook of the Interna-
tional Law Commission, 1980, Vol. II, Part 2, p. 49, para. 32); at the
same time, it included among the situations that could occasion a state of
necessity, "a grave danger to...the ecological preservation of all or
some of [the] territory [of a State]" (ibid., p. 35, para. 3); and specified,
with reference to State practice, that "It is primarily in the last two
decades that safeguarding the ecological balance has come to be consid-
ered an 'essential interest' of all States." (Ibid., p. 39, para. 14.)

The Court recalls that it has recently had occasion to stress, in the fol-
lowing terms, the great significance that it attaches to respect for the
environment, not only for States but also for the whole of mankind:

"the environment is not an abstraction but represents the living
space, the quality of life and the very health of human beings,
including generations unborn. The existence of the general
obligation of States to ensure that activities within their jurisdiction and
control respect the environment of other States or of areas beyond
national control is now part of the corpus of international law relating
to the environment." (Legality of the Threat or Use of Nuclear
Weapons, Advisory Opinion, I.C.J. Reports 1996, pp. 241-242,
para. 29.)

54. The verification of the existence, in 1989, of the "peril" invoked by
Hungary, of its "grave and imminent" nature, as well as of the absence of
any "means" to respond to it, other than the measures taken by Hungary
to suspend and abandon the works, are all complex processes.

As the Court has already indicated (see paragraphs 33 et seq.),
Hungary on several occasions expressed, in 1989, its "uncertainties" as to
the ecological impact of putting in place the Gabčíkovo-Nagymaros bar-
rage system, which is why it asked insistently for new scientific studies to
be carried out.

The Court considers, however, that, serious though these uncertainties
might have been they could not alone establish the objective existence of
a "peril" in the sense of a component element of a state of necessity. The
word "peril" certainly evokes the idea of "risk"; that is precisely what
distinguishes "peril" from material damage. But a state of necessity could
not exist without a "peril" duly established at the relevant point in time;
the mere apprehension of a possible "peril" could not suffice in that
respect. It could moreover hardly be otherwise, when the "peril" constit-
tuting the state of necessity has at the same time to be "grave" and
"imminent." "Imminence" is synonymous with "immediacy" or "proxim-
ity" and goes far beyond the concept of "possibility". As the Interna-
tional Law Commission emphasized in its commentary, the "extremely
grave and imminent" peril must "have been a threat to the interest at
the actual time" (Yearbook of the International Law Commission, 1980,
Vol. II, Part 2, p. 49, para. 33). That does not exclude, in the view of the
Court, that a "peril" appearing in the long term might be held to be
"imminent" as soon as it is established, at the relevant point in time, that
the realization of that peril, however far off it might be, is not thereby
any less certain and inevitable.

The Hungarian argument on the state of necessity could not convince
the Court unless it was at least proven that a real, "grave" and "imi-
minent" "peril" existed in 1989 and that the measures taken by Hungary
were the only possible response to it.

Both Parties have placed on record an impressive amount of scientific
material aimed at reinforcing their respective arguments. The Court has
given most careful attention to this material, in which the Parties have
developed their opposing views as to the ecological consequences of the
Project. It concludes, however, that, as will be shown below, it is not
necessary in order to respond to the questions put to it in the Special
Agreement for it to determine which of those points of view is scientifi-
cally better founded.

55. The Court will begin by considering the situation at Nagymaros.
As has already been mentioned (see paragraph 40), Hungary maintained
that, if the works at Nagymaros had been carried out as planned, the
environment — and in particular the drinking water resources — in the
area would have been exposed to serious dangers on account of problems
linked to the upstream reservoir on the one hand and, on the other, the
risks of erosion of the riverbed downstream.

The Court notes that the dangers ascribed to the upstream reservoir
were mostly of a long-term nature and, above all, that they remained un-
certain. Even though the Joint Contractual Plan envisaged that the Gab-
čikovo power plant would "mainly operate in peak-load time and continuously during high water", the final rules of operation had not yet been determined (see paragraph 19 above); however, any dangers associated with the putting into service of the Nagymaros portion of the Project would have been closely linked to the extent to which it was operated in peak mode and to the modalities of such operation. It follows that, even if it could have been established — which, in the Court's appreciation of the evidence before it, was not the case — that the reservoir would ultimately have constituted a "grave peril" for the environment in the area, one would be bound to conclude that the peril was not "imminent" at the time at which Hungary suspended and then abandoned the works relating to the dam.

With regard to the lowering of the riverbed downstream of the Nagymaros dam, the danger could have appeared at once more serious and more pressing, in so far as it was the supply of drinking water to the city of Budapest which would have been affected. The Court would however point out that the bed of the Danube in the vicinity of Szentháromság had already been deepened prior to 1980 in order to extract building materials, and that the river had from that time attained, in that sector, the depth required by the 1977 Treaty. The peril invoked by Hungary had thus already materialized to a large extent for a number of years, so that it could not, in 1989, represent a peril arising entirely out of the project. The Court would stress, however, that, even supposing, as Hungary maintained, that the construction and operation of the dam would have created serious risks, Hungary had means available to it, other than the suspension and abandonment of the works, of responding to that situation. It could for example have proceeded regularly to discharge gravel into the river downstream of the dam. It could likewise, if necessary, have supplied Budapest with drinking water by processing the river water in an appropriate manner. The two Parties expressly recognized that that possibility remained open even though — and this is not determinative of the state of necessity — the purification of the river water, like the other measures envisaged, clearly would have been a more costly technique.

56. The Court now comes to the Gabčíkovo sector. It will recall that Hungary's concerns in this sector related on the one hand to the quality of the surface water in the Dunakiliti reservoir, with its effects on the quality of the groundwater in the region, and on the other hand, more generally, to the level, movement and quality of both the surface water and the groundwater in the whole of the Szegetköz, with their effects on the fauna and flora in the alluvial plain of the Danube (see paragraph 40 above).

Whether in relation to the Dunakiliti site or to the whole of the Szegetköz, the Court finds here again, that the peril claimed by Hungary was to be considered in the long term, and, more importantly, remained uncertain. As Hungary itself acknowledges, the damage that it appre-

hended had primarily to be the result of some relatively slow natural processes, the effects of which could not easily be assessed.

Even if the works were more advanced in this sector than at Nagymaros, they had not been completed in July 1989 and, as the Court explained in paragraph 34 above, Hungary expressly undertook to carry on with them, early in June 1989. The report dated 23 June 1989 by the ad hoc Committee of the Hungarian Academy of Sciences, which was also referred to in paragraph 35 of the present Judgment, does not express any awareness of an authenticated peril — even in the form of a definite peril, whose realization would have been inevitable in the long term — when it states that:

"The measuring results of an at least five-year monitoring period following the completion of the Gabčíkovo construction are indispensable to the trustworthy prognosis of the ecological impacts of the barrage system. There is undoubtedly a need for the establishment and regular operation of a comprehensive monitoring system, which must be more developed than at present. The examination of biological indicator objects that can sensitively indicate the changes happening in the environment, neglected till today, have to be included."

The report concludes as follows:

"It can be stated, that the environmental, ecological and water quality impacts were not taken into account properly during the design and construction period until today. Because of the complexity of the ecological processes and lack of the measured data and the relevant calculations the environmental impacts cannot be evaluated.

The data of the monitoring system newly operating on a very limited area are not enough to forecast the impacts probably occurring over a longer term. In order to widen and to make the data more frequent a further multi-year examination is necessary to decrease the further degradation of the water quality playing a dominant role in this question. The expected water quality influences equally the aquatic ecosystems, the soils and the recreational and tourist land-use."

The Court also notes that, in these proceedings, Hungary acknowledged that, as a general rule, the quality of the Danube waters had improved over the past 20 years, even if those waters remained subject to hypertrophic conditions.

However "grave" it might have been, it would accordingly have been difficult, in the light of what is said above, to see the alleged peril as sufficiently certain and therefore "imminent" in 1989.

The Court moreover considers that Hungary could, in this context
also, have resorted to other means in order to respond to the dangers that it apprehended. In particular, within the framework of the original Project, Hungary seemed to be in a position to control at least partially the distribution of the water between the bypass canal, the old bed of the Danube and the side-arms. It should not be overlooked that the Dunakiliti dam was located in Hungarian territory and that Hungary could construct the works needed to regulate flows along the old bed of the Danube and the side-arms. Moreover, it should be borne in mind that Article 14 of the 1977 Treaty provided for the possibility that each of the parties might withdraw quantities of water exceeding those specified in the Joint Contractual Plan, while making clear that, in such an event, "the share of electric power of the Contracting Party benefiting from the excess withdrawal shall be correspondingly reduced".

57. The Court concludes from the foregoing that, with respect to both Nagymaros and Gabčíkovo, the perils invoked by Hungary, without prejudging their possible gravity, were not sufficiently established in 1989, nor were they "imminent"; and that Hungary had available to it at that time means of responding to these perceived perils other than the suspension and abandonment of works with which it had been entrusted. What is more, negotiations were under way which might have led to a review of the Project and the extension of some of its time-limits, without there being need to abandon it. The Court infers from this that the respect by Hungary, in 1989, of its obligations under the terms of the 1977 Treaty would not have resulted in a situation "characterized so aptly by the maxim summum jus summa injuria" (Yearbook of the International Law Commission, 1980, Vol. II, Part 2, p. 49, para. 31).

Moreover, the Court notes that Hungary decided to conclude the 1977 Treaty, a Treaty which — whatever the political circumstances prevailing at the time of its conclusion — was treated by Hungary as valid and in force until the date declared for its termination in May 1992. As can be seen from the material before the Court, a great many studies of a scientific and technical nature had been conducted at an earlier time, both by Hungary and by Czechoslovakia. Hungary was, then, presumably aware of the situation as then known, when it assumed its obligations under the Treaty. Hungary contended before the Court that these studies had been inadequate and that the state of knowledge at that time was not such as to make possible a complete evaluation of the ecological implications of the Gabčíkovo-Nagymaros Project. It is nonetheless the case that although the principal object of the 1977 Treaty was the construction of a System of Locks for the production of electricity, improvement of navigation on the Danube and protection against flooding, the need to ensure the protection of the environment had not escaped the parties, as can be seen from Articles 15, 19 and 20 of the Treaty.

What is more, the Court cannot fail to note the positions taken by Hungary after the entry into force of the 1977 Treaty. In 1983, Hungary asked that the works under the Treaty should go forward more slowly, for reasons that were essentially economic but also, subsidiarily, related to ecological concerns. In 1989, when, according to Hungary itself, the state of scientific knowledge had undergone a significant development, it asked for the works to be speeded up, and then decided, three months later, to suspend them and subsequently to abandon them. The Court is not however unaware that profound changes were taking place in Hungary in 1989, and that, during that transitory phase, it might have been more than usually difficult to co-ordinate the different points of view prevailing from time to time.

The Court infers from all these elements that, in the present case, even if it had been established that there was, in 1989, a state of necessity linked to the performance of the 1977 Treaty, Hungary would not have been permitted to rely upon that state of necessity in order to justify its failure to comply with its treaty obligations, as it had helped, by act or omission to bring it about.

58. It follows that the Court has no need to consider whether Hungary, by proceeding as it did in 1989, "seriously impair[ed] an essential interest" of Czechoslovakia, within the meaning of the aforementioned Article 33 of the Draft of the International Law Commission — a finding which does not in any way prejudice the damage Czechoslovakia claims to have suffered on account of the position taken by Hungary.

Nor does the Court need to examine the argument put forward by Hungary, according to which certain breaches of Articles 15 and 19 of the 1977 Treaty, committed by Czechoslovakia even before 1989, contributed to the purported state of necessity; and neither does it have to reach a decision on the argument advanced by Slovakia, according to which Hungary breached the provisions of Article 27 of the Treaty, in 1989, by taking unilateral measures without having previously had recourse to the machinery of dispute settlement for which that Article provides.

* * *

59. In the light of the conclusions reached above, the Court, in reply to the question put to it in Article 2, paragraph 1 (a), of the Special Agreement (see paragraph 27 above), finds that Hungary was not entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabčíkovo Project for which the 1977 Treaty and related instruments attributed responsibility to it.

* * *

60. By the terms of Article 2, paragraph 1 (b), of the Special Agreement, the Court is asked in the second place to decide

"(b) whether the Czech and Slovak Federal Republic was entitled to proceed, in November 1991, to the 'provisional solution'
and to put into operation from October 1992 this system, described in the Report of the Working Group of Independent Experts of the Commission of the European Communities, the Republic of Hungary and the Czech and Slovak Federal Republic dated 23 November 1992 (damming up of the Danube at river kilometre 1851.7 on Czechoslovak territory and resulting consequences on water and navigation course)".

61. The Court will recall that, as soon as Hungary suspended the works at Nagymaros on 13 May 1989 and extended that suspension to certain works to be carried out at Dunakiliti, Czechoslovakia informed Hungary that it would feel compelled to take unilateral measures if Hungary were to persist in its refusal to resume the works. This was inter alia expressed as follows in Czechoslovakia’s Note Verbale of 30 October 1989 to which reference is made in paragraph 37 above:

"Should the Republic of Hungary fail to meet its liabilities and continue unilaterally to breach the Treaty and related legal documents then the Czechoslovak party will be forced to commence a provisional, substitute project on the territory of the Czechoslovak Socialist Republic in order to prevent further losses. Such a provisional project would entail directing as much water into the Gabčíkovo dam as agreed in the Joint Construction Plan."

As the Court has already indicated (see paragraph 23), various alternative solutions were contemplated by Czechoslovakia. In September 1990, the Hungarian authorities were advised of seven hypothetical alternatives defined by the firm of Hydroconsult of Bratislava. All of those solutions implied an agreement between the parties, with the exception of one variant, subsequently known as "Variant C", which was presented as a provisional solution which could be brought about without Hungarian co-operation. Other contacts between the parties took place, without leading to a settlement of the dispute. In March 1991, Hungary acquired information according to which perceptible progress had been made in finalizing the planning of Variant C; it immediately gave expression to the concern this caused.

62. Inter-governmental negotiation meetings were held on 22 April and 15 July 1991.

On 22 April 1991, Hungary proposed the suspension, until September 1993, of all the works begun on the basis of the 1977 Treaty, on the understanding that the parties undertook to abstain from any unilateral action, and that joint studies would be carried out in the interval. Czechoslovakia maintained its previous position according to which the studies contemplated should take place within the framework of the 1977 Treaty and without any suspension of the works.

On 15 July 1991, Czechoslovakia confirmed its intention of putting the Gabčíkovo power plant into service and indicated that the available data enabled the effects of four possible scenarios to be assessed, each of them requiring the co-operation of the two Governments. At the same time, it proposed the setting up of a tripartite committee of experts (Hungary, Czechoslovakia, European Communities) which would help in the search for technical solutions to the problems arising from the entry into operation of the Gabčíkovo sector. Hungary, for its part, took the view that:

"In the case of a total lack of understanding the so-called C variant or 'theoretical opportunity' suggested by the Czech-Slovak party as a unilateral solution would be such a grave transgression of Hungarian territorial integrity and International Law for which there is no precedent even in the practices of the formerly socialist countries for the past 30 years";

it further proposed the setting up of a bilateral committee for the assessment of environmental consequences, subject to work on Czechoslovak territory being suspended.

63. By a letter dated 24 July 1991, the Government of Hungary communicated the following message to the Prime Minister of Slovakia:

"Hungarian public opinion and the Hungarian Government anxiously and attentively follows the [Czechoslovakian] press reports of the unilateral steps of the Government of the Slovak Republic in connection with the barrage system.

The preparatory works for diverting the water of the Danube near the Dunakiliti dam through unilaterally are also alarming. These steps are contrary to the 1977 Treaty and to the good relationship between our nations."

On 30 July 1991 the Slovak Prime Minister informed the Hungarian Prime Minister of

"the decision of the Slovak Government and of the Czech and Slovak Federal Government to continue work on the Gabčíkovo power plant, as a provisional solution, which is aimed at the commencement of operations on the territory of the Czech and Slovak Federal Republic"

On the same day, the Government of Hungary protested, by a Note Verbale, against the filling of the headrace canal by the Czechoslovak construction company, by pumping water from the Danube.

By a letter dated 9 August 1991 and addressed to the Prime Minister of Slovakia, the Hungarian authorities strenuously protested against "any unilateral step that would be in contradiction with the interests of our [two] nations and international law" and indicated that they considered it "very important [to] receive information as early as possible on the
64. The construction permit for Variant C was issued on 30 October 1977. In November 1978, construction of a dam started at Cunovo, where both banks of the Danube are on Czechoslovak territory.

65. As a result of a new intergovernmental negotiation, on 29 August 1992, all parties agreed to entrust the task of studying the whole of the question of the Gabčíkovo-Nagymaros project to a Joint Expert Committee which Hungary agreed should be complemented with an expert from Czechoslovakia. The work of that Committee would have been meaningless, if Czecho-

66. The Court had already referred to paragraph 24 of the 24th of the present Judgment, in which the principle of State borders, as well as with the general customary norms, was clearly referred to as the "principle of sovereignty, territorial integrity, the inviolability of State borders, as well as with the general customary norms on international rivers and the spirit of the 1948 Belgrade Convention."
of independent experts, and it should be emphasized that, according to the Special Agreement, "Variant C" must be taken to include the consequences "on water and navigation course" of the dam closing off the bed of the Danube.

In the section headed "Variant C Structures and Status of Ongoing Work", one finds, in the report of the Working Group, the following passage:

"In both countries the original structures for the Gabčíkovo scheme are completed except for the closure of the Danube river at Dunakiliti and the
(1) Completion of the hydropower station (installation and testing of turbines) at Gabčíkovo.

Variant C consists of a complex of structures, located in Czechoslovakia. . . . The construction of these are planned for two phases. The structures include . . .:
(2) By-pass weir controlling the flow into the river Danube.
(3) Dam closing the Danubian river bed.
(4) Floodplain weir (weir in the inundation).
(5) Intake structure for the Mosoni Danube.
(6) Intake structure in the power canal.
(7) Earth barrages/dykes connecting structures.
(8) Ship lock for smaller ships (15 m × 80 m).
(9) Spillway weir.
(10) Hydropower station.

The construction of the structures 1-7 are included in Phase 1, while the remaining 8-10 are a part of Phase 2 scheduled for construction 1993-1995."

* * *

67. Czechoslovakia had maintained that proceeding to Variant C and putting it into operation did not constitute internationally wrongful acts; Slovakia adopted this argument. During the proceedings before the Court Slovakia contended that Hungary’s decision to suspend and subsequently abandon the construction of works at Dunakiliti had made it impossible for Czechoslovakia to carry out the works as initially contemplated by the 1977 Treaty and that the latter was therefore entitled to proceed with a solution which was as close to the original Project as possible. Slovakia invoked what it described as a “principle of approximate application” to justify the construction and operation of Variant C. It explained that this was the only possibility remaining to it “of fulfilling not only the purposes of the 1977 Treaty, but the continuing obligation to implement it in good faith”.

68. Slovakia also maintained that Czechoslovakia was under a duty to mitigate the damage resulting from Hungary’s unlawful actions. It claimed that a State which is confronted with a wrongful act of another State is under an obligation to minimize its losses and, thereby, the damages claimable against the wrongdoing State. It argued furthermore that “Mitigation of damages is also an aspect of the performance of obligations in good faith.” For Slovakia, these damages would have been immense in the present case, given the investments made and the additional economic and environmental prejudice which would have resulted from the failure to complete the works at Dunakiliti/Gabčíkovo and to put the system into operation. For this reason, Czechoslovakia was not only entitled, but even obliged, to implement Variant C.

69. Although Slovakia maintained that Czechoslovakia’s conduct was lawful, it argued in the alternative that, even were the Court to find otherwise, the putting into operation of Variant C could still be justified as a countermeasure.

70. Hungary for its part contended that Variant C was a material breach of the 1977 Treaty. It considered that Variant C also violated Czechoslovakia’s obligations under other treaties, in particular the Convention of 31 May 1976 on the Regulation of Water Management Issues of Boundary Waters concluded at Budapest, and its obligations under general international law.

71. Hungary contended that Slovakia’s arguments rested on an erroneous presentation of the facts and the law. Hungary denied, inter alia, having committed the slightest violation of its treaty obligations which could have justified the putting into operation of Variant C. It considered that “no such rule of "approximate application" of a treaty exists in international law; as to the argument derived from "mitigation of damage[s]", it claimed that this has to do with the quantification of loss, and could not serve to excuse conduct which is substantively unlawful. Hungary furthermore stated that Variant C did not satisfy the conditions required by international law for countermeasures, in particular the condition of proportionality.

* * *

72. Before dealing with the arguments advanced by the Parties, the Court wishes to make clear that it is aware of the serious problems with which Czechoslovakia was confronted as a result of Hungary’s decision to relinquish most of the construction of the System of Locks for which it was responsible by virtue of the 1977 Treaty. Vast investments had been made, the construction at Gabčíkovo was all but finished, the bypass canal was completed, and Hungary itself, in 1991, had duly fulfilled its obligations under the Treaty in this respect in completing work on the tailrace canal. It emerges from the report, dated 31 October 1992, of the tripartite fact-finding mission the Court has referred to in paragraph 24 of the present Judgment, that not using the system would have
led to considerable financial losses, and that it could have given rise to serious problems for the environment.

73. Czechoslovakia repeatedly denounced Hungary’s suspension and abandonment of works as a fundamental breach of the 1977 Treaty and consequently could have invoked this breach as a ground for terminating the Treaty; but this would not have brought the Project any nearer to completion. It therefore chose to insist on the implementation of the Treaty by Hungary, and on many occasions called upon the latter to resume performance of its obligations under the Treaty.

When Hungary steadfastly refused to do so — although it had expressed its willingness to pay compensation for damage incurred by Czechoslovakia — and when negotiations stalled owing to the diametrically opposed positions of the parties, Czechoslovakia decided to put the Gabčíkovo system into operation unilaterally, exclusively under its own control and for its own benefit.

74. That decision went through various stages and, in the Special Agreement, the Parties asked the Court to decide whether Czechoslovakia “was entitled to proceed, in November 1991” to Variant C, and “to put it into operation from October 1992”.

75. With a view to justifying those actions, Slovakia invoked what it described as “the principle of approximate application”, expressed by Judge Sir Hersch Lauterpacht in the following terms:

“It is a sound principle of law that whenever a legal instrument of containing validity cannot be applied literally owing to the conduct of one of the parties, it must, without allowing that party to take advantage of its own conduct, be applied in a way approximating most closely to its primary object. To do that is to interpret and give effect to the instrument — not to change it.” (Admissibility of Hearings of Petitioners by the Committee on South West Africa, I.C.J. Reports 1956, separate opinion of Sir Hersch Lauterpacht, p. 46.)

It claimed that this is a principle of international law and a general principle of law.

76. It is not necessary for the Court to determine whether there is a principle of international law or a general principle of law of “approximate application” because, even if such a principle existed, it could by definition only be employed within the limits of the treaty in question. In the view of the Court, Variant C does not meet that cardinal condition with regard to the 1977 Treaty.

77. As the Court has already observed, the basic characteristic of the 1977 Treaty is, according to Article 1, to provide for the construction of the Gabčíkovo-Nagymaros System of Locks as a joint investment constituting a single and indivisible operational system of works. This element is equally reflected in Articles 8 and 10 of the Treaty providing for joint ownership of the most important works of the Gabčíkovo-Nagymaros Project and for the operation of this joint property as a co-ordinated single unit. By definition all this could not be carried out by unilateral action. In spite of having a certain external physical similarity with the original Project, Variant C thus differed sharply from it in its legal characteristics.

78. Moreover, in practice, the operation of Variant C led Czechoslovakia to appropriate, essentially for its use and benefit, between 80 and 90 per cent of the waters of the Danube before returning them to the main bed of the river, despite the fact that the Danube is not only a shared international watercourse but also an international boundary river.

Czechoslovakia submitted that Variant C was essentially no more than what Hungary had already agreed to and that the only modifications made were those which had become necessary by virtue of Hungary’s decision not to implement its treaty obligations. It is true that Hungary, in concluding the 1977 Treaty, had agreed to the damming of the Danube and the diversion of its waters into the bypass canal. But it was only in the context of a joint operation and a sharing of its benefits that Hungary had given its consent. The suspension and withdrawal of that consent constituted a violation of Hungary’s legal obligations, demonstrating, as it did, the refusal by Hungary of joint operation: but that cannot mean that Hungary forfeited its basic right to an equitable and reasonable sharing of the resources of an international watercourse.

The Court accordingly concludes that Czechoslovakia, in putting Variant C into operation, was not applying the 1977 Treaty but, on the contrary, violated certain of its express provisions, and, in so doing, committed an internationally wrongful act.

79. The Court notes that between November 1991 and October 1992, Czechoslovakia confined itself to the execution, on its own territory, of the works which were necessary for the implementation of Variant C, but which could have been abandoned if an agreement had been reached between the parties and did not therefore predetermine the final decision to be taken. For as long as the Danube had not been unilaterally dammed, Variant C had not in fact been applied.

Such a situation is not unusual in international law or, for that matter, in domestic law. A wrongful act or offence is frequently preceded by preparatory actions which are not to be confused with the act or offence itself. It is as well to distinguish between the actual commission of a wrongful act (whether instantaneous or continuous) and the conduct prior to that act which is of a preparatory character and which “does not qualify as a wrongful act” (see for example the Commentary on Article 41 of the Draft Articles on State Responsibility, “Report of the International Law Commission on the work of its forty-eighth session, 6 May-26 July 1996”, Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10), p. 141, and Yearbook of the International Law Commission, 1993, Vol. II, Part 2, p. 57, para. 14).
80. Slovakia also maintained that it was acting under a duty to mitigate damages when it carried out Variant C. It stated that “It is a general principle of international law that a party injured by the non-performance of another contract party must seek to mitigate the damage he has sustained.”

It would follow from such a principle that an injured State which has failed to take the necessary measures to limit the damage sustained would not be entitled to claim compensation for that damage which could have been avoided. While this principle might thus provide a basis for the calculation of damages, it could not, on the other hand, justify an otherwise wrongful act.

81. Since the Court has found that the putting into operation of Variant C constituted an internationally wrongful act, the duty to mitigate damage invoked by Slovakia does not need to be examined further.

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82. Although it did not invoke the plea of countermeasures as a primary argument, since it did not consider Variant C to be unlawful, Slovakia stated that “Variant C could be presented as a justified countermeasure to Hungary’s illegal acts”.

The Court has concluded, in paragraph 78 above, that Czechoslovakia committed an internationally wrongful act in putting Variant C into operation. Thus, it now has to determine whether such wrongfulness may be precluded on the ground that the measure so adopted was in response to Hungary’s prior failure to comply with its obligations under international law.


In the first place it must be taken in response to a previous international wrongful act of another State and must be directed against that State. Although not primarily presented as a countermeasure, it is clear that Variant C was a response to Hungary’s suspension and abandon-ment of works and that it was directed against that State; and it is equally clear, in the Court’s view, that Hungary’s actions were internationally wrongful.

84. Secondly, the injured State must have called upon the State committing the wrongful act to discontinue its wrongful conduct or to make reparation for it. It is clear from the facts of the case, as recalled above by the Court (see paragraphs 61 et seq.), that Czechoslovakia requested Hungary to resume the performance of its treaty obligations on many occasions.

85. In the view of the Court, an important consideration is that the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question.

In 1929, the Permanent Court of International Justice, with regard to navigation on the River Oder, stated as follows:

“[the] community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the user of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others” (*Territorial Jurisdiction of the International Commission of the River Oder, Judgment No. 16, 1929, P.C.I.J., Series A, No. 23, p. 27*).

Modern development of international law has strengthened this principle for non-navigational uses of international watercourses as well, as evidenced by the adoption of the Convention of 21 May 1997 on the Law of the Non-Navigational Uses of International Watercourses by the United Nations General Assembly.

The Court considers that Czechoslovakia, by unilaterally assuming control of a shared resource, and thereby depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube — with the continuing effects of the diversion of these waters on the ecology of the riparian area of the Szigetköz — failed to respect the proportionality which is required by international law.

86. Moreover, as the Court has already pointed out (see paragraph 78), the fact that Hungary had agreed in the context of the original Project to the diversion of the Danube (and, in the Joint Contractual Plan, to a provisional measure of withdrawal of water from the Danube) cannot be understood as having authorized Czechoslovakia to proceed with a unilateral diversion of this magnitude without Hungary’s consent.

87. The Court thus considers that the diversion of the Danube carried out by Czechoslovakia was not a lawful countermeasure because it was not proportionate. It is therefore not required to pass upon one other condition for the lawfulness of a countermeasure, namely that its purpose must be to induce the wrongdoing State to comply with its obliga-
tions under international law, and that the measure must therefore be reversible.

* *

88. In the light of the conclusions reached above, the Court, in reply to the question put to it in Article 2, paragraph 1 (b), of the Special Agreement (see paragraph 60), finds that Czechoslovakia was entitled to proceed, in November 1991, to Variant C in so far as it then confined itself to undertaking works which did not predetermine the final decision to be taken by it. On the other hand, Czechoslovakia was not entitled to put that Variant into operation from October 1992.

* *

89. By the terms of Article 2, paragraph 1 (c), of the Special Agreement, the Court is asked, thirdly, to determine “what are the legal effects of the notification, on 19 May 1992, of the termination of the Treaty by the Republic of Hungary”.

The Court notes that it has been asked to determine what are the legal effects of the notification given on 19 May 1992 of the termination of the Treaty. It will consequently confine itself to replying to this question.

90. The Court will recall that, by early 1992, the respective parties to the 1977 Treaty had made clear their positions with regard to the recourse by Czechoslovakia to Variant C. Hungary in a Note Verbale of 14 February 1992 had made clear its view that Variant C was a contravention of the 1977 Treaty (see paragraph 64 above); Czechoslovakia insisted on the implementation of Variant C as a condition for further negotiation. On 26 February 1992, in a letter to his Czechoslovak counterpart, the Prime Minister of Hungary described the impending diversion of the Danube as “a serious breach of international law” and stated that, unless work was suspended while further enquiries took place, “the Hungarian Government [would] have no choice but to respond to this situation of necessity by terminating the 1977 inter-State Treaty”. In a Note Verbale dated 18 March 1992, Czechoslovakia reaffirmed that, while it was prepared to continue negotiations “on every level”, it could not agree “to stop all work on the provisional solution”.

On 24 March 1992, the Hungarian Parliament passed a resolution authorizing the Government to terminate the 1977 Treaty if Czechoslovakia did not stop the works by 30 April 1992. On 13 April 1992, the Vice-President of the Commission of the European Communities wrote to both parties confirming the willingness of the Commission to chair a committee of independent experts including representatives of the two countries, in order to assist the two Governments in identifying a mutually acceptable solution. Commission involvement would depend on each Government not taking “any steps . . . which would prejudice possible actions to be undertaken on the basis of the report’s findings”. The Czechoslovak Prime Minister stated in a letter to the Hungarian Prime Minister dated 23 April 1992, that his Government continued to be interested in the establishment of the proposed committee “without any preliminary conditions”; criticizing Hungary’s approach, he refused to suspend work on the provisional solution, but added, “in my opinion, there is still time, until the damming of the Danube (i.e., until October 31, 1992), for resolving disputed questions on the basis of agreement of both States”.

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

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

* *

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

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

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

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

“Article 61

Supervening Impossibility of Performance

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

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

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

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

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

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

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

“Article 62

Fundamental Change of Circumstances

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

(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

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

(a) if the treaty establishes a boundary; or

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

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

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

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

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

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

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

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

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

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

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

Slovakia denied that there had been, on the part of Czechoslovakia or on its part, any material breach of the obligations to protect water quality and nature, and claimed that Variant C, far from being a breach, was devised as “the best possible approximate application” of the Treaty. It furthermore denied that Czechoslovakia had acted in breach of other international conventions or general international law.

97. Finally, Hungary argued that subsequently imposed requirements of international law in relation to the protection of the environment precluded performance of the Treaty. The previously existing obligation not to cause substantive damage to the territory of another State had, Hungary claimed, evolved into an erga omnes obligation of prevention of damage pursuant to the “precautionary principle”. On this basis, Hungary argued, its termination was “forced by the other party’s refusal to suspend work on Variant C”.

Slovakia argued, in reply, that none of the intervening developments in environmental law gave rise to norms of jus cogens that would override the Treaty. Further, it contended that the claim by Hungary to be entitled to take action could not in any event serve as legal justification for termination of the Treaty under the law of treaties, but belonged rather “to the language of self-help or reprisals”.

98. The question, as formulated in Article 2, paragraph 1 (c), of the Special Agreement, deals with treaty law since the Court is asked to determine what the legal effects are of the notification of termination of the Treaty. The question is whether Hungary’s notification of 19 May 1992 brought the 1977 Treaty to an end, or whether it did not meet the requirements of international law, with the consequence that it did not terminate the Treaty.

99. The Court has referred earlier to the question of the applicability to the present case of the Vienna Convention of 1969 on the Law of Treaties. The Vienna Convention is not directly applicable to the 1977 Treaty inasmuch as both States ratified that Convention only after the Treaty’s conclusion. Consequently only those rules which are declaratory of customary law are applicable to the 1977 Treaty. As the Court has already stated above (see paragraph 46), this is the case, in many respects, with Articles 60 to 62 of the Vienna Convention, relating to termination or suspension of the operation of a treaty. On this, the Parties, too, were broadly in agreement.

100. The 1977 Treaty does not contain any provision regarding its termination. Nor is there any indication that the parties intended to admit the possibility of denunciation or withdrawal. On the contrary, the Treaty establishes a long-standing and durable régime of joint investment
and joint operation. Consequently, the parties not having agreed otherwise, the Treaty could be terminated only on the limited grounds enumerated in the Vienna Convention.

* *

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

* *

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

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

* *

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

The Court recalls that, in the Fisheries Jurisdiction case, it stated that

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

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

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

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

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

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

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

Articles 15 and 19 expressly provide that the obligations they contain shall be implemented by the means specified in the Joint Contractual Plan. The failure of the parties to agree on those means cannot, on the basis of the record before the Court, be attributed solely to one party.

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

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

109. In this regard, it should be noted that, according to Hungary’s Declaration of 19 May 1992, the termination of the 1977 Treaty was to take effect as from 25 May 1992, that is only six days later. Both Parties agree that Articles 65 to 67 of the Vienna Convention on the Law of Treaties, if not codifying customary law, at least generally reflect customary international law and contain certain procedural principles which are based on an obligation to act in good faith. As the Court stated in its Advisory Opinion on the Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt (in which case the Vienna Convention did not apply):

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

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

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

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

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

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

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

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

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

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

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

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

114. Finally, Hungary maintained that by their conduct both parties had repudiated the Treaty and that a bilateral treaty repudiated by both parties cannot survive. The Court is of the view, however, that although it has found that both Hungary and Czechoslovakia failed to comply with their obligations under the 1977 Treaty, this reciprocal wrongful conduct did not bring the Treaty to an end nor justify its termination. The Court would set a precedent with disturbing implications for treaty relations and the integrity of the rule pacta sunt servanda if it were to conclude that a treaty in force between States, which the parties have implemented in considerable measure and at great cost over a period of years, might be unilaterally set aside on grounds of reciprocal non-compliance. It would be otherwise, of course, if the parties decided to terminate the Treaty by mutual consent. But in this case, while Hungary purported to terminate the Treaty, Czechoslovakia consistently resisted this act and declared it to be without legal effect.
115. In the light of the conclusions it has reached above, the Court, in reply to the question put to it in Article 2, paragraph 1 (c), of the Special Agreement (see paragraph 89), finds that the notification of termination by Hungary of 19 May 1992 did not have the legal effect of terminating the 1977 Treaty and related instruments.

* * *

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

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

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

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

Hungary sought to distinguish between, on the one hand, rights and obligations such as “continuing property rights” under the 1977 Treaty, and, on the other hand, the treaty itself. It argued that, during the negotiations leading to signature of the Special Agreement, Slovakia had proposed a text in which it would have been expressly recognized “as the successor to the Government of the CSFR” with regard to the 1977 Treaty, but that Hungary had rejected that formulation. It contended that it had never agreed to accept Slovakia as successor to the 1977 Treaty. Hungary referred to diplomatic exchanges in which the two Parties had each submitted to the other lists of those bilateral treaties which they respectively wished should continue in force between them, for negotiation on a case-by-case basis; and Hungary emphasized that no agreement was ever reached with regard to the 1977 Treaty.

119. Hungary claimed that there was no rule of succession which could operate in the present case to override the absence of consent. Referring to Article 34 of the Vienna Convention of 23 August 1978 on Succession of States in respect of Treaties, in which “a rule of automatic succession to all treaties is provided for”, based on the principle of continuity, Hungary argued not only that it never signed or ratified the Convention, but that the “concept of automatic succession” contained in that Article was not and is not, and has never been accepted as, a statement of general international law.

Hungary further submitted that the 1977 Treaty did not create “obligations and rights . . . relating to the régime of a boundary” within the meaning of Article 11 of that Convention, and noted that the existing course of the boundary was unaffected by the Treaty. It also denied that the Treaty was a “localized” treaty, or that it created rights “considered as attaching to [the] territory” within the meaning of Article 12 of the 1978 Convention, which would, as such, be unaffected by a succession of States. The 1977 Treaty was, Hungary insisted, simply a joint investment. Hungary’s conclusion was that there is no basis on which the Treaty could have survived the disappearance of Czechoslovakia so as to be binding as between itself and Slovakia.

120. According to Slovakia, the 1977 Treaty, which was not lawfully terminated by Hungary’s notification in May 1992, remains in force between itself, as successor State, and Hungary. Slovakia acknowledged that there was no agreement on succession to the Treaty between itself and Hungary. It relied instead, in the first place, on the “general rule of continuity which applies in the case of dissolution”; it argued, secondly, that the Treaty is one “attaching to [the] territory” within the meaning of Article 12 of the 1978 Vienna Convention, and that it contains provisions relating to a boundary.

121. In support of its first argument Slovakia cited Article 34 of the 1978 Vienna Convention, which it claimed is a statement of customary international law, and which imposes the principle of automatic succession as the rule applicable in the case of dissolution of a State where the predecessor State has ceased to exist. Slovakia maintained that State practice in cases of dissolution tends to support continuity as the rule to be followed with regard to bilateral treaties. Slovakia having succeeded to part of the territory of the former Czechoslovakia, this would be the rule applicable in the present case.

122. Slovakia’s second argument rests on “the principle of ipso jure continuity of treaties of a territorial or localized character”. This rule, Slovakia said, is embodied in Article 12 of the 1978 Convention, which in part provides as follows:

66
"Article 12
Other Territorial Regimes

2. A succession of States does not as such affect:
(a) obligations relating to the use of any territory, or to restrictions upon its use, established by a treaty for the benefit of a group of States or of all States and considered as attaching to that territory;
(b) rights established by a treaty for the benefit of a group of States or of all States and relating to the use of any territory, or to restrictions upon its use, and considered as attaching to that territory."

According to Slovakia, “[this] article [too] can be considered to be one of those provisions of the Vienna Convention that represent the codification of customary international law”. The 1977 Treaty is said to fall within its scope because of its “specific characteristics . . . which place it in the category of treaties of a localized or territorial character”. Slovakia also described the Treaty as one “which contains boundary provisions and lays down a specific territorial régime” which operates in the interest of all Danube riparian States, and as “a dispositive treaty, creating rights in rem, independently of the legal personality of its original signatories”. Here, Slovakia relied on the recognition by the International Law Commission of the existence of a “special rule” whereby treaties “intended to establish an objective régime” must be considered as binding on a successor State (Official Records of the United Nations Conference on the Succession of States in respect of Treaties, Vol. III, doc. A/CONF.80/16/Add.2, p. 34). Thus, in Slovakia’s view, the 1977 Treaty was not one which could have been terminated through the disappearance of one of the original parties.

123. The Court does not find it necessary for the purposes of the present case to enter into a discussion of whether or not Article 34 of the 1978 Convention reflects the state of customary international law. More relevant to its present analysis is the particular nature and character of the 1977 Treaty. An examination of this Treaty confirms that, aside from its undoubted nature as a joint investment, its major elements were the proposed construction and joint operation of a large, integrated and indivisible complex of structures and installations on specific parts of the respective territories of Hungary and Czechoslovakia along the Danube. The Treaty also established the navigational régime for an important sector of an international waterway, in particular the relocation of the main international shipping lane to the bypass canal. In so doing, it inescapably created a situation in which the interests of other users of the Danube were affected. Furthermore, the interests of third States were expressly acknowledged in Article 18, whereby the parties undertook to ensure “uninterrupted and safe navigation on the international fairway” in accordance with their obligations under the Convention of 13 August 1948 concerning the Regime of Navigation on the Danube.

In its Commentary on the Draft Articles on Succession of States in respect of Treaties, adopted at its twenty-sixth session, the International Law Commission identified “treaties of a territorial character” as having been regarded both in traditional doctrine and in modern opinion as unaffected by a succession of States (Official Records of the United Nations Conference on the Succession of States in respect of Treaties, Vol. III, doc. A/CONF.80/16/Add.2, p. 27, para. 2). The draft text of Article 12, which reflects this principle, was subsequently adopted unchanged in the 1978 Vienna Convention. The Court considers that Article 12 reflects a rule of customary international law; it notes that neither of the Parties disputed this. Moreover, the Commission indicated that “treaties concerning water rights or navigation on rivers are commonly regarded as candidates for inclusion in the category of territorial treaties” (ibid., p. 33, para. 26). The Court observes that Article 12, in providing only, without reference to the treaty itself, that rights and obligations of a territorial character established by a treaty are unaffected by a succession of States, appears to lend support to the position of Hungary rather than of Slovakia. However the Court concludes that this formulation was devised rather than take account of the fact that, in many cases, treaties which had established boundaries or territorial régimes were no longer in force (ibid., pp. 26-37). Those that remained in force would nonetheless bind a successor State.

Taking all these factors into account, the Court finds that the content of the 1977 Treaty indicates that it must be regarded as establishing a territorial régime within the meaning of Article 12 of the 1978 Vienna Convention. It created rights and obligations “attaching to” the parts of the Danube to which it relates; thus the Treaty itself cannot be affected by a succession of States. The Court therefore concludes that the 1977 Treaty became binding upon Slovakia on 1 January 1993.

124. It might be added that Slovakia also contended that, while still a constituent part of Czechoslovakia, it played a role in the development of the Project, as it did later, in the most critical phase of negotiations with Hungary about the fate of the Project. The evidence shows that the Slovak Government passed resolutions prior to the signing of the 1977 Treaty in preparation for its implementation; and again, after signature, expressing its support for the Treaty. It was the Slovak Prime Minister who attended the meeting held in Budapest on 22 April 1991 as the Plenipotentiary of the Federal Government to discuss questions arising out of the Project. It was his successor as Prime Minister who notified his Hun-
garian counterpart by letter on 30 July 1991 of the decision of the Government of the Slovak Republic, as well as of the Government of the Czech and Slovak Federal Republic, to proceed with the “provisional solution” (see paragraph 63 above); and who wrote again on 18 December 1991 to the Hungarian Minister without Portfolio, renewing an earlier suggestion that a joint commission be set up under the auspices of the European Communities to consider possible solutions. The Slovak Prime Minister also wrote to the Hungarian Prime Minister in May 1992 on the subject of the decision taken by the Hungarian Government to terminate the Treaty, informing him of resolutions passed by the Slovak Government in response.

It is not necessary, in the light of the conclusions reached in paragraph 123 above, for the Court to determine whether there are legal consequences to be drawn from the prominent part thus played by the Slovak Republic. Its role does, however, deserve mention.

* * *

125. The Court now turns to the other legal consequences arising from its Judgment.

As to this, Hungary argued that future relations between the Parties, as far as Variant C is concerned, are not governed by the 1977 Treaty. It claims that it is entitled, pursuant to the Convention of 1976 on the Regulation of Water Management Issues of Boundary Waters, to “50% of the natural flow of the Danube at the point at which it crosses the boundary below Čunovo” and considers that the Parties “are obliged to enter into negotiations in order to produce the result that the water conditions along the area from below Čunovo to below the confluence at Sap become jointly defined water conditions as required by Article 3 (a) of the 1976 Convention”.

Hungary moreover indicated that any mutually accepted long-term discharge régime must be “capable of avoiding damage, including especially damage to biodiversity prohibited by the [1992 Rio Convention on Biological Diversity]”. It added that “a joint environmental impact assessment of the region and of the future of Variant C structures in the context of the sustainable development of the region” should be carried out.

126. Hungary also raised the question of financial accountability for the failure of the original project and stated that both Parties accept the fact that the other has “proprietary and financial interests in the residues of the original Project and that an accounting has to be carried out”. Furthermore, it noted that:

“Other elements of damage associated with Variant C on Hungarian territory also have to be brought into the accounting...as well as electricity production since the diversion.”

and that: “The overall situation is a complex one, and it may be most easily resolved by some form of lump sum settlement.”

127. Hungary stated that Slovakia had incurred international responsibility and should make reparation for the damage caused to Hungary by the operation of Variant C. In that connection, it referred, in the context of reparation of the damage to the environment, to the rule of res titutio in integrum, and called for the re-establishment of “joint control by the two States over the installations maintained as they are now”, and the “re-establishment of the flow of [the] waters to the level at which it stood prior to the unlawful diversion of the river”. It also referred to reparation of the damage to the fauna, the flora, the soil, the sub-soil, the groundwater and the aquifer; the damages suffered by the Hungarian population on account of the increase in the uncertainties weighing on its future (premiam doloris); and the damage arising from the unlawful use, in order to divert the Danube, of installations over which the two Parties exercised joint ownership.

Lastly, Hungary called for the “cessation of the continuous unlawful acts” and a “guarantee that the same actions will not be repeated”, and asked the Court to order “the permanent suspension of the operation of Variant C”.

128. Slovakia argued for its part that Hungary should put an end to its unlawful conduct and cease to impede the application of the 1977 Treaty, taking account of its “flexibility and of the important possibilities of development for which it provides, or even of such amendments as might be made to it by agreement between the Parties, further to future negotiations”. It stated that joint operations could resume on a basis jointly agreed upon and emphasized the following:

“whether Nagymaros is built as originally planned, or built elsewhere in a different form, or, indeed, not built at all, is a question to be decided by the Parties some time in the future.

Provided the bypass canal and the Gabčíkovo Power-station and Locks — both part of the original Treaty, and not part of Variant C — remain operational and economically viable and efficient, Slovakia is prepared to negotiate over the future roles of Dunakiliti and Čunovo, bearing Nagymaros in mind.”

It indicated that the Gabčíkovo power plant would not operate in peak mode “if the evidence of environmental damage [was] clear and accepted by both Parties”. Slovakia noted that the Parties appeared to agree that an accounting should be undertaken “so that, guided by the Court’s findings on responsibility, the Parties can try to reach a global settlement”. It
added that the Parties would have to agree on how the sums due are to be paid.

129. Slovakia stated that Hungary must make reparation for the deleterious consequences of its failures to comply with its obligations, “whether they relate to its unlawful suspensions and abandonments of works or to its formal repudiation of the Treaty as from May 1992”, and that compensation should take the form of a resitutio in integrum. It indicated that “Unless the Parties come to some other arrangement by concluding an agreement, resitutio in integrum ought to take the form of a return by Hungary, at a future time, to its obligations under the Treaty” and that “For compensation to be ‘full’, . . . . to ‘wipe out all the consequences of the illegal act’ . . . a payment of compensation must . . . be added to the resitutio . . . .” Slovakia claims compensation which must include both interest and loss of profits and should cover the following heads of damage, which it offers by way of guidance:

(1) Losses caused to Slovakia in the Gabčíkovo sector: costs incurred from 1990 to 1992 by Czechoslovakia in protecting the structures of the G/N project and adjacent areas; the cost of maintaining the old bed of the River Danube pending the availability of the new navigation canal, from 1990 to 1992; losses to the Czechoslovak navigation authorities due to the unavailability of the bypass canal from 1990 to 1992; construction costs of Variant C (1990-1992).

(2) Losses caused to Slovakia in the Nagymaros sector: losses in the field of navigation and flood protection incurred since 1992 by Slovakia due to the failure of Hungary to proceed with the works.

(3) Loss of electricity production.

Slovakia also calls for Hungary to “give the appropriate guarantees that it will abstain from preventing the application of the Treaty and the continuous operation of the system”. It argued from that standpoint that it is entitled “to be given a formal assurance that the internationally wrongful acts of Hungary will not recur”, and it added that “the maintenance of the closure of the Danube at Cúneo constitutes a guarantee of that kind”, unless Hungary gives an equivalent guarantee “within the framework of the negotiations that are to take place between the Parties”.

* * *

130. The Court observes that the part of its Judgment which answers the questions in Article 2, paragraph 1, of the Special Agreement has a declaratory character. It deals with the past conduct of the Parties and determines the lawfulness or unlawfulness of that conduct between 1989 and 1992 as well as its effects on the existence of the Treaty.

131. Now the Court has, on the basis of the foregoing findings, to determine what the future conduct of the Parties should be. This part of the Judgment is prescriptive rather than declaratory because it determines what the rights and obligations of the Parties are. The Parties will have to seek agreement on the modalities of the execution of the Judgment in the light of this determination, as they agreed to do in Article 5 of the Special Agreement.

* * *

132. In this regard it is of cardinal importance that the Court has found that the 1977 Treaty is still in force and consequently governs the relationship between the Parties. That relationship is also determined by the rules of other relevant conventions to which the two States are party, by the rules of general international law and, in this particular case, by the rules of State responsibility; but it is governed, above all, by the applicable rules of the 1977 Treaty as a lex specialis.

133. The Court, however, cannot disregard the fact that the Treaty has not been fully implemented by either party for years, and indeed that their acts of commission and omission have contributed to creating the factual situation that now exists. Nor can it overlook that factual situation — or the practical possibilities and impossibilities to which it gives rise — when deciding on the legal requirements for the future conduct of the Parties.

This does not mean that facts — in this case facts which flow from wrongful conduct — determine the law. The principle ex injuria jus non oritur is sustained by the Court’s finding that the legal relationship created by the 1977 Treaty is preserved and cannot in this case be treated as voided by unlawful conduct.

What is essential, therefore, is that the factual situation as it has developed since 1989 shall be placed within the context of the preserved and developing treaty relationship, in order to achieve its object and purpose in so far as that is feasible. For it is only then that the irregular state of affairs which exists as the result of the failure of both Parties to comply with their treaty obligations can be remedied.

134. What might have been a correct application of the law in 1989 or 1992, if the case had been before the Court then, could be a miscarriage of justice if prescribed in 1997. The Court cannot ignore the fact that the Gabčíkovo power plant has been in operation for nearly five years, that the bypass canal which feeds the plant receives its water from a significantly smaller reservoir formed by a dam which is built not at Dunakiliti but at Cúneo, and that the plant is operated in a run-of-the-river mode and not in a peak hour mode as originally foreseen. Equally, the Court cannot ignore the fact that, not only has Nagymaros not been built, but that, with the effective discarding by both Parties of peak power operation, there is no longer any point in building it.

135. As the Court has already had occasion to point out, the 1977 Treaty was not only a joint investment project for the production of
energy, but it was designed to serve other objectives as well: the improvement of the navigability of the Danube, flood control and regulation of ice-discharge, and the protection of the natural environment. None of these objectives has been given absolute priority over the other, in spite of the emphasis which is given in the Treaty to the construction of a System of Locks for the production of energy. None of them has lost its importance. In order to achieve these objectives the parties accepted obligations of conduct, obligations of performance, and obligations of result.

136. It could be said that part of the obligations of performance which related to the construction of the System of Locks — in so far as they were not yet implemented before 1992 — have been overtaken by events. It would be an administration of the law altogether out of touch with reality if the Court were to order those obligations to be fully reinstated and the works at Čunovo to be demolished when the objectives of the Treaty can be adequately served by the existing structures.

137. Whether this is indeed the case is, first and foremost, for the Parties to decide. Under the 1977 Treaty its several objectives must be attained in an integrated and consolidated programme, to be developed in the Joint Contractual Plan. The Joint Contractual Plan was, until 1989, adapted and amended frequently to better fit the wishes of the parties. This Plan was also expressly described as the means to achieve the objectives of maintenance of water quality and protection of the environment.

138. The 1977 Treaty never laid down a rigid system, albeit that the construction of a system of locks at Gabčíkovo and Nagymaros was prescribed by the Treaty itself. In this respect, however, the subsequent positions adopted by the parties should be taken into consideration. Not only did Hungary insist on terminating construction at Nagymaros, but Czechoslovakia stated, on various occasions in the course of negotiations, that it was willing to consider a limitation or even exclusion of operation in peak hour mode. In the latter case the construction of the Nagymaros dam would have become pointless. The explicit terms of the Treaty itself were therefore in practice acknowledged by the parties to be negotiable.

139. The Court is of the opinion that the Parties are under a legal obligation, during the negotiations to be held by virtue of Article 5 of the Special Agreement, to consider, within the context of the 1977 Treaty, in what way the multiple objectives of the Treaty can best be served, keeping in mind that all of them should be fulfilled.

140. It is clear that the Project's impact upon, and its implications for, the environment are of necessity a key issue. The numerous scientific reports which have been presented to the Court by the Parties — even if their conclusions are often contradictory — provide abundant evidence that this impact and these implications are considerable.

In order to evaluate the environmental risks, current standards must be taken into consideration. This is not only allowed by the wording of Articles 15 and 19, but even prescribed, to the extent that these articles impose a continuing — and thus necessarily evolving — obligation on the parties to maintain the quality of the water of the Danube and to protect nature.

The Court is mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage.

Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind — for present and future generations — of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.

For the purposes of the present case, this means that the Parties together should look afresh at the effects on the environment of the operation of the Gabčíkovo power plant. In particular they must find a satisfactory solution for the volume of water to be released into the old bed of the Danube and into the side-arms on both sides of the river.

141. It is not for the Court to determine what shall be the final result of these negotiations to be conducted by the Parties. It is for the Parties themselves to find an agreed solution that takes account of the objectives of the Treaty, which must be pursued in a joint and integrated way, as well as the norms of international environmental law and the principles of the law of international watercourses. The Court will recall in this context that, as it said in the North Sea Continental Shelf cases:

"[the Parties] are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it" (I.C.J. Reports 1969, p. 47, para. 85).

142. What is required in the present case by the rule pacta sunt servanda, as reflected in Article 26 of the Vienna Convention of 1969 on the Law of Treaties, is that the Parties find an agreed solution within the cooperative context of the Treaty.

Article 26 combines two elements, which are of equal importance. It provides that “Every treaty in force is binding upon the parties to it and
must be performed by them in good faith.” This latter element, in the Court’s view, implies that, in this case, it is the purpose of the Treaty, and the intentions of the parties in concluding it, which should prevail over its literal application. The principle of good faith obliges the Parties to apply it in a reasonable way and in such a manner that its purpose can be realized.

143. During this dispute both Parties have called upon the assistance of the Commission of the European Communities. Because of the diametrically opposed positions the Parties took with regard to the required outcome of the trilateral talks which were envisaged, those talks did not succeed. When, after the present Judgment is given, bilateral negotiations without pre-conditions are held, both Parties can profit from the assistance and expertise of a third party. The readiness of the Parties to accept such assistance would be evidence of the good faith with which they conduct bilateral negotiations in order to give effect to the Judgment of the Court.

144. The 1977 Treaty not only contains a joint investment programme, it also establishes a régime. According to the Treaty, the main structures of the System of Locks are the joint property of the Parties; their operation will take the form of a co-ordinated single unit; and the benefits of the project shall be equally shared.

Since the Court has found that the Treaty is still in force and that, under its terms, the joint régime is a basic element, it considers that, unless the Parties agree otherwise, such a régime should be restored.

145. Article 10, paragraph 1, of the Treaty states that works of the System of Locks constituting the joint property of the contracting parties shall be operated, as a co-ordinated single unit and in accordance with jointly agreed operating and operational procedures, by the authorized operating agency of the contracting party in whose territory the works are built. Paragraph 2 of that Article states that works on the System of Locks owned by one of the contracting parties shall be independently operated or maintained by the agencies of that contracting party in the jointly prescribed manner.

The Court is of the opinion that the works at Čunovo should become a jointly operated unit within the meaning of Article 10, paragraph 1, in view of their pivotal role in the operation of what remains of the Project and for the water-management régime. The dam at Čunovo has taken over the role which was originally destined for the works at Dunajská Streda, and therefore should have a similar status.

146. The Court also concludes that Variant C, which it considers operates in a manner incompatible with the Treaty, should be made to conform to it. By associating Hungary, on an equal footing, in its operation, management and benefits, Variant C will be transformed from a de facto status into a treaty-based régime.

It appears from various parts of the record that, given the current state of information before the Court, Variant C could be made to function in such a way as to accommodate both the economic operation of the system of electricity generation and the satisfaction of essential environmental concerns.

Regularization of Variant C by making it part of a single and indivisible operational system of works also appears necessary to ensure that Article 9 of the Treaty, which provides that the contracting parties shall participate in the use and in the benefits of the System of Locks in equal measure, will again become effective.

147. Re-establishment of the joint régime will also reflect in an optimal way the concept of common utilization of shared water resources for the achievement of the several objectives mentioned in the Treaty, in concordance with Article 5, paragraph 2, of the Convention on the Law of the Non-Navigational Uses of International Watercourses, according to which:

“Watercourse States shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Such participation includes both the right to utilize the watercourse and the duty to cooperate in the protection and development thereof, as provided in the present Convention.”

(General Assembly doc. A/51/869 of 11 April 1997.)

* * *

148. Thus far the Court has indicated what in its view should be the effects of its finding that the 1977 Treaty is still in force. Now the Court will turn to the legal consequences of the internationally wrongful acts committed by the Parties.

149. The Permanent Court of International Justice stated in its Judgment of 13 September 1928 in the case concerning the Factory at Chorzów:

“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” (P.C.I.J., Series A, No. 17, p. 47).

150. Reparation must, “as far as possible”, wipe out all the consequences of the illegal act. In this case, the consequences of the wrongful acts of both Parties will be wiped out “as far as possible” if they resume their co-operation in the utilization of the shared water resources of the Danube, and if the multi-purpose programme, in the form of a co-ordinated single unit, for the use, development and protection of the watercourse is implemented in an equitable and reasonable manner. What it is possible for the Parties to do is to re-establish co-operative administration of what remains of the Project. To that end, it is open to them to agree to maintain the works at Čunovo, with changes in the mode of operation in respect of the allocation of water and electricity, and not to build works at Nagymaros.
151. The Court has been asked by both Parties to determine the consequences of the Judgment as they bear upon payment of damages. According to the Preamble to the Special Agreement, the Parties agreed that Slovakia is the sole successor State of Czechoslovakia in respect of rights and obligations relating to the Gabčíkovo-Nagymaros Project. Slovakia thus may be liable to pay compensation not only for its own wrongful conduct, but also for that of Czechoslovakia, and it is entitled to be compensated for the damage sustained by Czechoslovakia as well as by itself as a result of the wrongful conduct of Hungary.

152. The Court has not been asked at this stage to determine the quantum of damages due, but to indicate on what basis they should be paid. Both Parties claimed to have suffered considerable financial losses and both claim pecuniary compensation for them.

It is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it. In the present Judgment, the Court has concluded that both Parties committed internationally wrongful acts, and it has noted that those acts gave rise to the damage sustained by the Parties; consequently, Hungary and Slovakia are both under an obligation to pay compensation and are both entitled to obtain compensation.

Slovakia is accordingly entitled to compensation for the damage suffered by Czechoslovakia as well as by itself as a result of Hungary's decision to suspend and subsequently abandon the works at Nagymaros and Dunakiliti, as those actions caused the postponement of the putting into operation of the Gabčíkovo power plant, and changes in its mode of operation once in service.

Hungary is entitled to compensation for the damage sustained as a result of the diversion of the Danube, since Czechoslovakia, by putting into operation Variant C, and Slovakia, in maintaining it in service, deprived Hungary of its rightful part in the shared water resources, and exploited those resources essentially for their own benefit.

153. Given the fact, however, that there have been intersecting wrongs by both Parties, the Court wishes to observe that the issue of compensation could satisfactorily be resolved in the framework of an overall settlement if each of the Parties were to renounce or cancel all financial claims and counter-claims.

154. At the same time, the Court wishes to point out that the settlement of accounts for the construction of the works is different from the issue of compensation, and must be resolved in accordance with the 1977 Treaty and related instruments. If Hungary is to share in the operation and benefits of the Čunovo complex, it must pay a proportionate share of the building and running costs.

* * *
(2) Having regard to Article 2, paragraph 2, and Article 5 of the Special Agreement,

A. By twelve votes to three,

Finds that Slovakia, as successor to Czechoslovakia, became a party to the Treaty of 16 September 1977 as from 1 January 1993;

in favour: President Schwebel; Vice-President Weeramantry; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans; Judge ad hoc Skubiszewski;

against: Judges Herczegh, Fleischhauer, Rezek;

B. By thirteen votes to two,

Finds that Hungary and Slovakia must negotiate in good faith in the light of the prevailing situation, and must take all necessary measures to ensure the achievement of the objectives of the Treaty of 16 September 1977, in accordance with such modalities as they may agree upon;

in favour: President Schwebel; Vice-President Weeramantry; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; Judge ad hoc Skubiszewski;

against: Judges Herczegh, Fleischhauer;

C. By thirteen votes to two,

Finds that, unless the Parties otherwise agree, a joint operational régime must be established in accordance with the Treaty of 16 September 1977;

in favour: President Schwebel; Vice-President Weeramantry; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; Judge ad hoc Skubiszewski;

against: Judges Herczegh, Fleischhauer;

D. By twelve votes to three,

Finds that, unless the Parties otherwise agree, Hungary shall compensate Slovakia for the damage sustained by Czechoslovakia and by Slovakia on account of the suspension and abandonment by Hungary of works for which it was responsible; and Slovakia shall compensate Hungary for the damage it has sustained on account of the putting into operation of the "provisional solution" by Czechoslovakia and its maintenance in service by Slovakia;

in favour: President Schwebel; Vice-President Weeramantry; Judges Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Parra-Aranguren, Kooijmans, Rezek; Judge ad hoc Skubiszewski;

against: Judges Oda, Koroma, Vereshchetin;

E. By thirteen votes to two,

Finds that the settlement of accounts for the construction and operation of the works must be effected in accordance with the relevant provisions of the Treaty of 16 September 1977 and related instruments, taking due account of such measures as will have been taken by the Parties in application of points 2 B and 2 C of the present operative paragraph.

in favour: President Schwebel; Vice-President Weeramantry; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; Judge ad hoc Skubiszewski;

against: Judges Herczegh, Fleischhauer.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-fifth day of September, one thousand nine hundred and ninety-seven, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Hungary and the Government of the Slovak Republic, respectively.

(Signed) Stephen M. SCHWEBEL,
President.

(Signed) Eduardo VALENCIA-OSPINA,
Registrar.

President SCHWEBEL and Judge REZEK append declarations to the Judgment of the Court.

Vice-President WEERAMANTRY and Judges BEDJAOUI and KOROMA append separate opinions to the Judgment of the Court.

Judges ODA, RANJEVA, HERCZEZH, FLEISCHHAUER, VERESHCHETIN and PARRA-ARANGUREN and Judge ad hoc SKUBISZEWSKI append dissenting opinions to the Judgment of the Court.

(Initialled) S.M.S.
(Initialled) E.V.O.
Difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the *Rainbow Warrior Affair*
Decision of 30 April 1990

United Nations, *Reports of International Arbitral Awards*,
Volume XX
Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair

30 April 1990

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PART III

Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair

Decision of 30 April 1990

Affaire concernant les problèmes nés entre la Nouvelle-Zélande et la France relatifs à l’interprétation ou à l’application de deux accords conclus le 9 juillet 1986, lesquels concernaient les problèmes découlant de l’affaire du Rainbow Warrior

Sentence du 30 avril 1990
CASE CONCERNING THE DIFFERENCE BETWEEN NEW ZEALAND AND FRANCE CONCERNING THE INTERPRETATION OR APPLICATION OF TWO AGREEMENTS, CONCLUDED ON 9 JULY 1986 BETWEEN THE TWO STATES AND WHICH RELATED TO THE PROBLEMS ARISING FROM THE RAINBOW WARRIOR AFFAIR*

30 APRIL 1990

Violation of a treaty obligation by a treaty partner—Requirement of good faith to seek consent of the other treaty partner before deviating from the treaty obligation—Requirement of mutual consent of treaty partners—Obligation to act in good faith—Requirement of providing full information in a timely manner to the other treaty partner—Requirement of not impeding a party’s efforts to verify the information submitted by the other party—Requirement of allowing the other party a reasonable opportunity to reach an informed decision.

Relationship between the requirement of mutual consent and unilateral acts of treaty partners—Invocation of internal law as a justification for non-performance of treaty obligations—Change of circumstances as a reason for non-compliance with treaty obligations—Circumstances justifying the continuous breach of a treaty obligation—Cessation of a wrongful act.

Customary sources for determining applicable rules and principles of international law—Interpretation of treaties—The law of international responsibility—Circumstances precluding illegality of an otherwise wrongful act (force majeure, fortuitous event, distress, state of necessity)—Relationship between breach of a treaty and the law of international responsibility—Law applicable to the determination of the effects of a breach of a treaty.

Tempus commissi delicta—Duration of a treaty obligation—Existence of damage as a prerequisite for relief—Types of damage (material, economic, legal, moral, political)—Appropriate remedies (restituio in integrum, satisfaction in the form of a declaration of cessation of the wrongful act and declaration of obligation)—Reparation in the form of an indemnity for non-material damages.

Eduardo Jiménez de Aréchaga, Chairman
Sir Kenneth Keith,
Prof. Jean-Denis Bredin, Members
Registrar: Michael F. Hoellering
Assistant Registrar: Philippe P. Chalandon

I. AGREEMENT TO ARBITRATE

1. On 9 July 1986 the Governments of France and of New Zealand concluded in Paris by an Exchange of Letters* an Agreement submitting to arbitration any dispute concerning the interpretation or application of two other Agreements concluded on the same date, which related to the problems arising from the Rainbow Warrior affair.

The text of the letter sent by the Prime Minister of France and accepted by the New Zealand Government runs as follows:

I have the honour to refer to the two Agreements concluded today in the light of the ruling of the Secretary-General of the United Nations.

On the basis of that ruling, I have the honour further to propose that any dispute concerning the interpretation or application of either of these two Agreements which it has not been possible to resolve through the diplomatic channel shall, at the request of either of our two Governments, be submitted to an Arbitral Tribunal under the following conditions:

(a) each Government shall designate a member of the Tribunal within 30 days of the date of the delivery by either Government to the other of a written request for arbitration of the dispute, and the two Governments shall, within 60 days of that date, appoint a third member of the Tribunal who shall be its Chairman;

(b) if, within the times prescribed, either Government fails to designate a member of the Tribunal or the third member is not agreed the Secretary-General of the United Nations shall be requested to make the necessary appointment after consultations with the two Governments by choosing the member or members of the Tribunal;

(c) a majority of the members of the Tribunal shall constitute a quorum and all decisions shall be made by a majority vote;

(d) the decisions of the Tribunal, including all rulings concerning its constitution, procedure and jurisdiction, shall be binding on the two Governments.

If the foregoing is acceptable to the Government of New Zealand, I would propose that the present letter and your response to it to that effect should constitute an agreement between our two Governments with effect from today’s date.

2. On 14 February 1989 the Parties concluded in New York the following Supplementary Agreement relating to the present Arbitral Tribunal:

The Government of New Zealand and the Government of the French Republic
RECALLING the three Agreements concluded by Exchanges of Letters of 9 July 1986 following the ruling of the Secretary-General of the United Nations relating to the Rainbow Warrior affair;

RECALLING further that the third Agreement establishes an arbitral procedure for the settlement of any dispute concerning the interpretation or application of either of the first two Agreements which it has not been possible to settle through the diplomatic channel;

NOTING that the Government of New Zealand by diplomatic Note of 22 September 1988 requested that this procedure be used to settle such a dispute;

NOTING also that in accordance with the third Agreement an Arbitral Tribunal has been constituted comprising:
Dr. Eduardo Jiménez de Aréchaga, Chairman of the Tribunal, appointed by the two Governments,

* For the exchange of letters see United Nations, Reports of International Arbitral Awards, vol. XIX, pp. 216-221.
Sir Kenneth Keith, designated by the Government of New Zealand,
Mr. Jean-Denis Bredin, designated by the Government of the French Republic;
BEARING IN MIND the provisions of the third Agreement;
BELIEVING it desirable to supplement those provisions of the third Agreement
relating to the functioning and procedures of the Tribunal;
HAVE AGREED AS FOLLOWS:

**Article 1**

1. Subject to paragraphs 2, 3, and 4 of this Article, the composition of the Tribunal shall remain unchanged throughout the period in which it is exercising its functions.

2. In the event that either the arbitrator designated by the Government of New Zealand or the arbitrator designated by the Government of the French Republic is, for any reason, unable or unwilling to act as such, the vacancy may be filled by the Government which designated that arbitrator.

3. The proceedings of the Tribunal shall be suspended during a period of twenty days from the date on which the Tribunal has acknowledged such a vacancy. If at the end of that period the arbitrator has not been replaced by the Government which designated him the proceedings of the Tribunal shall nonetheless resume.

4. In the event that the Chairman of the Tribunal is, for any reason, unable or unwilling to act as such, he shall be replaced by agreement between the two Governments. If the two Governments are unable to agree within a period of forty days from the date on which the Tribunal has acknowledged such a vacancy, the Secretary-General of the United Nations shall be requested to make the necessary appointment after consultation with the two Governments. The proceedings of the Tribunal shall be suspended until such time as the vacancy has been filled.

**Article 2**

The decisions of the Tribunal shall be made on the basis of the Agreements concluded between the Government of New Zealand and the Government of the French Republic by Exchanges of Letters on 9 July 1986, this Agreement and the applicable rules and principles of international law.

**Article 3**

1. Each Government shall, within fourteen days of the entry into force of this Agreement, appoint an Agent for the purposes of the arbitration and shall communicate the name and address of its Agent to the other Government and to the Chairman of the Tribunal.

2. Each Agent may appoint a deputy or deputies. The names and addresses of such deputies shall also be communicated to the other Government and to the Chairman of the Tribunal.

**Article 4**

1. The Tribunal shall meet at New York at such days and times as it may determine after consultation with the Agents.

2. The Tribunal after consultation with the Agents shall designate a Registrar and may engage such staff and secure such services and equipment as it deems necessary.

**Article 5**

1. The procedure shall consist of two parts: written and oral.

2. The written pleadings shall consist of:
   (a) A Memorial, which shall be submitted by the Government of New Zealand to the Registrar of the Tribunal and to the French Agent within eight weeks after entry into force of this Agreement;
   (b) A Counter-Memorial, which shall be submitted by the Government of the French Republic to the Registrar of the Tribunal and the New Zealand Agent within eight weeks after the date of receipt by the French Agent of the New Zealand Memorial;
   (c) A Reply, which shall be submitted by the Government of New Zealand to the Registrar of the Tribunal and the French Agent within four weeks after the date of receipt by the New Zealand Agent of the French Counter-Memorial;
   (d) A Rejoinder, which shall be submitted by the Government of the French Republic to the Registrar of the Tribunal and the New Zealand Agent within four weeks after the date of receipt by the French Agent of the New Zealand Reply;
   (e) Such other written material as the Tribunal may determine to be necessary.

3. The Registrar shall notify the two Agents of the address for deposit of written pleadings and other written material.

4. Each document shall be communicated in six copies.

5. The Tribunal may extend the above time limits at the request of either Government.

6. The oral hearings shall follow the written proceedings after an interval of not less than two weeks.

7. Each Government shall be represented at the oral hearings by its Agent or deputy Agent and such counsel and experts as it deems necessary for this purpose.

**Article 6**

Each Government shall present its written pleadings and oral submissions to the Tribunal in English or in French. All decisions of the Tribunal shall be delivered in both languages. Verbatim records of the oral proceedings shall be produced each day in the language in which each statement was delivered. The Tribunal shall arrange for such translation and interpretation services as may be necessary and shall keep a verbatim record of all oral proceedings in English and French.

**Article 7**

1. On completion of the proceedings, the Tribunal shall render its Award as soon as possible and shall forward a copy of the Award, signed by the Chairman and the Registrar of the Tribunal, to the two Agents.

2. The Award shall state in full the reasons for the conclusions reached.

**Article 8**

The identity of the Agents and counsel of the two Governments, as well as the whole of the Tribunal's Award, may be made public. The Tribunal may also decide, after consultation with the two Agents and giving full weight to the views of each, to make public the written pleadings and the records of the oral hearings.

**Article 9**

Any dispute between the two Governments as to the interpretation of the Award may, at the request of either Government, be referred to the Tribunal for clarification within three months after the date of receipt of the Award by its Agent.
Article 10

The present Agreement shall enter into force on the date of signature.

II. SUMMARY OF THE PROCEEDINGS

3. In accordance with Article 3 of the Supplementary Agreement, each Government communicated to the Chairman of the Tribunal the name and address of its Agent.

The Agent appointed by New Zealand is Mr. Christopher David Beeby, Deputy Secretary, Ministry of External Relations and Trade, New Zealand.

The Agent appointed by France is Mr. Jean-Pierre Puissochet, Counselor of State, Director of Legal Affairs, Ministry of Foreign Affairs, France.

4. On 8 May 1989, the Tribunal met in New York and appointed Michael F. Hoellering as Registrar, and Philippe P. Chalandon as Assistant Registrar.

5. The two Governments filed their written pleadings within the agreed time limits.

On 5 April 1989 the Government of New Zealand submitted a Memorial with Annexes.

On 1 June 1989 the Government of France submitted a Counter-Memorial with Annexes.

On 30 June 1989 and on 27 July 1989 respectively, the parties submitted their Reply with further Annexes and a Rejoinder.

6. With the written stage of the proceedings concluded the Tribunal, following consultations with the Agents of both Parties, fixed the date of the opening of oral proceedings for 31 October 1989. Oral proceedings were held in New York from 31 October to 3 November 1989. The following persons attended:

For New Zealand:

Rt. Hon. D. R. Lange, Attorney General, as Leader of the Delegation,
Mr. C. D. Beeby, Deputy Secretary, Ministry of External Relations and Trade, as Agent and Counsel,
Professor D. W. Bowett, Q.C., Whewell Professor of International Law, University of Cambridge, as Counsel,
Mr. C. R. Keating, Assistant Secretary, Ministry of External Relations and Trade, as Counsel,
Mr. D. J. McKay, Counsellor, Ministry of External Relations and Trade, as Counsel,
Ms. J. A. Lake, Legal Consultant, Ministry of External Relations and Trade, as Counsel;
For France:

Mr. Jean-Pierre Puissochet, Counselor of State, Director of Legal Affairs, Ministry of Foreign Affairs, as Agent and Counsel,

7. The final submissions of the parties are as follows:

For New Zealand, in the Memorial:

144. In conclusion, New Zealand respectfully requests the Tribunal to grant the following relief:

(a) A declaration that the French Republic:

(i) breached its obligations to New Zealand by failing to seek in good faith the consent of New Zealand to the removal of Major Mafart and Captain Prieur from the island of Hao;
(ii) breached its obligations to New Zealand by the removal of Major Mafart and Captain Prieur from the island of Hao;
(iii) is in breach of its obligations to New Zealand by the continuous absence of Major Mafart and Captain Prieur from the island of Hao;
(iv) is under an obligation to return Major Mafart and Captain Prieur promptly to the island of Hao for the balance of their three year periods in accordance with the conditions of the First Agreement;

(b) An order that the French Republic shall promptly return Major Mafart and Captain Prieur to the island of Hao for the balance of their three year periods in accordance with the conditions of the First Agreement.

For France, in the Counter-Memorial:

Conclusion

For all the reasons set out in the foregoing chapters, the Government of the French Republic respectfully requests that the Arbitral Tribunal reject the requests of New Zealand.

For New Zealand, in the Reply:

Conclusion

In its Counter-Memorial France has failed to establish any reason, whether by reference to law or fact, why New Zealand should not be granted the relief it seeks.
Accordingly, New Zealand respectfully maintains its request for a declaration and an order for specific performance, as set out in paragraph 144 of its Memorial.

For France, in the Rejoinder:

Conclusion

For all the reasons set out in the foregoing chapters, the Government of the French Republic once again respectfully requests that the Arbitral Tribunal reject the requests of New Zealand.

Oral conclusions:

For New Zealand:

Mr. President, I have made it clear that New Zealand sees no reason to make any modification of its request to this Tribunal for a declaration and order as set out in paragraph 144 of the New Zealand Memorial.

For France:

Its Agent reaffirmed its earlier "... conclusions whose main thrust is to encourage you to reject the entire New Zealand request".

IV. THE FACTS

The 1986 Ruling and Agreements

8. On 10 July 1985, a civilian vessel, the Rainbow Warrior, not flying the New Zealand flag, was sunk at its moorings in Auckland Harbour, New Zealand, as a result of extensive damage caused by two high-explosive devices. One person, a Netherlands citizen, Mr. Fernando Pereira, was killed as a result of this action: he drowned when the ship sank.

9. On 12 July 1985, two agents of the French Directorate General of External Security (D.G.S.E.) were interviewed by the New Zealand Police and subsequently arrested and prosecuted. On 4 November 1985, they pleaded guilty in the District Court in Auckland, New Zealand, to charges of manslaughter and wilful damage to a ship by means of an explosive. On 22 November 1985, the two agents, Alain Mafart and Dominique Prieur, were sentenced by the Chief Justice of New Zealand to a term of 10 years imprisonment.

10. On 22 September 1985, the Prime Minister of France issued a communiqué confirming that the Rainbow Warrior had been sunk by agents of the D.G.S.E. under orders. On the same day, the French Minister for External Affairs indicated to the Prime Minister of New Zealand that France was ready to undertake reparations for the consequences of that action.

11. Bilateral efforts to resolve the differences that had arisen subsequently between New Zealand and France were undertaken over a period of several months. In June 1986, following an appeal by Prime Minister Lubbers of the Netherlands, the two Governments formally approached the Secretary-General of the United Nations and referred to him all the problems between them arising from the Rainbow Warrior affair for a binding Ruling.

12. On 6 July 1986, the Secretary-General of the United Nations issued the following:

Ruling

The issues that I need to consider are limited in number. I set out below my ruling on them, which takes account of all the information available to me. My ruling is as follows:

1. Apology

New Zealand seeks an apology. France is prepared to give one. My ruling is that the Prime Minister of France should convey to the Prime Minister of New Zealand a formal and unqualified apology for the attack, contrary to international law, on the "Rainbow Warrior" by French service agents which took place on 10 July 1985.

2. Compensation

New Zealand seeks compensation for the wrong done to it, and France is ready to pay some compensation. The two sides, however, are some distance apart on quantum. New Zealand has said that the figure should not be less than US Dollars 9 million, France that it should not be more than US Dollars 4 million. My ruling is that the French Government should pay the sum of US Dollars 7 million to the Government of New Zealand as compensation for all the damage it has suffered.

3. The two French service agents

It is on this issue that the two Governments plainly had the greatest difficulty in their attempts to negotiate a solution to the whole issue on a bilateral basis before they took the decision to refer the matter to me.

The French Government seeks the immediate return of the two officers. It underlines that their imprisonment in New Zealand is not justified, taking into account in particular the fact that they acted under military orders and that France is ready to give an apology and to pay compensation to New Zealand for the damage suffered.

The New Zealand position is that the sinking of the "Rainbow Warrior" involved not only a breach of international law, but also the commission of a serious crime in New Zealand for which the two officers received a lengthy sentence from a New Zealand court. The New Zealand side states that their release to freedom would undermine the integrity of the New Zealand judicial system. In the course of bilateral negotiations with France, New Zealand was ready to explore possibilities for the prisoners serving their sentences outside New Zealand.

But it has been, and remains, essential to the New Zealand position that there should be no release to freedom, that any transfer should be to custody, and that there should be a means of verifying that.

The French response to that is that there is no basis either in international law or in French law on which the two could serve out any portion of their New Zealand sentence in France, and that they could not be subjected to new criminal proceedings after a transfer into French hands.

On this point, if I am to fulfil my mandate adequately, I must find a solution in respect of the two officers which both respects and reconciles these conflicting positions.

My ruling is as follows:

(a) The Government of New Zealand should transfer Major Alain Mafart and Captain Dominique Prieur to the French military authorities. Immediately thereafter, Major Mafart and Captain Prieur should be transferred to a French military facility on an isolated island outside of Europe for a period of three years.

(b) They should be prohibited from leaving the island for any reason, except with the mutual consent of the two Governments. They should be isolated during
their assignment on the island from persons other than military or associated personnel and immediate family and friends. They should be prohibited from any contact with the press or other media whether in person or in writing or in any other manner. These conditions should be strictly complied with and appropriate action should be taken under the rules governing military discipline to enforce them.

(d) The French Government should every three months convey to the New Zealand Government and to the Secretary-General of the United Nations, through diplomatic channels, full reports on the situation of Major Mafart and Captain Prieur in terms of the two preceding paragraphs in order to allow the New Zealand Government to be sure that they are being implemented.

(e) If the New Zealand Government so requests, a visit to the French military facility in question may be made, by mutual agreement between the two Governments, by an agreed third party.

I have sought information on French military facilities outside Europe. On the basis of that information, I believe that the transfer of Major Mafart and Captain Prieur to the French military facility on the isolated island of Hao in French Polynesia would best facilitate the enforcement of the conditions which I have laid down in paragraphs (a) to (d) above. My ruling is that this should be their destination immediately after their transfer.

4. Trade issues

The New Zealand Government has taken the position that trade issues have been imported into the affair as a result of French action, either taken or in prospect. The French Government denies that, but it has indicated that it is willing to give some undertakings relating to trade, as sought by the New Zealand Government. I therefore rule that France should:

(a) Not oppose continuing imports of New Zealand butter into the United Kingdom in 1987 and 1988 at levels proposed by the Commission of the European Communities insofar as these do not exceed those mentioned in document COM (83) 574 of 6 October 1983, that is to say, 77,000 tonnes in 1987 and 75,000 tonnes in 1988; and

(b) Not take measures that might impair the implementation of the Agreement between New Zealand and the European Economic Community on Trade in Mutton, Lamb and Goatmeat which entered into force on 20 October 1980 (as complemented by the Exchange of Letters of 12 July 1984).

5. Arbitration

The New Zealand Government has argued that a mechanism should exist to ensure that any differences that may arise about the implementation of the agreements concluded as a result of my ruling can be referred for binding decision to an arbitral tribunal. The Government of France is not averse to that. My ruling is that an agreement to that effect should be concluded and provide that any dispute concerning the interpretation or application of the other agreements, which it has not been possible to resolve through the diplomatic channel, shall, at the request of either of the two Governments, be submitted to an arbitral tribunal. (The ruling then made the specific proposals for arbitration which were later incorporated in the Agreement set out in para. 1 of this Award.)

6. The two Governments should conclude and bring into force as soon as possible binding agreements incorporating all of the above rulings. These agreements should provide that the undertaking relating to an apology, the payment of compensation and the transfer of Major Mafart and Captain Prieur should be implemented at the latest on 25 July 1986.

7. On one matter I find no need to make a ruling. New Zealand, in its written statement of position, has expressed concern regarding compensation for the family of the individual whose life was lost in the incident and for Greenpeace. The French statement of position contains an account of the compensation arrangements that have been made; I understand that those assurances constitute the response that New Zealand was seeking.

* *

13. In accordance with paragraph 6 of the Ruling, the French and New Zealand Governments concluded in Paris, on 9 July 1986, by Exchanges of Letters, three Agreements which incorporated the provisions of the Ruling. The first of these Agreements, which relates to the situation of the two French officers, runs as follows:

On 19 June 1986, wishing to maintain the close and friendly relations which have traditionally existed between New Zealand and France, our two Governments agreed to refer all of the problems between them arising from the Rainbow Warrior affair to the Secretary-General of the United Nations for a binding Ruling. In the light of that Ruling, made available on 7 July 1986, I have the honour to propose the following:

The Prime Minister of France will convey to the Prime Minister of New Zealand a formal and unqualified apology for the attack, contrary to international law, on the Rainbow Warrior by French service agents which took place in Auckland on 10 July 1985. Furthermore, the French Government will pay the sum of US$ 7 million to the Government of New Zealand as compensation for all the damage which it has suffered.

The Government of New Zealand will transfer Major Alain Mafart and Captain Dominique Prieur to the French military authorities. Immediately thereafter, Major Mafart and Captain Prieur will be transferred to a French military facility on the island of Hao for a period of not less than three years.

They will be prohibited from leaving the island for any reason, except with the mutual consent of the two Governments. They will be isolated, during their assignment in Hao, from persons other than military or associated personnel and immediate family and friends. They will be prohibited from any contact with the press or other media, whether in person, in writing or in any other manner. These conditions will be strictly complied with and appropriate action will be taken under the rules governing military discipline to enforce them.

The French Government will every three months convey to the New Zealand Government and to the Secretary-General of the United Nations, through diplomatic channels, full reports on the situation of Major Mafart and Captain Prieur in terms of the two preceding paragraphs in order to allow the New Zealand Government to be sure that these paragraphs are being implemented as agreed.

If the New Zealand Government so requests, a visit to the facility on Hao may be made, by mutual agreement between the two Governments, by an agreed third party.

The undertakings relating to an apology, the payment of compensation and the transfer of Major Mafart and Captain Prieur will be implemented not later than 25 July 1986.

14. In accordance with the Ruling and the First Agreement, officers Mafart and Prieur were transferred from New Zealand to a French military facility on the island of Hao on 23 July 1986, and the other obligations undertaken in para. 2 of the Agreement were implemented.

The Case of Major Mafart

15. On 7 December 1987 the French Ministry of Defence was advised by the commander of the Hao military base that the condition
of Major Mafart’s health required examinations and immediate care, which could not be carried out locally. The Minister of Defence then decided to send a medical team to the site. This team was led by a principal Army doctor, Dr. Maurel, from the Val-de-Grace Hospital in Paris.

16. On 10 December 1987 (Hao date), Dr. Maurel sent the Ministry of Defence a message, received in Paris on Friday 11 December, stating that Major Mafart “poses the etiological and therapeutic problem of stabbing abdominal pains in a patient with a history of similar, and still unlabeled, problems. The results of today’s examination indicate the need for explorations in a highly specialized environment. His condition justifies an emergency return to a hospital in mainland France. Absent any formal notice from you to the contrary, I propose that this evacuation take place by the Sunday 13 December 1987 aircraft”.

17. On 11 December 1987, a Friday, the Minister of Defence conveyed Dr. Maurel’s message to the Minister of Foreign Affairs, adding that he planned to proceed with officer Mafart’s health-related repatriation. He also asked the Minister of Foreign Affairs to “contact the New Zealand Government through the procedures stipulated in the agreement signed with that Government”.

18. On 11 December 1987, at 6.59 p.m. (Paris time; it was 6.59 a.m. on Saturday 12 December in Wellington) the Minister of Foreign Affairs sent the French Ambassador in Wellington a telegram asking him to immediately give the New Zealand authorities a verbal note containing all the information that the French Government had just received (Dr. Maurel’s medical opinion was attached to this note). The French Government, referring to the 1986 Agreement, asked “the New Zealand Government to consent to Major Mafart’s urgent health-related transfer to a hospital in mainland France”.

The French Ambassador was instructed to stress the fact that the only means of transport immediately available between Hao and Paris was the military aircraft leaving Hao Sunday morning. The Ambassador was asked to add that “the state of Major Mafart’s health absolutely required that he be examined without delay in a highly specialized medical facility which exists neither in Hao nor in Papeete”.

19. On 12 December 1987, between 10 a.m. and 11 a.m. (Wellington time) the French Ambassador contacted a senior official of the New Zealand Ministry of Foreign Affairs, communicating the above message.

20. About 4 hours later, between 2.00 and 3.00 on the afternoon of Saturday, 12 December 1987, the New Zealand Government answered the preceding communication by note verbale which stated that “in order to enable the request to be examined with the care it deserves, the New Zealand Government will require a New Zealand assessment to be made of Major Mafart’s medical condition. Accordingly, urgent arrangements are now being made for a suitably qualified New Zealand military doctor to fly on a New Zealand military aircraft to Hao for this purpose”. The note added that “the Ministry seeks urgent confirmation that the French authorities will give the necessary clearance for a military flight to Hao for this purpose. Details of the proposed flight will be given to the Embassy as soon as possible”.

In transmitting the preceding note verbale to his Government the French Ambassador added that the New Zealand Senior official who handed him the note inquired whether the departure date scheduled for Major Mafart’s evacuation, that is, 13 December at 4.00 a.m., was in fact the Hao date. If so, this would correspond to the New Zealand date of Monday 14 December.

21. On 12 December 1987 the French Ambassador in Wellington advised the French Ministry of Foreign Affairs that he was given the following information relating to the projected visit to Hao of a New Zealand military doctor arriving by Air Force plane:

Type of aircraft: P3 ORION
Registration: New Zealand 6204
Flight number: N.P. 0999
Pilot: Lieutenant B. R. Clark
Crew: 12 members
Passengers: 1 doctor and 1 interpreter
Depart Auckland: Sunday 13 December 7.00 a.m.
(A New Zealand date and time)
Arrive Hao: Saturday 12 December 4.00 p.m.
(French Polynesia date and time)
Call sign: Kiwi 999
Facilities requested: Fuel 35,000 pounds Avtur.

22. On 12 December 1987 at 5.11 p.m. (Paris time), equivalent to 5.11 a.m. on 13 December 1987 (Wellington time), the Ministry of Foreign Affairs sent by telegram to the French Ambassador in Wellington the response to be delivered to the New Zealand authorities. Due to the time shift, this response was received in Wellington early on Sunday morning 13 December 1987, some sixteen hours after the New Zealand proposal in para. 20 above.

The French authorities indicated that, to their great regret, they were unable to authorize a New Zealand aircraft to make a stop on the Hao military base. Indeed, for imperative reasons of national security, access to this base is strictly regulated and is prohibited to foreign aircraft. This is the reason why Major Mafart and Major Prieur were transported to the Hao base in July 1986 by a French military aircraft, which had come to pick them up at the Wallis airport, to which they had been transported from New Zealand by a New Zealand military plane.

The French authorities added that “the French Government agrees to allow Major Mafart to be examined, as soon he arrives in mainland France, by a physician designated by New Zealand. If applicable, it would be willing to consider covering the cost of sending a New Zealand physician to France, if this solution was preferred by the New Zealand Government”.

23. On 13 December, the French Ambassador advised that the New Zealand Prime Minister could not accept the French proposal
but advanced new proposals, taking into account the impossibility of landing at Hao. According to the New Zealand Memorial, the New Zealand Government put forward two alternatives: that a New Zealand medical doctor be flown to Papeete, Tahiti, by a New Zealand military aircraft, and then onward to Hao by French military aircraft; or, if France preferred, that the New Zealand medical doctor be flown to Papeete by a commercial flight and then onward to Hao by French military aircraft.

The French Ambassador in Wellington advised his Government somewhat differently: "Mr. Lange proposes the following: New Zealand dispatches a military doctor to Papeete as soon as possible by commercial airline. The French party undertakes to transport him to Hao so that he can perform his medical assignment there. After being brought back to Papeete, he returns to New Zealand to submit his conclusions to the New Zealand authorities".

24. On 14 December (Wellington time), the French Ambassador sent the following note to the New Zealand Ministry of Foreign Affairs:

A—The New Zealand request to have Major Mafart examined by a New Zealand physician who would go to Hao, via Papeete, then return to Auckland to report to his Government, who would then make their decision known, would delay the French officer’s health-related transfer to mainland France by an excessive period of time that could be as long as several days, given the available transport opportunities. The French authorities feel that this additional delay is absolutely incompatible with the urgency, stressed by the doctor who examined Major Mafart, of transporting the Major to a highly specialized medical facility in mainland France.

B—In carrying out their duty to protect the health of their agents, the French authorities, in this case of force majeure, are forced to proceed, without any further delay, with the French officer’s health-related repatriation. Major Mafart will leave Hao on Sunday 13 December at 2.00 (local time) on board a military plane that will arrive in Paris on Monday 14 December at about 10.00 (local time) after a technical stop in Pointe-à-Pitre.

C—The French authorities reiterate that they are willing to allow Major Mafart to be examined by a physician chosen by New Zealand, as soon as he arrives in Paris, and that they are even willing to cover the cost of sending a physician from New Zealand for this purpose, if this solution is preferred by the New Zealand Government.

D—All measures have been taken to insure the confidentiality of the entire operation and to see to it that it remains secret, in any event until Major Mafart can be examined in mainland France by the physician designated by the New Zealand authorities’.

25. On 14 December 1987 at 9.30 (Paris time), Officer Mafart arrived in Paris. He was taken to the Val-de-Grace Hospital where he was examined and treated by Professor Daly, head of the Val-de-Grace medical clinic, a professor of medicine and a specialist in gastroenterology.

26. A note delivered on 14 December 1987 from the New Zealand Embassy to the French Ministry of Foreign Affairs stated:

New Zealand views with considerable concern, and wishes to record its serious objection to the unilateral action taken, in the absence of New Zealand consent, to transfer Major Alain Mafart to France on Sunday 13 December 1987.

New Zealand regards this action as a serious breach of both the letter and the spirit of the obligations undertaken pursuant to the Ruling of 6 July 1986 by the Secretary-General of the United Nations.

The first approach to the New Zealand Government about a possible medical evacuation of Mafart was made by the Ambassador of France in New Zealand at approximately 10.00 h. New Zealand time on Saturday 12 December. From that moment the New Zealand side has acted with great sensitivity to the humanitarian considerations involved and has worked hard, in a sympathetic and pragmatic way, to ensure that both medical requirements and requirements of principle were left in balance.

Within four hours of the receipt of the French request a proposal had been approved by the New Zealand Prime Minister and conveyed to the Ambassador of France which would have enabled examination in Hao of Mafart by a New Zealand doctor the following afternoon.

That proposal was rejected by the French side after 16 hours delay on the basis that it was undesirable that a New Zealand aircraft should land at Hao. New Zealand then immediately offered to transport its doctor to Tahiti, with France providing onward transportation to Hao. That proposal could also have been accomplished in a similar time frame had it not been for the delay on the part of the French authorities.

New Zealand reserves its right to submit the question of Mafart’s transfer from Hao to arbitration in accordance with the agreed procedures set out in the Exchange of Letters of 9 July 1986. Nevertheless the New Zealand Government is willing to work constructively with the French Government to reach a resolution of the matter and, to that end, New Zealand awaits the French response to the proposals made today in a separate communication to the Prime Minister of France from the Prime Minister of New Zealand.

27. The letter from the Prime Minister of New Zealand to the Prime Minister of France, dated 14 December 1987, read as follows:

I have been advised that, without the consent of the New Zealand Government, Major Mafart was taken some hours ago by French military aircraft from Hao for medical examination in metropolitan France.

My purpose in writing to you is not to deal with the legality of the action which has been taken—that is clear and will be the subject of a note from the New Zealand Embassy to the Quai d’Orsay—but to explore with you the best means of dealing with the situation which this unilateral action has created.

Your authorities have advised us that a New Zealand doctor may examine Mafart on his arrival in Paris; and arrangements are now being made to enable this to be done. I would of course expect that our doctor’s examination of Major Mafart will confirm a medical condition requiring urgent specialist examination. Should our doctor’s examination of Major Mafart confirm the need for urgent specialist attention then I suggest that we might proceed on the basis of an agreement as follows:

(a) compliance with the Exchange of Letters of 9 July 1986, by the return of Major Mafart to Hao, will be restored as soon as his medical condition permits and he will be so returned even if further maintenance treatment is required which could be continued on Hao;

(b) the conditions contained in the Exchange of Letters of July 1986 relating to Major Mafart’s isolation, including the prohibition of any contact with the press or other media whether in person, in writing or in any other manner will continue to apply during such time as Major Mafart is in metropolitan France;

(c) the French authorities will transmit regularly to the New Zealand Government medical reports on Major Mafart’s condition and, if requested, will undertake consultations with a designated New Zealand doctor and permit subsequent examinations;
(d) in the event of disagreement between our two Governments that Major Mafart’s medical condition is such as to permit his return to Hao, the issue will be referred to the Secretary-General of the United Nations for his decision.

In the event that our doctor’s examination does not confirm a medical condition requiring urgent specialist attention then he shall be returned forthwith to Hao and in the event that there is disagreement as to that then the provisions of (d) shall apply.

I should be grateful for your urgent confirmation that this proposal is acceptable to you.

I think I should add that when Major Mafart is returned to Hao I intend, pursuant to the Exchange of Letters of 9 July 1986, to request the agreement of your Government to a visit to Hao by a representative of the Secretary-General of the United Nations. I should also note, in this regard, that in view of the essential role played by the Secretary-General in this matter, I have thought it proper to advise him of these developments.

I hope that Major Mafart’s health will improve.

28. On 14 December 1987 New Zealand sent a doctor to examine Alain Mafart. At 4.00 p.m. (Paris time) officer Mafart was examined by Dr. R. S. Croxson, a national of New Zealand, residing in London. Dr. Croxson, with the cooperation of French authorities and medical doctors, was able to conduct a substantial physical examination of officer Mafart, becoming acquainted with all his health records, in consultation with the French doctors.

Dr. Croxson’s report to the New Zealand authorities of 14 December 1987 concerning his examination of Major Mafart read as follows:

Questions Dr. Croxson was asked to address:

(a) whether Mafart has a condition which, in your opinion, required specialist investigation not likely to be available in the presumably limited military facilities on Hao;

(b) whether in your opinion the symptoms and conditions were such as to justify an emergency evacuation;

(c) an account of the nature of the specialist investigations to be undertaken, including the likely length of time for the investigation;

(d) your opinion, if any, on whether or when he would be fit to be returned to Hao;

(e) whether in your opinion the patient may be simply a malingerer.

Conclusions from Dr. Croxson’s report on Major Mafart, 14 December 1987:

(a) I believe Mafart needed detailed investigations which were not available on Hao;

(b) Although Dr. Maurel appeared impressed by the severity of his pain and symptoms, when I asked if he thought Mafart might need an emergency operation he hesitated and I had the feeling he did not really feel at this stage that immediate surgery was going to be required but was more impressed by the recurring nature of the symptoms. I think it is therefore highly arguable whether an emergency evacuation as opposed to a planned urgent evacuation was necessary;

(c) 2-3 weeks;

(d) when investigations and observations are completed (possibly 3-4 weeks), as the doctors may wish to keep him under observation to witness a further attack should their investigations not disclose any other significant abnormalities;

(e) all the medical facts are very consistent and I do not think he is a malingerer.

29. On 18 December 1987 Dr. Croxson submitted a second report, which read as follows:

Opinion

The further sequencing and investigations would sound appropriate for somebody with such a longstanding story of recurrent abdominal pain and distension from probable adhesions. The investigations would normally take a further one to two weeks. I do not think that they are being excessively slow on their investigations, but are pursuing them in a fairly logical manner. Perhaps the investigations could be compressed over five or six days rather than the planned two weeks, although I did not take this point up with Professor Daly. Professor Daly offered to discuss by telephone with me the further results on Monday 4 January at the same time.

I did not tape record my conversation with Professor Daly, and I think I was a little limited in not having French interpretation. Nonetheless the results of the investigations and the planned sequencing really do sound quite appropriate. Given the long history, I suspect most clinicians would like to witness an episode of severe pain and abdominal distension. I did not raise the question again of exploratory surgery, nor did Professor Daly indicate to me that there was any question of this at the present time.

Professor Daly indicated that he had read my full medical report and agreed that it was a totally accurate picture of his (Professor Daly’s) medical facts as outlined to me. We did not discuss the acute management of Mafart as it appeared to Dr. Maurel when he arrived at Hao on 10 December.

30. On 19 December 1987 the Ministry of Foreign Affairs of the French Republic addressed a formal note to the New Zealand Embassy, answering the 14 December formal note in the following terms:

The French Government thinks that Major MAFART’s transfer to Paris on December 13 to undergo emergency medical examinations and the care necessitated by his condition cannot be analyzed as a failure to meet the obligations under the agreement resulting from the Exchanges of Letters on 9 July 1986 between France and New Zealand, following the intervention of the Secretary-General of the United Nations.

On 11 December, when it appeared imperative to have Major MAFART undergo medical examinations as soon as possible in a highly specialized environment, the New Zealand Ministry of Foreign Affairs was contacted in order to secure the New Zealand authorities’ consent to the French officer’s transfer to Paris by military flight departing Hao on 14 December. The New Zealand authorities then made their commitment contingent upon a doctor’s examination of Major Mafart on Hao and, for this purpose, proposed that the required physician be transported to the French military base by a New Zealand military plane. But, as the New Zealand authorities were moreover aware, given the nature of the Hao base, foreign aircraft were excluded from landing there. In this connection, the French Ministry of Foreign Affairs recalls that, when Major MAFART and Captain PRIEUR were transported from New Zealand to Hao, this impossibility was made known and resulted in their being forced to change planes at the Wallis airport.

The solution of having a New Zealand physician come to the Papeete airport and be transferred from that city to Hao by a French plane was also examined. But it was immediately ascertained that, given the technical possibilities and the fact that the doctor would have to return via the same arrangements, so that he could report to his Government, the result of this procedure would have been that no decision could be made for several days.

Under these conditions, the only solution, in the spirit of the Agreement of 9 July 1986 and of the conversations that led up to it, was to evacuate Major MAFART and permit the physician designated by New Zealand to ascertain his state of health as soon as he arrived in Paris. The French Government is happy to point out, in this
regard, that the New Zealand authorities accepted this solution and dispatched Dr. Croxson to Paris for this purpose.

It noted with satisfaction the very positive appraisal that the New Zealand Government gave of the frankness, candor and full cooperation that Dr. Croxson enjoyed while carrying out his assignment.

It observes that the conclusions of the report written by this doctor, which were conveyed to it on 16 December by the New Zealand Embassy in Paris, concur with those of the French physicians and show that there were perfect grounds for the decision to transport Major Mafart to a highly specialized facility existing only in mainland France.

The French Government shares the desire expressed by the New Zealand Government, in its note, to participate constructively in the examination of this matter, about which the Prime Minister will send a message to the Prime Minister of New Zealand under separate cover.

31. On 23 December 1987 the Prime Minister of France addressed the following letter to the Prime Minister of New Zealand:

The emergency conditions under which Major Mafart had to be returned to France to undergo medical examinations, which you asked about in your letter of 14 December, must, as you yourself indicate, be examined between us in order to analyze the main elements of the situation.

It is certainly not necessary to recall the details of the circumstances of this transfer, which, I am sure, you are perfectly familiar with. It was following the dispatch of a French military doctor, alerted by the Ministry of Defence, that the necessity became apparent on 11 December of having Major Mafart examined as soon as possible in a highly specialized environment, which could not be found on French territory except in Paris. Through our Ministries of Foreign Affairs, contacts were immediately made for the purpose of obtaining your country's consent, in accordance with the Agreement concluded on 9 July 1986 by the Exchanges of Letters following the intervention of the Secretary-General of the United Nations, which themselves resulted from secret conversations between our two Governments. Your representatives then indicated their desire to be permitted to have Major Mafart examined by a New Zealand physician. However, it was quickly ascertained that this was not possible by direct landing of a New Zealand airplane on the island of Hao, which is a military base closed to foreign aircraft. You will also recall that the transfer of Major Mafart and Captain Prieur from New Zealand to Hao had required a change of planes in Wallis, for the same reason.

It also became clear that the solution that your representatives immediately proposed, which consisted of flying a doctor from New Zealand to Papeete, then from Papeete to Hao, by French military plane, and returning this doctor via the same route so that he could report to his Government, would have required a delay of several days, which seemed contrary to the imperative interests of Major Mafart's health.

Under these conditions, the only remaining solution was to defer, until his arrival in Paris, Major Mafart's examination by a doctor of your choosing, which was done. In this regard, I noted the very positive appraisal that you and your staff gave to the quality of the cooperation that Dr. Croxson enjoyed from the French doctors. The reception given to your compatriot, his access to all the necessary documents, and the in-depth examination of Major Mafart, which he was able to do, showed the spirit of openness that we bring to this matter.

Moreover, as you undoubtedly recall, the eventuality of illness, and, in the case of Captain Prieur, of pregnancy, were precisely the conditions that led to the stipulation, in the July 1986 Agreement, of the possibility of leaving the island. This emerges from the secret negotiations of our two Governments, conducted, on respective sides, by Mr. Beeby and Mr. Guillaume, which prepared the way for the intervention of the United Nations Secretary-General, and of which we have kept a very accurate transcript. Dr. Croxson, at your request, drew up a medical report, the conclusions of which, not being covered by medical confidentiality, were conveyed to the Ministry of Foreign Affairs by your Embassy in Paris. This report shows that Major Mafart was in need of substantial medical examinations which could not be done in Hao and which were to last several weeks. In response to a question that you asked him, Dr. Croxson added that Major Mafart was by no means a malingerer and that he was indeed ill.

Thus, all the circumstances of this affair confirm my feeling that we have acted with moderation and discretion and that we should now await the results of the examinations underway in order to be able to appraise the state of Major Mafart's health with better knowledge of the facts.

Such are the indisputable facts, verified by individuals that you designated. You will understand that, under these conditions, I was surprised by the public accusations that you immediately made against this officer and against the French authorities, whereas I had proposed that this operation be kept confidential and that the fact themselves showed the correctness of the decision that I made.

However, I have just learned that you feel, after a new examination of all of the elements of this affair, that there was no longer any point to the intervention of the Secretary-General of the United Nations, to which you alluded to in your letter. This way of seeing things corresponds to the attitude that I personally adopted by refusing to engage in a polemic. Indeed, I am convinced that our two countries today should endeavor to turn the page and resume a constructive relationship, in keeping with the long tradition of friendship between our two nations.

32. On 23 December 1987 the Embassy of New Zealand answered the two communications in paragraphs 30 and 31 above by the following note:

The New Zealand Embassy presents its compliments to the Ministry of Foreign Affairs and has the honour to convey, on instruction, the following response to certain of the assertions contained in the Ministry's Note of 19 December 1987 and the letter to the Prime Minister of New Zealand from the Prime Minister of France delivered in Wellington on 23 December.

New Zealand rejects the view advanced by the French side that the transfer of Major Mafart from Hao was in accordance with the ruling of the United Nations Secretary-General and the Exchanges of Letters of 9 July 1986 between New Zealand and France.

On a point of fact, the sequence of dates set out in the Ministry's Note is inaccurate. New Zealand was advised of Mafart's condition late in the morning of 12 December (New Zealand time). About midnight on 13 December (New Zealand time)—about 39 hours later—advice was given by the French Ambassador in Wellington (and also by the Quai d'Orsay to the New Zealand Embassy) that he had already been removed from Hao.

The request for consent was presented as a humanitarian emergency. New Zealand responded promptly and sympathetically offering to send a New Zealand doctor for an on the spot examination so that, if the medical condition of Mafart justified it, consent could be given within the time frame requested by the French authorities. The quickest option involved a flight direct to Hao. It was a matter for the French authorities to judge whether their position about clearances for foreign aircraft at Hao was of greater importance to them than what was said to be a serious medical emergency. The long delay in responding and the terms of that response called in question the veracity of the so-called emergency.

It is manifestly incorrect to state that the New Zealand side, when confronted with this response from France, suggested an option that would have prevented a decision for several days. The French Ambassador in Wellington was told that the doctor could be transported immediately to Papeete by New Zealand military aircraft (or alternatively, if the French side preferred, civilian aircraft options could be explored) for onward transport to Hao by French military aircraft.
There is no basis in fact for the extraordinary statement that the New Zealand doctor would have had to return to New Zealand to make a report before a decision could be made.

New Zealand formally disputes the suggestion that the decision to evacuate Major Mafart was in accord with the spirit of the Agreement or the Secretary-General’s Ruling or any preliminary discussions. It was, on its face, a clear breach of both the letter and the spirit of the Ruling and the Exchanges of Letters—a breach which called in question the credibility of France’s commitment to honor undertakings in this matter. There is not and was never at any stage of the discussions between France and New Zealand, an agreement or understanding that New Zealand would automatically agree to a request for medical evacuation. The relevant clause in the Agreement means precisely what it says.

New Zealand also rejects the suggestion that its decision to accept the offer to send a New Zealand doctor to Paris to examine Major Mafart can or could be construed as acceptance by the New Zealand authorities of the evacuation of Mafart without New Zealand consent. That suggestion has no basis in fact and is wholly at variance with the terms of the Embassy’s Note 1987/103 of 14 December 1987 which recorded New Zealand’s serious objection to the unilateral action taken by France.

New Zealand reiterates that its proposals put forward on 12 and 13 December were made in good faith. New Zealand was not refusing consent but seeking clarification. That could have been accommodated in a number of ways and very quickly. The objective evidence now available confirms that there was in fact no emergency and no justification for the French authorities setting a deadline of the kind that they did. New Zealand could have been advised of the situation considerably earlier. It is also clear beyond any doubt that had there in fact been a genuine emergency, New Zealand’s requests for clarification (which were entirely reasonable and appropriate) could have been met within the time frame proposed had France been willing to work positively and constructively to that end. Responsibility for the delay in obtaining New Zealand consent lies at France’s door.

33. On the same day, 23 December 1987, the Prime Minister of New Zealand answered the Prime Minister of France in the following terms:

Thank you for your letter which I have received today. I appreciate the sentiment you have expressed about the need to restore and maintain the cordial relations between New Zealand and France. I must say, however, that the fact that you have not in your response addressed the substantive issues that were contained in my letter of 14 December, is a matter of grave concern to me and my Government.

If we are to turn a page as you suggest, then what we need is a satisfactory assurance that as soon as the medical investigations of Major Mafart have been completed and he has undergone any treatment which can only be given in Paris, he will be returned to Hao.

Our medical advice is that these investigations will be completed shortly. I must say to you that, in the absence of a satisfactory response by 30 December to the proposals set out in my earlier letter, we will have no choice but to conclude that France is unwilling to comply with its legal obligations. In that event we will feel compelled to invoke the arbitration provisions of the Secretary-General’s Ruling and the Agreement of 9 July 1986.

Let me also say that at no stage have we indicated that there was no role for the United Nations Secretary-General in seeking to resolve this matter. To the contrary, I specifically mentioned this role in my letter and in various public statements. I have discussed the situation with him and we have kept him fully informed and will continue to do so. He has also, as you know, taken various initiatives of his own.

Finally, there are a number of points in your letter (which are also mentioned in recent discussion between our officials) which I do not accept. I have asked the New Zealand Embassy in Paris to convey our views on these matters to the Quai d’Orsay.
The Ministry of Foreign Affairs does not see any need to quibble, at this stage, over the meaning of New Zealand’s agreement to send a doctor to Paris and, on this point, refers purely and simply to this doctor’s findings, which, in its eyes, corroborate the French doctors’ appraisals of the nature of the ailments that Major Mafart is suffering from.

The New Zealand Government has requested the application of the provision of the Agreement of 9 July 1986 which stipulates that “If the New Zealand Government requests, a visit to the Hao military installation may, by common agreement between the two Governments, be made by an approved third party.” Referring to the remarks made by the New Zealand Charge d’Affaires when the note of 24 December was submitted, it is the understanding of the Ministry of Foreign Affairs that the purpose of the request would be to verify the presence of Captain Prieur on Hao. In this regard, it gives the Government of New Zealand the most formal assurance. However, if the New Zealand Government intends to persist in its request, the French Government will agree to it in principle in order to avoid any erroneous interpretation. However, the Ministry of Foreign Affairs does feel that, in this case, there would be no grounds for asking the Secretary-General of the United Nations to designate a representative to make this visit. Indeed, it points out that, as is confirmed by the secret conversations that led up to it, the Exchange of Letters of 9 July 1986 provides that the visit must be made by a third party approved by common agreement between the two Governments. If a visit must take place, France proposes that it be entrusted to Dr. T. Maota, Vice Prime Minister and Minister of Health of the Cook Islands, given the geographical proximity and the historical ties between the Cook Islands and New Zealand. Dr. Maota could be transported by a Freighter plane or by a place or directly from the Cook Islands. In the absence of specific clauses in the Agreement of 9 July 1986, the cost of this mission should be paid by the requesting Government.

35. On 4 January 1988 a third report from Dr. Croxson transcribed what Professor Daly, the doctor in charge of Mafart, proposed to do as follows:

1. To supervise Major Mafart closely and in particular to witness if possible a major crisis at which time he would have a surgical consultation available.

2. To this end Major Mafart must remain close to the department near the hospital. Professor Daly would wish to review him should any new crisis appear and would be seeing him regularly at least once weekly for the next three to four weeks, and in his opinion Mafart should not return to Hao until the diagnosis and plan of treatment is more certain.

3. He feels that Mafart is very tired after the many investigations and explorations and is anxious in view of the diagnosis still not being settled, and he feels that some degree of “convalescence” for about three to four weeks is necessary.

4. He feels that perhaps exploratory surgery might be necessary, but again emphasized that he is not keen on blind laparotomy in view of the danger of new adhesions. I understand that he is proposing to discharge Mafart later this week and to review him once weekly.

Professor Daly and I agreed that this was a difficult clinical problem. Professor Daly also indicated that he would contact me in the event of any major crisis appearing in the next few days, and unless something further developed I would communicate with him next Monday, 11 January.

Professor Croxson concluded:

Professor Daly’s point about observing him for a longer period, particularly to try and witness a major episode when one would have a surgical opinion, is a very orthodox and appropriate clinical management.

36. On 5 January 1988 the Embassy of New Zealand conveyed to the French Ministry of Foreign Affairs the following response to the Ministry’s note of 30 December 1987:

Without addressing all of the points contained in the Ministry’s note and while reserving New Zealand’s legal position and, in particular, its right to commence arbitration proceedings, the explicit assurance that Major Mafart will return to Hao when his health permits is very welcome. Furthermore, the assurance given with respect to Captain Prieur is also welcomed, and it is hoped that these two assurances, together with the ongoing cooperation at the medical level, will provide a basis for resolving the remaining issues between France and New Zealand.

37. On 11 January 1988 a fourth report from Dr. Croxson was produced. In this report, Dr. Croxson advised that “no clear abnormality has been demonstrated on the previous investigations”, adding that “the plan is to examine him again in one week’s time or earlier should crisis develop.”

38. On 18 January 1988 Dr. Croxson advised that in a telephone conversation with Professor Daly the French Professor told him that “the situation had not altered clinically since last week”, “he has no final firm diagnosis” and that the final report would be available on 27 January 1988.

39. On 21 January 1988 the New Zealand Embassy, being advised that Professor Daly would be preparing a final report on 27 January, expressed the wish to have Major Mafart re-examined by their medical advisor, Dr. Croxson, assisted by a specialist, Dr. Christopher Mallinson, a gastroenterologist practicing in the United Kingdom. This request was agreed to by the French authorities and their examination took place on 25 January 1988.

40. On 28 January 1988 Professor Daly advised that:

Major Alain Mafart was hospitalized on 14 December 1987 at the Val-de-Grace hospital where he underwent in-depth radiological, biological and clinical tests. Given the need for close, specialized medical observation and on the basis of the standards of fitness governing military personnel, he must be considered as unfit to serve overseas for an indefinite period.

Prospects—Medical Decision:
1. Given the current uncertainties of the diagnosis, it does not seem warranted to propose an exploratory laparotomy right away for this abdominal ailment.
2. Depending on the subsequent clinical development, various additional tests can be considered:
   —barium enema
   —Wirsungography and pancreas function
   —Mesenteric arteriography

These points have been discussed with Professor Mallinson and Dr. Croxson.

3. So, close observation is called for in order to forestall a more acute crisis, which is liable to entail a surgical procedure, or to schedule the aforementioned explorations.

4. So, Major Mafart must be kept in mainland France insofar as this observation can be done only in a modern, well-equipped hospital center.

Because of these exigencies, and pursuant to the standards of fitness governing French military personnel, he is declared unfit to serve overseas for an indefinite period.
41. On 5 February 1988 the Ministry of Foreign Affairs conveyed Professor Daly's report to the New Zealand Embassy, adding that the Ministry "feels that, given the medical conclusions that it has been given, it is not possible at present for Major Mafart to return to the island of Hao. Hence, it is planned that Major Mafart will receive a military assignment in mainland France in which he will continue to be subject to the clauses resulting from the Exchange of Letters of 6 July 1986, specifically as regards contact with the press and other communication media".

42. On 12 February 1988 Dr. Croxson submitted his fifth report, stating, *inter alia*, that:

Dr. Mallinson, consultant gastroenterologist, and myself examined Major Mafart in the Val-de-Grace hospital on Monday 25 January in the presence of and with the assistance of Professor Daly and Dr. Laverdant. . . . We reviewed all the investigations, x-rays, laboratory studies which had been carried out . . .

Major Mafart has remained well, since his last report on 18 January, with no major episodes of pain or abdominal distension. He has been eating a light and varied diet and living in a house within the hospital confines. . . . He did not appear depressed; his pulse, blood pressure and temperature were normal . . .

The report concluded as follows:

I believe the investigations have proceeded at a very slow pace and could well have been compressed within one to two weeks. There was no evidence produced to show that Major Mafart had an impending obstruction at the time he was evacuated from Hao and certainly if he had, he should have been airlifted to the nearest general surgical center, which we believe exists in Tahiti. It would have been dangerous to have flown him to Paris.

We do not believe that he needs to remain in the confines of a major hospital center for the indefinite future but that he could be returned to Hao now, continue life as normal, rest during minor attacks and obtain treatment from the military medical facilities in Hao if the attacks were of a more severe nature comparable to the satisfactory management of the two previous attacks in July and December which were carried out at Hao.

In the unlikely event that a major crisis with acute irreversible obstruction did occur, and we emphasize that none have appeared in the last 22 years, surgical treatment in Tahiti would be the logical appropriate and safest management. We do not feel that mesenteric angiography nor an ERCP are essential investigations in his management; if they were they could have been carried out by now.

43. On 18 February 1988, the New Zealand Embassy addressed a note to the French Ministry of Foreign Affairs recalling the position of the New Zealand Government:

the unilateral removal of Major Mafart from Hao without the consent of the New Zealand Government constitutes a violation of France's obligations to New Zealand under the Ruling of July 1986 by the United Nations Secretary-General and the Agreement of 9 July 1986 between New Zealand and France.

The note added:

The medical reports available to both parties fully support the New Zealand position, which is corroborated by other evidence. There was no medical situation requiring emergency evacuation and the alternative proposals suggested by New Zealand for medical examination prior to giving consent to his departure were reasonable.

Despite the existence of this dispute regarding France's application of the Ruling and the Agreement, and while fully reserving its legal position at every step, New Zealand has, because of the humanitarian characteristics of the situation, cooperated fully with the French programme of medical examination of Major Mafart.

However, the extended nature of these medical examinations has been a matter of concern to the New Zealand Government and, according to the medical reports, also to Major Mafart himself. Dr. Croxson's reports indicate that they have been unnecessarily extended . . . Dr. Croxson's advice, supported by Dr. Mallinson, is that there is no medical reason for Major Mafart's return to Hao to be any further delayed. The position of the Ministry . . . that Major Mafart is unfit for military service overseas is noted. But in New Zealand's view that is not relevant to the question of compliance with France's obligations to New Zealand under the Agreement. The issue is whether compliance should now be restored. Dr. Croxson's advice is unequivocal. Major Mafart is medically fit to return to Hao. The nature of the assignment, if any, given to him in that place is not an issue.

44. On 21 July 1988 Dr. Croxson presented a final report on Major Mafart that states:

No change in Major Mafart's condition since last examination, 25 January 1988. No major episodes of severe abdominal pain, abdominal distension and none requiring hospitalization or special investigation. My conclusions of my report of 12 February 1988 remain and indeed are strengthened by this further period of five months of observations.

45. According to the French Counter-Memorial Alain Mafart, who was evacuated in December 1987 for health reasons, was declared "repatriated for health reasons" on 11 March 1988. After a temporary assignment at the Head Office of the Nuclear Experimentation Center, he was assigned on 1 September 1988 to the War College in Paris, after passing the entrance examination, for which he had taken the written part in Hao and the oral part in Paris. On 1 October 1988, he was promoted to the rank of Lieutenant Colonel.

*Mr. Bos' Visit to Hao*

46. On 28 March 1988 an agreed third party, a Netherlands official, designated by the two Governments for the purpose, visited Hao. Mr. Adriaan Bos submitted on 5 April 1988 a report indicating that he had had an interview with Captain Dominique Prieur, and that her military function on Hao is that of officier conseil and officier adjoint. In the former capacity she performs certain social functions, while in the latter she deputizes for the Commander of the base in carrying out certain duties. A few months after arrival in Hao, on 22 July 1986, she was joined by her husband, who is also an officer.

Mr. Bos advised that "there are approximately 17 officers on Hao. Tours of duty on Hao are normally limited to one year". Mr. Bos added that "Dominique Prieur and her husband have access to the normal recreational facilities at the base. As regards contact with her family, Dominique Prieur said that her mother had visited her twice and her parents-in-law once".

*The Case of Captain Prieur*

47. The French Counter-Memorial states that on 3 May 1988, the French Ministry of Foreign Affairs received a medical report indicating
that Dominique Prieur was 6 weeks pregnant. The report stated that this pregnancy should be treated with special care for several reasons: Mrs. Prieur was almost 39 years old; her gynecological history; the fact that this would be her first child. It also indicated that the medical facilities existing on Hao were unable to provide the necessary medical examinations and the care required by Mrs. Prieur’s condition.

48. On the same day, 3 May 1988, the New Zealand Ambassador in Paris was advised of the above information and answered that she would inform her Government. The New Zealand Ambassador noted that she “agrees that the medical facilities existing on Hao are clearly inappropriate, but it was her understanding that Papeete did have all the relevant necessary equipment”.

49. The next day, 4 May 1988, the New Zealand Government answered the French Ministry of Foreign Affairs, stating:

While New Zealand's consent is required in terms of the 1986 Agreement, this is not a case where, if the medical situation justifies it, consent would be unreasonably withheld.

The New Zealand Government would like, on the basis of medical consultation, to determine the nature of any special treatment that Captain Prieur might need and the place where the necessary tests and on-going treatment could be carried out if the facilities at Hao are not adequate.

As a first step to coming to an agreement on this basis, the New Zealand authorities are making arrangements for a New Zealand military doctor with the requisite qualifications to fly on the first available flight to Papeete for onward flight to Hao.

The answer added that Dr. Brenner, a civilian consultant to the Royal New Zealand Navy, qualified in obstetrics and gynecology, was standing by to travel to Papeete on that day, 4 May.

50. The French Ministry of Foreign Affairs, on the same day, 4 May, “agreed to the dispatching of Dr. Bernard Brenner to Hao as soon as possible”, adding that “this solution was suitable to us and that all the arrangements would be made for the New Zealand doctor’s trip to Papeete and his transfer to Hao, definitely on the morning of 5 May”.

51. On 5 May 1988, the New Zealand Ministry of Foreign Affairs informed the French Ambassador to New Zealand “that, due to the continuing UTA strike, Dr. Brenner and his interpreter are forced to delay their arrival in Papeete, which they will reach by Air New Zealand. Leaving Auckland on Friday, 6 May at 8.40 p.m., they will arrive in Papeete the same day at 3.25 a.m. (Papeete time). If extreme urgency so requires, a connection to Papeete by military plane could be envisaged”.

52. On 5 May 1988 at 11.00 a.m. (French time), the New Zealand Ambassador in Paris was told that the French Government had been informed of a “new development”, namely, that Dominique Prieur’s father, hospitalized for treatment of a cancer, was dying. The French Government informed the Ambassador that “for obvious humanitarian reasons” Dominique Prieur had to see her father before his death. It was proposed “bearing in mind the previous conversations regarding Mrs. Prieur’s pregnancy” that either Dr. Brenner, the New Zealand doctor, leave Auckland within three or four hours on a special flight for Papeete, whence a military aircraft would take him to Hao, or that Mrs. Prieur leave Hao immediately for Paris, where she would be examined by the New Zealand doctor.

In response to questions communicated via telephone by the New Zealand Ambassador, it was then stated that the Minister of Defence was ready to agree that Dr. Brenner be transported directly from Auckland to Hao by a New Zealand aircraft.

53. According to Annex 47 of the French Counter-Memorial, the New Zealand Ambassador replied on 5 May 1988 that the New Zealand Prime Minister could not be reached but that “while waiting for the Prime Minister’s decision, the solution of sending a New Zealand military aircraft to Hao was under study. It was, however, clear that the aircraft could not leave Auckland within the 3 or 4 hour time limit requested by the French Government. A departure would have to be planned instead for Friday morning (New Zealand time)”. French authorities then noted that “inasmuch as the New Zealand aircraft would head directly for Hao, its departure from Auckland could be delayed until Friday morning at 7.30 a.m. (New Zealand time). This was the latest possible deadline beyond which Dominique Prieur would run the risk of arriving in Paris too late to see her father alive”.

54. On 5 May 1988 at 9.30 p.m. (Paris time), the New Zealand Ambassador in France informed the French Minister of Foreign Affairs of the following:

A. It was not possible to ready a New Zealand military aircraft to leave for Hao “within the time limit set by France”.

B. Mr. Lange was not willing to agree to the departure of Mrs. Prieur from Hao for the reason invoked the same morning by the French Government (the state of health of the interested party’s father).

C. The response and offer that New Zealand had made regarding Mrs. Prieur’s pregnancy were still valid.

D. New Zealand would not give any guarantee of confidentiality regarding the state of health of Mrs. Prieur’s father.

E. New Zealand agreed to send a doctor on Friday morning to verify the state of health of Mrs. Prieur’s father.

55. On 5 May 1988 at 10.30 p.m. (French time), the following response was given to the New Zealand Ambassador:

A. The French Government considers it impossible, for obvious humanitarian reasons, to keep Mrs. Prieur on Hao while her father is dying in Paris. The French officer will therefore depart immediately for Paris.

B. We agree that a New Zealand doctor may contact the doctors treating Dominique Prieur’s father and, if those doctors agree to it, may examine the patient.

C. Our offer of a medical examination of Mrs. Prieur, upon her return to metropolitan France, by a doctor chosen by New Zealand, remains valid.

56. On 6 May 1988 a telegram sent by the French Minister of Foreign Affairs to the French Ambassador at Wellington confirmed that Mrs. Prieur had left on board the special flight on Thursday, 5 May at 11.30 p.m. (Paris time), and that she was expected in Paris on 6 May in the evening.
57. On 10 May 1988 the New Zealand Embassy presented the following note to the French Ministry of Foreign Affairs referring to the discussions which took place on 3, 4 and 5 May 1988 between the Cabinet of the Minister of Foreign Affairs and the Embassy concerning Captain Dominique Prieur:

The Government of New Zealand feels obliged to place on record at this time its concern about the actions of the former French Government with respect to France’s obligations to New Zealand under international law in connection with the Agreement following from the Ruling of 6 July 1986 by the Secretary-General of the United Nations and incorporated in the Exchange of Letters between France and New Zealand of 9 July 1986. New Zealand must protest these actions in the strongest possible terms.

In this connection New Zealand must also recall the previous violations of those solemn undertakings when Major Mafart was removed from Hao in December 1987 without New Zealand’s consent and when, contrary to the clear medical indications of adequate fitness, French authorities refused to restore compliance. New Zealand has sought to retain a cooperative relationship with France, including the activation of a medical team to visit Hao last week to examine Captain Prieur. Last week’s unilateral acts by the former French Government constitute a further serious violation of legal obligations under the Agreement concluded under the auspices of the United Nations Secretary-General and give rise to a further legal dispute between France and New Zealand.

Prior to the events of last week New Zealand had publicly committed itself to seeking to resolve these problems through the diplomatic channel. It remains New Zealand’s very strong wish to restore a climate of mutual confidence in its relations with France, and, accordingly, New Zealand continues to be willing to seek a settlement under which France would voluntarily return Major Mafart and Captain Prieur to Hao. An agreement whereby both officers could undergo specialist medical treatment in Tahiti, if that became necessary, and subject to appropriate conditions, could be envisaged.

The alternative approach is that the actions of the former French Government in this matter should be subject to independent review in accordance with the arbitration agreement between France and New Zealand. New Zealand awaits the response of the new French administration.

58. On 16 May 1988 the father of Captain Prieur died.

59. On 21 July 1988 Dr. Croxson examined both Major Mafart and Captain Prieur and advised as to the latter as follows:

The investigations and examinations by the French medical attendants and my clinical examination would all be consistent with an approximately 18-week pregnancy which is proceeding uneventfully. Results of the amniocentesis to exclude important chromosome abnormalities are awaited. No special arrangements for later pregnancy or delivery are planned, and I formed the opinion that management would be conducted on usual clinical criteria for a 39-year-old, fit, healthy woman in her first pregnancy.

60. According to the French Counter-Memorial, Dominique Prieur was assigned to the Head Office of the Nuclear Experimentation Center in Villacoublay. She was on leave until 7 November 1988, corresponding to military furlough that she had not taken previously. She then received twenty-two weeks maternity leave, pursuant to French labor law. She gave birth to her child on 15 December 1988.

61. On 22 September 1988 the New Zealand Government presented a note to the French Ministry of Foreign Affairs and referring to its notes of 18 February and 10 May 1988 (paras. 43 and 57) stated:

Extensive efforts have been made in the intervening months to resolve this dispute through the diplomatic channel. The Government of New Zealand greatly regrets the fact that constructive proposals to this end which it advanced on 10 August 1988 met no satisfactory response from the French Government. The New Zealand Government is therefore forced to the conclusion that all reasonable efforts to resolve this dispute have been exhausted. The Embassy is therefore instructed to advise that the Government of New Zealand hereby requests, in accordance with the Ruling of the Secretary-General of the United Nations and the Agreement of 9 July 1986 between New Zealand and France, that the dispute be submitted to an arbitral tribunal.

V. Discussion

The Contentions of the Parties

62. New Zealand contends that France has committed six separate breaches of the international obligations it assumed under Clauses 3 to 7 of the First Agreement of 9 July 1986, three in respect of each agent. New Zealand submits that, taken chronologically, these breaches of obligations were: first, France’s failure to seek in good faith its consent to the removal of the two agents from Hao; second, the removal of the two agents without New Zealand’s consent; and, third, the continued failure to return the two agents to Hao.

63. With respect to the first breach, New Zealand maintains that the mutual consent provision carried with it three subsidiary obligations to act in good faith, namely, to give full information in a timely manner about circumstances in which consent was to be sought; not to impede New Zealand’s efforts to verify this information; and, finally, to give its Government a reasonable opportunity to reach an informed decision.

New Zealand alleges that when Major Mafart was hospitalized in Hao in July 1987 its Government was not informed that a medical problem had arisen, nor was it advised in December that a medical doctor had been sent from France. The information furnished had no detailed description of the medical history and no explanation of the necessity for an air journey in excess of 20 hours to Paris, as against a flight of a little more than an hour to the excellent facilities in Papeete.

New Zealand further states that its proposal for an immediate medical examination in Hao by a New Zealand doctor encountered difficulties and obstructions such as the invoked absolute impossibility for a foreign military aircraft to land at Hao. It lays stress on the fact that the alleged impossibility was not absolute, as shown by the fact that a United States military aircraft had landed there previously, and, six months later, in the case of Captain Prieur, permission for landing in Hao was granted.

New Zealand also submits that in the case of Major Mafart reasonable time was not given, in fact less than 48 hours, to reach an informed decision and in the case of Captain Prieur France failed to seek New Zealand’s consent in good faith, for consent was never, in fact, sought on either the grounds of her pregnancy or on the grounds of her father’s illness. It states that while it was preparing to examine the alleged need for special treatment of the pregnancy and where it might be carried out,
just three days before Presidential elections in France, the New Zealand Government was told that the terminal illness of Captain Prieur's father required her immediate removal.

64. The second set of breaches which New Zealand asserts is the removal of the two agents from Hao without New Zealand consent. New Zealand points out that France has acknowledged in these proceedings that it removed the two agents without New Zealand's consent; thus, the French Republic has admitted a prima facie breach and the only question is whether it can legally justify that breach.

New Zealand contends that the mutual consent provision allows the departure from Hao when and only when both Governments were agreed that circumstances justified that departure. It also considers that in making such decisions both Governments are obliged to act in good faith. The provision reads that the two agents "will be prohibited from leaving the island for any reason, except with the mutual consent of the two Governments". The words "for any reason" and the words "except with mutual consent", in New Zealand's view, cannot be dismissed as superfluous but have a function and a meaning, expressly excluding any unilateral right to remove either agent. Any removal, for any reason, it argues, required the consent of New Zealand; moreover, the word "prohibited" emphasized the strictness of the regime established and the complete unacceptability of any exceptions to it.

65. The third set of breaches, according to New Zealand, consists in France's failure to return the agents: in the case of Major Mafart, France invokes, inter alia, French military law to excuse the continuous breach of the obligation to return him to Hao, alleging that he is not fit for military service overseas. However, New Zealand observes that Major Mafart is fit enough to attend the War College, and points out that it is not asking that he go overseas in active service or fight a war: a certificate by a French medical doctor that in terms of French military law Major Mafart is unfit for service overseas has no bearing on the question whether he should be in Hao. Anyway, it adds, Major Mafart can be placed under any necessary medical supervision in Hao and good medical support facilities exist nearby in Tahiti.

Recalling Article 27 of the Vienna Convention on the Law of Treaties, New Zealand asserts that it is not open to France nor to any other State to invoke the provisions of its own internal law as a justification for non-performance of its treaty obligations.

As to Captain Prieur, removed from Hao because of the illness of her father, France has stated that after his death, she was placed on maternity leave pursuant to the French military code and therefore could not be sent back to Hao as long as her pregnancy continued; subsequent to the birth, France has asserted that she can not be sent back with a baby.

New Zealand finds that these reasons fail to justify the continuous breach resulting from the fact that Captain Prieur has not been sent back to Hao.

It points out that whether Captain Prieur wishes to take the child to Hao is irrelevant; there are many children on the island, which has a civilian population of some 1,100 people. Just as the First Agreement allowed Captain Prieur's husband to live with her in Hao, it will allow her husband and child to accompany her or not, as she chooses.

New Zealand adds that there are countless examples in the South Pacific involving teachers, missionaries, administrators and others, where European families with small children have lived in small atoll communities less civilized than those on Hao.

66. For its part, the French Republic maintains that the clause prohibiting the two agents from leaving the island except with the consent of the two Governments is intended for one of the two following possibilities: either a special situation, particularly illness, or, as in the case of Captain Prieur, pregnancy, which would render their remaining on the island inconceivable, or a joint desire by the two Governments to shorten the total length of their stay. It stresses that, both in December 1987, for Major Mafart, and in May 1988, for Captain Prieur, the first possibility was involved.

France acknowledges that it did not obtain New Zealand's prior consent, but it nevertheless seems to France that, bearing in mind the reason that made the transfer to Paris necessary, and the very special circumstances under which that transfer was made, its action bore no stain of illegality under the 1986 Agreement and the rules and principles of international law.

It believes, moreover, that legitimate reasons have prevented the return of the officers in question to their island, and that in any case, the obligation to return can have no existence after 22 July 1989, the expiration date of the 1986 Agreement.

67. In the case of Major Mafart, the French Republic recalls that on 7 December 1987, the Ministry of Defence received from the commander of the base at Hao a message indicating that Major Mafart's state of health required immediate examinations and care that could not be provided on the atoll.

A principal Army physician, Dr. Maurel, was dispatched to the site and his report indicated that Major Mafart's condition necessitated "explorations in a highly specialized environment" and therefore "emergency repatriation to a hospital in mainland France". The French Republic adds that its authorities made every possible effort, during that weekend, bearing in mind the difficulties in communication between the two capitals, to obtain New Zealand's consent within the time available to the repatriation of Major Mafart for health reasons; to that end, the note verbale presented by the French Ambassador in Wellington on Saturday morning contained all the information that Paris had, and Dr. Maurel's message was attached.

As for the denial of access to the base of a New Zealand aircraft, the French Republic asserts that New Zealand knew about the prohibition because the transfer of officers in July 1986 was organized according to this rule; moreover, the description of the flight in question, with a crew of 12 members, seemed like a provocation. But at the same time, in order to respond to New Zealand's concerns, it was proposed that a doctor
designated by the latter should examine Major Mafart upon his arrival in Paris. In addition, there was a misunderstanding regarding the place from which the doctor sent by New Zealand to Hao should make his report: the information that French authorities had was that this doctor was to return to New Zealand to present his conclusions. This would have had the effect of delaying Major Mafart’s departure by several days. Under these conditions, the French Republic adds, the French authorities made the decision for an immediate repatriation for reasons of health, notwithstanding the terms of the Agreement.

68. As for Major Mafart’s stay in mainland France, he arrived in Paris on 14 December and was immediately hospitalized. He remained in the hospital until 6 January 1988, being subject to medical supervision within the hospital’s confines.

The French Republic stresses that the New Zealand doctor sent to verify the agent’s state of health, Dr. Croxson, examined him on the day of his arrival in Paris and submitted a report in the form of responses to a series of questions, concluding that the condition of the party in question necessitated specialized examinations which could not be carried out in Hao and that the officer was not a malingering. As for the emergency evacuation, Dr. Croxson’s response reflects doubt about the degree of emergency and not about the existence of an emergency.

The French Republic also points out that Dr. Croxson was kept regularly informed of the agent’s state of health, and that he examined him regularly on several occasions, being accompanied, on 25 January, by a British gastroenterologist, Dr. Mallinson. On 27 January, Professor Daly issued his final report on Major Mafart, in which, in accordance with the rules of fitness governing French military personnel, “Major Mafart was declared unfit to serve overseas for an indeterminate period.”

Dr. Croxson’s report of 16 February, written with Dr. Mallinson’s assistance, reaches a contrary conclusion, asserting that Major Mafart could return to Hao. But in the face of this difference of opinion, France maintains that the military status of the two officers, with all the consequences that entails, particularly as regards the exclusive competence of the French military physicians and the conclusiveness of their opinion, is one of the essential elements of the 1986 Agreement. France states that the French authorities consequently were not in a position to return Mafart to Hao.

69. As for Captain Prieur, France explains that on 3 May 1988 the Ministry of Foreign Affairs received a report indicating that Mrs. Prieur was six weeks pregnant, that it was a risky pregnancy, and that the facilities on Hao would not permit the carrying out of the necessary examinations and care. The New Zealand response said that this was not a case in which, if the medical situation justified it, the consent of New Zealand would be unreasonably refused and proposed that a New Zealand doctor take the first available flight to Papeete and be transported from there by a French aircraft, making his report from Hao. But since the airline was on strike Dr. Brenner’s voyage would be delayed 30 hours. Then, on 5 May, it was learned in Paris, the French Republic adds, that Mrs. Prieur’s father was dying, which gave the situation a dramatic urgency because it was necessary, for obvious humanitarian reasons, that Mrs. Prieur see her father again before he died. To bring about this last meeting, the French authorities proposed certain solutions, one of which was that Dr. Brenner be transported directly to Hao by a New Zealand military aircraft. But information was received from New Zealand to the effect that a New Zealand military aircraft could not take off until the morning of 6 May. The French authorities replied that, inasmuch as this aircraft would go directly to Hao, its departure from Auckland could be delayed until Thursday morning at 7.30, Wellington time. After that deadline, Dominique Prieur would risk arriving too late to see her father alive. The New Zealand authorities then indicated that it was impossible to get a New Zealand military aircraft ready within the stated time.

On 5 May, one hour after the response from the New Zealand Government was received, the French Government informed New Zealand that it considered it impossible to keep Mrs. Prieur on Hao while her father was dying in Paris and that she was departing immediately for France.

70. As regards Captain Prieur’s stay in mainland France, the French Republic maintains that, having returned to France to be present for her father’s last moments, she was obliged to remain there throughout her pregnancy, and after the birth of her child on 15 December 1988, obvious humanitarian considerations prevented her being returned either with or without her child.

71. In summary, it results from the foregoing that New Zealand contends that the removal of the two agents from the island of Hao without its consent, the circumstances of those removals and the continued failure of France to return them to Hao are breaches of the international obligations contained in the First Agreement.

The French Government, on its part, does not contest the fact that the provisions of the Agreement have not been literally honored, since the two officers’ return to mainland France was not preceded by New Zealand’s formal agreement, and they did not remain on the island of Hao for the three-year period that had been agreed. It believes nevertheless that because circumstances of extreme urgency were involved, its actions do not constitute internationally wrongful acts.

The Applicable Law

72. The first question that the Tribunal must determine is the law applicable to the conduct of the Parties.

According to Article 2 of the Supplementary Agreement of 14 February 1989:

The decisions of the Tribunal shall be taken on the basis of the Agreements concluded between the Government of New Zealand and the Government of the French Republic by Exchange of Letters of 9 July 1986, this Agreement and the applicable rules and principles of international law.
This provision refers to two sources of international law: the conventional source, represented by certain bilateral agreements concluded between the Parties, and the customary source, constituted by the "applicable rules and principles of international law".


The Parties disagree on the question of which of these two branches should be given primacy or emphasis in the determination of the primary obligations of France.

While New Zealand emphasizes the terms of the 1986 Agreement and related aspects of the Law of Treaties, France relies much more on the Law of State Responsibility. So far as remedies are concerned both are in broad agreement that the main law applicable is the Law of State Responsibility.

73. In this respect, New Zealand contests three French legal propositions which it describes as bad law. The first one is that the Treaty of 9 July 1986 must be read subject to the customary Law of State Responsibility; thus France is trying to shift the question at issue out of the Law of Treaties, as codified in the Vienna Convention of 1969.

New Zealand contends that the question at issue must be decided in accordance with the Law of Treaties, because the treaty governs and the reference to customary international law may be made only if there were a need (1) to clarify some ambiguity in the treaty, (2) to fill an evident gap, or (3) to invalidate a treaty provision by reference to a rule of jus cogens in customary international law. But, it adds, there is otherwise no basis upon which a clear treaty obligation can be altered by reference to customary international law.

A second French proposition contested by New Zealand is that Article 2 of the Supplementary Agreement of 14 February 1989 refers to the rules and principles of international law and thus, France argues, requires the Tribunal to refer to the Law of International Responsibility. New Zealand contends that Article 2 makes clear that the Tribunal is to decide in accordance with the Agreements, so the Treaty of 9 July 1986 governs and, consequently, customary international law applies only to the extent it is applicable as a source supplementary to the Treaty; not to change the treaty obligation but only to resolve an ambiguity in the treaty language or to fill some gap, which does not exist since the text is crystal clear. Thus, New Zealand takes the position that the Law of Treaties is the law relevant to this case.

Finally, New Zealand contests a third French proposition by which France relies upon the general concept of circumstances excluding illegality, as derived from the work of the International Law Commission on State Responsibility, contending that those circumstances arise in this case because there were determining factors beyond France's control, such as humanitarian reasons of extreme urgency making the action necessary. New Zealand asserts that a State party to a treaty, and seeking to excuse its own non-performance, is not entitled to set aside the specific grounds for termination or suspension of a treaty, enumerated in the 1969 Vienna Convention, and rely instead on grounds relevant to general State responsibility. New Zealand adduces that it is not a credible proposition to admit that the Vienna Convention identifies and defines a number of lawful excuses for non-performance—such as supervening impossibility of performance; a fundamental change of circumstances; the emergence of a new rule of jus cogens—and yet contend that there may be other excuses, such as force majeure or distress, derived from the customary Law of State Responsibility. Consequently, New Zealand asserts that the excuse of force majeure, invoked by France, does not conform to the grounds for termination or suspension recognized by the Law of Treaties in Article 61 of the Vienna Convention, which requires absolute impossibility of performing the treaty as the grounds for terminating or withdrawing from it.

74. France, for its part, points out that New Zealand's request calls into question France's international responsibility towards New Zealand and that everything in this request is characteristic of a suit for responsibility; therefore, it is entirely natural to apply the Law of Responsibility. The French Republic maintains that the Law of Treaties does not govern the breach of treaty obligations and that the rules concerning the consequences of a "breach of treaty" should be sought not in the Law of Treaties, but exclusively in the Law of Responsibility. France further states that within the Law of International Responsibility, "breach of treaty" does not enjoy any special status and that the breach of a treaty obligation falls under exactly the same legal regime as the violation of any other international obligation. In this connection, France points out that the Vienna Convention on the Law of Treaties is constantly at pains to exclude or reserve questions of responsibility, and that the sole provision concerning the consequences of the breach of a treaty is that of Article 60, entitled "Termination of a treaty or suspension of its application as a result of breach", but the provisions of this Article are not applicable in this instance. But even in this case, the French Republic adds, the State that is the victim of the breach is not deprived of its right to claim reparation under the general Law of Responsibility. France points out, furthermore, that the origin of an obligation in breach has no impact either on the international wrongfulness of an act nor on the regime of international responsibility applicable to such an act; this approach is explained in Article 17 of the draft of the International Law Commission on State Responsibility.

In particular, the French Republic adds, citing the report of the International Law Commission, the reasons which may be invoked to justify the non-execution of a treaty are a part of the general subject matter of the international responsibility of States.

The French Republic does admit, in this connection, that it is the Law of Treaties that makes it possible to determine the content and scope of the obligations assumed by France, but, even supposing that France had breached certain of these obligations, this breach would not entail any repercussion stemming from the Law of Treaties. On the
contrary, it is exclusively within the framework of the Law on International Responsibility that the effects of a possible breach by France of its treaty obligations must be determined and it is within the context of the Law of Responsibility that the reasons and justificatory facts adduced by France must be assessed. Consequently, the French Republic further states, it is up to the Tribunal to decide whether the circumstances under which France was led to take the contested decisions are of such a nature as to exonerate it of responsibility, and this assessment must be made within the context of the Law of Responsibility and not solely in the light of Article 61 of the 1969 Vienna Convention.

75. The answer to the issue discussed in the two preceding paragraphs is that, for the decision of the present case, both the customary Law of Treaties and the customary Law of State Responsibility are relevant and applicable.

The customary Law of Treaties, as codified in the Vienna Convention, proclaimed in Article 26, under the title “Pacta sunt servanda” that

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

This fundamental provision is applicable to the determination whether there have been violations of that principle, and in particular, whether material breaches of treaty obligations have been committed.

Moreover, certain specific provisions of customary law in the Vienna Convention are relevant in this case, such as Article 60, which gives a precise definition of the concept of a material breach of a treaty, and Article 70, which deals with the legal consequences of the expiry of a treaty.

On the other hand, the legal consequences of a breach of a treaty, including the determination of the circumstances that may exclude wrongfulness (and render the breach only apparent) and the appropriate remedies for breach, are subjects that belong to the customary Law of State Responsibility.

The reason is that the general principles of International Law concerning State responsibility are equally applicable in the case of breach of treaty obligation, since in the international law field there is no distinction between contractual and tortious responsibility, so that any violation by a State of any obligation, of whatever origin, gives rise to State responsibility and consequently, to the duty of reparation. The particular treaty itself might of course limit or extend the general Law of State Responsibility, for instance by establishing a system of remedies for it.

The Permanent Court proclaimed this fundamental principle in the Chorzow Factory (Jurisdiction) case, stating:

It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation, therefore, is the indispensable complement of a failure to apply a convention (P.C.I.J., Series A, Nos. 9, 21 (1927)).

And the present Court has said:

It is clear that refusal to fulfil a treaty obligation involves international responsibility (Peace Treaties (second phase) 1950, ICJ Reports, 221, 228).

The conclusion to be reached on this issue is that, without prejudice to the terms of the agreement which the Parties signed and the applicability of certain important provisions of the Vienna Convention on the Law of Treaties, the existence in this case of circumstances excluding wrongfulness as well as the questions of appropriate remedies, should be answered in the context and in the light of the customary Law of State Responsibility.

Circumstances Precluding Wrongfulness

76. Under the title “Circumstances Precluding Wrongfulness” the International Law Commission proposed in Articles 29 to 35 a set of rules which include three provisions, on force majeure and fortuitous event (Article 31), distress (Article 32), and state of necessity (Article 33), which may be relevant to the decision on this case.

As to force majeure, it was invoked in the French note of 14 December 1987, where, referring to the removal of Major Mafart, the French authorities stated that "in this case of force majeure" (emphasis added), they "are compelled to proceed without further delay with the repatriation of the French officer for health reasons".

In the oral proceedings, counsel for France declared that France “did not invoke force majeure as far as the Law of Responsibility is concerned”. However, the Agent for France was not so categorical in excluding force majeure, because he stated: “It is substantively incorrect to claim that France has invoked force majeure exclusively. Our written submissions indisputably show that we have referred to the whole theory of special circumstances that exclude or ‘attenuate’ illegality”.

Consequently, the invocation of “force majeure” has not been totally excluded. It is therefore necessary to consider whether it is applicable to the present case.

77. Article 31 (1) of the ILC draft reads:

The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act was due to an irresistible force or to an unforeseen external event beyond its control which made it materially impossible for the State to act in conformity with that obligation or to know that its conduct was not in conformity with that obligation.

In the light of this provision, there are several reasons for excluding the applicability of the excuse of force majeure in this case. As pointed out in the report of the International Law Commission, Article 31 refers to “a situation facing the subject taking the action, which leads it, as it were, despite itself, to act in a manner not in conformity with the requirements of an international obligation incumbent on it” (Ybk.ILC, 1979, vol. II, para. 2, p. 122, emphasis in the original). Force majeure is “generally invoked to justify involuntary, or at least unintentional conduct”, it refers “to an irresistible force or an unforeseen external event
The report points out the difference between the ground for excluding wrongful conduct and that of force majeure. In these circumstances, the State is not liable because it was only between conduct not in conformity with the obligation, but the decision to take the action was not taken by the person who is liable. The report also includes a discussion on the situation of distress, which is the only real 'necessity' that is relevant in this case. The report concludes that the situation of distress does not apply in this case, and thus the State is not liable for wrongful conduct. The report also discusses the possibility of the State taking action in conformity with the obligation, and if so, whether that action would be sufficient to comply with the obligations. The report further discusses the implications of the decision on the State's liability for wrongful conduct, and how it may affect future cases.
itarian considerations affecting the acting organs of the State may exclude wrongfulness in this case.

79. In accordance with the previous legal considerations, three conditions would be required to justify the conduct followed by France in respect to Major Mafart and Captain Prieur:

1) The existence of very exceptional circumstances of extreme urgency involving medical or other considerations of an elementary nature, provided always that a prompt recognition of the existence of those exceptional circumstances is subsequently obtained from the other interested party or is clearly demonstrated.

2) The reestablishment of the original situation of compliance with the assignment in Hao as soon as the reasons of emergency invoked to justify the repatriation had disappeared.

3) The existence of a good faith effort to try to obtain the consent of New Zealand in terms of the 1986 Agreement.

The Case of Major Mafart

80. The New Zealand reaction to the French initiative for the removal of Major Mafart appears to have been conducted in conformity with the above considerations.

The decision to send urgently a medical doctor to Hao in order to verify the existence of the invoked ground of serious risk to life clearly implied that if the alleged conditions were confirmed, then the requested consent would be forthcoming.

Unfortunately, it proved impossible to proceed with that verification while Major Mafart was still on the island. The rule forbidding foreign aircraft from landing in Hao prevented the prompt arrival of a New Zealand medical doctor in a military airplane and accompanied by a large crew. In these circumstances, the maintenance of the pre-existing interdiction of foreign landing cannot be considered as unfounded nor as deliberately designed to impede the New Zealand authorities from verifying the facts or frustrate their efforts to that end. Likewise, difficulties of communication and interpretation of statements made in different languages may explain the misunderstanding as to how and from where the New Zealand doctor would report his conclusions. The parties blame each other for the failure to carry out the verification in Hao, but there were many factors, not the fault of any party, nor questioning their good faith, which prevented the carrying out of that verification in the short time available. The problem arose during a weekend; communications had to be exchanged between Paris and Wellington, with half a day “time difference” between the two cities; various departments were involved, etc. Consequently, the conclusion must be reached that none of the parties is to blame for the failure in carrying out the very difficult task of verifying in situ Major Mafart’s health during that weekend.

81. The sending of Dr. Croxson to examine Major Mafart the same day of the arrival of the latter in Paris had the same implication indicated above, namely, that if the alleged conditions of urgency jus-

ifying the evacuation were verified, consent would very likely have been given to what was until then a unilateral removal. The reservation made by New Zealand in the formal diplomatic note of 23 December 1987 rejecting the suggestion that its decision to accept the offer to send a New Zealand doctor to Paris to examine Major Mafart could be construed as acceptance of the evacuation only applied to any implication resulting from the sending of Dr. Croxson; it is obvious that the acceptance of that French offer, by itself, could not imply consent to the removal.

But, on the other hand, having accepted the offer to verify whether Major Mafart had required an urgent sanitary evacuation, subsequent consent to that measure would necessarily be implied, unless there was an immediate and formal denial by New Zealand of the existence of the medical conditions which had determined Major Mafart’s urgent removal, accompanied by a formal request by New Zealand authorities for his immediate return to Hao, or at least to Papeete. And this did not occur.

On the contrary, Dr. Croxson’s first report, of 14 December 1987, accepts that Major Mafart needed “detailed investigations which were not available in Hao” and his answer to the crucial question of whether there was justification for the emergency evacuation is equivocal. He apparently assumes that the only reason for the repatriation was the need for immediate surgery, which was not the case, and he introduces a distinction between emergency evacuation and planned urgent evacuation, but in both alternatives justifying the sanitary evacuation which had been accomplished.

82. It was not until 12 February 1988 when Dr. Croxson, then accompanied by Professor Mallinson, stated: “there was no evidence produced to show that Major Mafart had an impending obstruction at the time he was evacuated from Hao and certainly, if he had, he should have been airlifted to the nearest surgical center which we believe exists in Tahiti. It would have been dangerous to have flown him to Paris”. But this was post-facto wisdom: too late to counteract the implications of his previous reports, and the tolerance of the continuation of the treatment for almost two months.

83. This sixth report, dated 12 February 1988, on the other hand, evidences that there was by that time a clear obligation of the French authorities to return Major Mafart to Hao, by reason of the disappearance of the urgent medical emergency which had determined his evacuation. This report, together with the absence of other medical reports showing the recurrence of the symptoms which determined the evacuation, demonstrates that Major Mafart should have been returned to Hao at least on 12 February 1988, and that failure to do so constituted a breach by the French Government of its obligations under the First Agreement. This breach is not justified by the decision of the French authorities to retain Major Mafart in metropolitan France on the ground that he was “unfit to serve overseas”.

84. This decision was based on a medical report by Professor Daly. Taking into account the reliance that both parties give to medical
reports concerning the state of health of Major Mafart, both in respect of his removal from Hao and his permanence in France, it becomes necessary to analyze the points of agreement and disagreement of the various medical reports filed in the proceedings and pronounce on the differences which exist between them.

The various medical reports by Dr. Croxson and Professor Daly coincide in finding that after several weeks of investigation and exploration no firm diagnosis had been reached and no clear abnormalities had been demonstrated. It is also stated in Dr. Croxson’s fifth report that in January 1988 Major Mafart had been discharged from the hospital and was living in a house within the hospital confines, being subject to weekly supervision by Professor Daly. Dr. Croxson also states in that same report that during his visit with Professor Mallinson on 25 January 1988 he verified that “Mafart has remained well since his last report of 18 January, with no major episodes of pain or abdominal distension”.

A final report by Dr. Croxson on 21 July 1988, after a 5-month period of observation, indicates “no change in Major Mafart’s clinical condition since last examination. No major episodes of severe abdominal pain, abdominal distension and none requiring hospitalization or special investigations”.

There are no medical reports of French origin questioning or contradicting these assertions of fact; this final report of Dr. Croxson, communicated to the French authorities, has also been presented as an Annex to the French Counter-Memorial.

85. It is against this background that Professor Daly’s report declaring Major Mafart “unfit for overseas service” must be examined. In support of his conclusion Professor Daly states that in the case of Major Mafart “close supervision is necessary” and consequently “he must remain in mainland France inasmuch as this follow up can be carried out only in a modern and well-equipped Hospital Center”. Professor Daly invokes two grounds in support of his assertion that “close supervision is necessary”: this must be done, according to him, with the object of 1) “intercepting an even more acute crisis, which may require surgery” or 2) “planning the above-mentioned explorations”.

86. The first ground, the need for surgery, had been discarded by all medical experts as an inappropriate answer to the two crises experienced by Major Mafart, both in Hao, in July 1987 and again in December 1987. Dr. Croxson and Professor Mallinson concurred in the view that the only indication for “surgery would be an acute and irreversible obstruction”, adding that “there have been no signs to suggest complete obstruction”.

This assertion was not questioned or contradicted by other medical reports.

Since such an intervention may be performed in any normally equipped surgical center, there is no medical justification to retain Major Mafart in metropolitan France for the remote and unlikely event that he would suffer, for the first time in his life, an acute and irreversible obstruction.

87. The second medical reason invoked in Professor Daly’s report was the need to “plan the above-mentioned explorations”. This sentence refers to the fact that he indicates in his final report that “a number of additional investigations could be contemplated”, adding that “these points have been discussed with Professor Mallinson and Dr. Croxson”. But the latter pointed out in their report that while they agreed with a “barium-enema X-ray” (which obviously may be performed in any hospital), they had observed that “we do not feel that mesenteric angiography nor an ERCP are essential investigations in (Mafart’s) management; if they were they could have been carried out by now”. This observation, not contested in any other medical report, is the conclusive answer to the second ground invoked by Professor Daly.

In consequence, there was no medical justification to retain Major Mafart in metropolitan France instead of returning him to Hao in compliance with the First Agreement.

88. The other ground leading Professor Daly to declare Major Mafart “unfit to serve overseas for an undetermined period” was of a legal and not of a medical character: the need to apply the “rules of fitness governing French military personnel”.

There is no reason to doubt that Professor Daly in his report and the French authorities in refusing on this ground the return of Major Mafart to Hao were applying the French norms on the subject of physical aptitude for service overseas and in general the French military regulations and statutes.

But compliance with the First Agreement was not dependent on the fact that Major Mafart should have been able to render active service in the military base at the island of Hao. Under the special obligations which the First Agreement imposed on him he was not required to render any military service at all. All that was required from him was to be re-transferred to Hao and remain there until the expiration of the term established in the First Agreement, without any contact with the press and other media. His transfer to Hao was not of a regular military character; it was not an assignment subject to the normal conditions or requirements of a French military posting. Lack of aptitude to serve actively in military service beyond the confines of metropolitan France does not imply lack of aptitude to be re-transferred to Hao and remain there for the required term. It has not been contended, nor even suggested, that the climate or the environment in Hao could affect adversely Major Mafart’s health nor that the food available in the island could be the cause of the troubles to his health.

Both parties recognized that the return of Major Mafart to Hao depended mainly on his state of health. Thus, the French Ministry of Foreign Affairs in its note of 30 December 1987 to the New Zealand Embassy referring to France’s respect for the 1986 Agreement had said that Major Mafart will return to Hao when his state of health allowed.

Consequently, there was no valid ground for Major Mafart continuing to remain in metropolitan France and the conclusion is unavoidable that this omission constitutes a material breach by the French Government of the First Agreement.
For the foregoing reasons the Tribunal:
— by a majority declares that the French Republic did not breach its obligations to New Zealand by removing Major Mafart from the island of Hao on 13 December 1987;
— declares that the French Republic committed a material and continuing breach of its obligation to New Zealand by failing to order the return of Major Mafart to the island of Hao as from 12 February 1988.

The Case of Captain Prieur

89. As to the situation of Captain Prieur, the French authorities advised the New Zealand Government, on 3 May 1988, that she was pregnant, adding that a medical report indicated that "this pregnancy should be treated with special care..." The advice added that "the medical facilities on Hao are not equipped to carry out the necessary medical examinations and to give Mrs. Prieur the care required by her condition".

90. The New Zealand authorities answered this communication on 4 May 1988, stating that "while New Zealand's consent is required in terms of the 1986 Agreement, this is not a case where, if the medical situation justifies it, consent would be unreasonably withheld". This communication added that the New Zealand Government "would like, on the basis of medical consultation, to determine the nature of any special treatment that Captain Prieur might need and the place where the necessary tests and ongoing treatment could be carried out if the facilities at Hao are not adequate". For this purpose "as a first step to coming to an agreement on this basis", the New Zealand authorities advised that they were "making arrangements for a New Zealand doctor with the requisite qualifications to fly on the first available flight to Papeete for onward flight to Hao by French military transport". The nominated doctor was Dr. Bernard Brenner, qualified in obstetrics and gynecology.

91. On 4 May 1988 the French authorities gave their "agreement for sending to Hao, as soon as possible, Doctor Bernard Brenner. The latter would first be taken to Papeete by airliner or by a New Zealand military aircraft, and from there he would be transported to Hao by a French military aircraft" (see para. 50).

However, industrial action by French airline pilots caused the postponement of these plans by one day, until 6 May 1988.

In the interim, on 5 May 1988, the New Zealand Ambassador in Paris was informed "by the Office of the Minister of Foreign Affairs" of a "new element", namely, that "Dominique Prieur's father, who is at the Begin Hospital for treatment of cancer, is dying", and "his condition is considered critical by the doctors". The French authorities added that: "we believed that, for obvious reasons of humanitaria nature, it was essential that Dominique Prieur be able to see her father before his death". They advised of several solutions that were conceivable (see para. 52).

92. It has been stated in paras. 53 to 56 above that:

The New Zealand Ambassador responded on 5 May that while awaiting the Prime Minister's decision, the solution of sending a New Zealand military aircraft was being studied;

The French authorities had indicated that the departure from Auckland could not be delayed beyond 7.30 a.m. Friday (New Zealand time), "the final deadline" after which France would be running the risk that Dominique Prieur would arrive in Paris too late to see her father alive;

The New Zealand authorities informed the French Government on 5 May 1988 at 9.30 p.m. that they were not ready to give their consent for the reason invoked but that the offer made because of Mrs. Prieur's pregnancy remained valid;

In their response on 5 May at 10.30 p.m., the French authorities stated that the French Government considered it impossible "for obvious humanitarian reasons" to keep Mrs. Prieur on Hao, and that the officer was therefore leaving immediately for Paris;

The French authorities confirmed on 6 May that Mrs. Prieur had left Hao by a special flight on Thursday at 11.30 p.m. (Paris time) and was expected in Paris at the end of the evening on that day (6 May).

93. The facts above, which are not disputed, show that New Zealand would not oppose Captain Prieur's departure, if that became necessary because of special care which might be required by her pregnancy. They also indicate that France and New Zealand agreed that Captain Prieur would be examined by Dr. Brenner, a New Zealand physician, before returning to Paris. Only because of the strike by the U.T.A. airline, the examination that was to take place in Hao on Thursday 5 May had to be postponed until Friday 6 May, since Dr. Brenner would be arriving in Papeete at 3.25 p.m. local time, via Air New Zealand. As the French Republic acknowledges in its Counter-Memorial, "It seemed that we were moving towards a satisfactory solution; New Zealand’s approval of Mrs. Prieur’s departure seemed probable". Reconciliation of respect for the Agreement of 9 July 1986 and the humanitarian concerns due to the particular circumstances of Mrs. Prieur’s pregnancy thus seemed to have been achieved.

94. On the other hand, it appears that during the day of 5 May the French Government suddenly decided to present the New Zealand Government with the fait accompli of Captain Prieur's hasty return for a new reason, the health of Mrs. Prieur's father, who was seriously ill, hospitalized for cancer. Indubitably the health of Mrs. Prieur's father, who unfortunately would die on 16 May, and the concern for allowing Mrs. Prieur to visit her dying father constitute humanitarian reasons worthy of consideration by both Governments under the 1986 Agreement. But the events of 5 May (French date) prove that the French Republic did not make efforts in good faith to obtain New Zealand's consent. First of all, it must be remembered that France and New Zealand agreed that Captain Prieur would be examined in Hao on 6 May, which would allow her to return to France immediately. For France, in this case, it was only a question of gaining 24 or 36 hours. Of course, the
health of Mrs. Prieur's father, who had been hospitalized for several months, could serve as grounds for such acute and sudden urgency; but, in this case, New Zealand would have had to be informed very precisely and completely, and not be presented with a decision that had already been made.

However, when the French Republic notified the Ambassador of New Zealand on 5 May at 11.00 a.m. (French time), the latter was merely told that Mrs. Dominique Prieur’s father, hospitalized for cancer treatment, was dying. Of course, it was explained that the New Zealand Government could verify the validity of this information using a physician of its choice, but the telegram the French Minister of Foreign Affairs sent to the Embassy of France in Wellington on 5 May 1988 clearly stated that the decision to repatriate was final. And this singular announcement was addressed to New Zealand: “After all, New Zealand should understand that it would be incomprehensible for both French and New Zealand opinion for the New Zealand Government to stand in the way of allowing Mrs. Prieur to see her father on his death bed ...” Thus, New Zealand was really not asked for its approval, as compliance with France's obligations required, even under extremely urgent circumstances; it was indeed demanded so firmly that it was bound to provoke a strong reaction from New Zealand.

95. The events that followed confirm that the French Government's decision had already been made and that it produced a foreseeable reaction. Indeed, at 9.30 p.m. (French time) on 5 May, the Ambassador of New Zealand in Paris announced that the New Zealand Government was not prepared to approve Mrs. Prieur’s departure from Hao, for the reason given that very morning by the French Government. But the New Zealand Government explained that the “response and New Zealand's offer concerning the consequences of Mrs. Prieur’s pregnancy were still valid”. France, therefore, could have expected the procedure agreed upon by reason of Mrs. Prieur’s pregnancy to be respected. Quite on the contrary, the French Government informed the New Zealand Ambassador at 10.30 p.m. that “the French officer is thus leaving immediately for Paris”, and Mrs. Prieur actually left Hao on board a special flight at 11.30 p.m. (Paris time). It would be very unlikely that the special flight leaving Hao at 11.30 p.m. had not been planned and organized before 10.30 p.m., when the French decision was intimated, and even before 9.30 p.m., the time of New Zealand’s response. Indeed, the totality of facts prove that, as of the morning of Thursday, 5 May, France had decided that Captain Prieur would leave Hao during the day, with or without New Zealand’s approval.

96. Pondering the reasons for the haste of France, New Zealand contended that Captain Prieur’s “removal took place against the backdrop of French presidential elections in which the Prime Minister was a candidate” and New Zealand pointed out that Captain Prieur’s departure and arrival in Paris had been widely publicized in France. During the oral proceedings, New Zealand produced the text of an interview given on 27 September 1989 by the Prime Minister at the relevant time, explaining the following on the subject of the “Turenga couple”: “I take responsibility for the decision that was made, and could not imagine how these two officers could be abandoned after having obeyed the highest authorities of the State. Because it was the last days of my Government, I decided to bring Mrs. Prieur, who was pregnant, back from the Pacific atoll where she was stationed. Had I failed to do so, she would surely still be there today”. New Zealand alleges that the French Government acted in this way for reasons quite different from the motive or pretext invoked. The Tribunal need not search for the French Government’s motives, nor examine the hypotheses alleged by New Zealand. It only observes that, during the day of 5 May 1988, France did not seek New Zealand’s approval in good faith for Captain Prieur’s sudden departure; and accordingly, that the return of Captain Prieur, who left Hao on Thursday, 5 May at 11.30 p.m. (French time) and arrived in Paris on Friday, 6 May, thus constituted a violation of the obligations under the 1986 Agreement.

This violation seems even more regrettable because, as of 12 February 1988, France had been in a state of continuing violation of its obligations concerning Major Mafart, as stated above, which normally should have resulted in special care concerning compliance with the Agreement in Captain Prieur’s case.

97. Moreover, France continued to fall short of its obligations by keeping Captain Prieur in Paris after the unfortunate death of her father on 16 May 1988. No medical report supports or demonstrates the original claim by French authorities to the effect that Captain Prieur’s pregnancy required “particular care” and demonstrating that “the medical facilities on Hao are not equipped to carry out the necessary medical examinations and to give Mrs. Prieur the care required by her condition”. There is no evidence either which demonstrates that the facilities in Papeete, originally suggested by the New Zealand Ambassador in Paris, were also inadequate: on the contrary, positive evidence has been presented by New Zealand as to their adequacy and sophistication.

The only medical report in the files concerning Captain Prieur’s health is one from Dr. Croxson, dated 21 July 1988, which appears to discard the necessity of “particular care” for a pregnancy which is “proceeding uneventfully”. This medical report adds that “no special arrangements for later pregnancy or delivery are planned, and I formed the opinion that management would be conducted on usual clinical criteria for a 39-year-old, fit, healthy woman in her first pregnancy”.

So, the record provides no justification for the failure to return Captain Prieur to Hao some time after the death of her father.

98. The fact that “pregnancy in itself normally constitutes a contra-indication for overseas appointment” is not a valid explanation, because the return to Hao was not an assignment to service, or “an assignment” or military posting, for the reasons already indicated in the case of Major Mafart.

Likewise, the fact that Captain Prieur benefited, under French regulations, from “military leave which she had not taken previously”, as well as “the maternity and nursing leaves established by French law”, may be measures provided by French military laws or regulations.
But in this case, as in that of Major Mafart, French military laws or regulations do not constitute the limit of the obligations of France or of the consequent rights deriving for New Zealand from those obligations. The French rules "governing military discipline" are referred to in the fourth paragraph of the First Agreement not as the limit of New Zealand rights, but as the means of enforcing the stipulated conditions and ensuring that they "will be strictly complied with". Moreover, French military laws or regulations can never be invoked to justify the breach of a treaty. As the French Counter-Memorial properly stated: "the principle according to which the existence of a domestic regulation can never be an excuse for not complying with an international obligation is well established, and France subscribes to it completely".

99. In summary, the circumstances of distress, of extreme urgency and the humanitarian considerations invoked by France may have been circumstances excluding responsibility for the unilateral removal of Major Mafart without obtaining New Zealand's consent, but clearly these circumstances entirely fail to justify France's responsibility for the removal of Captain Prieur and from the breach of its obligations resulting from the failure to return the two officers to Hao (in the case of Major Mafart once the reasons for their removal had disappeared). There was here a clear breach of its obligations and a breach of a material character.

100. According to Articles 60 (3) (b) of the Vienna Convention on the Law of Treaties, a material breach of a treaty consists in "the violation of a provision essential to the accomplishment of the object or purpose of the treaty".

The main object or purpose of the obligations assumed by France in Clauses 3 to 7 of the First Agreement was to ensure that the two agents, Major Mafart and Captain Prieur, were transferred to the island of Hao and remained there for a period of not less than three years, being subject to the special regime stipulated in the Exchange of Letters.

To achieve this object or purpose, the third and fourth paragraphs of the First Agreement provide that New Zealand will transfer the two agents to the French military authorities and these authorities will immediately transfer them to a French military facility in Hao. The prohibition "from leaving the island for any reason without the mutual consent of the two Governments" was the means to guarantee the fulfillment of the fundamental obligation assumed by France: to keep the agents in Hao and submit them to the special regime of isolation and restriction of contacts described in the fourth paragraph of the Exchange of Letters.

The facts show that the essential object or purpose of the First Agreement was not fulfilled, since the two agents left the island before the expiry of the three-year period.

This leads the Tribunal to conclude that there have been material breaches by France of its international obligations.

101. In its codification of the Law of State Responsibility, the International Law Commission has made another classification of the different types of breaches, taking into account the time factor as an ingredient of the obligation. It is based on the determination of what is described as tempus commissi delictu, that is to say, the duration or continuation in time of the breach. Thus the Commission distinguishes the breach which does not extend in time, or instantaneous breach, defined in Article 24 of the draft, from the breach having a continuing character or extending in time. In the latter case, according to paragraph 1 of Article 25, "the time of commission of the breach extends over the entire period during which the act continues and remains not in conformity with the international obligation".

Applying this classification to the present case, it is clear that the breach consisting in the failure of returning to Hao the two agents has been not only a material but also a continuous breach.

And this classification is not purely theoretical, but, on the contrary, it has practical consequences, since the seriousness of the breach and its prolongation in time cannot fail to have considerable bearing on the establishment of the reparations which is adequate for a violation presenting these two features.

For the foregoing reasons the Tribunal:
— declares that the French Republic committed a material breach of its obligations to New Zealand by not endeavouring in good faith to obtain on 5 May 1988 New Zealand's consent to Captain Prieur's leaving the island of Hao;
— declares that as a consequence the French Republic committed a material breach of its obligations by removing Captain Prieur from the island of Hao on 5 and 6 May 1988;
— declares that the French Republic committed a material and continuing breach of its obligations to New Zealand by failing to order the return of Captain Prieur to the island of Hao.

**Duration of the Obligations**

102. The Parties in this case are in complete disagreement with respect to the duration of the obligations assumed by France in paragraphs 3 to 7 of the First Agreement.

New Zealand contends that the obligation in the Exchange of Letters envisaged in the normal course of events both agents would remain on Hao for a continuous period of three years. It points out that the First Agreement does not set an expiry date for the three-year term but rather describes the term as being for "a period of not less than three years". According to the New Zealand Government, this is clearly not a fixed period ending on a predetermined date. "The three-year period, in its context, clearly means the period of time to be spent by Major Mafart and Captain Prieur on Hao rather than a continuous or fixed time span. In the event of an interruption to the three-year period, the obligation assumed by France to ensure that either or both agents serve the balance of the three years would remain". Consequently, concludes the Government of New Zealand, "France is under an ongoing obligation to return Major Mafart and Captain Prieur to Hao to serve out the balance of their three-year confinement".
103. For its part, the French Government answers: "it is true that the 1986 Agreement does not fix the exact date of expiry of the specific regime that it sets up for the two agents. But neither does it fix the exact date that this regime will take effect". The reason, adds the French Government, is that in paragraph 7 of the First Agreement, it is provided that the undertakings relating to "the transfer of Major Mafart and Captain Prieur will be implemented not later than 25 July 1986". Consequently, adduces the French Government, "it is quite obviously the effective date of transfer to Hao which should constitute the dies a quo and thus determine the dies ad quem . . . The obligation assumed by France to post the two officers to Hao and to subject them there to a regime that restricts some of their freedoms was planned by the parties to last for three years beginning on the day the transfer to Hao became effective; this transfer having taken place on 22 July 1986, the three-year period allotted for the obligatory stay on Hao and its attendant obligations’ expired three years after, that is to say, on 22 July 1989.

The French Government adds in the Reply that "a period is quite precisely a continuous and fixed interval of time" and "even if no exact expiry date was expressly stated in advance, this date necessarily follows from the determination of both a time period and the dies a quo". The French Government remarks, moreover, that there is no rule of international law extending the length of an obligation by reason of its breach.

104. It results from paragraph 7 of the Agreement of 9 July 1986 that both parties agreed that "the undertakings relating to an apology, the payment of compensation and the transfer of Major Mafart and Captain Prieur" should be implemented as soon as possible. For that purpose, they fixed a completion date of not later than 25 July 1986. In respect of the two agents, the date of their delivery to French military authorities was 22 July 1986, thus bringing to an end their prison term in New Zealand. In order to avoid any gap or interval, paragraph 3 of the Agreement required that the two agents should be transferred to a French military base "immediately thereafter" their delivery. There is no question therefore that the special regime stipulated and the undertakings assumed by the French Government began to operate uninterruptedly on 22 July 1986. It follows that such a special regime, intended to last for a minimum period of three years, expired on 22 July 1989. It would be contrary to the principles concerning treaty interpretation to reach a more extensive construction of the provisions which thus established a limited duration to the special undertakings assumed by France.

105. The characterization of the breach as one extending or continuing in time, in accordance with Article 25 of the draft on State Responsibility (see para. 101), confirms the previous conclusion concerning the duration of the relevant obligations by France under the First Agreement.

According to Article 25, "the time of commission of the breach" extends over the entire period during which the unlawful act continues to take place. France committed a continuous breach of its obligations, without any interruption or suspension, during the whole period when the two agents remained in Paris in breach of the Agreement.

If the breach was a continuous one, as established in paragraph 101 above, that means that the violated obligation also had to be running continuously and without interruption. The "time of commission of the breach" constituted an uninterrupted period, which was not and could not be intermittent, divided into fractions or subject to intervals. Since it had begun on 22 July 1986, it had to end on 22 July 1989, at the expiry of the three years stipulated.

Thus, while France continues to be liable for the breaches which occurred before 22 July 1989, it cannot be said today that France is now in breach of its international obligations.

106. This does not mean that the French Government is exempt from responsibility on account of the previous breaches of its obligations, committed while these obligations were in force.

Article 70 (1) of the Vienna Convention on the Law of Treaties provides that:

the termination of a treaty under its provisions . . .

(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its determination.

Referring to claims based on the previous infringement of a treaty which had since expired, Lord McNair stated:

such claims acquire an existence independent of the treaty whose breach gave rise to them (ICJ Reports, 1952, p. 63).

In this case it is undisputed that the breaches of obligation incurred by the French Government discussed in paragraphs 88 and 101 of the Award—the failure to return Major Mafart and the removal of and failure to return Captain Prieur—were committed at a time when the obligations assumed in the First Agreement were still in force.

Consequently, the claims advanced by New Zealand have an existence independent of the expiration of the First Agreement and entitle New Zealand to obtain adequate relief for these breaches.

For the foregoing reasons the Tribunal:

— by a majority declares that the obligations of the French Republic requiring the stay of Major Mafart and Captain Prieur on the island of Hao ended on 22 July 1989.

Existence of Damage

107. Before examining the question of adequate relief for the aggrieved State, it is necessary to deal with a fundamental objection which has been raised by the French Government. The French Government opposes the New Zealand claim for relief on the ground that such a claim "completely ignores a central element, the damage", since it does not indicate that "the slightest damage has been suffered, even moral damage".

And, the French Republic adds, in the theory of international responsibility, damage is necessary to provide a basis for liability to make reparation.
108. New Zealand gives a two-fold answer to the French objection: first, it contends that it has been confirmed by the International Law Commission draft on State Responsibility that damage is not a precondition of liability or responsibility and second, that in any event, New Zealand has suffered in this case legal and moral damage. New Zealand asserts that it is not claiming material damage in the sense of physical or direct injury to persons or property resulting in an identifiable economic loss, but it is claiming legal damage by reason of having been victim of a violation of its treaty rights, even if there is no question of a material or pecuniary loss. Moreover, New Zealand claims moral damage since in this case there is not a purely technical breach of a treaty, but a breach causing deep offence to the honour, dignity and prestige of the State. New Zealand points out that the affront it suffered by the premature release of the two agents in breach of the treaty revived all the feelings of outrage which had resulted from the Rainbow Warrior incident.

109. In the oral proceedings, France made it clear that it had never said, as New Zealand had once maintained, that only material or economic damage is taken into consideration by international law. It added that there exist other damages, including moral and even legal damage. In light of this statement, New Zealand remarked in the hearings that France recognized in principle that there can be legal or moral damage, and that material loss is not the only form of damage in this case. Consequently, the doctrinal controversy between the parties over whether damage is or is not a precondition to responsibility became moot, so long as there was legal or moral damage in this case. Accordingly, both parties agree that

in inter-State relations, the concept of damage does not possess an exclusive material or patrimonial character. Unlawful action against non-material interests, such as acts affecting the honor, dignity or prestige of a State, entitle the victim State to receive adequate reparation, even if those acts have not resulted in a pecuniary or material loss for the claimant State (cf. Soerenen, Manual cit., p. 534).

110. In the present case the Tribunal must find that the infringement of the special regime designed by the Secretary-General to reconcile the conflicting views of the Parties has provoked indignation and public outrage in New Zealand and caused a new, additional non-material damage. This damage is of a moral, political and legal nature, resulting from the affront to the dignity and prestige not only of New Zealand as such, but of its highest judicial and executive authorities as well.

The Appropriate Remedies

On the Request for an ‘‘Order’’ to the French Republic to Return its Agents to Hao

111. It follows from the foregoing findings that New Zealand is entitled to appropriate remedies. It claims certain declarations, to the effect that France has breached the First Agreement.

But New Zealand seeks as well an order for the return of the agents. It asserts in its Memorial, under the title ‘‘Restitutio in integrum’’ that ‘‘in the circumstances currently before the Tribunal, such a declaration is not, in itself, a true remedy. And the same is true for any order, or declaration of ‘cessation’ of the breach. For what is required to restore the position of full compliance with the First Agreement is positive action by France, i.e., positive steps to return Major Mafart and Captain Prieur to Hao and to keep them for the minimum of three years required by the First Agreement’’.

New Zealand therefore claims what it calls restitutio, in the form of an order for specific performance. In its formal request in its Memorial it seeks an order ‘‘that the French Republic shall promptly return Major Mafart and Captain Prieur to the island of Hao for the balance of their three-year periods in accordance with the conditions of the First Agreement’’. It does not at that stage use the label or title of restitutio or specific performance.

New Zealand points out that any other remedy would be inappropriate in this case. While France suggests that the appropriate remedy for non-material damage is satisfaction in the form of a declaration, New Zealand states that a mere declaration that France was in breach would be simply a statement of the obvious, and would not be satisfactory at all for New Zealand. A declaration of the respective rights and duties of the parties, contends New Zealand, would be an appropriate remedy in those cases where it is clear that once the judicial declaration is made, the Parties will conform their conduct to it, but it is not an appropriate remedy in this case because it is clear that France will not return the two agents to Hao unless specifically ordered to do so.

As to cessation, New Zealand contends that an order to that effect will suffice in those cases where the breach consists not of active conduct which is unlawful but of failing to act in a lawful manner; if one wants a party to desist from certain action cessation would be appropriate, but not if one wants a party to act positively.

Finally, as to reparation in the form of an indemnity, New Zealand contends that, at least in cases of treaty breach, what a claimant State seeks is not pecuniary compensation but actual, specific compliance or performance of the treaty, adding that if the party in breach were not expected to comply with the treaty, but need only pay monetary compensation for the breach, States would in effect be able to buy the privilege of breaching a treaty and the norm pacifica sunt servanda would cease to have any real meaning. It is for this reason, concludes New Zealand, that where responsibility arises from a fundamental breach of treaty, the remedy of restitution, in the sense of an order for specific performance, is the most appropriate remedy.

112. For its part, the French Republic maintains that adequate reparation for moral or legal damage can only take the form of satisfaction, generally considered as the remedy par excellence in cases of non-material damage. Invoking the decisions of the International Court of Justice, France maintains that whenever the damage suffered amounts
The International Law Commission has accepted the insertion of an article separate from the provisions on responsibility and dealing with the subject of the adoption of the Convention on the Responsibility of States for Internationally Wrongful Acts of 1986, otherwise known as the Vienna Convention on Responsibility of States for Internationally Wrongful Acts.

Article 17, paragraph 1, provides that a State, in accordance with the provisions of Article 16, shall, in respect of an international wrong committed by its organs, agencies and instrumentalities, be liable to another State for loss or damage caused by the international wrong.

The question arises whether an order for the cessation, discontinuance or reparation of the international wrong is an order for the cessation or discontinuance of any international wrong committed by the States concerned. This is the case if the order is issued by a competent international tribunal which is competent to issue the order. The order is not an order for the cessation or discontinuance of an international wrong committed by the States concerned if it is issued by a competent international tribunal which is competent to issue the order.

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It would be not only unjustified, but above all illogical to issue the order requested by New Zealand, which is really an order for the cessation or discontinuance of a certain French conduct, rather than a *restitutio*. The reason is that this conduct, namely to keep the two agents in Paris, is no longer unlawful, since the international obligation expired on 22 July 1989. Today, France is no longer obliged to return the two agents to Hao and submit them to the special regime.

For the foregoing reasons the Tribunal:
— declares that it cannot accept the request of New Zealand for a declaration and an order that Major Mafart and Captain Prieur return to the island of Hao.

115. On the other hand, the French contention that satisfaction is the only appropriate remedy for non-material damage is also not justified in the circumstances of the present case.

The granting of a form of reparation other than satisfaction has been recognized and admitted in the relations between the parties by the Ruling of the Secretary-General of 9 July 1986, which has been accepted and implemented by both Parties to this case.

In the Memorandum presented to the Secretary-General, the New Zealand Government requested compensation for non-material damage, stating that it was "entitled to compensation for the violation of sovereignty and the affront and insult that involved".

The French Government opposed this claim, contending that the compensation "could concern only the material damage suffered by New Zealand, the moral damage being compensated by the offer of apologies".

But the Secretary-General did not make any distinction, ruling instead that the French Government "should pay the sum of US dollars 7 million to the Government of New Zealand as compensation for all the damage it has suffered" (Ibid., p. 32, emphasis added).

In the Rejoinder in this case, the French Government has admitted that "the Secretary-General granted New Zealand double reparation for moral wrong, i.e., both satisfaction, in the form of an official apology from France, and reparations in the form of damages and interest in the amount of 7 million dollars".

In compliance with the Ruling, both parties agreed in the second paragraph of the First Agreement that "the French Government will pay the sum of US 7 million to the Government of New Zealand as compensation for all the damage which it has suffered" (emphasis added).

It clearly results from these terms, as well as from the amount allowed, that the compensation constituted a reparation not just for material damage—such as the cost of the police investigation—but for non-material damage as well, regardless of material injury and independent therefrom. Both parties thus accepted the legitimacy of monetary compensation for non-material damages.

116. The Tribunal has found that France has committed serious breaches of its obligations to New Zealand. But it has also concluded that no order can be made to give effect to these obligations requiring the agents to return to the island of Hao, because these obligations have already expired. The Tribunal has accordingly considered whether it should add to the declarations it will be making an order for the payment by France of damages.

117. The Tribunal considers that it has power to make an award of monetary compensation for breach of the 1986 Agreement under its jurisdiction to decide "any dispute concerning the interpretation or the application" of the provisions of that Agreement (Chorzow Factory Case (Jurisdiction) PCJ Publ. Ser A. No. 9, p. 21).

118. The Tribunal next considers that an order for the payment of monetary compensation can be made in respect of the breach of international obligations involving, as here, serious moral and legal damage, even though there is no material damage. As already indicated, the breaches are serious ones, involving major departures from solemn treaty obligations entered into in accordance with a binding ruling of the United Nations Secretary-General. It is true that such orders are unusual but one explanation of that is that these requests are relatively rare, for instance by France in the Cartaghe and Manouba cases (1913) (11 UNR IA:449, 463), and by New Zealand in the 1986 process before the Secretary-General, accepted by France in the First Agreement. Moreover, such orders have been made, for instance in the last case.

119. New Zealand has not however requested the award of monetary compensation—even as a last resort should the Tribunal not make the declarations and orders for the return of the agents. The Tribunal can understand that position in terms of an assessment made by a State of its dignity and its sovereign rights. The fact that New Zealand has not sought an order for compensation also means that France has not addressed this quite distinct remedy in its written pleadings and oral arguments, or even had the opportunity to do so. Further, the Tribunal itself has not had the advantage of the argument of the two Parties on the issues mentioned in paragraphs 117 and 118, or on other relevant matters, such as the amount of damages.

120. For these reasons, and because of the issue mentioned in paragraphs 124 to 126 following, the Tribunal has decided not to make an order for monetary compensation.

On Declarations of Unlawfulness as Satisfaction

121. The Tribunal considers in turn satisfaction by way of declarations of breach. Furthermore, in light of the foregoing considerations, it will make a recommendation to the two Governments.

122. There is a long established practice of States and international Courts and Tribunals of using satisfaction as a remedy or form of reparation (in the wide sense) for the breach of an international obliga-
tion. This practice relates particularly to the case of moral or legal damage done directly to the State, especially as opposed to the case of damage to persons involving international responsibilities. The whole matter is valuably and extensively discussed by Professor Arango-Ruiz in his second report (1989) for the International Law Commission on State Responsibility (A/CN.4/425, paras. 7-19, and Ch. 3, paras. 106-145; see also Ch. 4, paras. 146-161, "Guarantees of Non-Repetition in the Wrongful Act"). He demonstrates wide support in the writing as well as in judicial and State practice of satisfaction as "the special remedy for injury to the State's dignity, honour and prestige" (para. 106).

Satisfaction in this sense can take and has taken various forms. Arango-Ruiz mentions regrets, punishment of the responsible individuals, safeguards against repetition, the payment of symbolic or nominal damages or of compensation on a broader basis, and a decision of an international tribunal declaring the unlawfulness of the State's conduct (para. 107; see also his draft article 10, A/CN.4/425/Add.1, p. 25).

123. It is to the last of these forms of satisfaction for an international wrong that the Tribunal now turns. The Parties in the present case are agreed that in principle such a declaration of breach could be made—although France denied that it was in breach of its obligations and New Zealand sought as well a declaration and order of return. There is no doubt both that this power exists and that it is seen as a significant sanction. In two related cases brought by France against Italy for unlawful interference with French ships, the Permanent Court of Arbitration, having made an order for the payment of compensation for material loss, stated that:

in the case in which a Power has failed to meet its obligations... to another Power, the statement of that fact, especially in an arbitral award, constitutes in itself a serious sanction (Carthage and Manouba cases (1913) 11 UNR1AA 449, 463).

Most notable is the judgment of the International Court of Justice in the Corfu Channel (Merits) Case (1949 ICJ Reports 4). The Court, having found that the British Navy had acted unlawfully, in the operative part of its decision:

gives judgment that... the United Kingdom Government violated the sovereignty of the People's Republic of Albania, and that this declaration of the Court constitutes in itself appropriate satisfaction.

The Tribunal accordingly decides to make four declarations of material breach of its obligations by France and further decides in compliance with Article 8 of the Agreement of 14 February 1989 to make public the text of its Award.

For the foregoing reasons the Tribunal:
— declares that the condemnation of the French Republic for its breaches of its treaty obligations to New Zealand, made public by the decision of the Tribunal, constitutes in the circumstances appropriate satisfaction for the legal and moral damage caused to New Zealand.

124. New Zealand and France have had close and continuing relations since the early days of European exploration of the South Pacific. The relationship has grown more intense and friendly since the beginning of constitutional government in New Zealand exactly 150 years ago. It includes the friendship of many of the citizens of the two countries forged in peace and war, particularly in the two world wars; and, notwithstanding difficulties of great distance, it extends to the full range of cultural, social, economic and political matters.

125. From the time of the acknowledgement by the French Republic of its responsibility for the unlawful attack on the Rainbow Warrior, senior members of the Governments of both countries have stressed their wish to re-establish and strengthen those good relations. A critical element in that process is a fair and final settlement of the issues arising from that incident and the later events with which this Award is concerned. So the 1986 Agreements, giving effect to the Secretary-General's Ruling, stress the wish of the two Governments to maintain the close and friendly relations traditionally existing between them. In the hearing before the Tribunal, the Agents of the two Governments emphasised the warming of the relationship, referring for instance to a relevant statement made by Mr. Roccard, the French Prime Minister, during his visit in August 1989 to the South Pacific. Moreover, Mr. Lange, now Attorney-General of New Zealand and from July 1984 to August 1989 Prime Minister, spoke before the Tribunal of the dynamic of reconciliation now operating between the two countries.

126. That important relationship, the nature of the decisions made by the Tribunal, and the earlier discussion of monetary compensation lead the Tribunal to make a recommendation. The recommendation, addressed to the two Governments, is intended to assist them in putting an end to the present unhappy affair.

127. Consequently, the Tribunal recommends to the Government of France and the Government of New Zealand that they set up a fund to promote close and friendly relations between the citizens of the two countries and recommends that the Government of France make an initial contribution equivalent to US Dollars 2 million to that fund.

128. The power of an arbitral tribunal to address recommendations to the parties to a dispute, in addition to the formal finding and obligatory decisions contained in the award, has been recognised in particular arbitral institutions. During the hearings, the New Zealand Attorney-General proposed that the Tribunal make some recommendations. The Agent for France has not challenged in any way the power of the Tribunal to make such recommendations in aid of the resolution of the dispute.

For the foregoing reasons the Tribunal:
— in light of the above decisions, recommends that the Governments of the French Republic and of New Zealand set up a fund to promote close and friendly relations between the citizens of the two countries,
and that the Government of the French Republic make an initial contribution equivalent to US Dollars 2 million to that fund.

VI. Decision

The Arbitral Tribunal

1) by a majority declares that the French Republic did not breach its obligation to New Zealand by removing Major Mafart from the island of Hao on 13 December 1987;

2) declares that the French Republic committed a material and continuing breach of its obligations to New Zealand by failing to order the return of Major Mafart to the island of Hao as from 12 February 1988;

3) declares that the French Republic committed a material breach of its obligations to New Zealand by not endeavouring in good faith to obtain on 5 May 1988 New Zealand’s consent to Captain Prieur’s leaving the island of Hao;

4) declares that as a consequence the French Republic committed a material breach of its obligations to New Zealand by removing Captain Prieur from the island of Hao on 5 and 6 May 1988;

5) declares that the French Republic committed a material and continuing breach of its obligations to New Zealand by failing to order the return of Captain Prieur to the island of Hao;

6) by a majority declares that the obligations of the French Republic requiring the stay of Major Mafart and Captain Prieur on the island of Hao ended on 22 July 1989;

7) as a consequence declares that it cannot accept the requests of New Zealand for a declaration and an order that Major Mafart and Captain Prieur return to the island of Hao;

8) declares that the condemnation of the French Republic for its breaches of its treaty obligations to New Zealand, made public by the decision of the Tribunal, constitutes in the circumstances appropriate satisfaction for the legal and moral damage caused to New Zealand;

9) in the light of the above decisions, recommends that the Governments of the French Republic and of New Zealand set up a fund to promote close and friendly relations between the citizens of the two countries, and that the Government of the French Republic make an initial contribution equivalent to US$ 2 million to that fund.

DONE in English and in French in New York, on the 30 April, 1990.

Eduardo Jiménez de Aréchaga

President

Michael F. Hoelling

Registrar

Arbitrator Sir Kenneth Keith appends a separate opinion to the Decision of the Arbitral Tribunal.

Separate opinion of Sir Kenneth Keith

1. As appears from paras. 2 to 5 and 7 to 9 of the Decision of the Tribunal, I agree with major parts of the Award. In particular I agree — that France committed several serious breaches of the agreement it had entered into in 1986 in accordance with the binding ruling of the United Nations Secretary-General,

— that the Tribunal should declare its condemnation of those breaches in its Award which it also decides to make public, and

— that the parties should be recommended to establish a Fund, France making the first contribution equivalent to US$ 2 million, to promote close and friendly relations between the citizens of the two countries.

2. To my regret and with great respect to my colleagues, I do however disagree with them on two matters—

— the lawfulness of the removal of Major Mafart from the island of Hao (paras. 80-88 of the Award), and

— the duration of the period the two agents were to stay on the island (paras. 102-106).

I have accordingly prepared this separate opinion giving my reasons for that disagreement.

The removal of Major Mafart

3. The Tribunal holds that France did not act in breach of its obligations in removing Major Mafart from Hao on 14 December 1987. Its reason in essence is that a serious risk to life justified the removal of Major Mafart although New Zealand had not consented. The argument is not based on the obligations established by the agreement itself. New Zealand has not breached its obligations under the agreement to consider in good faith the French request for consent. Indeed in para. 80 the majority say that neither government is to blame for the failure in respect of the verification of Major Mafart’s health on Hao in the weekend in question. Rather the argument is founded on the law of state responsibility and in particular on distress as a reason precluding the apparent unlawfulness of the departure of Major Mafart without New Zealand’s consent.

4. In the words of the test stated by the International Law Commission, the question is whether the relevant French authorities “had no other means, in a situation of extreme distress, of saving [Major Mafart’s] life”. The commentary to the draft article suggests that the test, while still very stringent, may be a more relaxed one: so it asks will those at risk “almost inevitably perish” unless the impugned action is taken? And it suggests the widening of the situation of distress beyond the protection of life to the protection of “the physical integrity of a person” (see para. 78 of the Award).

5. On my understanding, such an argument is available in law notwithstanding the apparently absolute language of the 1986 agreement on the basis that that agreement has not excluded the operation of the principle. So the apparently absolute rule found in treaty and customary
international law affirming sovereignty over national airspace is not seen as being breached by the entry of foreign aircraft in distress. Similarly I would agree with counsel for France on the lawfulness of the urgent removal of an agent to Papeete for necessary life-saving surgery there following a shark attack at Hao and allowing no time to get New Zealand’s prior consent. All legal systems recognize such exceptions to the strict letter of the law.

6. The principle is established and broadly understood. How does it apply to the facts in this case? There are 2 elements—first the threat to the life or the physical integrity of Major Mafart, and second the action taken to deal with that threat. My disagreement with the majority relates to the second matter and specifically to the timing of that action. I agree that the state of Major Mafart’s health as known to the French authorities (including Dr. Maurel) on 14 December 1987 required detailed medical investigations not available on Hao. This was confirmed on the very day of Major Mafart’s return to Paris by Dr. Croxson, the physician nominated by the New Zealand Government. Indeed the indications are that had the relevant information been provided to the New Zealand authorities in a timely and adequate manner in advance of the departure they would very likely have consented to medical investigations outside Hao. Such consent would almost certainly have been accompanied by conditions, for instance about the course of the investigations and requiring return to Hao when the investigations were satisfactorily completed.

7. I need not however pursue those matters. As indicated, my particular concern is not with the medical situation and the need for medical tests, but with the timing of the French action taken in apparent breach of the 1986 agreement. The particular medical condition had its origins in surgery 22 years earlier. In July of 1987 Major Mafart was in hospital on Hao. On 7 December 1987 the commander of the base there advised the Minister of Defence in Paris that Major Mafart required tests and treatment which could not be provided there. On 9 December 1987 the Minister dispatched a medical team to Hao. The French authorities did not advise the New Zealand authorities of any of these events occurring in 1987—although each of course could have led in due time to a request for consent to Major Mafart’s departure. The three-monthly reports provided by France to New Zealand and the United Nations as required by the agreement also gave no hint of the July hospitalization. Those of 21 July and 21 October 1987 simply said that the earlier situation, involving among other things the officers being in their military positions, continued without change.

8. On Thursday 10 December 1987, Dr. Maurel, the senior Army doctor sent from Paris, reported to the Minister of Defence that his examination indicated the need to examine Major Mafart in a highly specialized environment; his state of health required urgent repatriation to a metropolitan hospital. In the absence of formal advice to the contrary from the Minister, he proposed that the evacuation should be made by the aircraft leaving on Sunday 13 December. On Friday 11 December the Minister of Defence advised his colleague the Minister of Foreign Affairs of these events and the planned removal and asked that the latter “prendre l’attache” of the New Zealand Government within the framework of the procedure included in the 1986 agreement. It was only at this very late stage, at about 7 p.m. on that Friday (Paris time), that steps were taken to seek New Zealand’s consent to the removal. By the time the request was presented to the New Zealand authorities in Wellington between 10 and 11 a.m. on the Saturday morning (Wellington time) a further 3 or 4 hours had passed and the aircraft was due to depart from Hao less than 2 days later.

9. Only 4 hours after receiving the French request, that is between 2 and 3 p.m. on the afternoon of Saturday 12 December, the New Zealand Government responded. It stated that a New Zealand medical assessment had to be made and it proposed that a New Zealand military doctor fly on a New Zealand military aircraft to Hao for that purpose. Later on the Saturday it sought clearances for that flight and it provided the relevant flight information. After the 8-hour flight from Auckland the plane would have been in Hao less than 30 hours after the initial request and fully 12 hours before the proposed departure of the flight from Hao.

10. It was about 16 hours later, on the Sunday morning (Wellington time), that France rejected New Zealand’s proposal—at about the time that the New Zealand aircraft would have left. New Zealand made further proposals in the course of that day, the exact content of which is disputed. Whatever their precise detail, the French authorities at no stage sought clarification (for instance of their surprising understanding of one proposal that the doctor would have to return to New Zealand to make his report). Nor did they make any counter-proposals to enable a timely medical assessment to be made by New Zealand as a basis for the decision whether to consent or not to the departure. Indeed, France’s first written communication since its request made on the Saturday morning was the note delivered in Wellington on the Monday announcing that “in this case of force majeure” the French authorities were forced to act without delay, and that Major Mafart “will leave Hao” on Sunday at 2 a.m. (Hao time). The aircraft had presumably already left when the note was delivered.

11. The long delay of about 7 days between the initial request from Hao and the arrival in Paris and the long arduous flight from Hao to Paris of about 20 hours both indicate that this was not a situation of extreme distress. France did not face an immediate medical emergency. It was not a case comparable to the hypothetical shark attack requiring urgent action and treatment (para. 5 above).

12. New Zealand was obliged to consider in good faith any request for consent made by France. It could not however perform that duty without adequate information and time. No one questions the propriety of its request to undertake a medical assessment—and indeed that was facilitated by the French authorities so far as an assessment in Paris was concerned. But the French authorities did not provide to New Zealand an appropriate opportunity to perform the duty and to make a decision before the proposed departure. So there is no indication in the record of
— why France failed to propose alternative arrangements for a New Zealand medical assessment in Hao or Papeete
— why France could not have delayed the flight from Hao for a short time to facilitate the visit
— why France could not have provided fuller medical information earlier—on a basis of confidence, of course.

13. France, in my view, has not established the need to act in apparent breach of its treaty obligations in the way and especially in the time that it allowed. There was no sufficient urgency. The case was not one of extreme distress threatening Major Mafart’s physical integrity. France was in a position to facilitate a proper medical assessment by New Zealand in the performance by New Zealand of its good faith obligations under the agreement. It did not meet its obligations in that respect.

14. In the result, this difference within the Tribunal is of limited consequence since we all agree that France was as from 12 February 1988 in breach of its obligation to order the return of Major Mafart to Hao. Moreover, as indicated, I think it highly likely that a properly supported and presented request for consent would have been accorded to—on terms, of course.

Duration of the obligations

15. As the Award says, the parties are in sharp disagreement about the duration of the obligations, undertaken by France, in respect of the stay by the two agents on the island of Hao. In France’s view, the obligations came to an end on 22 July 1989, the third anniversary of the transfer of the two agents to the island. That is so even if their removal from the island and their remaining in metropolitan France were unlawful. According to New Zealand, the agents were to spend a total period of 3 years (at least) on the island—whether the period was continuous or, exceptionally, aggregated from shorter, separate stays.

16. The majority of the Tribunal agrees with the French position. The consequence of the expiry of the obligations in July 1989 is that there can now be no order for the return of the agents to the island. I agree that that is the consequence of that date of expiry. As the Tribunal indicates in para. 114 of the Award, that is a sufficient and compelling reason for refusing to make the order for the return of the agents. Accordingly, I do not find it necessary to come to a conclusion on the issues discussed in para. 113—the characterization of the request either as restituto or as cessation, and the differences between them. Could I simply say that I am not sure, for instance, about the validity of the distinction in theory or in practice. It is notable that the International Court in deciding that the respondent States must take positive steps or refrain from unlawful actions in the Teheran and Nicaraguan cases did not attach such labels (nor did the applicant states in their formal requests). I now turn to my disagreement with the majority’s interpretation of the duration of the obligations.

17. We must of course begin with the 1986 agreement. Under its terms the agents will be transferred to a French military facility on the island of Hao for a period of not less than three years. seront transférés sur une installation militaire française de l’île de Hao, pour une période minimale de 3 ans. (emphasis added)

The agents were prohibited from leaving the island for any reason, except with the mutual consent of the two Governments.

18. The Vienna Convention on the Law of Treaties, the parties agree, provides an authoritative statement of the principles of interpretation of treaties. Article 31(1) reads

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in context and in the light of its object and purpose.

What is the ordinary meaning of the relevant terms? What does the context indicate? And the object and purpose of the agreement? Those questions involve, in the words of Max Huber, a process of encerclement progressif.

19. I begin with the terms of the agreement. The transfer to the island and the prohibition on departure involve of course an obligation to stay on the island. During that assignment on the island various additional obligations were imposed to ensure the agents’ isolation. To return to the critical phrase, these various obligations relating to the stay on the island were for, pour a period of not less than 3 years. The agreement does not say that the agents were to be on the island only during a 3-year period, and as a result for a shorter period in total than 3 years. Counsel for France put the matter very clearly: one of France’s obligations under paragraph 3 of the agreement was to transfer and to maintain the two officers on Hao for 3 years ("l’obligation de transférer et de maintenir pendant trois ans les deux officiers sur l’île de Hao").

20. While the words “at least” “minimale” may not make any difference to the ordinary meaning, they certainly give that meaning greater emphasis. That emphasis underlines the importance of this element of the ruling and of the settlement. Moreover, those words, included in the agreement, are an addition to the ruling of the Secretary-General. They are indeed the only such change from the ruling. That one change must have at least that emphatic significance.

21. The immediate context provided by other parts of the agreement supports that ordinary meaning of its terms. The agreement places a specific terminal time limit on the obligations imposed on France of apology, and payment, and on the two Governments of transfer. But by contrast it gives no express date for the completion of the obligations relating to being on the island. It is, of course, a date which can be easily calculated since the relevant facts are readily known—either a continuous period of 3 years from the date of transfer, had the two stayed on Hao continuously, or an aggregated period of 3 years if, exceptionally, there was a break in the stay.

22. The wider context of the agreement includes, as well, the character of the regime imposed by it. That character is seen in part in its
origins as found in the ruling of the Secretary-General. He was obliged to make a ruling which was equitable and principled (il sera équitable et conforme aux principes pertinents applicables). The parties made frequent references to that ruling in support of their understanding of the meaning of the agreement.

23. At the time of the ruling, agreement, and transfer, the two agents had served less than a year of a 10-year prison term imposed by the Chief Justice of New Zealand following due process of law and pleas of guilty to very serious crimes known to all legal systems. They did not appeal against the sentences, as they were entitled to. They were not eligible to be released on parole until they had served at least 5 years. The French position was that the agents should be immediately released (la libération immédiate); that was, said France, implied by an equitable and principled approach; the agents had acted under orders; and France was willing to apologize and pay compensation to New Zealand (as well as to the private individuals who had suffered from the attack). It was essential to the New Zealand position that there should be no release to freedom, that any transfer should be to custody, and that there should be a means of verifying that. New Zealand could not countenance the release to freedom after a token sentence of persons convicted of serious crimes.

24. As the Governments agree, and the ruling and later agreement indicate, the Secretary-General could not and did not fully adopt the position of either of them—either in respect of the character or the period of the stay on the isolated island.

25. The character of the regime was special. It was neither the New Zealand penal system nor French military service. Rather it was an assignment to an isolated military installation, subject to significant limits on the freedom of the two agents, and especially on their freedom of movement from the island. It is indeed the substantial restrictions on movement which France invokes for its view that it would be impossible or excessively onerous for an order for return to be made, even if it was otherwise appropriate to make it. The weight of the restrictions is briefly reflected in the only comment made by either of the agents about the regime and available to the Tribunal. Captain Prieur told Mr. Adriaan Bos during his inspection visit to Hao on 28 March 1988 that she felt isolated (très isolée) on Hao and was not looking forward (elle appréhén- dait) to the remainder of her stay which was then due to continue until July 1989. This was so notwithstanding that her husband was living with her on the base and that, as she recalled, she had had visits from her mother and parents-in-law.

26. The period of that regime—the stay on the isolated island was to be lengthy, shorter than both the 10 years imposed by the High Court and the 5-year minimum parole period. The period of real constraint on freedom was still going to be significant—a 3-year period in addition to the year that had already been spent in custody in New Zealand before and after conviction. It was not going to be a release to freedom. And yet that is what in real terms the French interpretation of the period could involve since, following a short stay on Hao and an unlawful departure,
I have sought information on French military facilities outside Europe. On the basis of that information I believe that the transfer of Major Mafart and Captain Prieur to the French military facility on the isolated island of Hao in French Polynesia would best facilitate the enforcement of the conditions which I have laid down in [the four] paragraphs . . . (emphasis added).

In the Secretary-General’s mind, the obligations were integrally tied to the isolated island. The conditions were to be met there. That also appears from the provision for a visit by an agreed third party to the island—to determine of course whether the agreement is being complied with there.

32. It is true that France, in response to New Zealand’s proposal, undertook to apply the conditions relating to the isolation of Major Mafart when he was in Paris. But that undertaking was a special one to deal only with the period during which Major Mafart was in Paris—France in giving it stated that Major Mafart would return to Hao when his health allowed. And it included the conditions which expressly applied only on the island. That it was a special additional undertaking peculiar to the circumstances appears as well from the lack of any such arrangement between the two governments for Captain Prieur.

33. The second reason for rejecting the argument based on the “heaviness” of the obligations proceeds on the basis—which I reject—that the obligations are capable of directly applying in metropolitan France. The reason for rejection is that those obligations of isolation which are additional to those arising from geography are in fact slight and are much lighter than the obligations of being on the island—obligations which at relevant times were being unlawfully evaded according to the ruling of the Tribunal. The lightness of the obligations, especially those concerning the press, is evidenced by a valuable note, Les règles de la discipline militaire, provided to the Tribunal by the Agent of France. The 1972 law on the statut général des militaires places restrictions on the members of the armed forces compared with other citizens. The exceptions concern
   —the expression of philosophical, religious and political beliefs in the context of the service;
   —the obligation of discretion (réservé) in all circumstances;
   —the requirements of military secrets.

34. It was of course by reference to such law that the obligations under the 1986 agreement were to be enforced. In the light of those obligations and of the general position of senior military officers, the statement by the French Agent that Colonel Mafart since July 1989 “still leads a life of total discretion” comes as no surprise at all. The French argument gives quite disproportionate weight to the obligations additional to those arising directly from being on Hao (assuming, that is, that the obligations were capable of direct application off the island) as well as from the officers’ military status.

35. France also argues that the New Zealand position produces a result which is “manifestly absurd or unreasonable” (using the words of article 32 of the Vienna Convention on the Law of Treaties—that provision of course not being directly applicable here since France does not use it to invoke supplementary interpretative material which assists its view). That absurdity or unreasonableness, for France, consists of the prolongation of the obligation of being on Hao beyond 3 years. But in the normal case the obligation would not so extend; if it did so extend, it would be for special reasons based on the consent of the two Governments or on force majeure or distress. It would be exceptional, and the prolongation would in any event accord with the ordinary meaning of the provisions in context and in the light of their purpose of imposing a real and not merely a token restraint on the liberty of the two officers.

36. France next argues that a tempus continuitatis is inherent in a contractual obligation of a given time period and that the same holds true for an international treaty obligation. The one case which it cites, Alising Trading Company Ltd v. Greece (1954) 23 Int. L. Reps 633, it is true, involved a contract for a period of 28 years, but the contract expressly stated both its beginning and its expiry dates; accordingly it is of no general assistance in the present case. Moreover, general words have to be given meaning in their particular contexts and by reference to their purpose. And the law, including treaty practice, knows many periods of residence which can each be made up of shorter periods where appropriate to the context and purpose—consider treaties and legislation relating to taxation, benefits, citizenship, and electoral rights.

37. The Tribunal perhaps suggests a further argument for the view that the obligations ended in July 1989 in its statement that “the principles of treaty interpretation” are opposed to a more extensive construction of special undertakings (para. 104). I have of course invoked “the general rule of interpretation” stated in the Vienna Convention. The International Law Commission in elaborating that general rule did not incorporate any “principles”. So it thought that it was not necessary to include in the general rule a separate statement of the principle of effective interpretation. It recalled that the International Court had insisted that there are definite limits to the use which may be made of that principle. Rather the Commission, like the Court, emphasized the ordinary meaning of the words in their context and in the light of the agreement’s purpose (para. 6 of the commentary to draft articles 27 and 28, H.C. Yearbook 1966, Vol. II, p. 219).

38. I have already indicated that those matters lead me to the conclusion that the agreement placed on France an obligation to ensure that the two agents spend three years on Hao.

Kenneth Keith
International Court of Justice

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

I.C.J. Reports 2004
CONSEQUENCES JURIDIQUES
DE L'ÉDIFICATION D'UN MUR
DANS LE TERRITOIRE PALESTINIEN OCCUPÉ

AVIS CONSULTATIF DU 9 JUILLET 2004

2004

INTERANTIONAL 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
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Jurisdiction of the Court to give the advisory opinion requested.
Article 65, paragraph 1, of the Statute — Article 96, paragraph 1, of the
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* *

"Legal consequences" of the construction of a wall in the Occupied Palestinian Territory, including in and around East Jerusalem — Scope of question posed — Request for opinion limited to the legal consequences of the construction of those parts of the wall situated in Occupied Palestinian Territory — Use of the term "wall".
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* *

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* *

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State of necessity — Customary international law — Conditions — Construction of the wall not the only means to safeguard Israel's interests against the peril invoked.

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

* * *

Legal consequences of the violation by Israel of its obligations.

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

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

* * *

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

ADVISORY OPINION

Present: President SHI; Vice-President RANJEVA; Judges GUILLAUME, KOROMA, VERESICHETIN, HIGGINS, PARRA-ARANGUREN, KOULMANS, REZIK, AL-KHASSAWNEH, 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,

Reaffirming the applicability of the Fourth Geneva Convention1 as well as Additional Protocol I to the Geneva Conventions2 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 19073, 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 underlining 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, in particular the section regarding the wall. 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, 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 aforementioned 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?2 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. Mdluli, 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;
Mr. Jean-Marc Sorel, Professor at the University of Paris I (Panthéon-Sorbonne);

for Belize:
H.E. Mr. Abelardo Moreno Fernández, Deputy Minister for Foreign Affairs;

for the Republic of Cuba:
H.E. Mr. Mohammad Jusuf, Ambassador of the Republic of Indonesia to the Kingdom of the Netherlands, Head of Delegation;

for the Republic of Indonesia:
Sir Arthur Watts, K.C.M.G., Q.C., Senior Legal
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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 Cisse, Ambassador of the Republic of Senegal to the Kingdom of the Netherlands, Head of Delegation;

for the Republic of the Sudan:
H.E. Mr. Abuelgasim A. Idris, Ambassador of the Republic of the Sudan to the Kingdom of the Netherlands;

for the League of Arab States:
Mr. Michael Bothe, Professor of Law, Head of the Legal Team;

for the Organization of the Islamic Conference:
H.E. Mr. Abdelouahed Belkeziz, Secretary General of the Organization of the Islamic Conference, Ms Monique Chemillier-Gendreau, Professor of Public Law, University of Paris VII-Denis Diderot, as Counsel.

* * *

13. When seised of a request for an advisory opinion, the Court must first consider whether it has jurisdiction to give the opinion requested and whether, should the answer be in the affirmative, there is any reason why 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 (1), p. 232, para. 10).

* * *

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 (1), pp. 232 and 233, paras. 11 and 12).

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

* * *

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

19. The Tenth Emergency Special Session of the General Assembly, at which that resolution was adopted, was first convened following the rejection by the Security Council, on 7 March and 21 March 1997, as a result of negative votes by a permanent member, of two draft resolutions concerning certain Israeli settlements in the Occupied Palestinian Territory (see, respectively, S/1997/199 and S/PV.3747, and S/1997/241 and S/PV.3756). By a letter of 31 March 1997, the Chairman of the Arab Group then requested "that an emergency special session of the General Assembly be convened pursuant to resolution 377 A (V) entitled "Uniting
for Peace’ ” with a view to discussing “Illegal Israeli actions in occupied East Jerusalem and the rest of the Occupied Palestinian Territory” (letter dated 31 March 1997 from the Permanent Representative of Qatar to the United Nations addressed to the Secretary-General, A/ES-10/1, 22 April 1997, Annex). The majority of Members of the United Nations having concurred in this request, the first meeting of the Tenth Emergency Special Session of the General Assembly took place on 24 April 1997 (see A/ES-10/1, 22 April 1997). Resolution ES-10/2 was adopted the following day; the General Assembly thereby expressed its conviction that:

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


20. By a letter dated 9 October 2003, the Chairman of the Arab Group, on behalf of the States Members of the League of Arab States, requested 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).


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

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

23. Nineteen days later, on 8 December 2003, the Tenth Emergency Special Session of the General Assembly again resumed its work, following a new request by the Chairman of the Arab Group, on behalf of the States Members of the League of Arab States, and pursuant to resolution ES-10/13 (letter dated 1 December 2003 to the President of the General Assembly from the Chargé d’affaires a.i. of the Permanent Mission
of Kuwait to the United Nations, A/ES-10/249, 2 December 2003). It was during the meeting convened on that day that resolution ES-10/14 requesting the present advisory opinion was adopted.

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

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

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

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

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

‘‘[T]he only limitation which Article 14 imposes on the General Council is the restriction found in Article 12, namely, that the Assembly should not recommend measures while the Security Council is dealing with the same matter unless the Council requests it to do so.” (I.C.J. Reports 1962, p. 163.)

27. As regards the practice of the United Nations, both the General Assembly and the Security Council initially interpreted and applied Article 12 to the effect that the Assembly could not make a recommendation on a question concerning the maintenance of international peace and security while the matter remained on the Council’s agenda. Thus the Assembly during its fourth session refused to recommend certain measures on the question of Indonesia, on the ground, inter alia, that the Council remained seised of the matter (Official Records of the General Assembly, Fourth Session, Ad Hoc Political Committee, Summary Records of Meetings, 27 September-7 December 1949, 56th Meeting, 3 December 1949, p. 339, para. 118). As for the Council, on a number of occasions it deleted items from its agenda in order to enable the Assembly to deliberate on them (for example, in respect of the Spanish question (Official Records of the Security Council, First Year: Second Series, No. 21, 79th Meeting, 4 November 1946, p. 498), in connection with incidents on the Greek border (Official Records of the Security Council, Second Year, No. 89, 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 seised in order to enable the Assembly to deliberate on the matter (Official Records of the Security Council, Sixth Year, S/PV.531, 531st Meeting, 31 January 1951, pp. 11-12, para. 57).

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

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

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

29. It has however been contended before the Court that the present request for an advisory opinion did not fulfil the essential conditions set by resolution 377 A (V), under which the Tenth Emergency Special Session was convened and has continued to act. In this regard, it has been said, first, that “The Security Council was never seised of a draft resolution proposing that the Council itself should request an advisory opinion from the Court on the matters now in contention”, and, that specific issue having thus never been brought before the Council, the General Assembly could not rely on any inaction by the Council to make such a request. Secondly, it has been claimed that, in adopting resolution 1515 (2003), which endorsed the “Roadmap”, before the adoption by the General Assembly of resolution ES-10/14, the Security Council continued to exercise its responsibility for the maintenance of international peace and security and that, as a result, the General Assembly was not entitled to act in its place. The validity of the procedure followed by the Tenth Emergency Special Session, especially the Session’s “rolling character” and the fact that its meeting was convened to deliberate on the request for the advisory opinion at the same time as the General Assembly 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 situation is one in which there appears to be a threat to the peace, breach of the peace, or act of aggression. The Court must accordingly ascertain whether these conditions were fulfilled as regards the convening of the Tenth Emergency Special Session of the General Assembly, in particular at the time when the Assembly decided to request an advisory opinion from the Court.

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

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

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

33. Turning now to alleged further procedural irregularities of the Tenth Emergency Special Session, the Court does not consider that the “rolling” character of that Session, namely the fact of its having been convened in April 1997 and reconvened 11 times since then, has any relevance with regard to the validity of the request by the General Assembly. The Court observes in that regard that the Seventh Emergency Special Session of the General Assembly, having been convened on 22 July 1980, was subsequently reconvened four times (on 20 April 1982, 25 June 1982, 16 August 1982 and 24 September 1982), and that the validity of
resolutions or decisions of the Assembly adopted under such circumstances was never disputed. Nor has the validity of any previous resolutions adopted during the Tenth Emergency Special Session been challenged.

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 (1973), a

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

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

36. The Court now turns to a further issue related to jurisdiction in the present proceedings, namely the contention that the request for an advisory opinion by the General Assembly is not on a “legal question” within the meaning of Article 96, paragraph 1, of the Charter and Article 65, paragraph 1, of the Statute of the Court. It has been contended in this regard that, for a question to constitute a “legal question” for the purposes of these two provisions, it must be reasonably specific, since otherwise it would not be amenable to a response by the Court. With regard to the request made in the present advisory proceedings, i: 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 (1), pp. 14-16), or did not correspond to the “true legal question” under consideration (Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980, pp. 87-89, paras. 34-36). The Court noted in one case that “the question put to the Court is, on the face of it, at once infectiously expressed and vague” (Application for Review of Judgement 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 (1), p. 234, para. 13).

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

40. The Court does not consider that what is contended to be the abstract nature of the question posed to it raises an issue of jurisdiction. Even when the matter was raised as an issue of propriety rather than one of jurisdiction, in the case concerning the Legality of the Threat or Use of Nuclear Weapons, the Court took the position that to contend that it should not deal with a question couched in abstract terms is “a mere affirmation devoid of any justification” and that “the Court may give an advisory opinion on any legal question, abstract or otherwise” (I.C.J. Reports 1996 (1), p. 236, para. 15, referring to Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948, I.C.J. Reports 1947-1948, p. 61; Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1954, p. 51; and Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 27, para. 40). In any event, the Court considers that the question posed to it in relation to the legal consequences of the construction of the wall is not an abstract one, and moreover that it would be for the Court to determine for whom any such consequences arise.

41. Furthermore, the Court cannot accept the view, which has also been advanced in the present proceedings, that it has no jurisdiction because of the “political” character of the question posed. As is clear from its long-standing jurisprudence on this point, the Court considers that the fact that a legal question also has political aspects, “as, in the nature of things, is the case with so many questions which arise in international life, does not suffice to deprive it of its character as a ‘legal question’ and to deprive the Court of a competence expressly conferred on it by its Statute” (Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973, p. 172, para. 14). Whatever its political aspects, the Court cannot refuse to admit the legal character of a question which invites it to discharge an essentially judicial task, namely, an assessment of the legality of the possible conduct of States with regard to the obligations imposed upon them by international law (cf. Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948, I.C.J. Reports 1947-1948, pp. 61-62; Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950, pp. 6-7; Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962, p. 155).” (Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (1), p. 234, para. 13).

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

Moreover, the Court has affirmed in its Opinion on the Legality of the Threat or Use of Nuclear Weapons that “the political nature of the motives which may be said to have inspired the request and the political implications that the opinion given might have are of no relevance in the establishment of its jurisdiction to give such an opinion” (I.C.J. Reports 1996 (1), p. 234, para. 13).
The Court is of the view that there is no element in the present proceedings which could lead it to conclude otherwise.

* * *

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

* * *

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

44. The Court has recalled many times in the past that Article 65, paragraph 1, of its Statute, which provides that “The Court may give an advisory opinion . . .” (emphasis added), should be interpreted to mean that the Court has a discretionary power to decline to give an advisory opinion even if the conditions of jurisdiction are met (Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (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 jurisdiction, 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 seised of a request for an opinion, as to the propriety of the exercise of its judicial function, by reference to the criterion of “compelling reasons” as cited above. The Court will accordingly examine in detail and in the light of its jurisdiction each of the arguments presented to it in this regard.

* *

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

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

“The consent of States, parties to a dispute, is the basis of the Court’s jurisdiction in contentious cases. The situation is different in regard to advisory proceedings even where the Request for an Opinion relates to a legal question actually pending between States. The Court’s reply is only of an advisory character: as such, it has no binding force. It follows that no State, whether a Member of the
United Nations or not, can prevent the giving of an Advisory Opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take. The Court’s Opinion is given not to the States, but to the organ which is entitled to request it; the reply of the Court, itself an ‘organ of the United Nations’, represents its participation in the activities of the Organization, and, in principle, should not be refused.” (Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950, p. 71; see also Western Sahara, I.C.J. Reports 1975, p. 24, para. 31.)

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

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

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

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

49. Furthermore, the Court does not consider that the subject-matter of the General Assembly’s request can be regarded as only a bilateral matter between Israel and Palestine. Given the powers and responsibilities of the United Nations in questions relating to international peace and security, it is the Court’s view that the construction of the wall must be deemed to be directly of concern to the United Nations. The responsibility of the United Nations in this matter also has its origin in the Mandate and the Partition Resolution concerning Palestine (see paragraphs 70 and 71 below). This responsibility has been described by the General Assembly as “a permanent responsibility towards the question of Palestine until the question is resolved in all its aspects in a satisfactory manner in accordance with international legitimacy” (General Assembly resolution 57/107 of 3 December 2002). Within the institutional framework of the Organization, this responsibility has been manifested by the adoption of many Security Council and General Assembly resolutions, and by the creation of several subsidiary bodies specifically established to assist in the realization of the inalienable rights of the Palestinian people.

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

* *

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

This is a submission of a kind which the Court has already had to consider several times in the past. For instance, in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, the Court stated:
“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 that “two key aspects of the peace process: the fundamental principle that permanent status issues must be resolved through negotiations; and the need during the interim period for the parties to fulfill their security responsibilities so that the peace process can succeed”.

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

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

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55. Several participants in the present 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.

* *

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

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

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

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

"Certain States have observed that the General Assembly has not explained to the Court for what precise purposes it seeks the advisory opinion. Nevertheless, it is not for the Court itself to purport to decide whether or not an advisory opinion is needed by the Assembly for the performance of its functions. The General Assembly has the right to decide for itself on the usefulness of an opinion in the light of its own needs." (I.C.J. Reports 1996 (1), p. 237, para. 16.)

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

* *

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

* * *

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

* * *

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

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

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

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

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

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

* * *

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

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

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

The territorial boundaries of the Mandate for Palestine were laid down by various instruments, in particular on the eastern border by a British memorandum of 16 September 1922 and an Anglo-Jordanian 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 Israeli armed forces from territories occupied in the recent conflict”, and “Termination of all claims or states of belligerency”.

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

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

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

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

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

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

The territories situated between the Green Line (see paragraph 72 above) and the former eastern boundary of Palestine under the Mandate were occupied by Israel in 1967 during the armed conflict between Israel and Jordan. Under customary international law, these were therefore occupied territories in which Israel had the status of occupying Power. Subsequent events in these territories, as described in paragraphs 75 to 77 above, have done nothing to alter this situation. All these territories (including East Jerusalem) remain occupied territories and Israel has continued to have the status of occupying Power.
79. It is essentially in these territories that Israel has constructed or plans to construct the works described in the report of the Secretary-General. The Court will now describe those works, basing itself on that report. For developments subsequent to the publication of that report, the Court will refer to complementary information contained in the Written Statement of the United Nations, which was intended by the Secretary-General to supplement his report (hereinafter “Written Statement of the Secretary-General”).

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

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

81. According to the Written Statement of the Secretary-General, the first part of these works (Phase A), which ultimately extends for a distance of 150 kilometres, was declared completed on 31 July 2003. It is reported that approximately 56,000 Palestinians would be encompassed in enclaves. During this phase, two sections totalling 19.5 kilometres were built around Jerusalem. In November 2003 construction of a new section was begun along the Green Line to the west of the Nazlat Issa-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-Mutila, 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
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part of the West Bank lying between the Green Line and the wall as a “Closed Area”. Residents of this area may no longer remain in it, nor may non-residents enter it, unless holding a permit or identity card issued by the Israeli authorities. According to the report of the Secretary-General, most residents have received permits for a limited period. Israeli citizens, Israeli permanent residents and those eligible to immigrate to Israel in accordance with the Law of Return may remain in, or move freely to, from and within the Closed Area without a permit. Access to and exit from the Closed Area can only be made through access gates, which are opened infrequently and for short periods.

*  *

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

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

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

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

88. The Court also notes that the principle of self-determination of peoples has been enshrined in the United Nations Charter and reaffirmed by the General Assembly in resolution 2625 (XXV) cited above, pursuant
to which “Every State has the duty to refrain from any forcible action which deprives peoples referred to [in that resolution] . . . of their right to self-determination.” Article 1 common to the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights reaffirms the right of all peoples to self-determination, and lays upon the States parties the obligation to promote the realization of that right and to respect it, in conformity with the provisions of the United Nations Charter.

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

89. As regards international humanitarian law, the Court would first note that Israel is not a party to the Fourth Hague Convention of 1907, to which the Hague Regulations are annexed. The Court observes that, in the words of the Convention, those Regulations were prepared “to revise the general laws and customs of war” existing at that time. Since then, however, the International Military Tribunal of Nuremberg has found that the “rules laid down in the Convention were recognised by all civilised nations, and were regarded as being declaratory of the laws and customs of war” (Judgment of the International Military Tribunal of Nuremberg, 30 September and 1 October 1946, p. 65). The Court itself reached the same conclusion when examining the rights and duties of belligerents in their conduct of military operations (Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (1), p. 256, para. 75). The Court considers that the provisions of the Hague Regulations have become part of customary law, as is in fact recognized by all the participants in the proceedings before the Court.

The Court also observes that, pursuant to Article 154 of the Fourth Geneva Convention, that Convention is supplementary to Sections II and III of the Hague Regulations. Section III of those Regulations, which concerns “Military authority over the territory of the hostile State”, is particularly pertinent in the present case.

90. Secondly, with regard to the Fourth Geneva Convention, differing views have been expressed by the participants in these proceedings. Israel, contrary to the great majority of the other participants, disputes the applicability de jure of the Convention to the Occupied Palestinian Territory. In particular, in paragraph 3 of Annex 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 “[w]as 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 satisfied, the Convention applies, in particular, in any territory occupied in the course of the conflict by one of the contracting parties.

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

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

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

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

97. Moreover, the Court would observe that the ICRC, whose special position with respect to execution of the Fourth Geneva Convention must be “recognized and respected at all times” by the parties pursuant
to Article 142 of the Convention, has also expressed its opinion on the interpretation to be given to the Convention. In a declaration of 5 December 2001, it recalled that “the ICRC has always affirmed the de jure applicability of the Fourth Geneva Convention to the territories occupied since 1967 by the State of Israel, including East Jerusalem”.

98. The Court notes that the General Assembly has, in many of its resolutions, taken a position to the same effect. Thus on 10 December 2001 and 9 December 2003, in resolutions 56/60 and 58/97, it reaffirmed “that the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, is applicable to the Occupied Palestinian Territory, including East Jerusalem, and other Arab territories occupied by Israel since 1967”.

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

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

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


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

“The military operations of the [Israeli Defence Forces] in Rafah, to the extent they affect civilians, are governed by Hague Convention IV Respecting the Laws and Customs of War on Land 1907 . . . and the Geneva Convention relative to the Protection of Civilian Persons in Time of War 1949.”

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

* *

102. The participants in the proceedings before the Court also disagree whether the international human rights conventions to which Israel is party apply within the Occupied Palestinian Territory. Annex I to the report of the Secretary-General states:

“4. Israel denies that the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both of which it has signed, are applicable to the occupied Palestinian territory. It asserts that humanitarian law is the protection granted in a conflict situation such as the one in the West Bank and Gaza Strip, whereas human rights treaties were intended for the protection of citizens from their own Government in times of peace.”

Of the other participants in the proceedings, those who addressed this issue contend that, on the contrary, both Covenants are applicable within the Occupied Palestinian Territory.


104. In order to determine whether these texts are applicable in the Occupied Palestinian Territory, the Court will first address the issue of the relationship between international humanitarian law and human rights law and then that of the applicability of human rights instruments outside national territory.

105. In its Advisory Opinion of 8 July 1996 on the Legality of the Threat or Use of Nuclear Weapons, the Court had occasion to address the first of these issues in relation to the International Covenant on Civil
and Political Rights. In those proceedings certain States had argued that “the Covenant was directed to the protection of human rights in peacetime, but that questions relating to unlawful loss of life in hostilities were governed by the law applicable in armed conflict” (I.C.J. Reports 1996 (I), p. 239, para. 24).

The Court rejected this argument, stating that:

“the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one’s life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable lex specialis, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.” (Ibid., p. 240, para. 25.)

106. More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as lex specialis, international humanitarian law.

107. It remains to be determined whether the two international Covenants and the Convention on the Rights of the Child are applicable only on the territories of the States parties thereto or whether they are also applicable outside those territories and, if so, in what circumstances.

108. The scope of application of the International Covenant on Civil and Political Rights is defined by Article 2, paragraph 1, thereof, which provides:

“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

This provision can be interpreted as covering only individuals who are both present within a State’s territory and subject to that State’s jurisdiction. It can also be construed as covering both individuals present within a State’s territory and those outside that territory but subject to that State’s jurisdiction. The Court will thus seek to determine the meaning to be given to this text.

109. The Court would observe that, while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions.

The constant practice of the Human Rights Committee is consistent with this. Thus, the Committee has found the Covenant applicable where the State exercises its jurisdiction on foreign territory. It has ruled on the legality of acts by Uruguay in cases of arrests carried out by Uruguayan agents in Brazil or Argentina (case No. 5279, López Burgos v. Uruguay; case No. 5679, Lilian Celiberti de Casariego v. Uruguay). It decided to the same effect in the case of the confiscation of 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/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/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
ambiuous 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 own territory and jurisdiction” (a formula inspired by the language of the International Covenant on Civil and Political Rights). This position, continued Israel, is “based on the well-established distinction between human rights and humanitarian law under international law”. It added: “the Committee’s mandate cannot relate to events in the West Bank and the Gaza Strip, inasmuch as they are part and parcel of the context of armed conflict as distinct from a relationship of human rights” (E/1990/6/Add.32, para. 5). In view of these observations, the Committee reiterated its concern about Israel’s position and reaffirmed “its view that the State party’s obligations under the Covenant apply to all territories and populations under its effective control” (E/C.12/1/Add.90, paras. 15 and 31).

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

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

* * *

114. Having determined the rules and principles of international law relevant to reply to the question posed by the General Assembly, and having ruled in particular on the applicability within the Occupied Palestinian Territory of international humanitarian law and human rights law, the Court will now seek to ascertain whether the construction of the wall has violated those rules and principles.

* *

115. In this regard, Annex II to the report of the Secretary-General, entitled “Summary Legal Position of the Palestine Liberation Organization”, states that “The construction of the Barrier is an attempt to annex the territory contrary to international law” and that “The de facto annexation of land interferes with the territorial sovereignty and consequently with the right of the Palestinians to self-determination.” This view was echoed in certain of the written statements submitted to the Court and in the views expressed at the hearings. Inter alia, it was contended that:

“the wall severs the territorial sphere over which the Palestinian people are entitled to exercise their right of self-determination and constitutes a violation of the legal principle prohibiting the acquisition of territory by the use of force.”

In this connection, it was in particular emphasized that “[t]he route of the wall is designed to change the demographic composition of the Occupied Palestinian Territory, including East Jerusalem, by reinforcing the Israeli
settlements” illegally established on the Occupied Palestinian Territory. It was further contended that the wall aimed at “reducing and parceling 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 “[the 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.22, 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 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 regime 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 illega 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.

* * *

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, or 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 “tinly 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).


* *

132. From the information submitted to the Court, particularly the report of the Secretary-General, it appears that the construction of the wall has led to the destruction or requisition of properties under conditions which contravene the requirements of Articles 46 and 52 of the Hague Regulations of 1907 and of Article 53 of the Fourth Geneva Convention.

133. That construction, the establishment of a closed area between the Green Line and the wall itself and the creation of enclaves have moreover imposed substantial restrictions on the freedom of movement of the inhabitants of the Occupied Palestinian Territory (with the exception of
Israeli citizens and those assimilated thereto). Such restrictions are most marked in urban areas, such as the Qalqiliya enclave or the City of Jerusalem and its suburbs. They are aggravated by the fact that the access gates are few in number in certain sectors and opening hours appear to be restricted and unpredictably applied. For example, according to the Special Rapporteur of the Commission on Human Rights, John Dugard, on the situation of human rights in the Palestinian territories occupied by Israel since 1967, “Qalqiliya, a city with a population of 40,000, is completely surrounded by the Wall and residents can only enter and leave through a single military checkpoint open from 7 a.m. to 7 p.m.” (Report of the Special Rapporteur of the Commission on Human Rights, John Dugard, on the situation of human rights in the Palestinian territories occupied by Israel since 1967, submitted in accordance with Commission resolution 1993/2 A and entitled “Question of the Violation of Human Rights in the Occupied Arab Territories, including Palestine”, E/CN.4/2004/6, 8 September 2003, para. 9.)

There have also been serious repercussions for agricultural production, as is attested by a number of sources. According to the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories

“an estimated 100,000 dunums [approximately 10,000 hectares] of the West Bank’s most fertile agricultural land, confiscated by the Israeli Occupation Forces, have been destroyed during the first phase of the wall construction, which involves the disappearance of vast amounts of property, notably private agricultural land and olive trees, wells, citrus groves and hothouses upon which tens of thousands of Palestinians rely for their survival” (Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories, A/58/311, 22 August 2003, para. 26).

Further, the Special Rapporteur on the situation of human rights in the Palestinian territories occupied by Israel since 1967 states that “Much of the Palestinian land on the Israeli side of the Wall consists of fertile agricultural land and some of the 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 impedes 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 International Covenant on Civil and Political Rights. On the other hand, Article 12, paragraph 3, of that instrument provides that restrictions on liberty of movement as guaranteed under that Article “shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant”.

As for the International Covenant on Economic, Social and Cultural Rights, Article 4 thereof contains a general provision as follows:

“The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.”

The Court would observe that the restrictions provided for under Article 12, paragraph 3, of the International Covenant on Civil and Political Rights are, by the very terms of that provision, exceptions to the right of freedom of movement contained in paragraph 1. In addition, it is not sufficient that such restrictions be directed to the ends authorized; they must also be necessary for the attainment of those ends. As the Human Rights Committee put it, they “must conform to the principle of proportionality” and “must be the least intrusive instrument amongst those which might achieve the desired result” (CCPR/C/21/Rev.1/Add.9, General Comment No. 27, para. 14). On the basis of the information available to it, the Court finds that these conditions are not met in the present instance.

The Court would further observe that the restrictions on the enjoyment by the Palestinians living in the territory occupied by Israel of their economic, social and cultural rights, resulting from Israel’s construction of the wall, fail to meet a condition laid down by Article 4 of the International Covenant on Economic, Social and Cultural Rights, that is to say that their implementation must be “solely for the purpose of promoting the general welfare in a democratic society”.

137. To sum up, the Court, from the material available to it, is not convinced that the specific course Israel has chosen for the wall was necessary to attain its security objectives. The wall, along the route chosen, and its associated régime gravely infringe a number of rights of Palestinians residing in the territory occupied by Israel, and the infringements resulting from that route cannot be justified by military exigencies or by the requirements of national security or public order. The construction of such a wall accordingly constitutes breaches by Israel of various
of its obligations under the applicable international humanitarian law and human rights instruments.

*

138. The Court has thus concluded that the construction of the wall constitutes action not in conformity with various international legal obligations incumbent upon Israel. However, Annex I to the report of the Secretary-General states that, according to Israel: “the construction of the Barrier is consistent with Article 51 of the Charter of the United Nations, its inherent right to self-defence and Security Council resolutions 1368 (2001) and 1373 (2001)”\(^2\). 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 paragraphs 135 and 136 above). Since those treaties already address considerations of this kind within their own provisions, it might be asked whether a state of necessity as recognized in customary international law could be invoked with regard to those treaties as a ground for precluding the wrongfulness of the measures or decisions being challenged. However, the Court will not need to consider that question. As the Court observed in the case concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia), “the state of necessity is a ground recognized by customary international law” that “can only be accepted on an exceptional basis”; it “can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met” (I.C.J. Reports 1997, p. 40, para. 51). One of those conditions was stated by the Court in terms used by the International Law Commission, in a text which in its present form requires that the act being challenged be “the only way for the State to safeguard an essential interest against a grave and imminent peril” (Article 25 of the International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts; see also former Article 33 of the Draft Articles on the International Responsibility of States, with slightly different wording in the English text). In the light of the material before it, the Court is not convinced that the construction of the wall along the route chosen was the only means to safeguard the interests of Israel against the peril which it has invoked as justification for that construction.

141. The fact remains that Israel has to face numerous indiscriminate and deadly acts of violence against its civilian population. It has the right, and indeed the duty, to respond in order to protect the life of its citizens. The measures taken are bound nonetheless to remain in conformity with applicable international law.

142. In conclusion, the Court considers that Israel cannot rely on a right of self-defence or on a state of necessity in order to preclude the wrongfulness of the construction of the wall resulting from the considerations mentioned in paragraphs 122 and 137 above. The Court accordingly finds that the construction of the wall, and its associated régime, are contrary to international law.

* * *

143. The Court having concluded that, by the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, and by adopting its associated régime, Israel has violated various international obligations incumbent upon it (see paragraphs 114-137 above), it must now, in order to reply to the question posed by the General Assembly, examine the consequences of those violations.
144. In their written and oral observations, many participants in the proceedings before the Court contended that Israel’s action in illegally constructing this wall has legal consequences not only for Israel itself, but also for other States and for the United Nations; in its Written Statement, Israel, for its part, presented no arguments regarding the possible legal consequences of the construction of the wall.

145. As regards the legal consequences for Israel, it was contended that Israel has, first, a legal obligation to bring the illegal situation to an end by ceasing forthwith the construction of the wall in the Occupied Palestinian Territory, and to give appropriate assurances and guarantees of non-repetition.

It was argued that, second, Israel is under a legal obligation to make reparation for the damage arising from its unlawful conduct. It was submitted that such reparation should first of all take the form of restitution, namely demolition of those portions of the wall constructed in the Occupied Palestinian Territory and annulment of the legal acts associated with its construction and the restoration of property requisitioned or expropriated for that purpose; reparation should also include appropriate compensation for individuals whose homes or agricultural holdings have been destroyed.

It was further contended that Israel is under a continuing duty to comply with all of the international obligations violated by it as a result of the construction of the wall in the Occupied Palestinian Territory and of the associated régime. It was also argued that, under the terms of the Fourth Geneva Convention, Israel is under an obligation to search for and bring before its courts persons alleged to have committed, or to have ordered to be committed, grave breaches of international humanitarian law flowing from the planning, construction and use of the wall.

146. As regards the legal consequences for States other than Israel, it was contended before the Court that all States are under an obligation not to recognize the illegal situation arising from the construction of the wall, not to render aid or assistance in maintaining that situation and to co-operate with a view to putting an end to the alleged violations and to ensuring that reparation will be made therefor.

Certain participants in the proceedings further contended that the States parties to the Fourth Geneva Convention are obliged to take measures to ensure compliance with the Convention and that, inasmuch as the construction and maintenance of the wall in the Occupied Palestinian Territory constitutes grave breaches of that Convention, the States parties to that Convention are under an obligation to prosecute or extradite the authors of such breaches. It was further observed that

“the United Nations Security Council should consider flagrant and systematic violation of international law norm[s] and principles by Israel, particularly . . . international humanitarian law, and take all necessary measures to put an end [to] these violations”,

and that the Security Council and the General Assembly must take due account of the advisory opinion to be given by the Court.

* *

147. Since the Court has concluded that the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated régime, are contrary to various of Israel’s international obligations, it follows that the responsibility of that State is engaged under international law.

148. The Court will now examine the legal consequences resulting from the violations of international law by Israel by distinguishing between, on the one hand, those arising for Israel and, on the other, those arising for other States and, where appropriate, for the United Nations. The Court will begin by examining the legal consequences of those violations for Israel.

* *

149. The Court notes that Israel is first obliged to comply with the international obligations it has breached by the construction of the wall in the Occupied Palestinian Territory (see paragraphs 114-137 above). Consequently, Israel is bound to comply with its obligation to respect the right of the Palestinian people to self-determination and its obligations under international humanitarian law and international human rights law. Furthermore, it must ensure freedom of access to the Holy Places that came under its control following the 1967 War (see paragraph 129 above).

150. The Court observes that Israel also has an obligation to put an end to the violation of its international obligations flowing from the construction of the wall in the Occupied Palestinian Territory. The obligation of a State responsible for an internationally wrongful act to put an end to that act is well established in general international law, and the Court has on a number of occasions confirmed the existence of that obligation (Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 149; United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980, p. 44, para. 95; Haya de la Torre, Judgment, I.C.J. Reports 1951, p. 82).

151. Israel accordingly has the obligation to cease forthwith the works of construction of the wall being built by it in the Occupied Palestinian Territory, including in and around East Jerusalem. Moreover, in view of the Court’s finding (see paragraph 143 above) that Israel’s violations of
its international obligations stem from the construction of the wall and from its associated régime, cessation of those 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.

*
not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with.

159. Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end. In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.

160. Finally, the Court is of the view that the United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime, taking due account of the present Advisory Opinion.

* * *

161. The Court, being concerned to lend its support to the purposes and principles laid down in the United Nations Charter, in particular the maintenance of international peace and security and the peaceful settlement of disputes, would emphasize the urgent necessity for the United Nations as a whole to redouble its efforts to bring the Israeli-Palestinian conflict, which continues to pose a threat to international peace and security, to a speedy conclusion, thereby establishing a just and lasting peace in the region.

162. The Court has reached the conclusion that the construction of the wall by Israel in the Occupied Palestinian Territory is contrary to international law and has stated the legal consequences that are to be drawn from that illegality. The Court considers itself bound to add that this construction must be placed in a more general context. Since 1947, the year when General Assembly resolution 181 (II) was adopted and the Mandate for Palestine was terminated, there has been a succession of armed conflicts, acts of indiscriminate violence and repressive measures on the former mandated territory. The Court would emphasize that both Israel and Palestine are under an obligation scrupulously to observe the rules of international humanitarian law, one of the paramount purposes of which is to protect civilian life. Illegal actions and unilateral decisions have been taken on all sides, whereas, in the Court's view, this tragic situation can be brought to an end only through implementation in good faith of all relevant Security Council resolutions, in particular resolutions 242 (1967) and 338 (1973). The “Roadmap” approved by Security Council resolution 1515 (2003) represents the most recent efforts to initiate negotiations to this end. The Court considers that it has a duty to draw the attention of the General Assembly, to which the present Opinion is addressed, to the need for these efforts to be encouraged with a view to achieving as soon as possible, on the basis of international law, a negotiated solution to the outstanding problems and the establishment of a Palestinian State, existing side by side with Israel and its other neighbours, with peace and security for all in the region.

* * *

163. For these reasons,

THE COURT,
(1) Unanimously,

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

(2) By fourteen votes to one,

Decides to comply with the request for an advisory opinion;

IN FAVOUR: President Shi; Vice-President Ranjeva; Judges Gaillloume, 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 Gaillloume, 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
CONSTRUCTION OF A WALL (ADVISORY OPINION) 202

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, Vereshcheticin, 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, Vereshcheticin, 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, Vereshcheticin, 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, Vereshcheticin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka;
AGAINST: Judge Buergenthal.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this ninth day of July, two thousand and

four, in two copies, one of which will be placed in the archives of the Court and the other transmitted to the Secretary-General of the United Nations.

(Signed) Shi Jiuyong,
President.

(Signed) Philippe COUVREUR,
Registrar.

Judges Koroma, Higgins, Kooijmans and Al-Khasawneh append separate opinions to the Advisory Opinion of the Court; Judge Buergenthal appends a declaration to the Advisory Opinion of the Court; Judges Elaraby and Owada append separate opinions to the Advisory Opinion of the Court.

(Initialled) J.Y.S.
(Initialled) Ph.C.
Permanent Court of International Justice

Factory at Chorzów (claim for indemnity)
Merits, Judgment of 13 September 1928

P.C.I.J., Series A, No. 17
CASE CONCERNING THE FACTORY AT CHORZÓW
(CLAIM FOR INDEMNITY)
(MERITS)

The Government of Germany, represented by Dr. Erich Kaufmann, Professor at Berlin,
Applicant,

versus

The Government of the Polish Republic, represented by Dr. Thadens Sobolewski, Agent for the Polish Government before the Polish-German Mixed Arbitral Tribunal,
Respondent.
JUDGMENT No. 13.—CHORZÓW FACTORY (MERITS)  

The Court,

composed as above,

having heard the observations and conclusions of the Parties,

delivers the following judgment:

The Government of the German Reich, by an Application instituting proceedings filed with the Registry of the Court on February 8th, 1927, in conformity with Article 40 of the Statute and Article 35 of the Rules of Court, has submitted to the Permanent Court of International Justice a suit concerning the reparation which, in the contention of the Government of the Reich, is due by the Polish Government for the damage suffered by the Oberschlesische Stickstoffwerke A.-G. (hereinafter designated as the Oberschlesische) and the Bayerische Stickstoffwerke A.-G. (hereinafter designated as the Bayerische) in consequence of the attitude adopted by that Government towards those Companies in taking possession of the nitrate factory situated at Chorzów, which attitude has been declared by the Court in Judgment No. 7 (May 25th, 1926) not to have been in conformity with the provisions of Article 6 and the following articles of the Convention concerning Upper Silesia concluded at Geneva on May 15th, 1922, between Germany and Poland (hereinafter described as the Geneva Convention).

On receipt of the German Government’s Case in the suit, on March 3rd, 1927, the Polish Government, on April 14th, 1927, raised a preliminary objection denying the Court’s jurisdiction to hear the suit brought before it and submitting that the Court should, “without entering into the merits, declare that it had no jurisdiction”.

The Court dealt with this plea in its Judgment No. 8 given on July 26th, 1927, by which it overruled the preliminary objection raised by the Polish Government and reserved for judgment on the merits the suit brought on February 8th, 1927, by the German Government.

Furthermore, under the terms of this judgment, the President was instructed to fix the times for the filing of the Counter-Case, Reply and Rejoinder on the merits. These times, which were in the first place fixed to expire on September 30th, November 15th and December 30th, 1927, were subsequently extended by successive decisions until November 30th, 1927, February 20th and May 7th, 1928, respectively.

The documents of the written proceedings were duly filed with the Registrar of the Court within the times finally fixed and were communicated to those concerned as provided in Article 43 of the Statute.

In the course of hearings held on June 21st, 22nd, 25th, 27th and 29th, 1928, the Court has heard the oral statements, reply and rejoinder submitted by the above-mentioned Agents for the Parties.

* * *

The submissions made in the German Government’s Application of February 8th, 1927, were as follows:

It is submitted:

[Translation.]

(1) that by reason of its attitude in respect of the Oberschlesische Stickstoffwerke and Bayerische Stickstoffwerke Companies, which attitude has been declared by the Court not to have been in conformity with the provisions of Article 6 and the following articles of the Geneva Convention, the Polish Government is under an obligation to make good the consequent damage sustained by the aforesaid Companies from July 3rd, 1922, until the date of the judgment sought;

(2) that the amount of the compensation to be paid by the Polish Government is 59,400,000 Reichsmarks for the damage caused to the Oberschlesische Stickstoffwerke Company and 16,775,200 Reichsmarks for the damage caused to the Bayerische Stickstoffwerke Company;

(3) in regard to the method of payment:

(a) that the Polish Government should pay within one month from the date of judgment, the compensation due to the Oberschlesische Stickstoffwerke Company for the taking possession of the working capital (raw material, finished and half-manufactured products, stores, etc.) and the compensation due to the Bayerische Stickstoffwerke Company for the period of exploitation from July 3rd, 1922, to the date of judgment;

(b) that the Polish Government should pay the sums remaining unpaid by April 15th, 1928, at latest;
(c) that, from the date of judgment, interest at 6% per annum should be paid by the Polish Government;
(d) that the payments mentioned under (a)—(c) should be made without deduction to the account of the two Companies with the Deutsche Bank at Berlin;
(e) that, until June 30th, 1931, no nitrated lime and no nitrate of ammonia should be exported to Germany, to the United States of America, to France or to Italy.

These submissions have, in the course of the written or oral proceedings, undergone modifications which will be indicated below. As the Court has not in the present suit availed itself of the right conferred upon it under Article 48 of the Statute to make orders as to “the form and time in which each Party must conclude its arguments”, it, in this case, allows the Parties, in accordance with established precedent, to amend their original submissions, not only in the Case and Counter-Case (Article 40 of the Rules), but also both in the subsequent documents of the written proceedings and in declarations made by them in the course of the hearings (Article 55 of the Rules), subject only to the condition that the other Party must always have an opportunity of commenting on the amended submissions.

Submission No. 1 of the Application has not been subsequently amended.

On the other hand, with regard to submission No. 2, important amendments have been made. In the Case this submission is worded as follows:

It is submitted:....

[Translation.]
(2) that the amount of the compensation to be paid by the Polish Government is 75,920,000 Reichsmarks, plus the present value of the working capital (raw materials, finished and half-manufactured products, stores, etc.) taken over on July 3rd, 1922, for the damage caused to the Oberschlesische Stickstoffwerke Company, and 20,179,000 Reichsmarks for the damage caused to the Bayerische Stickstoffwerke Company.

In comparing submission (2) of the Case with submission (2) of the Application, regard must be had to the following facts resulting from the Case:

(a) that the total of 59,400,000 mentioned in the Application as the figure representing the damage suffered by the Oberschlesische is calculated as on July 3rd, 1922;
(b) that this sum includes the sum of 1 million for raw materials, finished and half-manufactured products, stores, etc.;
(c) that the sum of 75,920,000 mentioned in the Case as the figure representing the damage suffered by the Oberschlesische is made up of 58,400,000 for damages as on July 3rd, 1922, and 17,520,000 for interest at 6% on 58,400,000 for the period July 3rd, 1922, to July 2nd, 1927;
(d) that this sum does not include an amount for “working capital”, compensation for the “present value” of this capital being in the Case sought in general terms;
(e) that the sum of 16,775,200 mentioned in the Application as the figure representing the damage suffered by the Bayerische is calculated as on July 3rd, 1922;
(f) that the sum of 20,179,000 mentioned in the Case as representing the damage suffered by the Bayerische is calculated as on July 2nd (or 3rd), 1927, at a rate of interest of 6%; the amount for the Bayerische indicated in the Application is said to contain an error of calculation.

Lastly, submission (2) of the Application has been amended in the German Agent’s oral reply as concerns the compensation claimed for the damage suffered by the Oberschlesische. This submission runs as follows in the submissions read by the Agent at the conclusion of his oral Reply:

It is submitted:

[Translation.]
that the total of the compensation to be paid to the German Government is 58,400,000 Reichsmarks, plus 1,656,000 Reichsmarks, plus interest at 6% on this sum as from July 3rd, 1922, until the date of judgment (for the damage done to the Oberschlesische Stickstoffwerke A.-G.);
that the total of the compensation to be paid to the German Government is 20,179,000 Reichsmarks for the damage done to the Bayerische Stickstoffwerke A.-G.

It follows that, as regards the Oberschlesische, the German Government (a) reverts to the sum of 58,400,000 as on
July 3rd, 1922; (b) fixes as 1,656,000 the value of the working capital on that date; (c) claims on these two sums interest at 6% until the date of judgment, thus abandoning the claim for a lump sum made in the Case.

As regards submission (3) of the German Government's Application, amendments both of form and of substance are to be noted in the course of the subsequent procedure.

As regards form, paragraph (e) of submission (3) of the Application constitutes by itself a new third submission in the Case, whilst the substance of paragraphs (a)-(d) of submission No. 3 of the Application has been embodied in a new submission No. 4 (a)-(d) in the Case. In these circumstances, it is preferable to trace back the modifications made to each of the paragraphs of the original third submission.

Paragraph 3 (a) is worded as follows in the Case (where it is numbered 4 (a)):

[Translation.]
that the Polish Government should pay, within one month from the date of judgment, the compensation due to the Oberschlesische Stickstoffwerke Company for the taking possession of the working capital and the compensation due to the Bayerische Stickstoffwerke Company for the period of exploitation from July 3rd, 1922, to the date of judgment.

As compared with the Application, therefore, this paragraph has undergone a purely superficial modification (deletion of an explanatory remark in parenthesis), and it has not subsequently been amended.

Paragraph 3 (b) is worded as follows in the Case (where it is numbered 4 (b)):

[Translation.]
that the Polish Government should pay the remaining sums by April 15th, 1928, at latest;

in the alternative, that, in so far as payment may be effected in instalments, the Polish Government shall deliver, within one month from the date of judgment, bills of exchange for the amounts of the instalments, including interest, payable on the respective dates on which they fall due to the Oberschlesische Stickstoffwerke Company and to the Bayerische Stickstoffwerke Company.

Thus to the main original submission has been added an alternative contemplating the possibility of payment by instalments.

The same paragraph is couched in the following terms in the oral reply:

[Translation.]
It is submitted that the Polish Government should pay the remaining sums at latest within fifteen days after the beginning of the financial year following the judgment; in the alternative that, in so far as payment may be effected by instalments, the Polish Government shall, within one month from the date of judgment, give bills of exchange for the amounts of the instalments, including interest, payable on maturity to the Oberschlesische Stickstoffwerke A.-G. and to the Bayerische Stickstoffwerke A.-G.

The modification as compared with the previous version consists in the substitution for the date April 15th, 1928, which had already passed, a time-limit fixed in relation to the beginning of the Polish financial year.

Paragraph 3 (c) of the submissions of the Application (4 (c) of the Case) has undergone no subsequent modification.

On the other hand, paragraph 3 (d) of the Application appears in the Case in the following form (No. 4 (d) of the Case):

[Translation.]
that the Polish Government is not entitled to set 'off, against the above-mentioned claim for indemnity of the German Government, its claim in respect of social insurances in Upper Silesia; that it may not make use of any other set-off against the above-mentioned claim for indemnity; and that the payments mentioned under (a)–(c) should be made without any deduction to the account of the two Companies with the Deutsche Bank at Berlin.

The original submission is contained in the last part of this paragraph, the principal clause of which now seeks a declaration excluding any possibility of extra-judicial set-off.

The wording of the Case is retained both in the written and in the oral reply, except that a new alternative submission is added in regard to the question of the prohibition of extra-judicial set-off. This addition runs as follows:
In the alternative it is submitted that set-off is only permissible if the Polish Government puts forward for this purpose a claim in respect of a debt recognized by the German Government or established by a judgment given between the two Governments.

Turning lastly to paragraph 3 (e) of the submissions in the Application, it is to be observed that this reappears unchanged in submission 3 of the Case. On the other hand, in the written Reply, whilst the submission of the Application is repeated, the following alternative is added:

It is submitted that the Polish Government should be obliged to cease the exploitation of the factory and of the chemical equipment for the transformation of nitrate of lime into ammonium nitrate, etc.

With this addition, this submission also appears in the oral reply in the following form:

in the alternative, should the Court not adopt the points of view set out in paragraphs 55 and 57 of the Reply, it is submitted that the Polish Government should be obliged to cease the exploitation of the factory or of the chemical equipment for the production of ammonium nitrate, etc.

* * *

In connection with certain submissions made by the Polish Government in regard to the compensation of the Oberschlesische, the German Government has not merely asked the Court to reject these submissions but has also formulated two other submissions, namely:

(1) that the Polish Government is not entitled to refuse to pay compensation to the German Government on the basis of arguments drawn from Article 256 and for motives of respect for the rights of the Reparation Commission and other third parties;

(2) that the Polish Government's obligation to pay the indemnity awarded by the Court is in no way set aside by a judgment given or to be given by a Polish municipal court in a suit concerning the question of the ownership of the factory at Chorzów.

These submissions, which were made in the written Reply, and in the first oral statement of the German Agent respectively, have been maintained unaltered in the oral reply.

Apart from the two additional claims just referred to, the final submissions of the German Government are therefore as follows:

(1) that by reason of its attitude in respect of the Oberschlesische Stickstoffwerke and Bayerische Stickstoffwerke Companies, which attitude has been declared by the Court not to have been in conformity with the provisions of Article 6 and the following articles of the Geneva Convention, the Polish Government is under an obligation to make good the consequent injury sustained by the aforesaid Companies from July 3rd, 1922, until the date of the judgment sought;

(2) (a) that the amount of the compensation to be paid to the German Government is 58,400,000 Reichsmarks, plus 1,656,000 Reichsmarks, plus interest at 6% on this sum as from July 3rd, 1922, until the date of judgment (for the damage caused to the Oberschlesische Stickstoffwerke A.-G.);

(b) that the amount of the compensation to be paid to the German Government is 20,279,000 Reichsmarks for the damage caused to the Bayerische Stickstoffwerke A.-G.;

(3) that until June 30th, 1931, no nitrate of ammonia should be exported to Germany, to the United States of America, to France or to Italy;

in the alternative, that the Polish Government should be obliged to cease from exploiting the factory or the chemical equipment for the production of nitrate of ammonia, etc.;

(4) (a) that the Polish Government should pay, within one month from the date of judgment, the compensation due to the Oberschlesische Stickstoffwerke A.-G. for the taking possession of the working capital and the compensation due to the Bayerische Stickstoffwerke A.-G. for the period of exploitation from July 3rd, 1922, to the date of judgment;

(b) that the Polish Government should pay the remaining sums at latest within fifteen days after the beginning of the financial year following the judgment; in the alternative, that, in so far as payment may be effected by instalments, the Polish Government should within one month from the date of judgment, give bills of exchange for the amounts of the instalments, including interest, payable on maturity to the Oberschlesische Stickstoffwerke A.-G. and to the Bayerische Stickstoffwerke A.-G.;

(c) that from the date of judgment, interest at 6% per annum should be paid by the Polish Government;
(d) that the Polish Government is not entitled to set off against the above-mentioned claim for indemnity of the German Government, its claim in respect of social insurances in Upper Silesia; that it may not make use of any other set-off against the said claim for indemnity; and that the payments mentioned under (a) to (c) should be made without any deduction to the account of the two Companies with the Deutsche Bank at Berlin; in the alternative, that set-off is only permissible if the Polish Government puts forward for this purpose a claim in respect of a debt recognized by the German Government or established by a judgment given between the two Governments.

The Polish Government has made no formal objection to the amendments successively made in the original submissions of the German Government.

* * *

The submissions formulated by the Polish Government in reply to those set out in the Application and Case of the German Government are worded as follows in the Counter-Case:

It is submitted:

[Translation.]

A. In regard to the Oberschlesische:

(1) that the applicant Government’s claim should be dismissed;

(2) in the alternative, that the claim for indemnity should be provisionally suspended;

(3) as a further alternative, in the event of the Court awarding some compensation, that such compensation should only be payable: (a) after the previous withdrawal by the said Company of the action brought by it and pending before the German-Polish Mixed Arbitral Tribunal in regard to the Chorzów factory and after the formal abandonment by it of any claim against the Polish Government in respect of the latter’s taking possession and exploitation of the Chorzów factory; (b) when the civil action brought against the said Company by the Polish Government in respect of the validity of the entry of its title to ownership in the land register has been finally decided in favour of the Oberschlesische.

(4) In any case, it is submitted that the German Government should, in the first place, hand over to the Polish Government the whole of the shares of the Oberschlesische Stickstoffwerke Company, of the nominal value of 110,000,000 Marks, which are in its hands under the contract of December 24th, 1919.

B. In regard to the Bayerische:

(1) (a) that the applicant Government’s claim for compensation in respect of the past, in excess of 1,000,000 Reichsmarks, should be dismissed;

(b) that, pro futuro, an annual rent of 250,000 Reichsmarks, payable as from January 1st, 1928, until March 31st, 1941, should be awarded;

(c) that these indemnities should only be payable after previous withdrawal by the said Company of the claim pending before the German-Polish Mixed Arbitral Tribunal in respect of the Chorzów factory and after the formal abandonment by it of any claim against the Polish Government in respect of the latter’s taking possession and exploitation of the Chorzów factory;

(2) that the applicant Government’s third submission to the effect that until June 30th, 1931, no exportation of nitrated lime or nitrate of ammonia should take place to Germany, the United States of America, France or Italy, should be dismissed.

C. In regard to the Oberschlesische and Bayerische jointly:

that submission No. 4—to the effect that it is not permissible for the Polish Government to set off, against the above-mentioned claim for indemnity of the German Government, its claim in respect of social insurances in Upper Silesia, that it may not make use of any other set-off against the above-mentioned claim for indemnity, and that the payments mentioned under 4 (a)—(c) should be made without any deduction to the account of the two Companies with the Deutsche Bank at Berlin—should be rejected.

These submissions have not subsequently been amended except that submission A, 3 (b), was withdrawn by means of a declaration contained in the written Rejoinder.

The German Government having disputed the right of the Polish Government to withdraw this submission (the rejection of which had been demanded by the former) at the stage of the proceedings reached when the withdrawal took place, the latter Government maintained its withdrawal.

For the reasons given above, the Court holds that there is nothing to prevent the Polish Government for its part from
amending its original submissions, especially seeing that this amendment occurred while the written proceedings were still in progress and took the form of the abandonment of a part of its submissions. In the Court’s opinion, the second of the “additional claims” of the German Government mentioned above, was doubtless designed to meet the Polish submission which has been thus abandoned.

The Court therefore considers that the final submissions of the Polish Government may be set down as under:

“It is submitted:

A. As regards the Oberschlesische:

(1) that the claim of the applicant Government should be dismissed;

(2) in the alternative, that the claim for indemnity should be provisionally suspended;

(3) as a further alternative, in the event of the Court awarding some compensation, that such compensation should only be payable after the previous withdrawal by the said Company of the action brought by it and pending before the German-Polish Mixed Arbitral Tribunal in regard to the Chorzów factory, and after the formal abandonment by it of any claim against the Polish Government in respect of the latter’s taking possession and exploitation of the Chorzów factory.

(4) In any case, it is submitted that the German Government should, in the first place, hand over to the Polish Government the whole of the shares of the Oberschlesische Stickstoffwerke Company, of the nominal value of 110,000,000 Marks, which are in its hands under the contract of December 24th, 1919.

B. As regards the Bayerische:

(1) (a) that the applicant Government’s claim for compensation in respect of the past, in excess of 1,000,000 Reichsmarks, should be dismissed;

(b) that, pro futuro, an annual rent of 250,000 Reichsmarks, payable as from January 1st, 1928, until March 31st, 1941, should be awarded;

(c) that these indemnities should only be payable after previous withdrawal by the said Company of the claim pending before the German-Polish Mixed Arbitral Tribunal in respect of the Chorzów factory and after the formal abandonment by it of any claim against the Polish Government in respect of the latter’s taking possession and exploitation of the Chorzów factory;

(2) that the applicant Government’s third submission to the effect that until June 30th, 1931, no exportation of nitrate of lime or nitrate of ammonia should take place to Germany, the United States of America, France or Italy.

C. As regards the Oberschlesische and Bayerische jointly:

that submission No. 4—to the effect that it is not permissible for the Polish Government to set off against the above-mentioned claim for indemnity of the German Government its claim in respect of social insurances in Upper Silesia, that it may not make use of any other set-off against the above-mentioned claim for indemnity, and that the payments mentioned under 4 (a)—(c) should be made without any deduction to the account of the two Companies with the Deutsche Bank at Berlin—should be rejected.

* * *

A comparison between the German and Polish final submissions as thus set out leads to the following results:

I.—(A) as regards the first German submission: that the Parties are at variance except in regard to the reparation of the damage sustained by the Bayerische;

(B) as regards submission No. 2 a of the German Government: that the Polish Government asks that it should be dismissed; and, in the alternative, that the claim for indemnity should be provisionally suspended; it is doubtless the alternative claim thus put forward by Poland in reply to submission No. 2 a of the German Government that the first of the “additional claims” of the latter Government mentioned above is intended to meet;

(C) as regards submission No. 2 b of the German Government: that the Polish Government asks that it should be dismissed except as regards the award, in respect of
the past, of a sum not exceeding 1,000,000 Reichsmarks for the future, of an annual rent of 250,000 Reichsmarks payable as from January 1st, 1928, until March 31st, 1941;

(D) as regards the German submission No. 3: that the Polish Government asks that the German Government's principal submission should be dismissed but does not formulate a definite submission with regard to the alternative submission under this number;

(E) as regards the German submissions Nos. 4 (a)—(e): that the Polish Government does not say anything specific concerning these submissions except in so far as it formulates its submission A 3, regarding the suspension of payment;

(F) as regards the German Government’s submission No. 4 (d): that the Polish Government submits that the principal submission under this number should be rejected, but does not formulate any definite submission regarding the alternative German submission.

II.— As regards the Polish submissions: that submission A 4, which goes beyond the scope of the German submissions, has given rise to a claim for its rejection on the part of the German Government, formulated during the oral proceedings.

* * *

It is therefore solely with the points of divergence as set out above that the Court has to deal in the judgment which it is about to deliver. It is true that the Parties have, both in the written and oral proceedings, formulated yet other claims. In so far, however, as these claims do not constitute developments of the original submissions, or alternatives to them, the Court cannot regard them otherwise than—to use the expression of the Agent of the German Government—as “subsidiary arguments” or as mere suggestions as to the procedure to be adopted; this is certainly the case as regards the numerous requests with a view to the consultation of experts or the hearing of witnesses. There is no occasion for the Court to pass upon all these requests; it may therefore confine itself to taking them into account, in so far as may be necessary during the discussion of the arguments advanced by the Parties in support of their submissions, for the purposes of stating the reasons of the judgment.

* * *

The Parties have presented to the Court numerous documents either as annexes to the documents of the written proceedings or in the course of the hearings, or, lastly, in response to requests made or questions put by the Court. (Annex.)

THE FACTS.

The facts underlying the present suit have already been succinctly stated or referred to in Judgments Nos. 6, 7, 8 and 11, given by the Court on August 25th, 1925, May 25th, 1926, July 26th, 1927, and December 16th, 1927.

The present judgment, however, must deal with the so-called case of the factory at Chorzów from a point of view with which the Court has not hitherto had to concern itself, namely, that of the nature—and, if necessary, the amount and method of payment—of the reparation which may be due by Poland in consequence of her having, as established by the Court in Judgment No. 7, adopted an attitude not in conformity with the Geneva Convention of May 15th, 1922. Accordingly, it is necessary, before approaching the point of law raised by the German Application of February 8th, 1927, briefly to trace out the relevant facts from this particular standpoint.

On March 5th, 1915, a contract was concluded between the Chancellor of the German Empire, on behalf of the Reich, and the Bayerische, according to which that Company undertook “to establish for the Reich and forthwith to begin the construction of”, amongst other things, a nitrate factory at Chorzów in Upper Silesia. The necessary lands were to be acquired on
behalf of the Reich and entered in its name in the land register. The machinery and equipment were to be in accordance with the patents and licences of the Company and the experience gained by it, and the Company undertook to manage the factory until March 31st, 1941, making use of all patents, licences, experience gained, innovations and improvements, as also of all supply and delivery contracts of which it had the benefit. For this purpose, a special section of the Company was to be formed which was, to a certain extent, to be subject to the supervision of the Reich, which had the right to a share of the profits resulting from the working of the factory during each financial year. The Reich had the right, commencing on March 31st, 1925, to terminate the contract for the management of the factory by the Company on March 31st of any year upon giving fifteen months' notice. The contract could be determined as early as March 31st, 1921, always on condition of fifteen months' notice being given, if the Reich's share of the surplus did not reach a fixed level.

This contract was subsequently supplemented by a series of seven additional contracts, of which, however, only the second and seventh, concluded on November 16th, 1916, and November 22nd, 1918, respectively, relate to the Chorzów factory. On May 14th, 1919, the Bayerische brought an action against the Reich, claiming that the latter was bound to compensate the Company for the damage said to have been suffered by it, owing to certain alleged shortcomings with respect to the fulfilment of the contract of March 5th, 1915, and the additional contracts. This matter was, however, settled out of court by an arrangement concluded on October 24th, 1919, between the Reich and the Bayerische, an arrangement which replaced the fifth additional contract and did not relate to the Chorzów factory.

On December 24th, 1919, a series of legal instruments were signed and legalized at Berlin with a view to the formation of a new Company, the Oberschlesische Stickstoffwerke A.-G., with a share capital of 250,000 marks, increased subsequently to 110 million marks, and the sale by the Reich to this Company of the factory at Chorzów, that is to say, the whole of the land, buildings and installations belonging thereto, with all accessories, reserves, raw material, equipment and stocks. The management and working of the factory were to remain in the hands of the Bayerische, which, for this purpose, was to utilize its patents, licences, experience gained and contracts. These relations between the two Companies were confirmed by means of letters dated December 24th and 28th, 1919, exchanged between them. The Oberschlesische was duly entered, on January 29th, 1920, at the Amtsgericht of Königsbüttel, in the Chorzów Land register, as owner of the landed property constituting the nitrate factory at Chorzów. The registered office of the Oberschlesische which, under the memorandum of association, was established at Chorzów, was subsequently, by an amendment executed on January 14th, 1920, transferred to Berlin.

In the contract of December 24th, 1919, between the Reich and the newly created Oberschlesische, a second limited liability company, founded the same day and known as the Stickstoff Treuhand Gesellschaft m. b. H. (hereinafter called the "Treuhand") was also concerned. This Company had a share capital of 300,000 marks, subsequently increased to 1,000,000 marks. Under the contract, the whole of the factory for the production of nitrated lime, with the accessory installations, situated at Chorzów, was ceded by the Reich to the Oberschlesische at the price of approximately 110 million marks,—which price was calculated according to certain data indicated in the contract itself,—the Treuhand taking over, in the place of the Oberschlesische, as sole and independent debtor, all the obligations imposed by the contract upon the latter in regard to the Reich, and obtaining in consideration thereof, without payment, shares of the Oberschlesische—to the nominal value of 109,750,000 marks. Later, the Treuhand also acquired the rest of the shares of the Oberschlesische, thus becoming the sole shareholder of that Company. As guarantee for the sums due to the Reich under the contract, the Treuhand undertook to obtain for the Reich a lien on all the shares of the Oberschlesische. The Treuhand was to liquidate the purchase price exclusively by paying to the Reich the dividends on the shares of the Oberschlesische. Nevertheless, the Treuhand was authorized to pay at any time the whole or a part of the purchase price; this would have the effect of removing the lien on shares of a nominal value corresponding to the payment
made. The Reich was authorized itself to exercise all the rights resulting from the possession of the shares, and in particular the right to vote at the general meeting of shareholders, but agreed that the management of the exploitation of the Oberschlesische should be left in the hands of the Bayerische. An alienation of the shares so pledged would be authorized only with the approval of the Reich, even after the lien had expired. As a guarantee for the fulfilment of this obligation, the Reich would, even after expiration of the lien, retain possession of the shares and the exercise of all rights resulting from such possession. The price realized in the event of a sale of the shares was in the first place to be devoted to the liquidation of the balance of the Reich's claim. Of any surplus, the Reich was to receive either 85%—if the sale were effected by the Treuhand—or 90%—if it were effected by the Reich; in both cases, the balance only would fall to the Treuhand which, however, in the second case, would obtain a right to acquire the shares at the price at which the Reich wished that they should be disposed of.

On May 15th, 1922, was signed at Geneva between Germany and Poland the Convention concerning Upper Silesia. After the signature of this Convention, but before the actual cession of Polish Upper Silesia to Poland, the Treuhand, by a letter dated May 26th, 1922, offered to a Swiss company, the Compagnie d'azote et de fertilisants S. A. at Geneva, an option until the end of the year for the purchase, at a price of five million Swiss francs, to be paid by January 2nd, 1923, at latest, of one half (55 million marks) of the shares of the Oberschlesische, in consideration of which the Genevese Company would, amongst other things, acquire the right to take part in the negotiations with the Polish Government. This offer came to nothing.

On July 1st, 1922, the Polish Court of Huta Krolewska, which had replaced the Amtsgericht of Königshütte, gave a decision to the effect that the registration with this Court of the Oberschlesische as owner of the factory, which was declared null and void, was to be cancelled and the previously existing situation restored and that the right of ownership in the landed property in question was to be registered in the name of the Polish Treasury. This decision, which cited Article 256 of the Treaty of Versailles and the Polish laws of July 14th, 1920, and June 16th, 1922, was carried into effect on the same day.

On July 3rd, 1922, M. Ignacy Moscicki, who was delegated with full powers to take charge of the factory at Chorzów by a Polish ministerial decree of June 24th, 1922, took possession of the factory and took over the management in accordance with the terms of the decree. The German Government contended, and the Polish Government did not deny, that the said delegate, in undertaking the control of the working of the factory, at the same time took possession of the movable property, patents, licences, etc.

After having taken over the factory, the Polish Government entered it in the list of property transferred to it under Article 256 of the Treaty of Versailles, which list was duly communicated to the Reparation Commission. The Polish Government alleges that after the pronouncement of Judgment No. 7 by the Court, the German Government asked that the factory should be struck out of the list in question; the former Government has not, however, been informed whether this has been done.

In the meantime, the Oberschlesische, on November 15th, 1922, had brought an action before the German-Polish Mixed Arbitral Tribunal at Paris, claiming, amongst other things, that the Polish Government should be ordered to restore the factory. This action, notice of which was served upon the respondent Government on January 17th, 1923, was withdrawn by the Oberschlesische in June 1928, before the Tribunal had been able to give a decision.

The Oberschlesische, on November 24th, 1922, instituted a parallel action in regard to the movable property existing at Chorzów at the time of the taking over of the factory, against the Polish Treasury before the Civil Court of Katowice, with a view to obtaining either the restitution to the Oberschlesische or the Bayerische of such property, or the payment of the equivalent value. This action however led to no decision on the merits.

As regards the Bayerische, that Company also, on March 25th, 1925, brought an action before the German-Polish Mixed
Arbitral Tribunal against the Polish Treasury with a view to obtaining an annual indemnity until the restitution of the factory to the Oberschlesische, and to causing the possession and management of the factory to be restored to it. Notice of this action was served on the respondent Government on December 16th, 1925; but the case was withdrawn in June 1928, at the same time as the action brought by the Oberschlesische and in the same circumstances.

The Court's Judgment No. 7 was given on May 25th, 1926. This judgment was the source of developments tending in two different directions.

On the one hand, at the initiative of the German Government, it formed the starting point for direct negotiations between the two Governments concerned. In regard to these negotiations, it is only necessary here to note that, on January 14th, 1927, the German Government had recognized that the factory could no longer be restored in kind and that consequently the reparation due must, in principle, take the form of the payment of compensation, a statement which is moreover formally repeated in the Case. The negotiations were unsuccessful owing, amongst other things, to the fact that, in the opinion of the Polish Government, certain claims which Poland was said to have against Germany, must be set off against the indemnity to be awarded to Germany. The failure of the negotiations resulted in the institution of the present proceedings.

On the other hand, the Court's Judgment No. 7 gave rise on the part of the Polish Government to the bringing of an action before the Polish Court of Katowice against the Oberschlesische in order to obtain a declaration that that Company had not become owner of the landed property at Chorzów; that the entry in the land register made in its favour on January 29th, 1922, was not valid, and that—indeed independently of the laws of July 14th, 1920, and June 16th, 1922,—the ownership of the landed property in question fell to the Polish Treasury. The judgment of the Court in this action—which was given by default—was published on November 12th, 1927, and took effect on January 2nd, 1928; it admitted all the submissions of the claimant.

Meanwhile, on October 18th, 1927, the Court had received a fresh application from the German Government which, relying on the terms of Article 60 of the Statute and Article 66 of the Rules of Court, prayed the Court to give an interpretation of its Judgments Nos. 7, of May 25th, 1926, and 8, of July 26th, 1927, alleging that a divergence of opinion had arisen between the two Governments in regard to the meaning and scope of these two judgments in connection with the point which had given rise to the proceedings before the Court of Katowice.

The Court, on December 16th, 1927, delivered its judgment in this suit (No. 11). According to this judgment the Court's intention in Judgment No. 7 had been to recognize, with binding effect between the Parties concerned and in respect of that particular case, amongst other things, the right of ownership of the Oberschlesische in the Chorzów factory under municipal law.

Whilst the proceedings in connection with the request for an interpretation were in progress, the German Government, by means of a Request dated October 14th, 1927, and filed with the Registry on November 15th, besought the Court to indicate to the Polish Government that it should pay to the German Government, as a provisional measure, the sum of 30 million Reichsmarks.

The Court gave its decision upon this request, which was submitted under the terms of Article 41 of the Statute, in the form of an Order made on November 21st, 1927. It held that effect could not be given to the request of the German Government, since it was to be regarded as designed to obtain not the indication of measures of protection, but judgment in favour of a part of the claim formulated in the Application of February 8th, 1927.
JUDGMENT No. 13.—CHORZÓW FACTORY (MERITS) 26

* * *

THE LAW.

I.

The Court, before proceeding to consider the Parties’ submissions, must determine the import of the application which has given rise to the present proceedings, in order to ascertain its nature and scope. In the light of the results of this investigation, it will then proceed to consider the submissions made in the course of the written and oral proceedings.

In the application the Court is asked:

(1) to declare that the Polish Government, by reason of its attitude in respect of the Oberschlesische and Bayerische Companies, which attitude the Court had declared not to be in conformity with the Geneva Convention, is under an obligation to make good the consequent damage sustained by those Companies;

(2) to award compensation, the amount of which is indicated in the application, for the damage caused to each of the respective Companies;

(3) to fix the method of payment, and amongst other things to order the payments to be made by the Polish Government to be effected to the account of the two Companies with the Deutsche Bank at Berlin.

In the course of the oral proceedings, a difference of opinion between the two Parties became apparent as to the nature and scope of the application. The Agent for the German Government argued in his address to the Court that a government may content itself with reparation in any form which it may consider proper, and that reparation need not necessarily consist in the compensation of the individuals concerned. The following passage should especially be noted:

[Translation:]

"It is in fact a question of the German Government's own rights. The German Government has not brought this suit as representative of the individuals who have suffered injury, but it may estimate the damage for which it claims reparation on its own behalf, according to the measure provided by the losses suffered by the companies whose case it has taken up. The German Government may claim the payment of this compensation at any locus solutionis which it may think fit in this case, whether it be a public or a private office.

The present dispute is therefore a dispute between governments and nothing but a dispute between governments. It is very clearly differentiated from an ordinary action for damages, brought by private persons before a civil court, as the Polish Government has said in its Rejoinder."

The Agent for the Polish Government in his Rejoinder submitted that this method of regarding the question involved a modification of the subject of the dispute and, in some sort also, of the nature of the application, for, according to Poland's view, the subject of the dispute had been defined by Germany as the obligation to compensate the two Companies. But damage and compensation being interdependent conceptions, the German claim assumed another aspect if it was no longer a question of compensating the Companies, but of compensating the State for the injury suffered by it. The Agent for the Polish Government disputed the German Government's right to make this change at that stage of the proceedings and refused to accept it.

Even should it be possible to construe the terms of the application and of the subsequent submissions of the Applicant as contemplating compensation due directly to the two Companies for damages suffered by them and not reparation due to Germany for a breach of the Geneva Convention, it follows from the conditions in which the Court has been seized of the present suit, and from the considerations which led the Court to reserve it by Judgment No. 8 for decision on the merits, that the object of the German application can only be to obtain reparation due for a wrong suffered by Germany in her capacity as a contracting Party to the Geneva Convention.

The present application is explicitly and exclusively based on Judgment No. 7 which declared that the attitude of the Polish Government in respect of the two Companies, the Oberschlesische and Bayerische, was not in conformity with Article 6 and the following articles of the said Convention. Already in Judgment No. 6, establishing the Court's jurisdiction to deal with the alleged violation of the Geneva Convention, the
Court recognized that—as had been maintained by the Applicant—the matter was exclusively a dispute between States as to the interpretation and application of a convention in force between them. Article 23 of the Geneva Convention only contemplates differences of opinion respecting the interpretation and application of Articles 6 to 22 of the Geneva Convention arising between the two Governments. The Court in fact declared itself competent to pass upon the claim for reparation because it regarded reparation as the corollary of the violation of the obligations resulting from an engagement between States. This view of the matter, which is in conformity with the general character of an international tribunal which, in principle, has cognizance only of interstate relations, is indicated with peculiar force in this case for the specific reason that the Geneva Convention, with its very elaborate system of legal remedies, has created or maintained for certain categories of private claims arbitral tribunals of a special international character, such as the Upper Silesian Arbitral Tribunal and the German-Polish Mixed Arbitral Tribunal. It was on the basis, amongst other things, of the purely interstate character of the dispute decided by Judgment No. 7 that the Court reserved the case for judgment, notwithstanding the fact that actions brought by the two Companies were pending before one of the arbitral tribunals above mentioned, actions which related to the same act of disposition which led to the filing with the Court of the German Government’s Application now before it.

The Court, which by Judgment No. 8 reserved the present application for judgment on the merits, could only do so on the grounds on which it had already based its Judgment No. 7 which constitutes the starting point for the claim for compensation now put forward by Germany. Accordingly the declarations of the Applicant in the present proceedings must be construed in the light of this conception and this method must also have been followed even if that Party had not stated its contention as explicitly as it has done in the German Agent’s address to the Court.

It is a principle of international law that the reparation of a wrong may consist in an indemnity corresponding to the damage which the nationals of the injured State have suffered as a result of the act which is contrary to international law. This is even the most usual form of reparation; it is the form selected by Germany in this case and the admissibility of it has not been disputed. The reparation due by one State to another does not however change its character by reason of the fact that it takes the form of an indemnity for the calculation of which the damage suffered by a private person is taken as the measure. The rules of law governing the reparation are the rules of international law in force between the two States concerned, and not the law governing relations between the State which has committed a wrongful act and the individual who has suffered damage. Rights or interests of an individual the violation of which rights causes damage are always in a different plane to rights belonging to a State, which rights may also be infringed by the same act. The damage suffered by an individual is never therefore identical in kind with that which will be suffered by a State; it can only afford a convenient scale for the calculation of the reparation due to the State.

International law does not prevent one State from granting to another the right to have recourse to international arbitral tribunals in order to obtain the direct award to nationals of the latter State of compensation for damage suffered by them as a result of infractions of international law by the first State. But there is nothing—either in the terms of Article 23 or in the relation between this provision and certain others of a jurisdictional character included in the Geneva Convention—which tends to show that the jurisdiction established by Article 23 extends to reparation other than that due by one of the contracting Parties to the other in consequence of an infraction of Articles 6 to 22, duly recognized as such by the Court.

This view is moreover readily reconcilable with the submissions of the Applicant. The first of its submissions, throughout all stages of the proceedings, aims at the establishment of an obligation to make reparation. The indemnities to be paid to the German Government, according to No. 2 of the final submissions, constitute, in the terms of submission 4d, as set out in both the Case and the oral reply, a debt due to that Government. The claim formulated in the same submission, to the effect that payment should be made to the account of the
two Companies with the Deutsche Bank at Berlin, is interpreted by the Agent for the German Government as solely relating to the locus solutionis.

The Court therefore is of opinion that the Applicant has not altered the subject of the dispute in the course of the proceedings.

* * *

It follows from the foregoing that the application is designed to obtain, in favour of Germany, reparation the amount of which is determined by the damage suffered by the Oberschlesische and Bayerische. Three fundamental questions arise:

1. The existence of the obligation to make reparation.
2. The existence of the damage which must serve as a basis for the calculation of the amount of the indemnity.
3. The extent of this damage.

As regards the first point, the Court observes that it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation. In Judgment No. 8, when deciding on the jurisdiction derived by it from Article 23 of the Geneva Convention, the Court has already said that reparation is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself. The existence of the principle establishing the obligation to make reparation, as an element of positive international law, has moreover never been disputed in the course of the proceedings in the various cases concerning the Chorzów factory.

The obligation to make reparation being in principle recognized, it remains to be ascertained whether a breach of an international engagement has in fact taken place in the case under consideration. Now this point is res judicata. The non-conformity of Poland's attitude in respect of the two Companies with Article 6 and the following articles of the Geneva Convention is established by No. 2 of the operative provisions of Judgment No. 7. The application of the principle to the present case is therefore evident.

As regards the second point, the question whether damage has resulted from the wrongful act which is common ground, is in no wise settled by the Court's previous decisions relating to the Chorzów case. The Applicant having calculated the amount of the reparation claimed on the basis of the damage suffered by the two Companies as a result of the Polish Government's attitude, it is necessary for the Court to ascertain whether these Companies have in fact suffered damage as a consequence of that attitude.

As regards the Bayerische, Poland admits the existence of a damage affording ground for reparation; the Parties only differ as to the extent of this damage and the mode of reparation; on the other hand, Poland denies the existence of any damage calling for reparation in the case of the Oberschlesische and consequently submits that Germany's claim should be dismissed. The fact of the dispossession of the Oberschlesische is in no way disputed. But notwithstanding this, in the contention of the Polish Government, that Company has suffered no damage: it argues, first, that the right of ownership claimed by the Oberschlesische was null and void or subject to annulment, and, secondly, that the contract of December 24th, 1919, attributed to the Reich rights and benefits so considerable that any possible damage would not materially affect the Company. In the alternative, the Polish Government contends that these same circumstances at all events have the effect of essentially diminishing the extent of the damage to be taken into account in so far as the said Company is concerned.

Apart from these preliminary objections, the Parties are at issue as to the amount and method of payment of any compensation which may be awarded.

In these circumstances, the Court must first of all consider whether damage affording ground for reparation has ensued as regards not only the Bayerische but also the Oberschlesische.
II.

On approaching this question, it should first be observed that, in estimating the damage caused by an unlawful act, only the value of property, rights and interests which have been affected and the owner of which is the person on whose behalf compensation is claimed, or the damage done to whom is to serve as a means of gauging the reparation claimed, must be taken into account. This principle, which is accepted in the jurisprudence of arbitral tribunals, has the effect, on the one hand, of excluding from the damage to be estimated, injury resulting for third parties from the unlawful act and, on the other hand, of not excluding from the damage the amount of debts and other obligations for which the injured party is responsible. The damage suffered by the Oberschlesische in respect of the Chorzów undertaking is therefore equivalent to the total value—but to that total only—of the property, rights and interests of this Company in that undertaking, without deducting liabilities.

The Polish Government argues in the first place that the Oberschlesische has suffered no loss as a result of its dispossession, because it was not the lawful owner, its right of ownership having never been valid and having in any case ceased to be so in virtue of the judgment given on November 12th, 1927, by the Court of Katowice; so that from that date at all events no damage for which reparation should be made could ensue as regards that Company.

In regard to this the Court observes as follows: the Court has already, in connection with Judgment No. 7, had to consider as an incidental and preliminary point, the question of the validity of the transactions in virtue of which the ownership of the Chorzów factory passed from the Reich to the Oberschlesische. It then arrived at the conclusion that the various transactions in question were genuine and bona fide; that is why it was able to regard the Chorzów factory as belonging to a company controlled by German nationals, namely, the Oberschlesische. Whatever the effect of this incidental decision may be as regards the right of ownership under municipal law, it is evident that the fact that the Chorzów factory belonged to the Oberschlesische was the necessary condition precedent to the Court's decision that: the attitude of the Polish Government in respect of the Oberschlesische was not in conformity with Article 6 and the following articles of the Geneva Convention. For if the factory did not belong to the Oberschlesische Stickstoffwerke, not only would Company not have suffered damage as a result of dispossession, but furthermore it could not have been subjected to a dispossession contrary to the Geneva Convention, but the Court established by Judgment No. 7 that such was the case.

It should be noted that the Court in Judgment No. 7 has not confined itself to recording the incompatibility with the Geneva Convention of the application of the law of July 14th, 1920, to properties entered in the land register in the name of companies controlled by German nationals, but has, in replying to the objections put forward by the Respondent, also had to deal with the question whether such entry was the outcome of fictitious and fraudulent transactions or of genuine and bona fide transactions. Poland herself objected in connection with the second submission of the German Application of May 15th, 1925, that the entry of the Oberschlesische in the land register was in any case not valid as it was based on a fictitious and fraudulent transaction and thus caused the Court to deal with this point.

As the application now under consideration is based on the damage established by Judgment No. 7, it is impossible that the Oberschlesische's right to the Chorzów factory should be looked upon differently for the purposes of that judgment and in relation to the claim for reparation based on the same judgment. The Court, having been of opinion that the Oberschlesische's right to the Chorzów factory justified the conclusion that the Polish Government's attitude in respect of that Company was not in conformity with Article 6 and the following articles of the Geneva Convention, must necessarily maintain that opinion when the same situation at law has to be considered for the purpose of giving judgment in regard to the reparation claimed as a result of the act which has been declared by the Court not to be in conformity with the Convention.

The Polish Government now points out that, after Judgment No. 7 had been rendered, the Civil Court of Katowice
which, under International Law, doubtless has jurisdiction in disputes at civil law concerning immovable property situated within its district, has declared the entry of the Obereschl"uische in the land register as owner not to be valid under the municipal law applicable to the case, and this apart from the Polish laws of July 14th, 1920, and June 16th, 1922; it further contends that the Court, in now giving judgment on the question of damages, should bear in mind this new fact.

There is no need for the Court to consider what would have been the situation at law as regards the Geneva Convention, if dispossession had been preceded by a judgment given by a competent tribunal. It will suffice to recall that the Court in Judgment No. 8 has said that the violation of the Geneva Convention consisting in the dispossession of an owner protected by Article 6 and following of the Geneva Convention could not be rendered non-existent by the judgment of a municipal court which, after dispossession had taken place, nullified the grounds rendering the Convention applicable, which grounds were relied upon by the Court in Judgment No. 7. The judgment of the Tribunal of Katowice given on November 12th, 1927.—which judgment was given by default as regards the Obereschl"uische, the Reich not being a Party to the proceedings,—does not contain in the text known to the Court the reasons for which the entry of the property in the name of the Obereschl"uische was declared null and void; but it appears from the application upon which this judgment was given that the reasons advanced by the Polish Treasury are essentially the same as those already discussed before the Court on the basis of the Polish Government’s submissions in the proceedings leading up to Judgment No. 7, which reasons, in the opinion of the Court, did not suffice to show that the Obereschl"uische did not fall within the scope of Article 6 and the following articles of the Geneva Convention. If the Court were to deny the existence of a damage on the ground that the factory did not belong to the Obereschl"uische, it would be contradicting one of the reasons on which it based its Judgment No. 7 and it would be attributing to a judgment of a municipal court power indirectly to invalidate a judgment of an international court, which is impossible. Whatever the effect of the judgment of the Tribunal of Katowice of November 12th, 1927, may be at municipal law, this judgment can neither render in-existent the violation of the Geneva Convention recognized by the Court in Judgment No. 7 to have taken place, nor destroy one of the grounds on which that judgment is based.

It is to the objection dealt with above and to a submission connected therewith which the Polish Government made in its Counter-Case but subsequently withdrew, that the following submission of the German Government relates:

[Translation.]

that the obligation of the Polish Government to pay the indemnity awarded by the Court is in no way set aside by a judgment given or to be given by a Polish municipal court in a suit concerning the question of the ownership of the factory situated at Chorz"ow.

This submission has been maintained notwithstanding the withdrawal of the Polish submission referred to.

The Court, being of opinion that this latter submission is to be regarded as having been validly withdrawn, but that, nevertheless, the objection to which it referred still subsists, considers that there is no need expressly to deal with the submission in regard thereto made by the German Government, save in order to dismiss the submission of the Polish Government based on the judgment of the Tribunal of Katowice.

* * *

The Polish Government not only disputes the existence of a damage for the reason that the Obereschl"uische is not or is no longer owner of the factory at Chorzów, but also contends from various points of view that the rights possessed by the Reich in the undertaking, having passed into the hands of Poland, cannot be included amongst the assets to be taken into account in the calculation of the damage sustained on which calculation will depend the amount of the reparation due by Poland to Germany.

The Polish Government, admitting, for the sake of argument, that the contract of December 24th, 1919, was not null and void, but must be regarded as a genuine and valid legal instrument, holds that, according to that contract, the Ger-
The German Government is the owner of the whole of the shares of the Oberschlesische, as guarantee for its rights, and to enable it to exercise those rights, these shares, on the possession of which depend the rights of the Reich, should be transferred to Poland. If the contract of December 24th, 1919, is to be regarded as genuine and effective, the Polish Government holds that, in order to determine the indemnity which may be due to the Oberschlesische, the rights of the Reich must first be eliminated; and as it is of opinion that this can only be done in one way, namely, by the handing over by Germany to Poland of the shares of the Oberschlesische to the nominal value of 110 million marks, the Polish Government has in regard to this point made the following submission (No. A 4) in its Counter-Case:

[Translation.]

"In any case, it is submitted that the German Government should, in the first place, hand over to the Polish Government the whole of the shares of the Oberschlesische Company of the nominal value of 110,000,000 marks, which are in its hands under the contract of December 24th, 1919."

The German Government in its Reply made the following observations in regard to this submission:

[Translation.]

"In the first place, the Polish Government cites no provision on which it is possible to base the Court's jurisdiction to take cognizance of this question, which arises from the interpretation of Article 256. In the previous proceedings, the Polish Government strongly maintained that the interpretation of this article would not be admissible even as a question incidental and preliminary to the interpretation of Articles 6 to 22 of the Geneva Convention.

The German Government does not know whether the Polish Government has in mind the general treaty of arbitration signed at Locarno according to which any dispute of a legal nature must be submitted to arbitration, and, unless some special arbitral tribunal is agreed upon, to the Permanent Court of International Justice. But, however that may be, the German Government, being animated by a wish to ensure that full scope shall be given to the Treaty of Locarno, without pausing to debate questions as to the procedure therein provided for, and also to see the Chorzów case settled once and for all, abstains from undertaking a detailed examination of the questions of lack of jurisdiction or prematurity, even though these questions might enter into account in connection with the counter-claim which, in the German Government's
contention, is formulated in submission A 4 of the Counter-Case. It will simply refer to Article 40, paragraph 2, No. 4, of the Rules of Court, according to which the Court may give judgment on counter-claims in so far as the latter come within its jurisdiction. As between Germany and Poland this applies in respect of any question of law in dispute between them. The only point which might be disputed is the question whether, for the application of this article of the Rules, the conditions respecting forms and times must also be fulfilled, or whether it is enough that the material conditions should be fulfilled. This point, however, may be left open, since the German Government accepts the jurisdiction of the Court in regard to the question raised in the Counter-Case. In the course of the negotiations in regard to the Chorzów case, the German plenipotentiary had already proposed to the Polish plenipotentiary that this question should be referred to the Court."

In the subsequent proceedings, the Polish Government has not made any statement in regard to the question of the Court’s jurisdiction. It is impossible, therefore, to say whether it accepts the view of the German Government according to which it may be inferred that such jurisdiction exists under the Convention between Germany and Poland initiated at Locarno on October 16th, 1925, or whether it contends that the Court has jurisdiction on some other basis. In any case, it is certain that it has not withdrawn its claim and that, consequently, it wishes the Court to give judgment on the submission in question. For its part the German Government, though basing the Court’s jurisdiction on the Locarno Convention, seems above all anxious that the Court should give judgment on this submission in the course of the present proceedings.

The Parties therefore are agreed in submitting to the Court for decision the question raised by this submission. As the Court has said in Judgment No. 12, concerning certain rights of minorities in Upper Silesia, Article 36 of the Statute establishes the principle that the Court’s jurisdiction depends on the will of the Parties; the Court therefore is always competent once the latter have accepted its jurisdiction, since there is no dispute which States entitled to appear before the Court cannot refer to it, save in exceptional cases where a dispute may be within the exclusive jurisdiction of some other body.

But this is not the case as regards the submission in question.

The Court also observes that the counter-claim is based on Article 256 of the Versailles Treaty, which article is the basis of the objection raised by the Respondent, and that, consequently, it is juridically connected with the principal claim.

Again, Article 40 of the Rules of Court, which has been cited by the German Government, lays down amongst other things that counter-cases shall contain:

"4° conclusions based on the facts stated; these conclusions may include counter-claims, in so far as the latter come within the jurisdiction of the Court."

The claim having been formulated in the Counter-Case, the formal conditions required by the Rules as regards counter-claims are fulfilled in this case, as well as the material conditions.

As regards the relationship existing between the German claims and the Polish submission in question, the Court thinks it well to add the following: Although in form a counter-claim, since its object is to obtain judgment against the Applicant for the delivery of certain things to the Respondent—in reality, having regard to the arguments on which it is based, the submission constitutes an objection to the German claim designed to obtain from Poland an indemnity the amount of which is to be calculated, amongst other things, on the basis of the damage suffered by the Oberschlesische. It is in fact a question of eliminating from the amount of this indemnity a sum corresponding to the value of the rights and interests which the Reich possessed in the enterprise under the contract of December 24th, 1919, which value, according to the Polish Government, does not constitute a loss to the Oberschlesische because these rights and interests are said to belong to the Polish Government itself under Article 256 of the Treaty of Versailles. The Court, having by Judgment No. 8 accepted jurisdiction, under Article 23 of the Geneva Convention, to decide as to the reparation due for the damage caused to the two Companies by the attitude of the Polish Government towards them, cannot dispense with an examination of the objections the
aim of which is to show either that no such damage exists or that it is not so great as it is alleged to be by the Applicant. This being so, it seems natural on the same grounds also to accept jurisdiction to pass judgment on the submissions which Poland has made with a view to obtaining the reduction of the indemnity to an amount corresponding to the damage actually sustained.

Proceeding now to consider the above-mentioned objections of the Polish Government, the Court thinks it well first of all to define what is, in its opinion, the nature of the rights which the German Government possesses in respect of the Chorzów undertaking under the contract of December 24th, 1919, the main features of which have been described above. Referring to this description, the Court points out that the Treuhand, and not the Reich, is legally the owner of the shares of the Oberschlesische. The Reich is the creditor of the Treuhand and in this capacity has a lien on the shares. It also has, besides this lien, all rights resulting from possession of the shares, including the right to the greater portion of the price in the event of the sale of these shares. This right, which may be regarded as preponderating, is, from an economic standpoint, very closely akin to ownership, but it is not ownership; and even from an economic point of view it is impossible to disregard the rights of the Treuhand.

Such being the situation at law, to endeavour now to identify the Oberschlesische with the Reich—the effect of which would be that the ownership of the factory would have passed to Poland under Article 256 of the Treaty of Versailles—would be in conflict with the view taken by the Court in Judgment No. 7 and reaffirmed above, on which view is based the decision to the effect that Poland's attitude as regards both the Oberschlesische and Bayerische was not in conformity with the provisions of the Geneva Convention.

The same applies in regard to the contention that the Oberschlesische is a company controlled not by German nationals but by the Reich. It is true, as the Polish Government has recalled, that the Court in Judgment No. 7 has declared that there was no need for it to consider the question whether the Oberschlesische, having regard to the rights conferred by the contract of December 24th, 1919, on the Reich, should be considered as controlled by the Reich, and, should this be the case, what consequences would ensue as regards the application of the Geneva Convention. But the reason for this was that the Court held that the Polish Government had not raised this question, and that, apart from its contention as to the fictitious character of the instruments of December 24th, 1919, that Government did not seem to have disputed that the Company was controlled by German nationals.

At all events, it is clear that only by regarding the said Company as a company controlled by German nationals within the meaning of Article 6 of the Geneva Convention, was the Court able to declare that the attitude of the Polish Government towards that Company was not in conformity with the terms of Article 6 and the following articles of the said Convention.

Even if the question were still open and the Court were now free once more to consider it, it would be bound to conclude that the Oberschlesische was controlled by the Bayerische. For seeing that, under the contract of December 24th, 1919, the Reich had declared that it agreed to leave the management of the Chorzów undertaking in the hands of the Bayerische, under the conditions previously settled with the Reich, and that, under the subsequent contract concluded on November 25th, 1920, between the Bayerische and the Treuhand, it had been stipulated that for this purpose the Bayerische was to appoint at least two members of its own board as members of the board of the Oberschlesische, the Court considers that the Bayerische, rather than the Reich, controls the Oberschlesische.

The Court, therefore, arrives at the conclusion that the Polish contention to the effect that the Oberschlesische has not suffered damage, because that Company is to be regarded as identifiable with the Reich, and that the property of which the said Company was deprived by the action of the Polish Government has passed to Poland under Article 256 of the Treaty of Versailles, is not well founded.
Alternatively, the Polish Government has contended that, even if the rights possessed by the Reich under the contract of December 24th, 1919, in the Chorzów undertaking are not to be considered as involving ownership of the shares of the Oberschlesische, the value of these rights, which fall within the scope of Article 256 of the Treaty of Versailles, should nevertheless be deducted from the indemnity claimed as regards the Oberschlesische. The Court is likewise unable to admit this contention.

In this respect, it should be noted that Article 256 contains two conditions, namely, that the “property and possessions” with which it deals must belong to the Empire or to the German States, and that such “property and possessions” must be “situated” in German territory ceded under the Treaty.

It must therefore be ascertained, amongst other things, whether the rights of the Reich under the contract of December 24th, 1919, are “situated” in the part of Upper Silesia ceded to Poland. In so far as these rights consist in a claim against the Treuhand, it is clear that this claim cannot be regarded as situated in Polish Upper Silesia, since the Treuhand is a company whose registered office is in Germany and whose shares belong to companies which also have their registered office in Germany and which are undeniably controlled by German nationals. The fact that this claim is guaranteed by a lien on the shares on which the profit, as well as the price obtained in the event of sale, is to be devoted to the payment of this claim, does not, in the Court’s opinion, justify the view that the rights of the Reich are situated in Polish Upper Silesia where the factory is. These are only rights in respect of the shares; and these rights, if not regarded as situated where the shares are, must be considered as localized at the registered office of the Company which in this case in at Berlin and not in Polish Upper Silesia. The transfer of the registered office of the Oberschlesische from Chorzów to Berlin after the coming into force of the Treaty of Versailles cannot be regarded as illegal and null:

the reasons for which the Court, in Judgment No. 7, held that alienations of public property situated in the plebiscite zone were not prohibited by that Treaty, apply a fortiori in respect of the transfer by a company of its registered office from this zone to Germany.

It is also in vain that the Polish Government cites paragraph 10 of the Annex to Articles 297 and 298 of the Treaty of Versailles, which paragraph lays down that Germany shall deliver “to each Allied or Associated Power all securities, certificates, deeds, or other documents of title held by its nationals and relating to property, rights or interests situated in the territory of that Allied or Associated Power, including any shares, stock, debentures, debenture stock, or other obligations of any company incorporated in accordance with the laws of that Power”. Even disregarding the circumstances that the Oberschlesische was constituted under German law and has not been “incorporated” in accordance with the laws of Poland, the clause quoted has nothing to do with Article 256 and relates only to the articles to which it is annexed.

Since, as has been shown above, Article 256 of the Treaty of Versailles is not, in the Court’s opinion, applicable to the rights possessed by the Reich under the contract of December 24th, 1919, it follows that the Polish Government’s contention—based on the applicability of that article—to the effect that the value of these rights should be eliminated from the amount of the indemnity to be awarded, must be rejected. The same is true as regards the Polish Government’s submission that the whole of the shares of the Oberschlesische should be handed over to Poland, a submission the aim of which is precisely to bring about the elimination referred to. For this submission is likewise based solely on the alleged applicability of the same article of the Treaty of Versailles.
Alternatively, and also in regard to the claim for an indemnity based on the damage sustained by the Oberschlesische, the Polish Government has asked the Court "provisionally to suspend" its decision on the claim for indemnity.

The reasons for which it seeks this suspension appear to be as follows:

The Polish Government has notified the Reparation Commission of the taking over of the Chorzów factory, under Article 256 of the Treaty of Versailles, by entering it on the list of German State property acquired under that article. It is for the Reparation Commission to fix the value of such property, which value is to be paid to the Commission by the succession State and credited to Germany on account of the sums due for reparations. Now after the Court had delivered Judgment No. 7, the German Government asked the Reparation Commission to strike out the Chorzów factory from the list of property transferred to Poland, but the Commission has not yet taken any decision in regard to this. The question whether Poland is to be debited with the value of the factory therefore remains undecided, and the Polish Government considers that, until this question has been decided and the Reparation Commission has struck the Chorzów factory off the list, it—the Polish Government—cannot be compelled to make a payment in favour of the Oberschlesische.

In addition to these considerations, the Polish Government also cites the Armistice Convention and Article 248 of the Treaty of Versailles. The latter lays down that, "subject to such exceptions as the Reparation Commission may approve, a first charge upon all the assets and revenues of the German Empire and its constituent States shall be the cost of reparation and all other costs arising under the present Treaty or any treaties or agreements supplementary thereto or under arrangements concluded between Germany and the Allied and Associated Powers during the armistice or its extensions". The Polish Government says that in Judgment No. 7 the Court has decided first that Poland, not having been a party to the Armistice Convention, is not entitled to avail itself of the terms of that instrument in order to establish that the alienation of the factory is null and void, and secondly, that that country cannot, on her own account, cite Article 248 of the Treaty of Versailles for the same purpose. It would seem, however, that the said Government contends that, in view of the right which the States signatory to the Armistice Convention may have to oppose the sale of the factory and in view of the right of the Reparation Commission to ensure the discharge of reparation debts in general and especially in view of the right reserved to it under Article 248, Poland's obligation to pay to Germany an indemnity in favour of the Oberschlesische is dependent on the previous approval of the said States and of the Reparation Commission.

The German Government, for its part, whilst disputing the justice of these objections of the Polish Government, has accepted the jurisdiction of the Court to decide upon them "as preliminary points in regard to the questions of form, amount and methods of payment of the indemnities claimed by it, questions with which the Court has already declared itself competent to deal". It has asked the Court to dismiss the Polish alternative submission and to decide:

"that the Polish Government is not justified in refusing to pay compensation to the German Government on the basis of arguments drawn from Article 256 or for motives of respect for the rights of the Reparation Commission or other third parties".

The Court considers that there is no doubt as to its jurisdiction to pass judgment upon the Polish submission in question, but that this submission must be rejected as not well-founded.

In this respect, it should be observed in the first place that the facts cited by Poland cannot prevent the Court, which now has before it a claim for indemnity based on its Judgment No. 7, from passing judgment upon this claim in so far as concerns the fixing of an indemnity corresponding, amongst other things, to the amount of the damage sustained by the Oberschlesische, of which damage the most important element is represented by the loss of the factory. For the Court, when it declared in Judgment No. 7 that the attitude
of the Polish Government in regard to the Oberschlesische was not in conformity with the provisions of Article 6 and the following articles of the Geneva Convention—which attitude consisted in considering and treating the Chorzów factory as acquired by Poland under Article 256 of the Treaty of Versailles—established that, as between the Parties, that article was not applicable to the Chorzów factory. Again it appears from the documents submitted to the Court by the Parties that the Reparation Commission does not claim to be competent to decide whether any particular property is or is not acquired by a succession State under the said article. The Commission accepts in this respect the solution arrived at in regard to this question either by the means at the disposal of those concerned—diplomatic negotiations, arbitration, etc.—or as the result of a unilateral act on the part of the succession State itself. The fact that the Parties are now agreed that Poland must retain the factory has nothing to do with Article 256 of the Treaty of Versailles, but is owing to the impracticability of returning it. In these circumstances there seems to be no doubt that Poland incurs no risk of having again to pay the value of the factory to the Reparation Commission, if, in accordance with Germany's claim, she pays this value to that State.

With regard to the Armistice Convention and Article 248 of the Treaty of Versailles, the question assumes a different aspect. The Armistice Convention appears to have been cited in order to reserve the possibility of getting the sale of the factory to the Oberschlesische declared invalid by means of an action to be brought to that end by the States signatory to that Convention. As, however, the Court, in Judgment No. 7, has held that Poland cannot avail itself of the provisions of the said Convention to which she is not a party, the Court cannot without inconsistency admit that country's right to invoke the Convention in order to delay making reparation for the damage resulting from her adoption of an attitude not in conformity with her obligations under the Geneva Convention.

As has already been said, the Court in Judgment No. 7 has declared that Poland cannot on her own account rely on Article 248 of the Treaty of Versailles in order to obtain the annulment of the sale of the factory. Furthermore, the Court has stated that this article does not involve a prohibition of alienation, and that the rights reserved to the Allied and Associated Powers in the article are exercised through the Reparation Commission. But it would be difficult to understand how these rights could be affected by the payment to the Reich, as an indemnity, of the value of the factory, seeing that, without such a payment, the rights of the Reich in the enterprise would probably lose all value. The objection based on this article must therefore also be overruled.

The Court considers that it should confine itself to rejecting the submission whereby the Polish Government asks for a suspension, since by so doing and by overruling the objections raised by the Polish Government on the basis of Article 256 of the Treaty of Versailles, it is deciding in conformity with the German submission to the extent that that submission is well-founded; the Court cannot, in fact, consider the submission in question in so far as it relates to third parties who are not specified.

III.

The existence of a damage to be made good being recognized by the respondent Party as regards the Bayerische, and the objections raised by the same Party against the existence of any damage that would justify compensation to the Oberschlesische being set aside, the Court must now lay down the guiding principles according to which the amount of compensation due may be determined.

The action of Poland which the Court has judged to be contrary to the Geneva Convention is not an expropriation—to render which lawful only the payment of fair compensation would have been wanting; it is a seizure of property, rights and interests which could not be expropriated even against compensation, save under the exceptional conditions fixed by Article 7 of the said Convention. As the Court has expressly declared in Judgment No. 8, reparation is in this case the consequence not of the application of Articles 6 to 22 of the Geneva Convention, but of acts contrary to those articles.
It follows that the compensation due to the German Government is not necessarily limited to the value of the undertaking at the moment of dispossession, plus interest to the day of payment. This limitation would only be admissible if the Polish Government had had the right to expropriate, and if its wrongful act consisted merely in not having paid to the two Companies the just price of what was expropriated; in the present case, such a limitation might result in placing Germany and the interests protected by the Geneva Convention, on behalf of which interests the German Government is acting, in a situation more unfavourable than that in which Germany and these interests would have been if Poland had respected the said Convention. Such a consequence would not only be unjust, but also and above all incompatible with the aim of Article 6 and following articles of the Convention—that is to say, the prohibition, in principle, of the liquidation of the property, rights and interests of German nationals and of companies controlled by German nationals in Upper Silesia—since it would be tantamount to rendering lawful liquidation and unlawful dispossession indistinguishable in so far as their financial results are concerned.

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.

This conclusion particularly applies as regards the Geneva Convention, the object of which is to provide for the maintenance of economic life in Upper Silesia on the basis of respect for the status quo. The dispossession of an industrial undertaking—the expropriation of which is prohibited by the Geneva Convention—then involves the obligation to restore the undertaking and, if this be not possible, to pay its value at the time of the indemnification, which value is designed to take the place of restitution which has become impossible. To this obligation, in virtue of the general principles of international law, must be added that of compensating loss sustained as the result of the seizure. The impossibility, on which the Parties are agreed, of restoring the Chorzów factory could therefore have no other effect but that of substituting payment of the value of the undertaking for restitution; it would not be in conformity either with the principles of law or with the wish of the Parties to infer from that agreement that the question of compensation must henceforth be dealt with as though an expropriation properly so called was involved.

* * *

Such being the principles to be followed in fixing the compensation due, the Court may now consider whether the damage to be made good is to be estimated separately for each of the two Companies, as the Applicant has claimed, or whether it is preferable to fix a lump sum.

If the Court were dealing with damage which, though caused by a single act, had affected persons independent one of the other, the natural method to be applied would be a separate assessment of the damage sustained by each of them; the total amount of compensation thus assessed would then constitute the amount of reparation due to the State.

In the present case, the situation is different. The economic unity of the Chorzów undertaking, pointed out by the Court in its Judgment No. 6, is shown above all in the fact that the interests possessed by the two Companies in the said undertaking are interdependent and complementary; it follows that they cannot simply be added together without running the risk of the same damage being compensated twice over; for all that the Bayerische would have obtained from its participation in the undertaking (sums due and shares in the profits) would have been payable by the Oberschlesische. The value
of the Bayerische's option on the factory depended also on the value of the undertaking. The whole damage suffered by the one or the other Company as the result of dispossession, in so far as concerns the cessation of the working and the loss of profit which would have accrued, is determined by the value of the undertaking as such; and, therefore, compensation under this head must remain within these limits.

On the other hand, it is clear that the legal relationship between the two Companies in no way concerns the international proceedings and cannot hinder the Court from adopting the system of a lump sum corresponding to the value of the undertaking, if, as is the Court's opinion, such a calculation is simpler and gives greater guarantees that it will arrive at a just appreciation of the amount, and avoid awarding double damages.

One reservation must, however, be made. The calculation of a lump sum referred to above concerns only the Chorzów undertaking, and does not exclude the possibility of taking into account other damage which the Companies may have sustained owing to dispossession, but which is outside the undertaking itself. No damage of such a nature has been alleged as regards the Oberschlesische, and it seems hardly conceivable that such damage should exist, for the whole activity of the Oterschlesische was concentrated in the undertaking. On the other hand, it is possible that damage of such a nature may be shown to exist as regards the Bayerische, which possesses or works other factories of the same nature as Chorzów; the Court will consider later whether such damage must be taken into account in fixing the amount of compensation.

* * *

Faced with the task of determining what sum must be awarded to the German Government in order to enable it to place the dispossessed Companies as far as possible in the economic situation in which they would probably have been if the seizure had not taken place, the Court considers that it cannot be satisfied with the data for assessment supplied by the Parties.

The cost of construction of the Chorzów factory, which the Applicant has taken as a basis for his calculation as regards compensation to the Oberschlesische, gave rise to objections and criticisms by the Respondent which are perhaps not without some foundation. Without entering into this discussion and without denying the importance which the question of cost of construction may have in determining the value of the undertaking, the Court merely observes that it is by no means impossible that the cost of construction of a factory may not correspond to the value which that factory will have when built. This possibility must more particularly be considered when, as in the present case, the factory was built by the State in order to meet the imperious demands of public necessity and under exceptional circumstances such as those created by the war.

Nor yet can the Court, on the other hand, be satisfied with the price stipulated in the contract of December 24th, 1919, between the Reich, the Oberschlesische and the Treuhand, or with the offer of sale of the shares of the Oberschlesische to the Geneva Compagnie d'azote et de fertilisants made on May 26th, 1922. It has already been pointed out above that the value of the undertaking at the moment of dispossession does not necessarily indicate the criterion for the fixing of compensation. Now it is certain that the moment of the contract of sale and that of the negotiations with the Genevese Company belong to a period of serious economic and monetary crisis; the difference between the value which the undertaking then had and that which it would have had at present may therefore be very considerable. And further, it must be considered that the price stipulated in the contract of 1919 was determined by circumstances and accompanied by clauses which in reality seem hardly to admit of its being considered as a true indication of the value which the Parties placed on the factory; and that the offer to the Genevese Company is probably to be explained by the fear of measures such as those which the Polish Government in fact adopted afterwards against the Chorzów undertaking, and which the Court has judged not to be in conformity with the Geneva Convention.
And finally as regards the sum agreed on at one moment by the two Governments during the negotiations which followed Judgment No. 7—which sum, moreover, neither Party thought fit to rely on during the present proceedings—it may again be pointed out that the Court cannot take into account declarations, admissions or proposals which the Parties may have made during direct negotiations between themselves, when such negotiations have not led to a complete agreement.

This being the case, and in order to obtain further enlightenment in the matter, the Court, before giving any decision as to the compensation to be paid by the Polish Government to the German Government, will arrange for the holding of an expert enquiry, in conformity with Article 50 of its Statute and actually with the suggestions of the Applicant. This expert enquiry, directions for which are given in an Order of Court of to-day's date, will refer to the following questions:

I.—A. What was the value, on July 3rd, 1922, expressed in Reichsmarks current at the present time, of the undertaking for the manufacture of nitrate products of which the factory was situated at Chorzów in Polish Upper Silesia, in the state in which that undertaking (including the lands, buildings, equipment, stocks and processes at its disposal, supply and delivery contracts, goodwill and future prospects) was, on the date indicated, in the hands of the Bayerische and Oberschlesische Stickstoffwerke?

B. What would have been the financial results, expressed in Reichsmarks current at the present time (profits or losses), which would probably have been given by the undertaking thus constituted from July 3rd, 1922, to the date of the present judgment, if it had been in the hands of the said Companies?

II.—What would be the value at the date of the present judgment, expressed in Reichsmarks current at the present time, of the same undertaking (Chorzów) if that undertaking (including lands, buildings, equipment, stocks, available processes, supply and delivery contracts, goodwill and future prospects) had remained in the hands of the Bayerische and Oberschlesische Stickstoffwerke, and had either remained substantially as it was in 1922 or had been developed proportionately on

The purpose of question I is to determine the monetary value, both of the object which should have been restored in kind and of the additional damage, on the basis of the estimated value of the undertaking including stocks at the moment of taking possession by the Polish Government, together with any probable profit that would have accrued to the undertaking between the date of taking possession and that of the expert opinion.

On the other hand, question II is directed to the ascertainment of the present value on the basis of the situation at the moment of the expert enquiry and leaving aside the situation presumed to exist in 1922.

This question contemplates the present value of the undertaking from two points of view: firstly, it is supposed that the factory had remained essentially in the state in which it was on July 3rd, 1922, and secondly, the factory is to be considered in the state in which it would (hypothetically but probably) have been in the hands of the Oberschlesische and Bayerische, if, instead of being taken in 1922 by Poland, it had been able to continue its supposedly normal development from that time onwards. The hypothetical nature of this question is considerably diminished by the possibility of comparison with other undertakings of the same nature directed by the Bayerische, and, in particular, with the Piesteritz factory, the analogy of which with Chorzów, as well as certain differences between the two, have been many times pointed out during the present proceedings.

In regard to this, it should be observed that the Agent for the German Government, at the public sitting of June 21st, 1928, handed in two certificates by notaries containing a summary of contracts concluded on April 16th, 1925, and August 27th, 1927, between the Mitteldeutsche Stickstoffwerke A.-G. and the Bayerische, and adhered to by the Vereinigte Industrie-Unternehmungen A.-G., under which contracts the Mitteldeutsche leased to the Bayerische the landed properties at Piesteritz belonging to it, together with all installations, etc., connected therewith. The Agent for the Polish Govern-
ment, however, in his speech on June 25th, said that, not being acquainted with the contracts and being entirely unable to form an opinion as to whether the summaries in question contained all the data necessary for accurate calculations, he formally objected to the said summaries being taken as a basis in the present proceedings.

As regards the lucrum cessans, in relation to question II, it may be remarked that the cost of upkeep of the corporeal objects forming part of the undertaking and even the cost of improvement and normal development of the installation and of the industrial property incorporated therein, are bound to absorb in a large measure the profits, real or supposed, of the undertaking. Up to a certain point, therefore, any profit may be left out of account, for it will be included in the real or supposed value of the undertaking at the present moment. If, however, the reply given by the experts to question I B should show that after making good the deficits for the years during which the factory was working at a loss, and after due provision for the cost of upkeep and normal improvement during the following years, there remains a margin of profit, the amount of such profit should be added to the compensation to be awarded.

On the other hand, if the normal development presupposed by question II represented an enlargement of the undertaking and an investment of fresh capital, the amount of such sums must be deducted from the value sought for.

The Court does not fail to appreciate the difficulties presented by these two questions, difficulties which are however inherent in the special case under consideration, and closely connected with the time that elapsed between the dispossessions and the demand for compensation, and with the transformations of the factory and the progress made in the industry with which the factory is concerned. In view of these difficulties, the Court considers it preferable to endeavour to ascertain the value to be estimated by several methods, in order to permit of a comparison and if necessary of completing the results of the one by those of the others. The Court, therefore, reserves every right to review the valuations referred to in the different formulae; basing itself on the results of the said valuations and of facts and documents submitted to it, it will then proceed to determine the sum to be awarded to the German Government, in conformity with the legal principles set out above.

It must be stated that the Chorzów factory to be valued by the experts includes also the chemical factory.

Besides the arguments which, in the Polish Government’s opinion, tend to show that the working of the said factory was not established on a profitable basis—arguments which it will be for the experts to consider—that Government has claimed that the working depended on a special authorization, which the Polish authorities were entitled to refuse. But the Court is of opinion that this argument is not well-founded.

The authorization referred to seems to be that envisaged by paragraph 18 of the Prussian law of 1861, under which, failing international treaty provisions to the contrary, moral persons of foreign nationality cannot engage in industry without the authorization of the Government. In the present case, it is certain that the Geneva Convention does actually constitute the international treaty which, guaranteeing to industrial undertakings the continuation of their activities, does away with any necessity for the special authorization required by the law of 1861.

The fact that the chemical factory was not only not working, but not even completed, at the time of transfer of the territory to Poland, can be of no importance; for chemical industry of all kinds was expressly mentioned in the articles of the Oberschlesische Company as one of the objects of that Company’s activities, and the sections and plant of the chemical factory, which were, moreover, closely connected with the sections and plant producing nitrate of lime, had already been provided for and mentioned in the contract for construction and exploitation of March 5th, 1915; thus, the entry into working of the factory was only the normal and only foreseen development of the industrial activity which the Oberschlesische had the right to exercise in Polish Upper Silesia.
In the Court's opinion, the value to which the above questions relate will be sufficient to permit it with a full knowledge of the facts to fix the amount of compensation to which the German Government is entitled, on the basis of the damage suffered by the two Companies in connection with the Chorzów undertaking.

It is true that the German Government has pointed out several times during the written and oral proceedings that fair compensation for damage suffered by the Bayerische could not be limited to the value of what has been called the "contractual rights", namely, the remuneration provided for in the contracts between the Reich or the Oberschlesische and the said Company for having made available its patents, licences and experience gained, for the management and for the organization of the sale of the finished products. The reason given is that this remuneration, which was accepted in view of the special relationship between the Parties, would hardly correspond to the fair remuneration which the Bayerische might have claimed from any third party, like the Polish Government, for the same consideration. It was on these grounds that the German Government proposed to take as a basis for the calculation of damage suffered by the Bayerische a licence supposed to be granted by the said Company to a third party under fair and normal conditions.

The method adopted by the Court in putting the questions set out above to the experts meets the German Government's contention, in so far as that contention is justified. For if the Bayerische had demanded a larger sum or additional payments in its favour, or if it had stipulated for other conditions to its advantage, the value to the Oberschlesische of its participation would to the same extent be diminished; this shows that the relation between value given and value received does not enter into consideration in calculating the worth of the enterprise as a whole. If the Bayerische had not merely managed but also owned the undertaking, this amount would still be the same; in fact, all the elements constituting the undertaking—the factory and its accessories on the one hand, the non-corporeal and other values supplied by the Bayerische on the other—are independent of the advantages which, under its contracts, each of the two Companies may derive from the undertaking.

For this reason, any difference which might exist between the conditions fixed in the contracts of 1915, 1919 and 1920 and those laid down in a contract supposed to be concluded with a third party, is of no importance in estimating the damage.

It therefore only remains to be considered whether, in conformity with the reservation made above, the Bayerische has, owing to the dispossession, suffered damage, other than that sustained by the undertaking, such as might be considered in calculating the compensation demanded by the German Government.

Although the position taken up on this subject by the German Government does not seem clear to it, the Court is in a position to state that this Government has not failed to draw attention to certain circumstances which are said to prove the existence of damage of such a nature. The possibility of competition injurious to the Bayerische's factories by a third party, alleged to have unlawfully become acquainted with and have obtained means of making use of that Company's processes, is certainly the circumstance which is most important and easiest to appreciate in this connection.

The Court must however observe that it has not before it the data necessary to enable it to decide as to the existence and extent of damage resulting from alleged competition of the Chorzów factory with the Bayerische factories; the Court is not even in a position to say for certain whether the methods of the Bayerische have been or are still being employed at Chorzów, nor whether the products of that factory are to be found in the markets in which the Bayerische sells or might sell products from its own factories. In these circumstances, the Court can only observe that the damage alleged to have resulted from competition is insufficiently proved.
Moreover, it would come under the heading of possible but contingent and indeterminate damage which, in accordance with the jurisprudence of arbitral tribunals, cannot be taken into account.

Tais is more especially the case as regards damage which might arise from the fact that the field in which the Bayerische can carry out its experiments, perfect its processes and make fresh discoveries has been limited, and from the fact that the Company can no longer influence the market in the manner that it could have done if it had continued to work the Chorzów factory.

As the Court has discarded for want of evidence, indemnity for damage alleged to have been sustained by the Bayerische outside the undertaking, it is not necessary to consider whether the interests in question would be protected by Articles 6 to 22 of the Geneva Convention.

* * *

In addition to pecuniary damages for the benefit of the Bayerische, the German Government asks the Court to give judgment:

"that, until June 30th, 1931, no nitrated lime and no nitrate of ammonia should be exported to Germany, to the United States of America, to France or to Italy;

in the alternative, that the Polish Government should be obliged to cease working the factory or the chemical equipment for the production of nitrate of ammonia, etc."

In regard to these submissions, it should be observed in the first place that they cannot contemplate damage already sustained, but solely damage which the Bayerische might suffer in the future.

If the prohibition of export is designed to prevent damage arising from the competition which the Chorzów factory might offer to the Bayerische factories, this claim must be at once dismissed, in view of the result arrived at above by the Court. To the reasons on which this result was based, it is to be added, in so far as the prohibition of export is concerned, that the Applicant has furnished no information enabling the Court to satisfy itself as to the justification for the German submission naming certain countries to which export should not be allowed and stating a definite period for which this prohibition should be in force.

It must further be observed that if the object of the prohibition were to protect the industrial property rights of the Bayerische and to prevent damage which the latter might suffer as a result of the use of these rights by Poland, in conflict with licences granted by the Bayerische to other persons or companies, the German Government should have furnished definite data as regards the existence and duration of the patents or licences in question. But notwithstanding the express requests made in this respect by the Polish Government, the German Government has produced no such data. The explanation no doubt is that the German Government does not appear to wish to base its claim respecting a prohibition of export upon the existence of these patents and licences.

On the contrary, the German Government's claim seems to present the prohibition of export as a clause which should have been included in a fair and equitable licensing contract concluded between the Bayerische and any third party; in this connection the following remarks should be made:

The mere fact that the produce of any particular undertaking is excluded from any particular market cannot evidently in itself be in the interests of such undertaking, nor of the persons who, as such, are interested therein. If the Bayerische—which, whilst participating with the Oberschlesische in the Chorzów undertaking, constitutes an entirely separate undertaking from that of Chorzów and one that may even to a certain extent have interests conflicting with those of Chorzów—were to limit in its own favour, by contract, the number of the markets of that factory, it would follow that the profit which it would draw from its share in the Chorzów undertaking might be correspondingly diminished. The Court having, as is said above, adopted, in calculating the compensation to be awarded to the German Government, a method by which such compensation shall include the total value of the undertaking, it follows that the profits of the Bayerische will be estimated without deducting the advantages which that Company might draw from a clause limiting export. The
prohibition of export asked for by the German Government cannot therefore be granted, or the same compensation would be awarded twice over.

This being so, the Court need not deal with the question whether such a prohibition, although customary in contracts between individuals, might form the subject of an injunction issued by the Court to a government, even if that government were working, as a State enterprise, the factory of which export was to be limited, nor if the prohibition asked for would be fair and appropriate in the circumstances.

As regards the German Government's alternative claim for a prohibition of exploitation, it may be added that this seems hardly compatible with the award of compensation representing the present value of the undertaking; for when that compensation, which is to cover future prospects and will consist in a sum of money bearing interest, has been paid, the Polish Government will have acquired the right to continue working the undertaking as valued, more especially as the Parties agree that the factory shall remain in the hands of the Polish Government. This agreement cannot, in fact, be construed as meaning that the factory should remain inoperative or be adapted to some other purpose, if the reparation contemplated did not include, in addition to a pecuniary indemnity, the prohibition of export sought for. It is moreover very doubtful whether, apart from any other consideration, prohibition of exploitation is admissible under the Geneva Convention, the object of which is to provide for the maintenance of industrial undertakings, and which, for this purpose, even permits them, in exceptional cases, to be expropriated (Article 7).

IV.

The Court thinks it preferable not to proceed at this stage to consider the Parties' submissions concerning certain conditions and methods in regard to the payment of the indemnity to be awarded, which conditions and methods are closely connected either with the amount of the sum to be paid or with circumstances which may exist when the time comes for payment. This applies more especially as regards the German submission No. 4 (a)—(b)—(c), and the Polish submissions A 3 and B I (c), which the Court therefore reserves for the judgment fixing the indemnity.

On the other hand, it is possible and convenient at once to decide the so-called question of set-off to which submission No. 4 (d) of the Applicant and submission C of the Respondent respectively relate.

The claim of the German Government in regard to this matter has, in the last instance, been couched in the following terms:

[Translation.]

"It is submitted that the Polish Government is not entitled to set off, against the above-mentioned claim for indemnity of the German Government, its claim in respect of social insurances in Upper Silesia; that it may not make use of any other set-off against the above-mentioned claim for indemnity; in the alternative, that set-off is only permissible if the Polish Government puts forward for this purpose a claim in respect of a debt recognized by the German Government or established by a judgment given between the two Governments."

The Polish Government, for its part, has simply asked for the rejection of this submission.

If the German submission is read literally, it is possible to regard it as mainly designed to prevent a specific case of set-off, that is to say, the setting-off in this case of the claim which the Polish Government contends that it possesses in respect of social insurances in Upper Silesia, and which was the cause of the failure of the negotiations between the two Governments following Judgment No. 7. But, if we consider the submission in the light of the observations contained in the Case and more especially in the Reply, it is easy to see that the claim in respect of social insurances in Upper Silesia is only taken as an example. In reality, the German Government asks the Court for a decision of principle the effect of which would be either to prevent the set-off of any counter-claim against the indemnity fixed in the judgment to be given by the Court, or, alternatively, only to allow such set-off in certain defined circumstances.

Though, as has been seen, the Polish Government for its part confines itself in its submission to asking the Court to reject the German submission, the arguments advanced in
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support of its claim clearly show that it considers the said German submission to be both premature and inadmissible, and that the Court has therefore no power to deal with it.

The question of the Court’s jurisdiction is thus clearly raised. Since there is no agreement between the Parties to submit to the Court the so-called question of set-off, it remains first of all to be considered whether the Court has jurisdiction to pass judgment on the German submission No. 4 (d) in virtue of any other provision, which, in the present case, could only be Article 23 of the Geneva Convention.

It is clear that the question whether international law allows claims to be set-off against each other, and if so, under what conditions such set-off is permitted, is, in itself, outside the jurisdiction derived by the Court from the said article. But the German Government contends that the question raised by it only relates to one aspect of the payment which the Polish Government must make and that, this being so, it constitutes a difference of opinion covered by the arbitration clause contained in the article.

The Court considers that this argument must be interpreted in the sense that the prohibition of set-off is asked for in order to ensure that in the present case reparation shall be really effective.

It may be admitted, as the Court has said in Judgment No. 8, that jurisdiction as to the reparation due for the violation of an international convention involves jurisdiction as to the forms and methods of reparation. If the reparation consists in the payment of a sum of money, the Court may therefore determine the method of such payment. For this reason it may well determine to whom the payment shall be made, in what place and at what moment; in a lump sum or maybe by instalments; where payment shall be made; who shall bear the costs, etc. It is then a question of applying to a particular case the general rules regarding payment, and the Court’s jurisdiction arises quite naturally out of its jurisdiction to award monetary compensation.

But this principle would be quite unjustifiably extended if it were taken as meaning that the Court might have cognizance of any question whatever of international law.

even quite foreign to the convention under consideration, for the sole reason that the manner in which such question is decided may have an influence on the effectiveness of the reparation asked for. Such an argument seems hardly reconcilable with the fundamental principles of the Court’s jurisdiction, which is limited to cases specially provided for in treaties and conventions in force.

The German Government’s standpoint however is that the power of the Court to decide on the exclusion of set-off is derived from the power which it has to provide that reparation shall be effective. Now, it seems clear that this argument can only refer to a plea of set-off raised against the beneficiary by the debtor, of such a nature as to deprive reparation of its effectiveness. Such for instance would be the case if the claim put forward against the claim on the score of reparation was in dispute and was to lead to proceedings which would in any case have resulted in delaying the entry into possession by the person concerned of the compensation awarded to him. On the contrary, if a liquid and undisputed claim is put forward against the reparation claim, it is not easy to see why a plea of set-off based on this demand should necessarily prejudice the effectiveness of the reparation.

It follows that the Court’s jurisdiction under Article 23 of the Geneva Convention could in any case only be relied on in regard to a plea raised by the respondent Party.

Now it is admitted that Poland has raised no plea of set-off in regard to any particular claim asserted by her against the German Government.

It is true that in the negotiations which followed Judgment No. 7 Poland had put forward a claim to set off a part of the indemnity which she would have undertaken to pay the German Government, against the claim which she put forward in regard to social insurances in Upper Silesia. But the Court has already had occasion to state that it can take no account of declarations, admissions or proposals which the Parties may have made during direct negotiations between them. Moreover, there is nothing to justify the Court in thinking that the Polish Government would wish to put forward, against a judgment of the Court, claims which it may have thought
fit to raise during friendly negotiations which the Parties intended should lead to a compromise. The Court must also draw attention in this connection to what it has already said in Judgment No. 1 to the effect that it neither can nor should contemplate the contingency of the judgment not being complied with at the expiration of the time fixed for compliance.

In these circumstances the Court must abstain from passing upon the submissions in question.

* * *

FOR THESE REASONS,

The Court,

having heard both Parties,

by nine votes to three,

(1) gives judgment to the effect that, by reason of the attitude adopted by the Polish Government in respect of the Oberschlesische Stickstoffwerke and Bayerische Stickstoffwerke Companies, which attitude has been declared by the Court not to have been in conformity with the provisions of Article 6 and the following articles of the Geneva Convention, the Polish Government is under an obligation to pay, as reparation to the German Government, a compensation corresponding to the damage sustained by the said Companies as a result of the aforesaid attitude;

(2) dismisses the pleas of the Polish Government with a view to the exclusion from the compensation to be paid of an amount corresponding to all or a part of the damage sustained by the Oberschlesische Stickstoffwerke, which pleas are based either on the judgment given by the Tribunal of Katowice on November 12th, 1927, or on Article 256 of the Treaty of Versailles;

(3) dismisses the submission formulated by the Polish Government to the effect that the German Government should in the first place hand over to the Polish Government the whole of the shares of the Oberschlesische Stickstoffwerke Company, of the nominal value of 110,000,000 marks, which are in the hands of the German Government under the contract of December 24th, 1919;

(4) dismisses the alternative submission formulated by the Polish Government to the effect that the claim for indemnity, in so far as the Oberschlesische Stickstoffwerke Company is concerned, should be provisionally suspended;

(5) dismisses the submission of the German Government asking for judgment to the effect that, until June 30th, 1931, no nitrated lime and no nitrate of ammonia should be exported to Germany, to the United States of America, to France or to Italy, or, in the alternative, that the Polish Government should be obliged to cease working the factory or the chemical equipment for the production of nitrate of ammonia, etc.;

(6) gives judgment to the effect that no decision is called for on the submissions of the German Government asking for judgment to the effect that the Polish Government is not entitled to set off, against the above-mentioned claim for indemnity of the German Government, its claim in respect of social insurances in Upper Silesia; that it may not make use of any other set-off against the said claim for indemnity, and, in the alternative, that set-off is only permissible if the Polish Government puts forward for this purpose a claim in respect of a debt recognized by the German Government or established by a judgment given between the two Governments;

(7) gives judgment to the effect that the compensation to be paid by the Polish Government to the German Government shall be fixed as a lump sum;

(8) reserves the fixing of the amount of this compensation for a future judgment, to be given after receiving the report of experts to be appointed by the Court for the purpose of enlightening it on the questions set out in the present judgment and after hearing the Parties on the subject of this report;

(9) also reserves for this future judgment the conditions and methods for the payment of the compensation in so far as concerns points not decided by the present judgment.
Done in French and English, the French text being authoritative, at the Peace Palace, The Hague, this thirteenth day of September nineteen hundred and twenty-eight, in three copies, one of which is to be placed in the archives of the Court, and the others to be forwarded to the Agents of the applicant and respondent Parties respectively.

(Signed) D. ANZILOTTI,
President.

(Signed) PAUL RUEGGER,
Deputy-Registrar.

M. de Bustamante, Judge, declares that he is unable to concur in the judgment of the Court as regards No. 8 of the operative portion; he considers that the questions numbered I B and II in the judgment should not be put to the experts.

M. Altamira, Judge, declares that he is unable to concur in the judgment of the Court as regards No. 6 of the operative portion.

M. Rabel, National Judge, desires to add to the judgment the remarks which follow hereafter.

Lord Finlay, Judge, and M. Ehrlich, National Judge, declaring that they cannot concur in the judgment of the Court and availing themselves of the right conferred on them by Article 57 of the Statute, have delivered the separate opinions which follow hereafter.

M. Nyholm, Judge, being unable to concur in the result arrived at by the judgment, desires to add the remarks which follow hereafter.

(Initialled) D. A.
(Initialled) P. R.
International Court of Justice

Ahmadou Sadio Diallo

(Republic of Guinea v. Democratic Republic of the Congo)

Compensation owed by the Democratic Republic of the Congo to the Republic of Guinea, Judgment of 19 June 2012
AHMADOU SADIO DIALLO
(REPUBLIQUE DE GUINEE c. REPUBLIQUE DEMOCRATIQUE DU CONGO)

(Indemnisation due par la Republique democratique du Congo a la Republique de Guinee)

AHMADOU SADIO DIALLO
(REPUBLIC OF GUINEA v. DEMOCRATIC REPUBLIC OF THE CONGO)

(Compensation owed by the Democratic Republic of the Congo to the Republic of Guinea)

19 JUIN 2012
ARRÊT

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Ahmadou Sadio Diallo

(Republic of Guinea v. Democratic Republic of the Congo)

(Compensation owed by the Democratic Republic of the Congo to the Republic of Guinea)

Introductory observations.

Object of the present proceedings pursuant to Court’s Judgment of 30 November 2010 — Injury resulting from unlawful detentions and expulsion of Mr. Diallo — Guinea’s exercise of diplomatic protection — General rules governing compensation — Establishment of injury and causal nexus between the wrongful acts and that injury — Valuation of the injury — General rule that it is for the party which alleges a particular fact to prove existence of that fact — That rule to be applied flexibly in this case as Respondent may be in a better position to establish certain facts — Evidence adduced by Guinea as starting point of the Court’s inquiry — Assessment in light of evidence introduced by the Democratic Republic of the Congo (DRC) — Allowance for the difficulty in providing certain evidence because of abruptness of Mr. Diallo’s expulsion — The Court’s inquiry limited to the injury resulting from the breach of Mr. Diallo’s rights as an individual.

Claim for compensation for non-material injury suffered by Mr. Diallo.

Non-material injury may take various forms — Establishment of non-material injury even without specific evidence — Non-material injury of Mr. Diallo as an inevitable consequence of the wrongful acts of the DRC already ascertained by the Court in its Judgment on the merits — Reasonable to conclude that the wrongful conduct of the DRC caused Mr. Diallo significant psychological suffering and loss of reputation — Number of days for which Mr. Diallo was detained, as well as fact that he was not mistreated, taken into account — Context in which the wrongful detentions and expulsion occurred, as well as their arbitrary nature, as factors aggravating Mr. Diallo’s non-material injury — Importance of equitable considerations in the quantification of compensation for non-material injury — US$85,000 in compensation awarded.

Claim for compensation for material injury suffered by Mr. Diallo.

Alleged loss of personal property.

Property of the two companies not taken into account given the Court’s prior decision that claims related thereto were inadmissible — Personal property located in Mr. Diallo’s apartment appearing on an inventory prepared 12 days after his expulsion — Failure of Guinea to prove extent of loss of Mr. Diallo’s personal property listed on inventory and extent to which any such loss was caused by the unlawful conduct of the DRC — Lack of any evidence regarding value of items on inventory — Mr. Diallo nevertheless required to transport his personal property to Guinea or to arrange for its disposition in the DRC — US$10,000 awarded based on equitable considerations.

High-value items not specified on the inventory — No evidence put forward by Guinea that Mr. Diallo owned these items at the time of his expulsion; that they were in his apartment if he did own them; or that they were lost as a result of Mr. Diallo’s treatment by the DRC — No compensation awarded.

Assets alleged to have been contained in bank accounts — No information provided by Guinea about total sum held in bank accounts, the amount of any particular account or the name(s) of bank(s) in which account(s) were held — No evidence put forward by Guinea demonstrating that the unlawful detentions and expulsion of Mr. Diallo caused the loss of any assets held in bank accounts — No compensation awarded.

Alleged loss of remuneration during Mr. Diallo’s unlawful detentions and following his expulsion.

Cognizable character, as a component of compensation, of claim for income lost as a result of unlawful detention — Estimation may be appropriate where amount of lost income cannot be calculated precisely — No evidence however offered by Guinea to support the claim that
Mr. Diallo was earning US$25,000 per month as gérant of Africom-Zaire and Africontainers-Zaire — Evidence, on the contrary, that neither of the companies was conducting business during the years immediately prior to Mr. Diallo’s detentions — Failure of Guinea to prove how Mr. Diallo’s unlawful detentions would have caused him to lose any remuneration he could have been receiving — Guinea’s claim for loss of remuneration during period of Mr. Diallo’s detention rejected — Reasons for rejecting claim equally applicable to Guinea’s highly speculative claim relating to the period following Mr. Diallo’s expulsion — No compensation awarded.

Alleged deprivation of potential earnings.

Guinea’s claim concerning “potential earnings” as beyond the scope of the proceedings, given the Court’s prior decision on the inadmissibility of Guinea’s claims relating to the injuries alleged to have been caused to the companies — No compensation awarded.

Total sum awarded and post-judgment interest.

The total sum awarded to Guinea is US$95,000 to be paid by 31 August 2012 — Should payment be delayed, post-judgment interest on the principal sum due to accrue as from 1 September 2012 at an annual rate of 6 per cent — Sum awarded to Guinea in the exercise of diplomatic protection of Mr. Diallo intended to provide reparation for the latter’s injury.

Procedural costs.

Article 64 of the Statute of the Court as implying that there may be circumstances which would make it appropriate for the Court to allocate costs in favour of one of the parties — No such circumstances exist in the present case.

JUDGMENT

Present: President Tomka; Vice-President Sepúlveda-Amor; Judges Owada, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue, Gaia, Sebutinde; Judges ad hoc Mahiou, Mampuya; Registrar Couvreur.

In the case concerning Ahmadou Sadio Diallo, between

the Republic of Guinea,

represented by

Mr. Mohamed Camara, First Counsellor for Political Affairs, Embassy of Guinea in the Benelux countries and in the European Union,

as Agent;

Mr. Hassane II Diallo, Counsellor and chargé de mission at the Ministry of Justice,

as Co-Agent,

and

the Democratic Republic of the Congo,

represented by

H.E. Mr. Henri Mova Sakanyi, Ambassador of the Democratic Republic of the Congo to the Kingdom of Belgium, the Kingdom of the Netherlands and the Grand Duchy of Luxembourg,

as Agent;

Mr. Tshibangu Kalala, Professor of International Law at the University of Kinshasa, member of the Kinshasa and Brussels Bars, and member of the Congolese Parliament,

as Co-Agent,

The COURT, composed as above, after deliberation,

delivers the following Judgment:

1. On 28 December 1998, the Government of the Republic of Guinea (hereinafter “Guinea”) filed in the Registry of the Court an Application instituting proceedings against the Democratic Republic of the Congo (hereinafter the “DRC”, named Zaire between 1971 and 1997) in respect of a dispute concerning “serious violations of international law” alleged to have been committed upon the person of Mr. Ahmadou Sadio Diallo, a Guinean national.
In the Application, Guinea maintained that:

"Mr. Ahmadou Sadio Diallo, a businessman of Guinean nationality, was unjustly imprisoned by the authorities of the Democratic Republic of the Congo, after being resident in that State for thirty-two (32) years, deposed of his sizable investments, businesses, movable and immovable property and bank accounts, and then expelled."

Guinea added: "[H]is expulsion came at a time when Mr. Ahmadou Sadio Diallo was pursuing recovery of substantial debts owed to his businesses [Africom-Zaire and Africontainers-Zaire] by the [Congolese] State and by oil companies established in its territory and of which the State is a shareholder. According to Guinea, Mr. Diallo's arrests, detentions and expulsion constituted, inter alia, violations of

"the principle that aliens should be treated in accordance with 'a minimum standard of civilization', [of] the obligation to respect the freedom and property of aliens, [and of] the right of aliens accused of an offence to a fair trial on adversarial principles by an impartial court."

To found the jurisdiction of the Court, Guinea invoked in the Application the declarations whereby the two States have recognized the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Statute of the Court.

2. On 3 October 2002, the DRC raised preliminary objections in respect of the admissibility of Guinea's Application. In its Judgment of 24 May 2007 on these preliminary objections, the Court declared the Application of the Republic of Guinea to be admissible "in so far as it concerns protection of Mr. Diallo's rights as an individual" and "in so far as it concerns protection of [his] direct rights as associé in Africom-Zaire and Africontainers-Zaire". However, the Court declared the Application of the Republic of Guinea to be inadmissible "in so far as it concerns protection of Mr. Diallo in respect of alleged violations of rights of Africom-Zaire and Africontainers-Zaire" (Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II), pp. 617-618, para. 98, subparas. 3 (a), (b), and (c) of the operative part).

3. In its Judgment of 30 November 2010 on the merits, the Court found that, in respect of the circumstances in which Mr. Diallo had been expelled on 31 January 1996, the DRC had violated Article 13 of the International Covenant on Civil and Political Rights (hereinafter the "Covenant") and Article 12, paragraph 4, of the African Charter on Human and Peoples' Rights (hereinafter the "African Charter") (Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II), p. 692, para. 165, subpara. (2) of the operative part). The Court also found that, in respect of the circumstances in which Mr. Diallo had been arrested and detained in 1995-1996 with a view to his expulsion, the DRC had violated Article 9, paragraphs 1 and 2, of the Covenant and Article 6 of the African Charter (ibid., p. 692, para. 165, subpara. (3) of the operative part).

4. The Court further decided that "the Democratic Republic of the Congo [was] under obligation to make appropriate reparation, in the form of compensation, to the Republic of Guinea for the injurious consequences of the violations of international obligations referred to in subparagraphs (2) and (3) [of the operative part]" (ibid., p. 693, para. 165, subpara. (7) of the operative part), namely the unlawful arrests, detentions and expulsion of Mr. Diallo.

5. In addition, the Court found that the DRC had violated Mr. Diallo's rights under Article 36, paragraph 1 (b), of the Vienna Convention on Consular Relations (ibid., p. 692, para. 165, subpara. (4) of the operative part). It did not however order the DRC to pay compensation for this violation (ibid., p. 693, para. 165, subpara. (7) of the operative part).

6. In the same Judgment, the Court rejected all other submissions by Guinea relating to the arrests and detentions of Mr. Diallo, including the contention that he was subjected to treatment prohibited by Article 10, paragraph 1, of the Covenant during his detentions (ibid., p. 693, para. 165, subpara. (5) of the operative part). Furthermore, the Court found that the DRC had not violated Mr. Diallo's direct rights as an associé in the companies Africom-Zaire and Africontainers-Zaire (ibid., p. 693, para. 165, subpara. (6) of the operative part).

7. Finally, the Court decided, with respect to the question of compensation owed by the DRC to Guinea, that "failing agreement between the Parties on this matter within six months from the date of [the said] Judgment, [this] question . . . shall be settled by the Court" (ibid., p. 693, para. 165, subpara. (8) of the operative part). Considering itself to have been "sufficiently informed of the facts of the . . . case", the Court found that "a single exchange of written pleadings by the Parties would then be sufficient in order for it to decide on the amount of compensation" (Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II), p. 692, para. 164).

8. The time-limit of six months thus fixed by the Court having expired on 30 May 2011 without an agreement being reached between the Parties on the question of compensation due to Guinea, the President of the Court held a meeting with the representatives of the Parties on 14 September 2011 in order to ascertain their views on the time-limits to be fixed for the filing of the two pleadings envisaged by the Court.

9. By an Order of 20 September 2011, the Court fixed 6 December 2011 and 21 February 2012 as the respective time-limits for the filing of the Memorial of Guinea and the Counter-Memorial of the DRC on the question of compensation due to Guinea. The Memorial and the Counter-Memorial were duly filed within the time-limits thus prescribed.

10. In the written proceedings relating to compensation, the following submissions were presented by the Parties:
On behalf of the Government of Guinea,

in the Memorial:

“In compensation for the damage suffered by Mr. Ahmadou Sadio Diallo as a result of his arbitrary detentions and expulsion, the Republic of Guinea begs the Court to order the Democratic Republic of the Congo to pay it (on behalf of its national) the following sums:

— US$250,000 for mental and moral damage, including injury to his reputation;
— US$6,430,148 for loss of earnings during his detention and following his expulsion;
— US$550,000 for other material damage; and
— US$4,360,000 for loss of potential earnings;
amounting to a total of eleven million five hundred and ninety thousand one hundred and forty-eight American dollars (US$11,590,148), not including statutory default interest.

Furthermore, as a result of having been forced to institute the present proceedings, the Guinean State has incurred unrecoverable costs which it should not, in equity, be required to bear and which are assessed at US$500,000. The Republic of Guinea also begs the Court to order the DRC to pay it that sum.

The Democratic Republic of the Congo should also be ordered to pay all the costs.”

On behalf of the Government of the DRC,

in the Counter-Memorial:

“Having regard to all of the arguments of fact and law set out above, the Democratic Republic of the Congo asks the Court to adjudge and declare that:

(1) compensation in an amount of US$30,000 is due to Guinea to make good the non-pecuniary injury suffered by Mr. Diallo as a result of his wrongful detentions and expulsion in 1995-1996;
(2) no default interest is due on the amount of compensation as fixed above;
(3) the DRC shall have a time-limit of six months from the date of the Court’s judgment in which to pay to Guinea the above amount of compensation;
(4) no compensation is due in respect of the other material damage claimed by Guinea;

(5) each Party shall bear its own costs of the proceedings, including costs and fees of its counsel, advocates, advisers, assistants and others.”

I. INTRODUCTORY OBSERVATIONS

11. It falls to the Court at this stage of the proceedings to determine the amount of compensation to be awarded to Guinea as a consequence of the unlawful arrests, detentions and expulsion of Mr. Diallo by the DRC, pursuant to the findings of the Court set out in its Judgment of 30 November 2010 and recalled above. In that Judgment, the Court indicated that the amount of compensation was to be based on “the injury flowing from the wrongful detentions and expulsion of Mr. Diallo in 1995-96, including the resulting loss of his personal belongings” (I.C.J. Reports 2010(II), p. 691, para. 163).

12. The Court begins by recalling certain of the facts on which it based its Judgment of 30 November 2010. Mr. Diallo was continuously detained for 66 days, from 5 November 1995 until 10 January 1996 (ibid., p. 662, para. 59), and was detained for a second time between 25 and 31 January 1996 (ibid., p. 662, para. 60), that is, for a total of 72 days. The Court also observed that Guinea failed to demonstrate that Mr. Diallo was subjected to inhuman or degrading treatment during his detentions (ibid., p. 671, paras. 88-89). In addition, the Court found that Mr. Diallo was expelled by the DRC on 31 January 1996 and that he received notice of his expulsion on the same day (ibid., p. 659, para. 50, and p. 668, para. 78).

13. The Court turns to the question of compensation for the violations of Mr. Diallo’s human rights established in its Judgment of 30 November 2010. It recalls that it has fixed an amount of compensation once, in the Corfu Channel case ((United Kingdom v. Albania), Assessment of Amount of Compensation, Judgment, I.C.J. Reports 1949, p. 244). In the present case, Guinea is exercising diplomatic protection with respect to one of its nationals, Mr. Diallo, and is seeking compensation for the injury caused to him. As the Permanent Court of International Justice stated in the Factory of Chorzów case (Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, pp. 27-28), “[i]t is a principle of international law that the reparation of a wrong may consist in an indemnity corresponding to the damage which the nationals of the injured State have suffered as a result of the act which is contrary to international law”. The Court has taken into account the practice in other international courts, tribunals and commissions (such as the International Tribunal for the Law of the Sea, the European Court of Human Rights (ECHR), the Inter-American Court of Human Rights (IACHR), the Iran-United States Claims Tribunal, the Eritrea-Ethiopia Claims Commission, and the United Nations Compensation Commission), which have applied general principles governing compensation when fixing its amount, including in respect of injury resulting from unlawful detention and expulsion.
14. Guinea seeks compensation under four heads of damage: non-material injury (referred to by Guinea as “mental and moral damage”); and three heads of material damage: alleged loss of personal property; alleged loss of professional remuneration (referred to by Guinea as “loss of earnings”) during Mr. Diallo’s detentions and after his expulsion; and alleged deprivation of “potential earnings”. As to each head of damage, the Court will consider whether an injury is established. It will then “ascertain whether, and to what extent, the injury asserted by the Applicant covers harm other than material injury which is suffered by an injured entity or individual. Non-material injury to a person which is cognizable under international law may take various forms. For instance, the umpire in the *Lusitania* cases before the Mixed Claims Commission (United States/Germany) mentioned “mental suffering, injury to [a claimant’s] feelings, humiliation, shame, degradation, loss of social position or injury to his credit or to his reputation” (Opinion in the *Lusitania* Cases, 1 November 1923, United Nations, *Reports of International Arbitral Awards* (RIAA), Vol. VII, p. 40). The Inter-American Court of Human Rights observed in *Gutiérrez-Soler v. Colombia* that “[n]on pecuniary damage may include distress, suffering, tampering with the victim’s core values, and changes of a non pecuniary nature in the person’s everyday life” (Judgment of 12 September 2005 (Merits, Reparations and Costs), IACHR, Series C, No. 132, para. 82).

15. The assessment of compensation owed to Guinea in this case will require the Court to weigh the Parties’ factual contentions. The Court recalled in its Judgment of 30 November 2010 that, as a general rule, it is for the party which alleges a particular fact in support of its claims to prove the existence of that fact (*I.C.J. Reports 2010 (II)*, p. 660, para. 54; see also *Application of the Interim Accord of 13 September 1995* (the former Yugoslav Republic of Macedonia v. Greece), Judgment of 5 December 2011, para. 72; *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Judgment, *I.C.J. Reports* 2010 (I), p. 71, para. 162). The Court also recognized that this general rule would have to be applied flexibly in this case and, in particular, that the Respondent may be in a better position to establish certain facts (*I.C.J. Reports 2010 (II)*, pp. 660-661, paras. 54-56).

16. In the present stage of the proceedings, the Court once again will be guided by the approach summarized in the preceding paragraph. Thus, the starting point in the Court’s inquiry will be the evidence adduced by Guinea to support its claim under each head of damage, which the Court will assess in light of evidence introduced by the DRC. The Court also recognizes that the abruptness of Mr. Diallo’s expulsion may have diminished the ability of Mr. Diallo and Guinea to locate certain documents, calling for some flexibility by the Court in considering the record before it.

17. Before turning to the various heads of damage, the Court also recalls that the scope of the present proceedings is determined in important respects by the Court’s Judgments of 24 May 2007 and of 30 November 2010. Having declared Guinea’s Application inadmissible as to alleged violations of the rights of Africom-Zaïre and Africontainers-Zaïre (*I.C.J. Reports 2007 (II)*, p. 616, para. 94), the Court will not take account of any claim for injury sustained by the two companies, rather than by Mr. Diallo himself. Moreover, the Court will award no compensation in respect of Guinea’s claim that the DRC violated Mr. Diallo’s direct rights as an *associé* in Africom-Zaïre and Africontainers-Zaïre, because the Court found that there was no such violation in its Judgment of 30 November 2010 (*I.C.J. Reports 2010 (II)*, p. 690, para. 157, and pp. 690-691, para. 159). The Court’s inquiry will be limited to the injury resulting from the breach of Mr. Diallo’s rights as an individual, that is, “the injury flowing from the wrongful detentions and expulsion of Mr. Diallo in 1995-96, including the resulting loss of his personal belongings” (*ibid.*, p. 691, para. 163).

II. HEADS OF DAMAGE IN RESPECT OF WHICH COMPENSATION IS REQUESTED

A. Claim for compensation for non-material injury suffered by Mr. Diallo

18. “Mental and moral damage”, referred to by Guinea, or “non-pecuniary injury”, referred to by the DRC, covers harm other than material injury which is suffered by an injured entity or individual. Non-material injury to a person which is cognizable under international law may take various forms. For instance, the umpire in the *Lusitania* cases before the Mixed Claims Commission (United States/Germany) mentioned “mental suffering, injury to [a claimant’s] feelings, humiliation, shame, degradation, loss of social position or injury to his credit or to his reputation” (Opinion in the *Lusitania* Cases, 1 November 1923, United Nations, *Reports of International Arbitral Awards* (RIAA), Vol. VII, p. 40). The Inter-American Court of Human Rights observed in *Gutiérrez-Soler v. Colombia* that “[n]on pecuniary damage may include distress, suffering, tampering with the victim’s core values, and changes of a non pecuniary nature in the person’s everyday life” (Judgment of 12 September 2005 (Merits, Reparations and Costs), IACHR, Series C, No. 132, para. 82).

19. In the present case, Guinea contends that

“Mr. Diallo suffered moral and mental harm, including emotional pain, suffering and shock, as well as the loss of his position in society and injury to his reputation as a result of his arrests, detentions and expulsion by the DRC.”

No specific evidence regarding this head of damage is submitted by Guinea.

20. The DRC, for its part, does not contest the fact that Mr. Diallo suffered “non-pecuniary injury”. However, the DRC requests the Court to

“take into account the specific circumstances of this case, the brevity of the detention complained of, the absence of any mistreatment of Mr. Diallo, [and] the fact that Mr. Diallo was expelled to his country of origin, with which he had been able to maintain ongoing and high-level contacts throughout his lengthy stay in the Congo”.

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21. In the view of the Court, non-material injury can be established even without specific evidence. In the case of Mr. Diallo, the fact that he suffered non-material injury is an inevitable consequence of the wrongful acts of the DRC already ascertained by the Court. In its Judgment on the merits, the Court found that Mr. Diallo had been arrested without being informed of the reasons...
for his arrest and without being given the possibility to seek a remedy (I.C.J. Reports 2010 (II), p. 666, para. 74, and p. 670, para. 84); that he was detained for an unjustifiably long period pending expulsion (ibid., pp. 668-669, para. 79); that he was made the object of accusations that were not substantiated (ibid., p. 669, para. 82); and that he was wrongfully expelled from the country where he had resided for 32 years and where he had engaged in significant business activities (ibid., pp. 666-667, paras. 73 and 74). Thus, it is reasonable to conclude that the DRC’s wrongful conduct caused Mr. Diallo significant psychological suffering and loss of reputation.

22. The Court has taken into account the number of days for which Mr. Diallo was detained and its earlier conclusion that it had not been demonstrated that Mr. Diallo was mistreated in violation of Article 10, paragraph 1, of the Covenant (ibid., p. 671, para. 89).

23. The circumstances of the case point to the existence of certain factors which aggravate Mr. Diallo’s non-material injury. One is the context in which the wrongful detentions and expulsion occurred. As the Court noted in its Judgment on the merits,

“it is difficult not to discern a link between Mr. Diallo’s expulsion and the fact that he had attempted to recover debts which he believed were owed to his companies by, amongst others, the Zairean State or companies in which the State holds a substantial portion of the capital” (I.C.J. Reports 2010 (II), p. 669, para. 82).

In addition, Mr. Diallo’s

“arrest and detention aimed at allowing such an expulsion measure, one without any defensible basis, to be effected can only be characterized as arbitrary within the meaning of Article 9, paragraph 1, of the Covenant and Article 6 of the African Charter” (ibid.).

24. Quantification of compensation for non-material injury necessarily rests on equitable considerations. As the umpire noted in the Lusitania cases, non-material injuries “are very real, and the mere fact that they are difficult to measure or estimate by money standards makes them none the less real and affords no reason why the injured person should not be compensated therefore as compensatory damages” (RIAA, Vol. VII, p. 40). When considering compensation for material or non-material injury caused by violations of the Covenant or the African Charter, respectively, the Human Rights Committee and the African Commission on Human and Peoples’ Rights recommended “adequate compensation” without specifying the sum to be paid (see, for example, A. v. Australia, HRC, 3 April 1997, communication No. 560/1993, United Nations doc. CCPR/C/59/D/560/1993, para. 11; Kenneth Good v. Republic of Botswana, ACHPR, 26 May 2010, communication No. 313/05, 28th Activity Report, Ann.IV, p. 110, para. 244). Arbitral tribunals and regional human rights courts have been more specific, given the power to assess compensation granted by their respective constitutive instruments. Equitable considerations have guided their quantification of compensation for non-material harm. For instance, in Al-Jedda v. the United Kingdom, the Grand Chamber of the European Court of Human Rights stated that, for determining damage,

“[i]ts guiding principle is equity, which above all involves flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant but the overall context in which the breach occurred” (Application No. 27021/08, Judgment of 7 July 2011, ECHR Reports 2011, para. 114).

Similarly, the Inter-American Court of Human Rights has said that the payment of a sum of money as compensation for non-pecuniary damages may be determined by that court “in reasonable exercise of its judicial authority and on the basis of equity” (Cantoral Benavides v. Peru, Judgment of 3 December 2001 (Reparations and Costs), IACHR, Series C, No. 88, para. 53).

25. With regard to the non-material injury suffered by Mr. Diallo, the circumstances outlined in paragraphs 21 to 23 lead the Court to consider that the amount of US$85,000 would provide appropriate compensation. The sum is expressed in the currency to which both Parties referred in their written pleadings on compensation.

B. Claim for compensation for material injury suffered by Mr. Diallo

26. As previously noted (see paragraph 14), Guinea claims compensation for three heads of material damage. The Court will begin by addressing Guinea’s claim relating to the loss of Mr. Diallo’s personal property; it will then consider Guinea’s claims concerning loss of professional remuneration during Mr. Diallo’s unlawful detentions and following his unlawful expulsion from the DRC; and, finally, it will turn to Guinea’s claim in respect of “potential earnings”.

1. Alleged loss of Mr. Diallo’s personal property (including assets in bank accounts)

27. Guinea claims that Mr. Diallo’s abrupt expulsion prevented him from making arrangements for the transfer or disposal of personal property that was in his apartment and also caused the loss of certain assets in bank accounts. Guinea refers to an inventory of items in Mr. Diallo’s apartment that was prepared 12 days after he was expelled, claiming that the inventory understated his personal property because it failed to include a number of high-value items that were in the apartment. It states that all of these assets have been irretrievably lost and estimates the value of lost tangible and intangible assets (including bank accounts) at US$550,000.

28. The DRC contends that Guinea was responsible for having produced the inventory in question as evidence before the Court, only later to declare it incomplete. Citing Guinea’s role in preparing the inventory, the DRC characterizes that inventory as “credible” and “serious”, and
contends that Guinea cannot now claim that Mr. Diallo owned additional assets not reflected in it. The DRC further asserts that it cannot be held responsible for the alleged loss of any property that was in the apartment because the DRC did not order Mr. Diallo’s eviction from the apartment and because Mr. Diallo’s personal property was under the control of officials from the Guinean embassy and of Mr. Diallo’s friends and relatives. Further, the DRC states that Guinea has provided no evidence regarding bank assets.

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29. The Court here addresses Guinea’s claim for the loss of Mr. Diallo’s personal property, without taking into account property of the two companies (to which Guinea also refers), given the Court’s prior decision that Guinea’s claims relating to the companies were inadmissible (see paragraph 17 above). The personal property at issue in Guinea’s claim may be divided into three categories: furnishings of Mr. Diallo’s apartment that appear on the above-referenced inventory; certain high-value items alleged to have been in Mr. Diallo’s apartment, which are not specified on that inventory; and assets in bank accounts.

30. As to personal property that was located in Mr. Diallo’s apartment, it appears that the inventory of the property in Mr. Diallo’s apartment, which both Parties have submitted to the Court, was prepared approximately 12 days after Mr. Diallo’s expulsion from the DRC. While Guinea complains about omissions from the inventory (the high-value items discussed below), both Parties appear to accept that the items that are listed on the inventory were in the apartment at the time the inventory was prepared.

31. There is, however, uncertainty about what happened to the property listed on the inventory. Guinea does not point to any evidence that Mr. Diallo attempted to transport or to dispose of the property in the apartment, and there is no evidence before the Court that the DRC barred him from doing so. The DRC states that it did not take possession of the apartment and that it did not evict Mr. Diallo from the apartment. Mr. Diallo himself stated in 2008 that the company from which the apartment was leased took possession of it soon after his expulsion and that, as a result, he had lost all of his personal effects. Therefore, taken as a whole, Guinea has failed to prove the extent of the loss of Mr. Diallo’s personal property listed on the inventory and the extent to which any such loss was caused by the DRC’s unlawful conduct.

32. Even assuming that it could be established that the personal property on the inventory was lost and that any such loss was caused by the DRC’s unlawful conduct, Guinea offers no evidence regarding the value of the items on the inventory (either with respect to individual items or in the aggregate).
36. The Court therefore awards no compensation in respect of the high-value items and bank account assets described in paragraphs 34 and 35 above. However, in view of the Court’s conclusions above (see paragraph 33) regarding the personal property of Mr. Diallo and on the basis of equitable considerations, the Court awards the sum of US$10,000 under this head of damage.

2. Alleged loss of remuneration during Mr. Diallo’s unlawful detentions and following his unlawful expulsion

37. At the outset, the Court notes that, in its submissions at the conclusion of its Memorial, Guinea claims US$6,430,148 for Mr. Diallo’s loss of earnings during his detentions and following his expulsion. However, Guinea makes reference elsewhere in its Memorial to a sum of US$80,000 for Mr. Diallo’s loss of earnings during his detentions. As presented by Guinea, this claim for US$80,000, although not reflected as a separate submission, is clearly distinct from its claim for US$6,430,148 which, in the reasoning of the Memorial, only concerns the alleged “loss of earnings” following Mr. Diallo’s expulsion. The Court will interpret Guinea’s submissions in light of the reasoning of its Memorial, as it is entitled to do (see, e.g., Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974, p. 262, para. 29; Nuclear Tests (New Zealand v. France), Judgment, I.C.J. Reports 1974, p. 466, para. 30). Therefore, in the present Judgment, it will first consider the claim of US$80,000 for loss of professional remuneration during Mr. Diallo’s detentions (see paragraphs 38-46) and then will examine the claim of US$6,430,148 for loss of professional remuneration following his expulsion (see paragraphs 47-49).

38. Guinea asserts that, prior to his arrest on 5 November 1995, Mr. Diallo received monthly remuneration of US$25,000 in his capacity as gérant of Africom-Zaire and Africontainers-Zaire. Based on that figure, Guinea estimates that Mr. Diallo suffered a loss totalling US$80,000 during the 72 days he was detained, an amount that, according to Guinea, takes account of inflation. Guinea states that remuneration from the two companies was Mr. Diallo’s “main source of income” and does not ask the Court to award compensation in respect of any other income relating to the period of Mr. Diallo’s detentions. Guinea further asserts that Mr. Diallo was unable to carry out his “normal management activities” while in detention and thus to ensure that his companies were being properly run.

39. In response, the DRC contends that Guinea has not produced any documentary evidence to support the claim for loss of remuneration. The DRC also takes the view that Guinea has failed to show that Mr. Diallo’s detentions caused a loss of remuneration that he otherwise would have received. In particular, the DRC asserts that Guinea has failed to explain why Mr. Diallo, as the sole gérant and associé of the two companies, could not have directed that payments be made to him. According to the DRC, no compensation for loss of remuneration during the period of Mr. Diallo’s detention is warranted.

40. The Court observes that, in general, a claim for income lost as a result of unlawful detention is cognizable as a component of compensation. This approach has been followed, for example, by the European Court of Human Rights (see, e.g., Teixeira de Castro v. Portugal, Application No. 44/1997/828/1034, Judgment of 9 June 1998, ECHR Reports 1998-IV, paras. 46-49), by the Inter-American Court of Human Rights (see, e.g., Suárez-Rosero v. Ecuador, Judgment of 20 January 1999 (Reparations and Costs), IACHR, Series C, No. 44, para. 60), and by the Governing Council of the United Nations Compensation Commission (see United Nations Compensation Commission Governing Council, Report and Recommendations Made by the Panel of Commissioners Concerning the Fourteenth Instalment of ‘E3’ Claims, United Nations doc. S/AC.26/2000/19, 29 September 2000, para. 126). Moreover, if the amount of the lost income cannot be calculated precisely, estimation may be appropriate (see, e.g., Elci and Others v. Turkey, Application Nos. 23145/93 and 25091/94, Judgment of 13 November 2003, ECHR, para. 721; Case of the “Street Children” (Villagrá-Morales et al.) v. Guatemala, Judgment of 26 May 2001 (Reparations and Costs), IACHR, Series C, No. 77, para. 79). Thus, the Court must first consider whether Guinea has established that Mr. Diallo was receiving remuneration prior to his detentions and that such remuneration was in the amount of US$25,000 per month.

41. The claim that Mr. Diallo was earning US$25,000 per month as gérant of the two companies is made for the first time in the present phase of the proceedings, devoted to compensation. Guinea offers no evidence to support the claim. There are no bank account or tax records. There are no accounting records of either company showing that it had made such payments. It is plausible, of course, that Mr. Diallo’s abrupt expulsion impeded or precluded his access to such records. That said, the absence of any evidence in support of the claim for loss of remuneration at issue here stands in stark contrast to the evidence adduced by Guinea at an earlier stage of this case in support of the claims relating to the two companies, which included various documents from the records of the companies.

42. Moreover, there is evidence suggesting that Mr. Diallo was not receiving US$25,000 per month in remuneration from the two companies prior to his detentions. First, the evidence regarding Africom-Zaire and Africontainers-Zaire strongly indicates that neither of the companies was conducting business — apart from the attempts to collect debts allegedly owed to each company — during the years immediately prior to Mr. Diallo’s detentions. In particular, the record indicates that the operations of Africontainers-Zaire had, even according to Guinea, experienced a serious decline by 1990. In addition, as the Court noted previously, the DRC asserted that Africom-Zaire had ceased all commercial activities by the end of the 1980s and for that reason had been struck from the Trade Register (I.C.J. Reports 2007 (II), p. 593, para. 22; I.C.J. Reports 2010 (II), p. 677, para. 108), this assertion was not challenged by Guinea. It appears that disputes about the amounts payable by various entities to Africom-Zaire and Africontainers-Zaire continued into the 1990s, in some cases even after Mr. Diallo’s expulsion in 1996. But there is no evidence of operating activity that would have generated a flow of income during the years just prior to Mr. Diallo’s detentions.
43. Secondly, in contrast to Guinea’s claim in the present phase of the proceedings devoted to compensation that Mr. Diallo was receiving monthly remuneration of US$25,000, Guinea told the Court, during the preliminary objections phase, that Mr. Diallo was “already impoverished in 1995”. This statement to the Court is consistent with the fact that, on 12 July 1995, Mr. Diallo obtained in the DRC, at his request, a “Certificate of Indigency” declaring him “temporarily destitute” and thus permitting him to avoid payments that would otherwise have been required in order to register a judgment in favour of one of the companies.

44. The Court therefore concludes that Guinea has failed to establish that Mr. Diallo was receiving remuneration from Africom-Zaire and Africontainers-Zaire on a monthly basis in the period immediately prior to his detentions in 1995-1996 or that such remuneration was at the rate of US$25,000 per month.

45. Guinea also does not explain to the satisfaction of the Court how Mr. Diallo’s detentions caused an interruption in any remuneration that Mr. Diallo might have been receiving in his capacity as gérant of the two companies. If the companies were in fact in a position to pay Mr. Diallo as of the time that he was detained, it is reasonable to expect that employees could have continued to make the necessary payments to the gérant (their managing director and the owner of the companies). Moreover, as noted above (see paragraph 12), Mr. Diallo was detained from 5 November 1995 to 10 January 1996, then released and then detained again from 25 January 1996 to 31 January 1996. Thus, there was a period of two weeks during which there was an opportunity for Mr. Diallo to make arrangements to receive any remuneration that the companies allegedly had failed to pay him during the initial 66-day period of detention.

46. Under these circumstances, Guinea has not proven to the satisfaction of the Court that Mr. Diallo suffered a loss of professional remuneration as a result of his unlawful detentions.

47. In addition to the claim for loss of remuneration during his unlawful detentions, Guinea asserts that the unlawful expulsion of Mr. Diallo by the DRC deprived him of the ability to continue receiving remuneration as the gérant of Africom-Zaire and Africontainers-Zaire. Based on its claim (described above) that Mr. Diallo received remuneration of US$25,000 per month prior to his detentions in 1995-1996, Guinea asserts that, during the period that has elapsed since Mr. Diallo’s expulsion on 31 January 1996, he has lost additional “professional income” in the amount of US$4,755,500. Guinea further asserts that this amount should be adjusted upward to account for inflation, such that its estimate of Mr. Diallo’s loss of professional remuneration since his expulsion is US$6,430,148.

48. The DRC reiterates its position regarding the claim for unpaid remuneration from the period of Mr. Diallo’s detentions, in particular the lack of evidence to support the claim that Mr. Diallo was receiving remuneration of US$25,000 per month prior to his detentions and expulsion.

49. For the reasons indicated above, the Court has already rejected the claim for loss of professional remuneration during the period of Mr. Diallo’s detentions (see paragraphs 38-46). Those reasons also apply with respect to Guinea’s claim relating to the period following Mr. Diallo’s expulsion. Moreover, Guinea’s claim with respect to Mr. Diallo’s post-expulsion remuneration is highly speculative and assumes that Mr. Diallo would have continued to receive US$25,000 per month had he not been unlawfully expelled. While an award of compensation relating to loss of future earnings inevitably involves some uncertainty, such a claim cannot be purely speculative (cf. Khamidov v. Russia, Application No. 72118/01, Judgment of 15 November 2007 (Merits and Just Satisfaction), ECHR, para. 197; Chaparro Álvarez and Lapo Íñiguez v. Ecuador, Judgment of 21 November 2007 (Preliminary Objections, Merits, Reparations and Costs), IACHR, Series C, No. 170, paras. 235-236; see also Commentary to Article 36, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Yearbook of the International Law Commission, 2001, Vol. II (2), pp. 104-105 (concerning “lost profits” claims)). Thus, the Court concludes that no compensation can be awarded for Guinea’s claim relating to unpaid remuneration following Mr. Diallo’s expulsion.

50. The Court therefore awards no compensation for remuneration that Mr. Diallo allegedly lost during his detentions and following his expulsion.

3. Alleged deprivation of potential earnings

51. Guinea makes an additional claim that it describes as relating to Mr. Diallo’s “potential earnings”. Specifically, Guinea states that Mr. Diallo’s unlawful detentions and subsequent expulsion resulted in a decline in the value of the two companies and the dispersal of their assets.
Guinea also asserts that Mr. Diallo was unable to assign his holdings (parts sociales) in these companies to third parties and that his loss of potential earnings can be valued at 50 per cent of the "exchange value of the holdings", a sum that, according to Guinea, totals US$4,360,000.

52. The DRC points out that Guinea’s calculation of the alleged loss to Mr. Diallo is based on assets belonging to the two companies, and not assets that belong to Mr. Diallo in his individual capacity. Furthermore, the DRC contends that Guinea provides no proof that the companies’ assets have, in fact, been lost or that specific assets of Africom-Zaire or Africontainers-Zaire to which Guinea refers could not be sold on the open market.

53. The Court considers that Guinea’s claim concerning “potential earnings” amounts to a claim for a loss in the value of the companies allegedly resulting from Mr. Diallo’s detentions and expulsion. Such a claim is beyond the scope of these proceedings, given this Court’s prior decision that Guinea’s claims relating to the injuries alleged to have been caused to the companies are inadmissible (I.C.J. Reports 2007 (II), p. 617, para. 98, subpara. (1) (b) of the operative part).

54. For these reasons, the Court awards no compensation to Guinea in respect of its claim relating to the “potential earnings” of Mr. Diallo.

55. Having analysed the components of Guinea’s claim in respect of material injury caused to Mr. Diallo as a result of the DRC’s unlawful conduct, the Court awards compensation to Guinea in the amount of US$10,000.

III. TOTAL SUM AWARDED AND POST-JUDGMENT INTEREST

56. The total sum awarded to Guinea is US$95,000 to be paid by 31 August 2012. The Court expects timely payment and has no reason to assume that the DRC will not act accordingly.

Nevertheless, considering that the award of post-judgment interest is consistent with the practice of other international courts and tribunals (see, for example, The M/V “Saiga” (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment of 1 July 1999, ITLOS, para. 175; Bâmaca-Velásquez v. Guatemala (Reparations and Costs), Judgment of 22 February 2002, IACHR, Series C, No. 91, para. 103; Papamichalopoulos and Others v. Greece (Article 50), Application No. 33808/02, Judgment of 31 October 1995, ECHR, Series A, No. 330-B, para. 39; Lordos and Others v. Turkey (just satisfaction), Application No. 15973/00, Judgment of 10 January 2012, ECHR, para. 76 and dispositif, para. 1 (b)), the Court decides that, should payment be delayed, post-judgment interest on the principal sum due will accrue as from 1 September 2012 at an annual rate of 6 per cent. This rate has been fixed taking into account the prevailing interest rates on the international market and the importance of prompt compliance.

57. The Court recalls that the sum awarded to Guinea in the exercise of diplomatic protection of Mr. Diallo is intended to provide reparation for the latter’s injury.

IV. PROCEDURAL COSTS

58. Guinea requests the Court to award costs in its favour, in the amount of US$500,000, because, “as a result of having been forced to institute the present proceedings, the Guinean State has incurred unrecoverable costs which it should not, in equity, be required to bear”.

59. The DRC asks the Court “to dismiss the request for the reimbursement of costs submitted by Guinea and to leave each State to bear its own costs of the proceedings, including the costs of its counsel, advocates and others”. The DRC contends that Guinea lost the major part of the case and that, moreover, the amount claimed “represents an arbitrary, lump-sum determination, unsupported by any serious and credible evidence”.

60. The Court recalls that Article 64 of the Statute provides that, “[u]nless otherwise decided by the Court, each party shall bear its own costs”. While the general rule has so far always been followed by the Court, Article 64 implies that there may be circumstances which would make it appropriate for the Court to allocate costs in favour of one of the parties. However, the Court does not consider that any such circumstances exist in the present case. Accordingly, each party shall bear its own costs.
61. For these reasons,

THE COURT,

(1) By fifteen votes to one,

Fixes the amount of compensation due from the Democratic Republic of the Congo to the Republic of Guinea for the non-material injury suffered by Mr. Diallo at US$85,000;

IN FAVOUR: President Tomka; Vice-President Sepúlveda-Amor; Judges Owada, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue, Gaja, Sebutinde; Judge ad hoc Mahiou;

AGAINST: Judge ad hoc Mampuya;

(2) By fifteen votes to one,

Fixes the amount of compensation due from the Democratic Republic of the Congo to the Republic of Guinea for the material injury suffered by Mr. Diallo in relation to his personal property at US$10,000;

IN FAVOUR: President Tomka; Vice-President Sepúlveda-Amor; Judges Owada, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue, Gaja, Sebutinde; Judge ad hoc Mahiou;

AGAINST: Judge ad hoc Mampuya;

(3) By fourteen votes to two,

Finds that no compensation is due from the Democratic Republic of the Congo to the Republic of Guinea with regard to the claim concerning material injury allegedly suffered by Mr. Diallo as a result of a loss of professional remuneration during his unlawful detentions and following his unlawful expulsion;

IN FAVOUR: President Tomka; Vice-President Sepúlveda-Amor; Judges Owada, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue, Gaja, Sebutinde; Judge ad hoc Mahiou;

AGAINST: Judge Yusuf; Judge ad hoc Mampuya;

(4) Unanimously,

Finds that no compensation is due from the Democratic Republic of the Congo to the Republic of Guinea with regard to the claim concerning material injury allegedly suffered by Mr. Diallo as a result of a deprivation of potential earnings;

(5) Unanimously,

Decides that the total amount of compensation due under points 1 and 2 above shall be paid by 31 August 2012 and that, in case it has not been paid by this date, interest on the principal sum due from the Democratic Republic of the Congo to the Republic of Guinea will accrue as from 1 September 2012 at an annual rate of 6 per cent;

(6) By fifteen votes to one,

Rejects the claim of the Republic of Guinea concerning the costs incurred in the proceedings.

IN FAVOUR: President Tomka; Vice-President Sepúlveda-Amor; Judges Owada, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue, Gaja, Sebutinde; Judge ad hoc Mampuya;

AGAINST: Judge ad hoc Mahiou.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this nineteenth day of June, two thousand and twelve, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Guinea and the Government of the Democratic Republic of the Congo, respectively.

(Signed) Peter TOMKA,
President.

(Signed) Philippe COUVREUR,
Registrar.

Judge CANÇADO TRINDADE appends a separate opinion to the Judgment of the Court; Judges YUSUF and GREENWOOD append declarations to the Judgment of the Court; Judges ad hoc MAHIOU and MAMPUYA append separate opinions to the Judgment of the Court.
Air Service Agreement of 27 March 1946
(United States of America v. France)
Decision of 9 December 1978

United Nations, *Reports of International Arbitral Awards*,
Volume XVIII
Air Service Agreement of 27 March 1946 between the United States of America and France

9 December 1978

PART II

Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France

Decision of 9 December 1978

Affaire concernant l’accord relatif aux services aériens du 27 mars 1946 entre les États-Unis d’Amérique et la France

Sentence arbitrale du 9 décembre 1978
CASE CONCERNING THE AIR SERVICE AGREEMENT OF 27 MARCH 1946 BETWEEN THE UNITED STATES OF AMERICA AND FRANCE

DECISION OF 9 DECEMBER 1978

Characterization of questions of facts and issues of law—Application of the rule of exhaustion of local remedies in cases of diplomatic protection distinguished from application of the rule in cases of direct injury to States inter se—The relevance of draft Article 22 of the International Law Commission on State responsibility in the determination of the nature of the local remedies rule—Affirmation of the principle that a treaty must be read as a whole and that its meaning is not to be determined mainly upon particular phrases which, if detached from the text, may be interpreted in more than one sense—Interpretation of the concept of "continuous service" for the purposes of determining permitted and prohibited change of gauge (size of aircraft) in a designated air service route—Consideration of the fifth-freedom rights in relation to the question of change of gauge—The relevance of the Convention on International Civil Aviation convened at Chicago 7 December 1944 in the application of the concept of "freedom of the air" as opposed to the concept of national sovereignty of a State over the air space above its territory in the determination of the right of change of gauge in third-party States—The relevance of the formula on the change of gauge contained in the 1946 Bermuda Agreement between the United States and the United Kingdom—The weight to be given to the evidence of the practice of the parties to a treaty in interpretation of the treaty—Consideration of the concept of "counter-measures" and the related rule of "proportionality"—The proper content of the requirement to negotiate, the duty not to aggravate a dispute, and the related question of interim measures of protection.

ARBITRAL AWARD

Mr. Willem Riphaeg, President;
Mr. Thomas Ehrlich, M. Paul Reuter, Arbitrators;
Mr. Lucius Cafisch, Registrar.

In the case concerning the Air Services Agreement of 27 March 1946 between The United States of America, represented by:

Mr. Lee R. Marks, Deputy Legal Adviser, Department of State, as Agent; and Ms. Judith Hippler Bello, Department of State, Ms. Lori Fisler Damrosch, Department of State, as Deputy-Agents; assisted by: Mr. James R. Atwood, Deputy Assistant Secretary for Transportation Affairs, Department of State, Mr. William A. Kutzke, Assistant General Counsel, International Law, Department of Transportation, Mr. Peter B. Schwarzkopf, Assistant General Counsel, International Affairs, Civil Aeronautics Board, as Advisers; Mr. Norman P. Seagrave, Pan American World Airways, Inc., as Expert-Adviser. Mrs. Cozetta B. Johnson, Department of State, as Secretary;

And The French Republic, represented by:

M. Guy Ladreit de Lacharrière, Minister Plenipotentiary, Director of Legal Affairs in the Ministry of Foreign Affairs, as Agent; M. Noël Museux, Magistrate, Deputy-Director of Legal Affairs in the Ministry of Foreign Affairs, M. Henry Cuny, Secretary in the Ministry of Foreign Affairs, Office of the Director of Legal Affairs in the Ministry of Foreign Affairs, as Deputy-Agents; assisted by: M. Gilbert Guillaume, Maître des requêtes, Conseil d'État, M. Michel Virally, Professor of the Faculties of Law, University of Paris, M. Emmanuelle du Pontavice, Professor of the Faculties of Law, University of Paris, as Counsel; M. Robert Espérou, Director of Air Transport (Civil Aviation), M. Jean-Baptiste Vallé, Head of Department, Air France, as Experts; Mlle Solange Challe, as Secretary;

The Tribunal, composed as above, delivers the following Arbitral Award:

By a Compromis of Arbitration signed on 11 July 1978, the text of which is given below, at paragraph 9, the Governments of the United States of America and of the French Republic submitted to the Arbitral Tribunal, composed as above, the following questions:

(A) Does a United States-designated carrier have the right to operate West Coast-Paris service under the Air Services Agreement between the United States and France with a change of gauge in London (transshipment to a smaller aircraft on the outward journey and to a larger aircraft on the return journey)?

(B) Under the circumstances in question, did the United States have the right to undertake such action as it undertook under Part 213 of the Civil Aeronautics Board's Economic Regulations?

The Compromis provided that on Question (A), "the tribunal's decision...shall be binding", and with respect to Question (B), "the tribunal shall issue an advisory report...in accordance with Article X of the Agreement, 54 which shall not be binding". It also provided that the Parties were to exchange memorials not later than 18 September 1978, and replies not later than 6 November 1978. It was finally specified that oral hearings were to be held at Geneva (Switzerland) on 20 and 21 November 1978.

On 4 September 1978, the French Government appointed M. Guy Ladreit de Lacharrière as its Agent for the case. Mr. Lee R. Marks was appointed as Agent for the United States of America on 18 September 1978.

The Arbitral Tribunal met at Geneva on 17 and 18 November 1978 and, after having consulted the Parties, appointed Mr. Lucius Cafisch as its Registrar. Its inaugural hearing took place on 17 November 1978 in the "Alabama" room of the Geneva City Hall.

The Memorials and Replies having been filed within the prescribed time-limits, the case was ready for hearing on 6 November 1978.

The Arbitral Tribunal held hearings on 20 and 21 November 1978, during which it heard, in the order agreed between the Parties and approved by the Tribunal, the following persons submit oral argument: Mr. Marks on behalf of the Government of the United States of America, M. Ladreit de

54 Air Services Agreement concluded between the United States of America and France on 27 March 1946. Article X of the Agreement was amended by the Exchange of Notes dated 19 March 1951.
Lacharrière, Agent, and MM. Guillaume and Virally, Counsel, on behalf of the Government of the French Republic.

In the course of the oral proceedings, the following final Submissions were made by the Parties:

**On behalf of the Government of the United States of America:**

On the basis of the Memorial and Reply of the United States, including the Exhibits thereto, and the oral hearings held in Geneva on November 20-21, 1978 including the eight Hearing Exhibits submitted by the United States, the United States respectfully requests the Tribunal to rule as follows:

--- On Question A, to answer in the affirmative;
--- On Question B, to decline to answer the question, or, in the alternative, to answer in the affirmative.

**On behalf of the Government of the French Republic:**

May it please the Arbitral Tribunal:

(1) Regarding Question (A),

To adjudge and declare that the Government of the United States was required, before acting on the international level by resorting to arbitration, to wait until the United States company that considers itself injured by the allegedly unlawful act of the French Government had exhausted the remedies open to it under French law; and that, since those remedies have not been exhausted, the Arbitral Tribunal is unable to decide on the question submitted to it;

Subsidiarily,

To adjudge and declare that, for the above-mentioned reasons, the Arbitral Tribunal must postpone its decision on Question (A) until such time as the Pan American World Airways company has either obtained recognition of the rights it claims from the French courts or exhausted the remedies available to it under French law without obtaining satisfaction;

If neither of the above is possible,

To adjudge and declare that a carrier designated by the United States does not have the right, under the Air Services Agreement between France and the United States of America, to operate a West Coast-Paris service with a change of gauge in London (transshipment to a smaller aircraft on the outward journey and to a larger aircraft on the return journey).

(2) Regarding Question (B),

To adjudge and declare that, under the circumstances in question, the United States Government did not have the right to undertake such action as it undertook under Part 213 of the Economic Regulations of the Civil Aeronautics Board.\(^{55}\)

**The Facts**

I. An Exchange of Notes of 5 April 1960 relating to the Air Services Agreement concluded between the United States of America and France on 27 March 1946 authorises air carriers designated by the United States to operate to Paris via London (without traffic rights between London and Paris) services to and from United States West Coast points.\(^{56}\) A carrier so design-

\(^{55}\) Translation by the Registry.

\(^{56}\) Part of this Exchange of Notes is reproduced below, p 436, foot-note 67.

nated, Pan American World Airways (hereinafter referred to as Pan Am) intermittently operated services over this route until 2 March 1975.

2. On 20 February 1978, pursuant to French legislation requiring flight schedules to be filed thirty days in advance, Pan Am informed the competent French authority, the Direction générale de l’Aviation civile (hereinafter referred to as D.G.A.C.), of its plan to resume its West Coast-London-Paris service (without traffic rights between London and Paris) on 1 May 1978 with six weekly flights in each direction. The operation of this service was to involve a change of gauge, in London, from a Boeing 747 aircraft to a smaller Boeing 727 on the outward journey and from a Boeing 727 to a larger Boeing 747 on the return journey.

3. On 14 March 1978, the D.G.A.C. refused to approve Pan Am’s plan on the ground that it called for a change of gauge in the territory of a third State and thus was contrary to Section VI of the Annex to the 1946 Air Services Agreement, which deals with changes of gauge in the territory of the Contracting Parties only.\(^{57}\) The United States Embassy in Paris having, on 22 March 1978, requested the French Foreign Ministry to reconsider the decision of the D.G.A.C., the matter then became the subject of discussions and of diplomatic exchanges between the two Parties, the United States arguing that Pan Am’s proposed change of gauge in London was consistent with the 1946 Air Services Agreement and France contending that it was not and reserving its right to take appropriate measures.

4. On 1 and 2 May 1978, when Pan Am operated for the first time its renewed West Coast-London-Paris service with a change of gauge in London, the French police confined themselves to drawing up reports of what they considered to be unlawful flights. Another flight having taken place on 3 May, Pan Am’s Boeing 727 aircraft was surrounded by French police upon arrival at Paris Orly Airport, and its captain was instructed to return to London without having disembarked the passengers or freight. Thereupon Pan Am’s flights were suspended.

5. On 4 May, the United States proposed that the issue be submitted to binding arbitration, on the understanding that Pan Am would be permitted to continue its flights pending the arbitral award. On 9 May, the United States Civil Aeronautics Board (hereinafter referred to as C.A.B.) issued a first Order putting into operation phase 1 of Part 213 of its Economic Regulations by requiring the French companies Air France and Union de transports aériens (U.T.A.) to file, within prescribed time-limits, all their existing flight schedules to and from the United States as well as any new schedules. After having unsuccessfully attempted to have this Order stayed and revised by the C.A.B. or the United States courts, the two companies complied with it on 30 May 1978 by filing their schedules.

6. In a Note dated 13 May 1978, the French Embassy in Washington had in the meantime acknowledged Pan Am’s suspension of its flights to Paris and had informed the United States Department of State of France’s agreement “to the principle of recourse to arbitration”. At the same time,
the Embassy had objected to the unilateral measure decreed by the Order of the C.A.B. prior to the exhaustion of the means of direct negotiations; it had proposed that such negotiations be held and had noted that French local remedies had not been exhausted; finally, it had warned the Department of State that the pursuit of a course of unilateral measures "would have damaging consequences for the French airline companies and create an additional dispute regarding legality and compensation".

7. On 18 May 1978, Pan Am requested the Administrative Tribunal of Paris to annul as being ultra vires the decision taken by the D.G.A.C. on 14 March 1978 to disapprove Pan Am's flight schedule. This request is still pending. In a motion filed on 31 May, Pan Am asked that the decision of 14 March 1978 be stayed. This motion was denied on 11 July on the ground that implementation of that decision would not cause irreparable harm.

8. In the meantime, on 31 May 1978, the C.A.B. issued a second Order under Part 213 of its Economic Regulations. This Order, which was subject to stay or disapproval by the President of the United States within ten days and which was to be implemented on 12 July, was to prevent Air France from operating its thrice-weekly flights to and from Los Angeles and Paris via Montreal for the period during which Pan Am would be barred from operating its West Coast-London-Paris service with change of gauge in London.

9. The second Part 213 Order was not implemented, however. Legal experts of both Parties having met on 1 and 2 June in Washington, on 28 and 29 June in Paris and on 10 and 11 July in Washington, a Compromis of Arbitration was signed between the United States and France on 11 July 1978. This Compromis reads as follows:

**Compromis of Arbitration**

**between**

**the Government of the United States of America**

**and the Government of the French Republic**

The Government of the United States of America and the Government of the French Republic (the "Parties").

Considering that there is a dispute concerning change of gauge under the Air Services Agreement between the United States of America and France, signed at Paris on March 27, 1946, as amended, and its Annex, as amended (collectively referred to as the "Agreement"),

Recognizing that the Parties have been unable to settle this dispute through consultations;

Considering also that the Government of France has raised a question with respect to the validity of the action undertaken by the Government of the United States under Part 213 of the Civil Aeronautics Board’s Economic Regulations in response to the action of the Government of France;

Noting that the Parties have decided to submit the dispute concerning change of gauge to an arbitral tribunal for binding arbitration;

Noting that the Government of France wishes to submit its question regarding the validity of the action undertaken by the United States to the arbitral tribunal for an advisory report pursuant to Article X of the Agreement;

Noting that in agreeing to resort to arbitration with respect to change of gauge, the French Government reserves its right to argue before the tribunal that all means of internal recourse must be exhausted before a State may invoke arbitration under the Agreement;

Noting also that in agreeing to resort to arbitration with respect to Part 213, the United States Government reserves its right to argue before the tribunal that under the circumstances the issue is not appropriate for consideration by an arbitral tribunal.

Agree as follows:

(1) The arbitral tribunal ("tribunal") shall be composed of three arbitrators. One arbitrator shall be Mr. Thomas Mährlich. If for any reason Mr. Mährlich becomes unable to act as arbitrator, the Government of the United States shall promptly designate a replacement. Another arbitrator shall be Prof. Paul Reuter. If for any reason Prof. Reuter becomes unable to act as arbitrator, the Government of France shall promptly designate a replacement. The third arbitrator shall be Prof. W. Riphagen, who shall serve as President of the tribunal.

(2) The tribunal is requested to decide the following two questions in accordance with applicable international law and in particular with the provisions of the Agreement:

(A) Does a United States-designated carrier have the right to operate West Coast-Paris service under the Air Services Agreement between the United States and France with a change of gauge in London (transshipment to a smaller aircraft on the onward journey and to a larger aircraft on the return journey)?

The tribunal’s decision of this question shall be binding.

(B) Under the circumstances in question, did the United States have the right to undertake such action as it undertook under Part 213 of the Civil Aeronautics Board’s Economic Regulations?

The tribunal shall issue an advisory report with respect to this question in accordance with Article X of the Agreement, which shall not be binding.

(3) The Parties have agreed on interim arrangements that will maintain strict equality of balance between the position of the Government of the United States that Pan American World Airways should be permitted to change gauge during arbitration, and the position of the Government of France that it should not change gauge during this period. To this end, and without prejudice to the position of either Party in this arbitration, from the date of this compromis to December 10, 1978, Pan American World Airways shall be permitted to operate West Coast-Paris service with a change of gauge in London to the extent of 05 London-Paris flights in each direction. Such flights may be scheduled at the airline’s discretion; provided, however, that no such service may operate prior to July 17, and that no more than six flights per week may be operated in each direction.

The tribunal shall be competent, in any event, at the request of either Party, to prescribe all other provisional measures necessary to safeguard the rights of the Parties A Party may make such request in its written pleadings, at oral hearings, or subsequent to the oral hearings, as appropriate.

Upon signature of this compromis, the United States Civil Aeronautics Board shall immediately vacate all pertinent orders issued pursuant to Part 213 of its Economic Regulations (Orders 78-5-45, 78-5-106, 78-5-82, and 78-6-202)

(4) Each Party shall be represented before the tribunal by an agent. Each agent may nominate a deputy or deputies to act for him and may be assisted by such advisors, counsel, and staff as he deems necessary. Each Party shall communicate the names and addresses of its respective agent and deputy or deputies to the other Party and to the members of the tribunal.

(5) The tribunal shall, after consultation with the two agents, appoint a registrar

(6) The proceedings shall consist of written pleadings and oral hearings

(B) The written pleadings shall be limited to the following documents:

(i) A memorial, which shall be submitted by each Party to the other Party by September 18, 1978,

(ii) A reply, which shall be submitted by each Party to the other Party by November 6, 1978.

Four certified copies of each document shall be submitted promptly to the registrar.

(C) The tribunal may extend the above time limits at the request of either Party for good
economic principles”; this objective would be frustrated by denying the carriers designated by the United States the most efficient means to operate over agreed routes. The change of gauge in London contemplated by Pan Am (from a larger to a smaller aircraft on the outward journey and from a smaller to a larger aircraft on the return journey) is also consonant with the capacity principles enunciated by Section IV; operational changes which are consonant with traffic principles, which do not affect traffic rights, and which are executed in third countries on agreed routes should be of no concern to the other Party. This interpretation is confirmed by the negotiating history of the 1946 Agreement, which is modelled on the Air Services Agreement concluded on 11 February 1946 between the United States and the United Kingdom (Bermuda I). The latter Agreement, like the former, only regulated changes of gauge occurring in the territory of the Contracting Parties; in so doing, it struck a compromise between United Kingdom preference for regulating changes of gauge anywhere and United States preference for total freedom in this matter. In their similar, Bermuda I-type Agreement, the United States and France likewise agreed to regulate changes of gauge in their territory but not in the territory of third countries. Finally, the interpretation of the 1946 Agreement advocated by the United States is confirmed by long-standing international practice under that Agreement as well as by the manner in which other States have applied bilateral air services agreements of the Bermuda I type.

14. France argues that the 1919 Paris Convention and the 1944 Chicago Convention on International Civil Aviation recognise the sovereignty of States over the air space above their territory and that the bilateral air services agreements granting air traffic rights must hence be interpreted strictly, in the sense that, wherever an agreement does not expressly permit changes of gauge—as is the case under Section VI of the Annex to the 1946 Agreement as regards changes in third countries—such changes must be deemed to be prohibited. This interpretation, which corresponds to the clear text and natural meaning of Section VI and which results in an application of the maxim “expressio unius est exclusio alterius”, is supported by the application of general principles of treaty interpretation, not only by the above-mentioned rule according to which treaty rules implying limitations on sovereignty must be interpreted restrictively, but also by the principle according to which the objective and the fundamental provisions of the agreement must be taken into consideration. First, it is the objective of the 1946 Agreement to confer upon the Parties specific and limited rights on a basis of reciprocity, and this objective calls for a strict interpretation; the grant of additional economic advantages, such as the right to change gauge in third countries, would require new negotiations. Second, certain fundamental rules contained in Section IV of the Annex to the Agreement and expressly referred to in Section VI (change of gauge) support the strict interpretation already arrived at. This is true, in particular, of the statement that the Parties wish “to foster and encourage the widest possible distribution of the benefits of air travel”, of the principle under which the designated carriers of one Party operating on authorized routes shall take into account the interests of the carriers of the other Party operating on all or part of the same route, of the rule that the air services offered “should bear a close relationship to the requirements of the public”—and changes of gauge may indeed inconvenience the public—and of the capacity principles contained in letter (d), which provides, inter alia, that the services provided by a designated air carrier

shall retain as their primary objective the provision of capacity adequate to the traffic demands between the country of which such air carrier is a national and the country of ultimate destination of the traffic.

A change of gauge, in London, on the West Coast-Paris route, from a Boeing 747 to a Boeing 727 aircraft means that the capacity offered is geared to the traffic demand on the San Francisco-London segment rather than to the traffic demand existing for the entire San Francisco-Paris service. According to France, a strict interpretation of Section VI of the Annex to the 1946 Agreement is also warranted by the opinions of writers and by the subsequent conduct of the Parties to that Agreement.

2. Question (B)

(a) The preliminary issue

15. In the seventh preambular paragraph of the Compromis, the United States reserved the right to argue that “under the circumstances the issue is not appropriate for consideration by an arbitral tribunal”. The United States submits that the Arbitral Tribunal should decline to answer Question (B). A first argument made in support of this Submission is that neither France nor French carriers suffered any injury as a result of the action taken by the United States under Part 213 of the Economic Regulations of the C.A.B. The Order of 9 May 1978 required Air France and U.T.A. to file their existing and new schedules within specified time-limits, just as United States carriers must routinely file schedules with the French authorities. The Order of 31 May 1978, which was to bar Air France from operating its thrice-weekly Paris-Los Angeles flights, was vacated before its implementation. It follows that, no French air services having been restricted by the two Orders, France has suffered no injury. A second argument put forward by the United States is based on the rule that international tribunals vested with a judicial function should not act when, as in the present case, there is no actual and genuine controversy the resolution of which can affect existing relations between the Parties. A third argument is that the issue addressed by Question (B) did not form the object of the consultation required by Article X of the 1946 Agreement. Finally, in response to a French argument outlined below (paragraph 16), to the effect that the two C.A.B. Orders were deliberately maintained during negotiations with a view to inducing France to accept binding adjudication of Question (A) and to agree to an expedited procedure and to the interim arrangements now contained in the Compromis, the United States observes that these solutions were arrived at, not as a result of undue pressure, but because France, too, was convinced that binding arbitration was the most appropriate method for dealing with Question (A), because the interests in issue called for a prompt solution, and because the interim régime established appeared a fair one.

16. In reply to the first argument put forward by the United States,
France contends that it is seeking reparations for the moral damage ("dommage moral") caused to it through the violation of international law and the 1946 Agreement by the C.A.B. A.B. The C.A.B. argues that France is entitled to damages because the 1946 Agreement is still in force and that the C.A.B. is not responsible for the damage caused by the violation of the 1946 Agreement.

According to the C.A.B., the United States is not entitled to damages because the 1946 Agreement is still in force and that the C.A.B. is not responsible for the damage caused by the violation of the 1946 Agreement.

The United States argues that the 1946 Agreement is no longer in force and that the C.A.B. is responsible for the damage caused by the violation of the 1946 Agreement. The United States also argues that the C.A.B. is not entitled to damages because it is not a party to the 1946 Agreement.

The arbitral tribunal found in favor of the United States, ruling that the C.A.B. is responsible for the moral damage caused to France by the violation of the 1946 Agreement. The tribunal also ruled that the United States is entitled to damages, but that the amount of damages should be determined by a separate proceeding.

The United States is also entitled to an indemnification of its expenses and costs incurred in the arbitration proceedings.

The C.A.B. has appealed the decision of the arbitral tribunal, arguing that the tribunal erred in finding that the 1946 Agreement is no longer in force and in determining the amount of damages.

The United States has also appealed the decision of the arbitral tribunal, arguing that the tribunal erred in determining the amount of damages.

The appeal cases are currently pending before the Court of International Trade of the United States.
that in agreeing to resort to arbitration with respect to change of gauge, the French
Government reserves the right to argue before the tribunal that all means of internal re-
course must be exhausted before a State may invoke arbitration under the Agreement,
and
that in agreeing to resort to arbitration with respect to Part 213, the United States
Government reserves the right to argue before the tribunal that under the circumstances
the issue is not appropriate for consideration by an arbitral tribunal.
20. The relevant final Submissions of the Parties, as presented during
the oral hearing of 21 November 1978, read as follows:
For France:
May it please the Arbitral Tribunal:
(1) Regarding Question (A),
To adjudge and declare that the Government of the United States was required, before
acting on the international level by resorting to arbitration, to wait until the United States
company that considers itself injured by the allegedly unlawful act of the French Govern-
ment had exhausted the remedies open to it under French law; and that, since those reme-
dies have not been exhausted, the Arbitral Tribunal is unable to decide on the question
submitted to it;
Subsidiary,
To adjudge and declare that, for the above-mentioned reasons, the Arbitral Tribunal
must postpone its decision on Question (A) until such time as the Pan American World
Airways company has either obtained recognition of the rights it claims from the French
courts or exhausted the remedies available to it under French law without obtaining satis-
faction;

For the United States:
the United States respectfully requests the Tribunal to rule as follows: on
Question B, to decline to answer the question.
21. At first glance, the preambular paragraphs, together with the Sub-
missions quoted above, seem to be self-contradictory, in particular when
viewed within the context of the Compromis as a whole.
22. In paragraph (2) of the Compromis, the Parties in common agree-
ment request the Tribunal "to decide the following two questions", and in
the first sentence of paragraph (9) a precise and very short time-limit is set
for the Tribunal "to render a decision on the change of gauge question
and an advisory report on the Part 213 issue": the decision and advisory report
must be given not later than 10 December 1978; the same time-limit appears
in paragraph (3) dealing with interim arrangements. Apparently, the Parties
to the Compromis wanted a decision on both questions, and that within a
period of time that would not permit the delays inherent in the fulfilment of
the conditions elaborated in the written and oral pleadings relating to these
preliminary matters.
23. Indeed, this is not a case in which one Party unilaterally presents
a claim before a tribunal under Article X of the Air Transport Services
Agreement. On the contrary, both Parties, by agreement, request the Tri-
“Except as otherwise provided in this Agreement or its Annex, any dispute between
the Contracting Parties relative to the interpretation or application of this Agreement or its
Annex which can not be settled through consultation shall be submitted for an advisory re-
port to a tribunal of three arbitrators, one to be named by each Contracting Party, and the
third to be agreed upon by the two arbitrators so chosen, provided that such third arbitrator
shall not be a national of either Contracting Party. Each of the Contracting Parties shall
designate an arbitrator within two months of the date of delivery of the other Party to the
diplomatic note requesting arbitration of a dispute; and the third arbitrator shall be agreed upon within one month after such period of two months.
"If either of the Contracting Parties fails to designate its own arbitrator within two
months, or if the third arbitrator is not agreed upon within the time limit indicated, the
President of the International Court of Justice shall be requested to make the necessary ap-
pointments by choosing the arbitrator or arbitrators, after consulting the President of the
Council of the International Civil Aviation Organization.
"The Contracting Parties will use their best efforts under the powers available to them
to put into effect the opinion expressed in any such advisory report. A majority of the ex-
"
29. It has however been argued that, even if the question put to the Tribunal is formulated as a pure question of law independent from any existing factual situation, in reality a specific set of actual facts involving acts of Pan Am and of the French authorities (communication by Pan Am to French aeronautical authorities and reply thereto; landing of Pan Am aircraft at Orly on 3 May 1978 and acts of the French gendarmerie on that date) is at the root of the request for a decision on Question (A). In this connexion, reference has also been made to the fact that paragraph (3) of the Compromis, dealing with interim arrangements, mentions a specific air carrier—Pan Am—and specific conduct of that company in the period from the date of signature of the Compromis up to 10 December 1978.

30. The Tribunal does not consider these elements to be of such a character as to justify the application of the rule of exhaustion of local remedies in the present situation, with the effect of excluding—even if only for the time being—a decision of the Tribunal on Question (A). Quite naturally, governments of States are not likely to create a legal dispute between them if there exist no factual situations which somehow raise questions of international law. Similarly, if these governments agree on any interim arrangements pending the settlement of the dispute, such arrangements are likely to be expressed in terms of actual conduct, be it conduct of private individuals or entities or conduct of State organs in relation to those individuals or entities. Indeed, rules of international law, though primarily conceived in terms of conduct of and relationships between States, are ultimately concerned, like all rules of law, with the reality of physical persons, objects and activities in their interrelationship within human society. Accordingly, the rules of international law relating to the requirement of exhaustion of local remedies, when making a distinction between the State-to-State claims in which the requirement applies, and claims which are not subject to such a requirement, must necessarily base this distinction on the juridical character of the legal relationship between States which is invoked in support of the claim. Consequently, with respect to the applicability of the local remedies rule, a distinction is generally made between “cases of diplomatic protection” and “cases of direct injury”.

31. If it is argued that, by virtue of the French reservation contained in the sixth preambular paragraph of the Compromis, a parallel distinction should be made in the present case, where the question before the Tribunal is not one of reputation for, or even only determination of, injuries allegedly caused to a State by actual conduct of another State, such a distinction could only be based on the juridical character of the rules of international law which the Tribunal is requested and required to apply in deciding on Question (A). In this connexion, it is significant that Article 22 of the draft articles on State responsibility, as provisionally adopted in first reading by the International Law Commission in 1977, 64 establishes the requirement of exhaustion of local remedies only in relation to an obligation of “result”, which obligation “allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State”, and which is an obligation “concerning the treatment of aliens”. Leaving aside the choice made in this draft article between the qualification of the rule of exhaustion of local remedies as one of “procedure” or one of “substance”—a matter which the Tribunal considers irrelevant for the present case—it is clear that the juridical character of the rules of international law to be applied in the present case is fundamentally different from that of the rules referred to in the draft article just cited. Indeed, under Article I of the Air Services Agreement, “[t]he Contracting Parties grant to each other the rights specified in the Annex hereto . . .” (emphasis added), and Sections I and II of the Annex both mention “the right to conduct air transport services by one or more air carriers of French [United States] nationality designated by the latter country . . .” as a right granted by one government to the other government. Furthermore, it is obvious that the object and purpose of an air services agreement such as the present one is the conduct of air transport services, the corresponding obligations of the Parties being the admission of such conduct rather than an obligation requiring a “result” to be achieved, let alone one allowing an “equivalent result” to be achieved by conduct subsequent to the refusal of such admission. For the purposes of the issue under discussion, there is a substantial difference between, on the one hand, an obligation of a State to grant to aliens admitted to its territory a treatment corresponding to certain standards, and, on the other hand, an obligation of a State to admit the conduct of air transport services to, from and over its territory. In the latter case, owing to the very nature of international air transport services, there is no substitute for actually permitting the operation of such service, which could normally be regarded as providing an “equivalent result”.

32. On the basis of the foregoing considerations, the Tribunal is of the opinion that it is “able to decide on the question submitted to it” and that it should not postpone its decision on Question (A) until such time as the Pan American World Airways company has either obtained recognition of the rights it claims from the French courts or exhausted the remedies available to it under French law without obtaining satisfaction.

33. Turning now to the last preambular paragraph of the Compromis and the final Submission of the United States requesting the Tribunal “. . . to decline to answer . . .” Question (B), the Tribunal first of all recalls the general observations made earlier relating to the self-contradictory character of this paragraph and Submission and the context within which the Tribunal has to deal with the objections of the United States to the effect that the Part 213 issue “under the circumstances . . . is not appropriate for consideration by an arbitral tribunal.”

34. Indeed, here again, the objections of the United States that (a)
United States action under Part 213 did not injure France or French air carriers; (b) the Parties did not consult with respect to the Part 213 issue; and (c) there is no actual controversy to adjudicate, are to be appreciated within the framework of the Compromis as a whole, including in particular its paragraphs (2) (B) and (3).

35. In paragraph (2) of the Compromis, then, the Tribunal is requested "to decide the following two questions . . . " (emphasis added), including Question (B), which is framed as follows: "Under the circumstances in question, did the United States have the right to undertake . . . ?" (emphasis added). The opinion of the Tribunal, expressed in an advisory report, will have the effect provided for in Article X of the Agreement.

36. On the other hand, paragraph (3) of the Compromis, dealing with arrangements the Parties have agreed upon pending the arbitration, provides

inter alia that:

Upon signature of this compromis, the United States Civil Aeronautics Board shall immediately vacate all pertinent orders issued pursuant to Part 213.

37. Under these circumstances, the Tribunal is of the opinion that the objections raised against its issuing an advisory report with respect to Question (B) have to be assessed in a context substantially different from the one which exists in a case where an arbitral tribunal or international court would have to decide on a unilateral claim of one Party to a dispute, to establish the actual breach of an international obligation and to determine the consequences of such a breach.

38. In particular, the fact that, by virtue of paragraph (3) of the Compromis, the pertinent C.A.B. Orders—notably Order 78-6-82 as amended by Order 78-6-202—have been vacated before they became effective is, in the opinion of the Tribunal, irrelevant for an answer to Question (B), which can only relate to the action undertaken by the United States before the date of signature of the Compromis.

39. The Tribunal does not consider it necessary to express an opinion on the question whether the earlier C.A.B. Orders 78-5-45 (Order to file schedules) and 78-5-106 (Order denying motion for stay)—which did have effects before they were vacated—did injure France or French air carriers, since it is clear that the other Orders, considered within the framework of Question (B)—i.e. without taking into account their being vacated by virtue of, and after the signature of, the Compromis—would inflict such injury.

40. The question of the requirement of prior consultations under Article X of the Air Services Agreement should be contemplated within the same framework. Even if the discussions between the Parties with respect to the action of the United States under Part 213 were not very extensive and perhaps more limited in time than those relating to the change-of-gauge issue, dealt with in the same discussions, they did in fact take place. In this connexion, it should be taken into account that, by their nature, the two issues were in fact closely interrelated: the Part 213 issue, by the wording of both the relevant legislative text and the Orders themselves, is based on an alleged violation by France of its obligations in the matter of change of gauge.

41. Finally—and again within the framework outlined above—the Tribunal considers that the arguments advanced and the precedents invoked by the United States in support of its thesis that under international law tribunals are enjoined to decide only "actual controversies" between the Parties are not directly applicable in the present situation. Throughout the discussions leading up to the signature of the Compromis, the request for arbitration on Question (B) has been linked up with the request for arbitration on Question (A). The link between the two issues also appears clearly from paragraph (3) of the Compromis. Both issues, in fact, involve the object and purpose of the Air Services Agreement between the Parties, viz., the rights of France and of the United States, respectively, to conduct air transport services on the routes specified in Schedules I and II (as amplified by the Exchange of Notes of 5 April 1960).

42. Under these circumstances, the Tribunal would be failing in its duties were it to refuse to give its opinion on Question (B).

**Question (A)**

43. The first question to be decided by the Tribunal is as follows:

Does a United States-designated carrier have the right to operate West Coast-Paris service under the Air Services Agreement between the United States and France with a change of gauge in London (transshipment to a smaller aircraft on the outward journey and to a larger aircraft on the return journey)?

On this question, the decision of the Tribunal shall be binding.

44. To answer Question (A), the Tribunal first examined the terms of the Agreement itself as they refer specifically to change of gauge. In the absence of a clear answer based solely on those terms, the Tribunal next referred to other provisions of the Agreement as a whole. This analysis led to a tentative judgment on a response to Question (A). The Tribunal then tested that judgment in the light of both the overall context of international civil aviation in which the Agreement was negotiated and the practice of the Parties as they operated under the Agreement. The analysis indicates that neither the overall context nor the practice of the Parties is inconsistent with the tentative judgment based on the text of the Agreement as a whole. Finally, the Tribunal undertook a limited examination of practice under air services agreements similar to the France-United States one, for the sole purpose of ensuring that this practice did not suggest a wholly dissimilar approach from the Tribunal's tentative judgment. Having taken these steps, the Tribunal concluded that the judgment referred to is valid and should properly serve as the basis for its response to Question (A). Each of the steps is discussed in some detail below.

1. **The Text of the Agreement Relating to Change of Gauge**

45. The only specific provision concerning change of gauge in the Agreement is in Section VI of the Annex.65 Section VI provides:

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65 Throughout this Award, the Tribunal uses the terms "change of gauge" and "rupture de charge" to mean a change in the size of the aircraft.
53. Section V deals with rates to be charged by carriers of the Parties. Section VI, of course, has already been discussed. Section VII permits route changes by one Party in the territory of third countries—not but in the territory of the other Party—with a requirement only of prompt notice and an opportunity to consult if requested. Lastly, Section VIII calls for the prompt exchange of information by the Parties.

54. The text of the entire Agreement is as significant for what it omits as for what it specifies. It is silent concerning most of the major operational issues facing an air carrier—types of plane, number of crew members, and the like. When jet planes were first developed, for example, one unfamiliar with the Agreement might have assumed that a new accord would be necessary. In fact, however, the 1946 Agreement was not modified at the time this remarkable technological innovation was introduced. Similarly, recent objections to supersonic planes were not based on the terms of the Agreement but solely on environmental concerns. The point is that the Agreement leaves to the Parties—and, if a Party chooses, to its designated air carriers—the right to decide a wide range of key issues concerning almost every aspect of service on designated routes apart from those regarding rates and capacity.

55. Exceptions to this basic approach are made in the Agreement, but in the main they concern regulation by a Party of activities in that Party’s territory. Section VII of the Annex provides, for example, that one Party may make changes in the routes described—with notice and the option of consultation—in the territory of third countries, but not in the territory of the other Party.

56. Section VI of the Annex refers, as has been discussed, solely to change of gauge in the territory of one of the Parties. This in itself is understandable when the Agreement is viewed as a whole. It is entirely reasonable to draw a distinction between activities within the territory of a Party and activities within the territories of third countries. Each Party is naturally more concerned about what happens on its own territory than what happens elsewhere. Within a network of bilateral air services agreements throughout the world, this approach assures that activities in each territory are primarily regulated by the countries most directly concerned.

57. What insights on Question (A) emerge from this examination of the text of the Agreement as a whole? First, it seems evident to the Tribunal that neither extreme position on the change-of-gauge issue may be accepted. On the one hand, some gauge changes in third countries must be permitted. When a plane has a mechanical failure, for example, a transshipment is plainly required, and no plane of the same size may be available. Similarly, carriers on routes that involve extremely long distances—including, most obviously, routes around the world—must change planes at some point or points, and there seems to be no reason why the same size aircraft must be used on every segment of such routes.

58. On the other hand, the Agreement includes a variety of conditions concerning services by carriers of the Parties. The route descriptions in the Schedules are one set of conditions. The capacity provisions in Section IV of the Annex are another. It would undercut the terms of the Agreement to permit a change of gauge for the sole purpose of enabling a carrier to act inconsistently with one or more of these conditions.

59. The issue that must be resolved, therefore, is how to distinguish between permitted and prohibited gauge changes in third countries. On this issue, the terms of the Agreement referred to above are of considerable assistance. Most important, they refer to designated routes and to services on those routes. Passengers may embark and disembark at various points, but the Agreement consistently reflects a concept of continuous service scheduled from a point of origin on a route to a point of termination on that route. This concept is not stated expressly in the Agreement, but it emerges from the text when read as a whole—particularly Section I of the Annex and the Schedules.

60. On this basis, the Tribunal tentatively concluded that a change of gauge is authorized in the territory of a third country when the service in-
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61. Under this approach, change of gauge cannot be used as an excuse for acting inconsistently with provisions of the Agreement, most obviously those relating to capacity. At the same time, a change of gauge may be the most appropriate means to ensure compliance with certain provisions. Traffic demands may diminish, for example, over the course of an extended route. This is plainly the case when, as in the particular situation at issue, so-called fifth-freedom traffic is precluded. United States carriers are prohibited from embarking passengers in London on the route to Paris via London from United States West Coast points. It is virtually certain, therefore, that the traffic demands on the route will be less on the London to Paris segment than on the preceding segment.

62. Although Section VI is not by its terms applicable to the situation raised in Question (A), its text may properly be taken into account, and seems appropriately to reflect the Tribunal’s tentative judgment. That text refers specifically to three criteria: first, a change of gauge within the territory of a Party must be justified by “economy of operation”; second, it must not “alter the long-range characteristics of the operation”; and third, it must not be inconsistent with other provisions of the Agreement, particularly Section IV of the Annex regarding capacity.

63. The focus of the Tribunal on a concept of continuous service appears related to these criteria, when interpreted broadly. Economy of operation would naturally be a guiding principle for gauge changes that are consistent with the concept of continuous service: the “long-range characteristics of the operation” (i.e., characteristics of a service as opposed to a particular aircraft) reflect a sense of that concept; and, as already stated, a change of gauge may not be used simply as a basis for action inconsistent with provisions in the Agreement—most obviously the capacity provisions in Section IV of the Annex.

64. Drawing on Section VI for appropriate guidance thus further confirms the judgment that a concept of continuous service is the key to a resolution of Question (A). A change of gauge that is consistent with that concept is authorised; a change of gauge that is designed to establish essentially separate services is precluded.

65. At a point on a route where fifth-freedom rights are allowed, therefore, a scheduled change of gauge from a smaller to a larger plane is not permitted if experience has shown that the purpose of the change is solely to accommodate more fifth-freedom traffic than is allowed under the capacity principles in Section IV. Even if—as in the situation involved in Question (A)—no fifth-freedom rights are permitted at a point, change of gauge must not be used as an excuse for a significant delay in service—in effect to change a continuous service into a series of separate services.

3. The Context in Which the Agreement Was Negotiated

66. Although no negotiating history of the Agreement concerning the specific question at issue was uncovered by the Parties, the broader context in which the Agreement was negotiated is relevant. There is no need to dwell at length on the Convention on International Civil Aviation concluded at Chicago on 7 December 1944, the basic instrument that set the stage for the rapid expansion of international civil aviation. It is considered in some detail in the Italy–United States Air Arbitration, 1964 (United Nations, Reports of International Arbitral Awards, vol. XVI, pp. 96–98). Most important, the Convention established the structure for an international régime for civil air services that was remarkably open and unregulated except in terms of routes, rates, and capacity, and certain activities that may be regulated by the government of a country within its own territory. Taken as a whole, the Chicago Convention reflects neither the concept of “freedom of the air” nor a concept of national sovereignty of a State over the airspace above its territory as would permit that State to impose on the use of that airspace by foreign air carriers any condition whatsoever relating to conduct of that air carrier prior to or after such use. This context supports, therefore, the distinction that has been drawn above between activities relating to the territories of the Parties, which generally require specific authorisation, and activities on the territories of third countries, which are generally permitted absent a specific prohibition.

67. The 1946 Bermuda Agreement between the United Kingdom and the United States, which preceded the France–United States Agreement by only a few months, is also a part of the relevant context, although France is clearly not bound by the Bermuda Agreement, let alone its negotiating history, for it was not a Party to the Agreement.

68. The negotiating history of the Bermuda Agreement does indicate, however, a compromise between an initial United Kingdom position that was opposed to any change of gauge by a carrier of one Party without specific authorisation by the other Party, and an initial United States position favouring completely unrestricted change of gauge. The change-of-gauge provision that was finally adopted \(^2\) and the negotiating history make clear

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\(^2\) Section V of the Annex to the Bermuda Agreement, which deals with change of gauge, provides the following:

(a) Where the onward carriage of traffic by an aircraft of different size from that employed on the earlier stage of the same route (hereinafter referred to as “change of gauge”) is justified by reason of economy of operation, such change of gauge at a point in the territory of the United Kingdom or the territory of the United States shall not be made in violation of the principles set forth in the Final Act of the Conference on Civil Aviation held at Bermuda from January 15 to February 11, 1946 and, in particular, shall be subject to there being an adequate volume of traffic.

(b) Where a change of gauge is made at a point in the territory of the United Kingdom or in the territory of the United States, the smaller aircraft will operate only in connection with the larger aircraft arriving at the point of change, so as to provide a continuing service which will thus normally wait on the arrival of the larger aircraft, for the primary purpose of carrying passengers who have travelled to Bermuda or United States territory in the larger aircraft to their ultimate destination in the smaller aircraft. Where there are vacancies in the smaller aircraft there may not be filled with passengers from United Kingdom or United States territory respectively. It is understood, however, that the capacity of the smaller aircraft shall be determined with primary reference to the traffic travelling in the larger aircraft normally requiring to be carried thereon.

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that the Bermuda Agreement embodies a position on change of gauge consistent with the judgment expressed in this Award.

4. The Practice of the Parties

69. The activities of the Parties under an international agreement over a period of time may, of course, be relevant—occasionally even decisive—in interpreting the text. In this case, a number of changes of gauge in third countries by United States carriers on routes specified in the Schedules occurred during the years that the Agreement has been in force. Not surprisingly, the Parties differ on the weight to be given to this practice. In the circumstances of this case, the Tribunal believes that all that can be fairly concluded from the entire course of practice by the Parties is that it does not lead to a different conclusion from the one tentatively adopted on the basis of the text of the Agreement and supported by the overall context in which the Agreement was negotiated.

70. The United States has also referred to thousands of gauge changes under other international air services agreements to which it was or is a Party. Some of those agreements contain provisions similar to those in the France-United States Agreement; others are substantially different.

71. The Tribunal would be extremely hesitant to draw firm conclusions from this practice, at least without detailed examination of each agreement and the relevant practice of the Parties—an examination that has not been possible in the limited time available to the Tribunal. On this basis, it is possible to say no more than that this practice also does not appear inconsistent with the approach adopted by the Tribunal.

Question (B)

72. As a preliminary consideration, the Tribunal has to make two series of observations, the first covering the question itself, the second covering the "circumstances in question".

73. First of all with regard to the question itself, it is quite certain that the Arbitral Tribunal does not have to consider the compatibility in principle of the régime as a whole established by the system of Part 213 of the C.A.B. Economic Regulations with United States international obligations; nor even less does it have to assess the advantages and drawbacks of a system which constitutes, in air transport, the application of an approach which the United States has often used in its economic relations with other countries.

74. All the Tribunal has to consider is whether, in the circumstances in question, the United States Government violated its international obligations by the action taken in the period immediately prior to the conclusion of the Compromis of Arbitration. It is also quite obvious that the lawfulness of such action must be considered regardless of the answer to the question of substance concerning the alleged violation of the 1946 Agreement by the French Government. It must now be established whether the United States Government violated its international obligations by its action, even if it were assumed that it was established after such action, so as to bind the French Government, that the French Government had violated the 1946 Agreement before the United States action was taken.

75. The second series of observations pertains to the specific "circumstances in question" in the present case. They cover a number of general aspects which must be briefly recalled. The most sensitive issue is perhaps the great uncertainty surrounding relations between the Parties inter se and between them and the company in question regarding the subject of the dispute, the objectives pursued, and even the exact reach of their positions. Such a situation easily gives rise to suspicion, concern and misjudged reactions which are liable to worsen the dispute. The fact that the interested company ignored the objections of the French authorities—brought to its notice by letter of 14 March 1978—by landing in French territory, the action taken by the French gendarmerie on 2 May and the subsequent measures taken by the C.A.B. clearly show an "escalation" of the conflict.

76. Relations between the air companies and their national governments are complex: legally the companies are distinct from the governments and occasionally oppose their action; but the companies also fall in many ways under the legal dependence of governments and often act in close conjunction with them.

77. Pan Am's primary intention, as it appears from its letter of 5 October 1977, was to make changes in its services that could give rise to questions of principle. The French authorities' refusal to approve those changes was not, however—it would seem—followed by any kind of consultation which would have been for both authorities concerned the normal consequence of such a representation under Article VIII of the 1946 Agreement. Pan Am then presented a more limited request which is at the origin of the dispute and based on transitional technical reasons which might possibly have been responded to by an approval for a limited period of time. The French refusal of 1978 acutely raised a question of principle not dealt with in so many words by the text of the Agreement (change of gauge in third countries); according to the documents submitted to the Tribunal, it does not appear that in more than 30 years of application of the Agreement the Parties had ever discussed that question of principle. What then is the matter about? The solution of a provisional technical problem? The definition of a rule both the existence and the scope of which the Parties until then had avoided addressing? Would it really be a limited dispute or the preliminaries of a re-structuring of international transport networks in that region of the world?

78. The scope of the United States action could be assessed in very different ways according to the object pursued; does it bear on a simple principle of reciprocity measured in economic terms? Was it pressure aiming at achieving a quicker procedure of settlement? Did such action have, beyond the French case, an exemplary character directed at other countries and, if so, did it have to some degree the character of a sanction? It is not certain that those responsible for the measures taken made very refined studies of that point; it is understandable that France may have construed the proce-
dures adopted by the United States in a way other than may have been intended by the United States.

79. Those circumstances as a whole characterise a situation during which the Parties negotiated and which resulted in a Compromis of Arbitration, including interim measures, which is not submitted to the judgment of the Tribunal.

80. Having thus recalled some of the essential circumstances of the case, the Tribunal will consider, in turn, the principle of the legitimacy of "counter-measures" and the limits on those measures in the light either of the existence of a machinery of negotiations or of a mechanism of arbitration or judicial settlement.

81. Under the rules of present-day international law, and unless the contrary results from special obligations arising under particular treaties, notably from mechanisms created within the framework of international organisations, each State establishes for itself its legal situation vis-à-vis other States. If a situation arises which, in one State's view, results in the violation of an international obligation by another State, the first State is entitled, within the limits set by the general rules of international law pertaining to the use of armed force, to affirm its rights through "counter-measures".

82. At this point, one could introduce various doctrinal distinctions and adopt a diversified terminology dependent on various criteria, in particular whether it is the obligation allegedly breached which is the subject of the counter-measures or whether the latter involve another obligation, and whether or not all the obligations under consideration pertain to the same convention. The Tribunal, however, does not think it necessary to go into these distinctions for the purposes of the present case. Indeed, in the present case, both the alleged violation and the counter-measure directly affect the operation of air services provided for in the Agreement and the Exchange of Notes of 5 April 1960.

83. It is generally agreed that all counter-measures must, in the first instance, have some degree of equivalence with the alleged breach; this is a well-known rule. In the course of the present proceedings, both Parties have recognised that the rule applies to this case, and they both have invoked it. It has been observed, generally, that judging the "proportionality" of counter-measures is not an easy task and can at best be accomplished by approximation. In the Tribunal's view, it is essential, in a dispute between States, to take into account not only the injuries suffered by the companies concerned but also the importance of the questions of principle arising from the alleged breach. The Tribunal thinks that it will not suffice, in the present case, to compare the losses suffered by Pan Am on account of the suspension of the projected services with the losses which the French companies would have suffered as a result of the counter-measures; it will also be necessary to take into account the importance of the positions of principle which were taken when the French authorities prohibited changes of gauge in third countries. If the importance of the issue is viewed within the framework of the general air transport policy adopted by the United States Government and implemented by the conclusion of a large number of international agreements with countries other than France, the measures taken by the United States do not appear to be clearly disproportionate when compared to those taken by France. Neither Party has provided the Tribunal with evidence that would be sufficient to affirm or reject the existence of proportionality in these terms, and the Tribunal must be satisfied with a very approximative appreciation.

84. Can it be said that the resort to such counter-measures, which are contrary to international law but justified by a violation of international law allegedly committed by the State against which they are directed, is restricted if it is found that the Parties previously accepted a duty to negotiate or an obligation to have their dispute settled through a procedure of arbitration or of judicial settlement?

85. It is tempting to assert that when Parties enter into negotiations, they are under a general duty not to aggravate the dispute, this general duty being a kind of emanation of the principle of good faith.

86. Though it is far from rejecting such an assertion, the Tribunal is of the view that, when attempting to define more precisely such a principle, several essential considerations must be examined.

87. First, the duty to negotiate may, in present times, take several forms and thus have a greater or lesser significance. There is the very general obligation to negotiate which is set forth by Article 33 of the Charter of the United Nations and the content of which can be stated in some quite basic terms. But there are other, more precise obligations.

88. The Tribunal recalls the terms of Article VIII of the 1946 Agreement, which reads as follows:

In a spirit of close collaboration, the aeronautical authorities of the two Contracting Parties will consult regularly with a view to assuring the observance of the principles and the implementation of the provisions outlined in the present Agreement and its Annex.

This Article provides for an obligation of continuing consultation between the Parties. In the context of this general duty, the Agreement establishes a clear mandate to the Parties to make good faith efforts to negotiate on issues of potential controversy. Several other provisions of the Agreement and the Annex state requirements to consult in specific circumstances, when the possibility of a dispute might be particularly acute. Finally, Article X imposes on the Parties a special consultation requirement when, in spite of previous efforts, a dispute has arisen.

89. But the present problem is whether, on the basis of the above-mentioned texts, counter-measures are prohibited. The Tribunal does not consider that either general international law or the provisions of the Agreement allow it to go that far.

90. Indeed, it is necessary carefully to assess the meaning of counter-measures in the framework of proportionality. Their aim is to restore equality between the Parties and to encourage them to continue negotiations with mutual desire to reach an acceptable solution. In the present case, the United States of America holds that a change of gauge is permissible in third countries; that conviction defined its position before the French refusal came into
play; the United States counter-measures restore in a negative way the symmetry of the initial positions.

91. It goes without saying that recourse to counter-measures involves the great risk of giving rise, in turn, to a further reaction, thereby causing an escalation which will lead to a worsening of the conflict. Counter-measures therefore should be a wager on the wisdom, not on the weakness of the other Party. They should be used with a spirit of great moderation and be accompanied by a genuine effort at resolving the dispute. But the Arbitral Tribunal does not believe that it is possible, in the present state of international relations, to lay down a rule prohibiting the use of counter-measures during negotiations, especially where such counter-measures are accompanied by an offer for a procedure affording the possibility of accelerating the solution of the dispute.

92. That last consideration is particularly relevant in disputes concerning air service operations: the network of air services is in fact an extremely sensitive system, disturbances of which can have wide and unforeseeable consequences.

93. With regard to the machinery of negotiations, the actions by the United States Government do not appear, therefore, to run counter to the international obligations of that Government.

94. However, the lawfulness of such counter-measures has to be considered still from another viewpoint. It may indeed be asked whether they are valid in general, in the case of a dispute concerning a point of law, where there is arbitral or judicial machinery which can settle the dispute. Many jurists have felt that while arbitral or judicial proceedings were in progress, recourse to counter-measures, even if limited by the proportionality rule, was prohibited. Such an assertion deserves sympathy but requires further elaboration. If the proceedings form part of an institutional framework ensuring a degree of enforcement of obligations, the justification of counter-measures will undoubtedly disappear, but owing to the existence of that framework rather than solely on account of the existence of arbitral or judicial proceedings as such.

95. Besides, the situation during the period in which a case is not yet before a tribunal is not the same as the situation during the period in which that case is sub judice. So long as a dispute has not been brought before the tribunal, in particular because an agreement between the Parties is needed to set the procedure in motion, the period of negotiation is not over and the rules mentioned above remain applicable. This may be a regrettable solution, as the Parties in principle did agree to resort to arbitration or judicial settlement, but it must be conceded that under present-day international law States have not renounced their right to take counter-measures in such situations. In fact, however, this solution may be preferable as it facilitates States’ acceptance of arbitration or judicial settlement procedures.

96. The situation changes once the tribunal is in a position to act. To the extent that the tribunal has the necessary means to achieve the objectives justifying the counter-measures, it must be admitted that the right of the Parties to initiate such measures disappears. In other words, the power of a tribunal to decide on interim measures of protection, regardless of whether this power is expressly mentioned or implied in its statute (at least as the power to formulate recommendations to this effect), leads to the disappearance of the power to initiate counter-measures and may lead to an elimination of existing counter-measures to the extent that the tribunal so provides as an interim measure of protection. As the object and scope of the power of the tribunal to decide on interim measures of protection may be defined quite narrowly, however, the power of the Parties to initiate or maintain counter-measures, too, may not disappear completely.

97. In a case under the terms of a provision like Article X of the Air Services Agreement of 1946, as amended by the Exchange of Notes of 19 March 1951, the arbitration may be set in motion unilaterally. Although the arbitration need not be binding, the Parties are obliged to “use their best efforts under the powers available to them to put into effect the opinion expressed” by the Tribunal. In the present case, the Parties concluded a Compromis that provides for a binding decision on Question (A) and expressly authorises the Tribunal to decide on interim measures.

98. As far as the action undertaken by the United States Government in the present case is concerned, the situation is quite simple. Even if arbitration under Article X of the Agreement is set in motion unilaterally, implementation may take time, and during this period counter-measures are not excluded; a State resorting to such measures, however, must do everything in its power to expedite the arbitration. This is exactly what the Government of the United States has done.

99. The Tribunal’s Reply to Question (B) consists of the above observations as a whole. These observations lead to the conclusion that, under the circumstances in question, the Government of the United States had the right to undertake the action that it undertook under Part 213 of the Economic Regulations of the C.A.B.

For these reasons,
The Arbitral Tribunal replies as follows to the questions submitted to it:

Question (A)

Considering that under the sixth preambular paragraph of the Compromis of Arbitration, the French Government,

In agreeing to resort to arbitration with respect to change of gauge reserves its right to argue before the tribunal that all means of internal recourse must be exhausted before a State may invoke arbitration under the Agreement.

Considering that the question asked is the following:

Does a United States-designated carrier have the right to operate West Coast-Paris service under the Air Services Agreement between the United States and France with a change of gauge in London (transshipment to a smaller aircraft on the outward journey and to a larger aircraft on the return journey)?

Considering that the Arbitral Tribunal is therefore called upon to pronounce on two points,
The Arbitral Tribunal,

With regard to the first point,

Decides, unanimously, that it is able to decide on Question (A);

With regard to the second point,

Decides, by two votes to one, that the answer to be given on this point is that a United States designated carrier has the right to operate West Coast-Paris service under the Air Services Agreement between the United States and France with a change of gauge in London (transshipment to a smaller aircraft on the outward journey and to a larger aircraft on the return journey), provided that the service is continuous and does not constitute separate services.

Question (B)

Considering that, under the seventh preambular paragraph of the Comprimes of Arbitration, the United States Government,

in agreeing to resort to arbitration with respect to Part 213, reserves its right to argue before the tribunal that under the circumstances the issue is not appropriate for consideration by an arbitral tribunal.

Considering that the question asked is the following:

Under the circumstances in question, did the United States have the right to undertake such action as it undertook under Part 213 of the Civil Aeronautics Board’s Economic Regulations?

Considering that the Arbitral Tribunal is therefore called upon to pronounce on two points,

The Arbitral Tribunal,

With respect to the first point,

Decides, unanimously, to pronounce on Question (B);

With respect to the second point,

Decides, unanimously, that the answer to be given on this point is that, under the circumstances in question, the Government of the United States had the right to undertake the action that it undertook under Part 213 of the Economic Regulations of the C.A.B.

Done in English and French at the Graduate Institute of International Studies, Geneva, this 9th day of December 1978, both texts being equally authoritative, in three original copies, one of which will be placed in the archives of the Arbitral Tribunal, and the two others transmitted to the Government of the United States of America and to the Government of the French Republic, respectively.

(Signed)
Willems Riphen, President
Thomas Ehrlich, Arbitrator
Paul Reuter, Arbitrator
Lucius Carlisch, Registrar

M. Paul Reuter appended to the Arbitral Award a statement of his dissenting opinion.

Dissenting opinion of M. Reuter

I accepted the position of the Tribunal on the preliminary objection to Question (A) and on the preliminary objection and the answer on the merits to Question (B); in that connexion I feel bound, however, to make a number of observations and to express certain doubts.

The Parties in the present Arbitration sovereignly determined the questions put to the Tribunal and therefore restricted the Tribunal’s jurisdiction to those questions. An arbitral tribunal like the present one has to comply with that common will. But it is clear, from the documents of the case, that the dispute between the Parties is more extensive than the questions submitted to the Tribunal. The actual choice of questions is, in my view, very artificial. That situation resulted in problems which created difficulties for the Parties themselves since they raised preliminary objections; difficulties may arise for the Tribunal as well. It could thus have been asked whether the difference in legal value attributed to the Tribunal’s replies to Questions (A) and (B) is consonant with the judicial function of a tribunal; it could further have been asked whether, in the circumstances of the case, France could still claim a sufficient legal interest to ask Question (B) after the conclusion of the Comprimes. With the Tribunal, I have answered in the negative the preliminary issue raised by Question (B), because a refusal of the Tribunal to answer that Question would only have emphasized further an inequality between the Parties visible elsewhere.

As regards the merits of Question (B), my answer has been that of the Tribunal, but with one observation. I accept the Tribunal’s legal analysis, in particular the idea that, in order to assess the proportionality of the counter-measures, it is necessary to take into account, not only the actual facts, but also the questions of principle raised by them. Those questions should, however, be considered in the light of their probable effects. Hence, proportionality should be assessed on the basis of what actually constituted the dispute rather than exclusively on the basis of the facts before the Tribunal. One may well continue to entertain serious doubts on the proportionality of the counter-measures taken by the United States, which the Tribunal has been unable to assess definitely.

As far as the Tribunal’s reply to Question (A) is concerned, I regret being unable to concur in either the general position adopted by the Tribunal or its reply, and I shall briefly state the reasons for my dissent.

I shall first make two preliminary comments pertaining to the scope of “transshipment” and to the terminology used.

Within the extensive meaning attributed to the term “transshipment” by the 1946 Agreement, the economic scope of this expression varies con-

73 In the present Opinion, the term will be used in that sense
In the present case, the 1946 Agreement devotes a rather substantial provision to the question of "transhipment." The wording of this provision invites the reader to expect a thorough regulation both of "transhipment in the territory of third countries" and of "transhipment in the third countries of third countries." It is therefore apparent that the issue was left unresolved when the Convention was concluded, having endorsed Article VIII, the principle that the use of the Convention, general rules, and regulations as applicable on International Civil Aviation would be the rule provided by every State. The French Government had to give its agreement to services relating to French territory in all their aspects.

In this field of civil aviation, the economic consequences of a different approach may be striking, and the reasonably linear character of long-distance air routes is affected. In the interests of the Parties, this is particularly true. The French Government, however, not being able to determine the appropriate approach, it is not surprising that the Agreement should remain silent on the issue of transhipment in the third countries of third countries.

The provision of Article VIII is particularly important because the rule which provides that every State shall have complete exclusive sovereignty over the airspace above its territory (Article I) is not qualified by the French Government's agreement to give its agreement to services relating to French territory in all their aspects (Article VI).

There is no need to seek confirmation of this interpretation of the 1946 Agreement by reviewing the respective positions and interests of the Parties at the time of conclusion of that Agreement. At the time, there was a strong divergence of views between the United States and others, and certain exclusive rules, which were more stringent than those of the United States, were concluded in the 1946 Agreement, which differs considerably from the text of the ratification by the United States of the 1944 Convention on International Air Transport, as quoted in full in the text of that Agreement, which differs considerably from the text of the ratification of the 1946 Agreement, which differs considerably from the text of the ratification by the United States of the 1944 Convention on International Air Transport, as quoted in full in the text of that Agreement.

In particular, the requirement that the Agreement be concluded in full in the text of the ratification of the 1946 Agreement, which differs considerably from the text of the ratification by the United States of the 1944 Convention on International Air Transport, as quoted in full in the text of that Agreement, is quoted in full in the text of the ratification by the United States of the 1944 Convention on International Air Transport, as quoted in full in the text of that Agreement, is quoted in full in the text of the ratification by the United States of the 1944 Convention on International Air Transport, as quoted in full in the text of that Agreement.
case, appropriate safeguards may also be contemplated. But it can easily be

conceded that a great number of 'transmission' carried out in third coun-

tries do not belong to these categories and, consequently, the authorisa-

tion to effect them is a right and gives rise to no compensation or set-

guaranties.

This interpretation cannot be objected to on the ground that it results in

the establishment of two separate regimes for third countries. Such an

interpretation, however, would make the two regimes not applicable to

either case, and, in any case, the interpretation is not valid in either case.

One of the ways open to the party to the 1946 Agreement, which was not

used, is for the two parties to agree to add to the 1946 Agreement a provi-

sion dealing with the special case of third countries, which would allow

for the interpretation of the agreement to be made in a manner that is con-

sistent with the provisions of the agreement as applied to the parties.

The fact that the 1946 Agreement does not contain such an interpretation

does not mean that the 1946 Agreement is not applicable to the parties. On

the contrary, the provisions of the agreement are applicable to the parties,

as well as to any third country that is a party to the agreement.

The 1946 Agreement also contains provisions that are not applicable to

the parties, but which do not affect the interpretation of the agreement.

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The provisions of the 1946 Agreement are not applicable to the parties,
In conclusion, ‘‘transshipment’’ in London of avions des Etats-Unis . . . autorisés à desservir Paris via Londres (sans droits de trafic entre Londres et Paris) sur les lignes qu’ils exploient à partir de ou à destination de la côte occidentale des Etats-Unis (French text of the Exchange of Notes of 5 April 1960). was therefore subject to the prior consent of the French Government; negotiations were to be opened for that purpose; it was necessary to establish the precise nature of the operations contemplated under the guise of ‘‘transshipment’’, as well as the precise nature of the rights which United States aircraft intended to exercise on a segment on which they had no traffic rights; France was entitled to equitable compensation and, possibly, to safeguards. But, as such, the consideration that the aircraft which replaced another aircraft in London had a smaller capacity is only one element in the negotiations and not necessarily the most important one.

It is in that sense, in my view, that Question (A) should have been answered.

(Signed)
Paul REUTER
International Court of Justice

Ahmadou Sadio Diallo
(Republic of Guinea v. Democratic Republic of the Congo)
Judgment of 30 November 2010
30 NOVEMBRE 2010
ARRÊT

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JUDGMENT

Present: President Owada; Vice-President Tomka; Judges Al-Khasawneh, Simma, Abraham, Keith, Sepulveda-Amor, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood; Judges ad hoc Mahou, Mampuya; Registrar Couvreur.

In the case concerning Ahmadou Sadio Diallo,

between

the Republic of Guinea,

represented by

Colonel Siba Lohalamou, Minister of Justice, Keeper of the Seals, as Head of Delegation;

Ms Djénabou Sàïfon Diallo, Minister of Co-operation;

Mr. Mohamed Camara, First Counsellor for Political Affairs, Embassy of Guinea in the Benelux countries and in the European Union, as Agent;

Mr. Alain Pellet, Professor at the University of Paris Ouest, Nanterre-La Défense, Member and former Chairman of the International Law Commission, Associate of the Institut de droit international, as Deputy Agent, Counsel and Advocate;

Mr. Mathias Forteau, Professor at the University of Paris Ouest, Nanterre-La Défense, Secretary-General of the Société française pour le droit international,

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

Mr. Jean-Marc Thouvenin, Professor at the University of Paris Ouest, Nanterre-La Défense, Director of the Centre de droit international de Nanterre (CEDIN), member of the Paris Bar, Cabinet Sygna Partners,
Mr. Luke Vidal, member of the Paris Bar, Cabinet Sygna Partners,
Mr. Samuel Wordsworth, member of the English and Paris Bars, Essex Court Chambers,
as Counsel and Advocates;
H.E. Mr. Ahmed Tidiane Sakho, Ambassador of the Republic of Guinea to the Benelux
countries and to the European Union,
Mr. Alfred Mathos, Judicial Agent of the State,
Mr. Hassan II Diallo, Legal Adviser to the Prime Minister of the Republic of Guinea,
Mr. Ousmane Diao Balde, Director of the Legal and Consular Division of the Ministry of
Foreign Affairs,
Mr. André Saféla Leno, President of the Indictments Division of the Court of Appeal of
Conakry,
H.E. Mr. Abdoulaye Sylla, former Ambassador,
as Advisers;
Mr. Ahmadou Sadio Diallo,
and
the Democratic Republic of the Congo,
represented by

H.E. Mr. Henri Mova Sakanyi, Ambassador of the Democratic Republic of the Congo to the
Kingdom of Belgium, the Kingdom of the Netherlands and the Grand Duchy of
Luxembourg,
as Agent and Head of Delegation;
Mr. Tshibangu Kalala, Professor of International Law at the University of Kinshasa, member
of the Kinshasa and Brussels Bars, and Deputy, Congolese Parliament,
as Co-Agent, Counsel and Advocate;
Mr. Lwamba Katansi, Professor at the University of Kinshasa, Legal Adviser, Office of the
Minister of Justice and Human Rights,
Ms Corinne Clavé, member of the Brussels Bar, Cabinet
Liedekerke-Wolters-Waelbroeck-Kirkpatrick,
Mr. Kadima Mukadi, member of the Kinshasa Bar, Cabinet Tshibangu & Associés,
Mr. Bukasa Kabeya, member of the Kinshasa Bar, Cabinet Tshibangu & Associés,

Mr. Kikangala Ngoie, member of the Brussels Bar,
Mr. Mona Kazimba Kalumba, member of the Brussels Bar, Lawyer-Counsel, Embassy of
the Democratic Republic of the Congo in Brussels,
Mr. Tshimangila Lufuluabo, member of the Brussels Bar,
Ms Mwenze Kisonga Pierrette, Head of the Legal and Litigation Department, Embassy of
the Democratic Republic of the Congo in Brussels,
Mr. Kalume Mabingo, Legal Adviser, Embassy of the Democratic Republic of the Congo in
Brussels,
as Advisers;
Mr. Mukendi Tshibangu, Researcher, Cabinet Tshibangu & Associés,
Ms Ali Feza, Researcher, Office of the Minister of Justice and Human Rights,
Mr. Makaya Kiela, Researcher, Office of the Minister of Justice and Human Rights,
as Assistants,

THE COURT,
composed as above,
after deliberation,
delivers the following Judgment:

1. On 28 December 1998, the Government of the Republic of Guinea (hereinafter “Guinea”)
filed in the Registry of the Court an Application instituting proceedings against the Democratic
Republic of the Congo (hereinafter the “DRC”, named Zaire between 1971 and 1997) in respect of
a dispute concerning “serious violations of international law” alleged to have been committed
“upon the person of a Guinean national”. The Application consisted of two parts, each signed by
Guinea’s Minister for Foreign Affairs. The first part, entitled “Application” (hereinafter the
“Application (Part One)”), contained a succinct statement of the subject of the dispute, the basis of
the Court’s jurisdiction and the legal grounds relied on. The second part, entitled “Memorial of the
Republic of Guinea” (hereinafter the “Application (Part Two)”), set out the facts underlying the
dispute, expanded on the legal grounds put forward by Guinea and stated Guinea’s claims.

In the Application (Part One), Guinea maintained that:

“Mr. Ahmadou Sadio Diallo, a businessman of Guinean nationality, was
unjustly imprisoned by the authorities of the Democratic Republic of the Congo, after
being resident in that State for thirty-two (32) years, despoiled of his sizable
investments, businesses, movable and immovable property and bank accounts, and
then expelled.”
Guinea added: “[t]his expulsion came at a time when Mr. Ahmadou Sadio Diallo was pursuing recovery of substantial debts owed to his businesses by the State and by oil companies established in its territory and of which the State is a shareholder”. Mr. Diallo’s arrest, detention and expulsion constituted, inter alia, according to Guinea, violations of

“the principle that aliens should be treated in accordance with ‘a minimum standard of civilization’, [of] the obligation to respect the freedom and property of aliens, [and of] the right of aliens accused of an offence to a fair trial on adversarial principles by an impartial court”.

To found the jurisdiction of the Court, Guinea invoked in the Application (Part One) the declarations whereby the two States have recognized the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Statute of the Court.

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

3. By an Order of 25 November 1999, the Court fixed 11 September 2000 as the time-limit for the filing of a Memorial by Guinea and 11 September 2001 as the time-limit for the filing of a Counter-Memorial by the DRC. By an Order of 8 September 2000, the President of the Court, at Guinea’s request, extended the time-limit for the filing of the Memorial to 23 March 2001; in the same Order, the time-limit for the filing of the Counter-Memorial was extended to 4 October 2002. Guinea duly filed its Memorial within the time-limit as thus extended.

4. Since the Court included upon the Bench no judge of the nationality of either of the Parties, each of them availed itself of its right under Article 31, paragraph 3, of the Statute to choose a judge ad hoc to sit in the case. Guinea chose Mr. Mohammed Bedjaoui and the DRC Mr. Auguste Mampuya Kamunk’a-Tshiabo. Following Mr. Bedjaoui’s resignation on 10 September 2002, Guinea chose Mr. Ahmed Mahiou.

5. On 3 October 2002, within the time-limit set in Article 79, paragraph 1, of the Rules of Court as adopted on 14 April 1978, the DRC raised preliminary objections in respect of the admissibility of Guinea’s Application. In accordance with Article 79, paragraph 3, of the Rules of Court, the proceedings on the merits were then suspended. By an Order of 7 November 2002, the Court, taking account of the particular circumstances of the case and the agreement of the Parties, fixed 7 July 2003 as the time-limit for the presentation by Guinea of a written statement of its observations and submissions on the preliminary objections raised by the DRC. Guinea filed such a statement within the time-limit fixed, and the case thus became ready for hearing on the preliminary objections.

6. The Court held hearings on the preliminary objections raised by the DRC from 27 November to 1 December 2006. In its Judgment of 24 May 2007, the Court declared the Application of the Republic of Guinea to be admissible “in so far as it concerns protection of Mr. Diallo’s rights as an individual” and “in so far as it concerns protection of [his] direct rights as associé in Africom-Zaïre and Africontainers-Zaïre”. On the other hand, the Court declared the Application of the Republic of Guinea to be inadmissible “in so far as it concerns protection of Mr. Diallo in respect of alleged violations of rights of Africom-Zaïre and Africontainers-Zaïre”.

7. By an Order of 27 June 2007, the Court fixed 27 March 2008 as the time-limit for the filing of the Counter-Memorial of the DRC. That pleading was duly filed within the time-limit thus prescribed.

8. By an Order of 5 May 2008, the Court authorized the submission of a Reply by Guinea and a Rejoinder by the DRC, and fixed 19 November 2008 and 5 June 2009 as the respective time-limits for the filing of those pleadings. The Reply of Guinea and the Rejoinder of the DRC were duly filed within the time-limits thus prescribed.

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

10. Owing to the difficulties in the air transport sector following the volcanic eruption in Iceland during April 2010, the public hearings which, according to the schedule originally adopted, were due to be held from 19 to 23 April 2010 took place on 19, 26, 28 and 29 April 2010. At those hearings, the Court heard the oral arguments and replies of:

For Guinea: Mr. Mohamed Camara, Mr. Luke Vidal, Mr. Jean-Marc Thouvenin, Mr. Mathias Forteau, Mr. Sam Wordsworth, Mr. Daniel Müller, Mr. Alain Pellet.

For the DRC: Mr. Tshibangu Kalala.

11. At the hearings, Members of the Court put questions to the Parties, to which replies were given orally and in writing, in accordance with Article 61, paragraph 4, of the Rules of Court.

12. In the Application (Part Two), the following requests were made by Guinea:
"As to the merits: To order the authorities of the Democratic Republic of the Congo to make an official public apology to the State of Guinea for the numerous wrongs done to it in the person of its national Ahmadou Sadio Diallo;

To find that the sums claimed are certain, liquidated and legally due;

To find that the Congolese State must assume responsibility for the payment of these debts, in accordance with the principles of State responsibility and civil liability;

To order the Congolese State to pay to the State of Guinea on behalf of its national Ahmadou Sadio Diallo the sums of US$31,334,685,888.45 and Z14,207,082,872.7 in respect of the financial loss suffered by him;

To pay also to the State of Guinea damages equal to 15 per cent of the principal award, that is to say US$4,700,202,883.26 and Z2,131,062,430.9;

To award to the applicant State bank and moratory interest at respective annual rates of 15 per cent and 26 per cent from the end of the year 1995 until the date of payment in full;

To order the said State to return to the Applicant all the unvalued assets set out in the list of miscellaneous claims;

To order the Democratic Republic of the Congo to submit within one month an acceptable schedule for the repayment of the above sums;

In the event that the said schedule is not produced by the date indicated or is not respected, to authorize the State of Guinea to seize the assets of the Congolese State wherever they may be found, up to an amount equal to the principal sum due and such further amounts as the Court shall have ordered.

To order that the costs of the present proceedings be borne by the Congolese State." (Emphasis in the original.)

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

On behalf of the Government of Guinea,

in the Memorial:

“The Republic of Guinea has the honour to request that it may please the International Court of Justice to adjudge and declare:

(1) that, in arbitrarily arresting and expelling its national, Mr. Ahmadou Sadio Diallo; in not at that time respecting his right to the benefit of the provisions of the 1963 Vienna Convention on Consular Relations; in subjecting him to humiliating and degrading treatment; in depriving him of the exercise of his rights of ownership and management in respect of the companies founded by him in the DRC; in preventing him from pursuing recovery of the numerous debts owed to him — to himself personally and to the said companies — by the DRC itself and by other contractual partners; in not paying its own debts to him and to his companies, the Democratic Republic of the Congo has committed internationally wrongful acts which engage its responsibility to the Republic of Guinea;

(2) that the Democratic Republic of the Congo is accordingly bound to make full reparation on account of the injury suffered by the Republic of Guinea in the person of its national;

(3) that such reparation shall take the form of compensation covering the totality of the injuries caused by the internationally wrongful acts of the Democratic Republic of the Congo including loss of earnings, and shall also include interest.

The Republic of Guinea further requests the Court kindly to authorize it to submit an assessment of the amount of the compensation due to it on this account from the Democratic Republic of the Congo in a subsequent phase of the proceedings in the event that the two Parties should be unable to agree on the amount thereof within a period of six months following delivery of the Judgment.”

in the Reply:

“On the grounds set out in its Memorial and in the present Reply, the Republic of Guinea requests the International Court of Justice to adjudge and declare:

1. that, in carrying out arbitrary arrests of its national, Mr. Ahmadou Sadio Diallo, and expelling him; in not at that time respecting his right to the benefit of the provisions of the 1963 Vienna Convention on Consular Relations; in submitting him to humiliating and degrading treatment; in depriving him of the exercise of his rights of ownership, oversight and management in respect of the companies which he founded in the DRC and in which he was the sole associé; in preventing him in that capacity from pursuing recovery of the numerous debts owed to the said companies both by the DRC itself and by other contractual partners; in expropriating de facto Mr. Diallo’s property, the Democratic Republic of the Congo has committed internationally wrongful acts which engage its responsibility to the Republic of Guinea;

2. that the Democratic Republic of the Congo is accordingly bound to make full reparation on account of the injury suffered by Mr. Diallo or by the Republic of Guinea in the person of its national;

3. that such reparation shall take the form of compensation covering the totality of the injuries caused by the internationally wrongful acts of the Democratic Republic of the Congo, including loss of earnings, and shall also include interest.

The Republic of Guinea further requests the Court kindly to authorize it to submit an assessment of the amount of the compensation due to it on this account from the Democratic Republic of the Congo in a subsequent phase of the proceedings in the event that the two Parties should be unable to agree on the amount thereof within a period of six months following delivery of the Judgment.”
On behalf of the Government of the DRC,
in the Counter-Memorial:

“In the light of the arguments set out above and of the Court’s Judgment of 24 May 2007 on the preliminary objections, in which the Court declared Guinea’s Application to be inadmissible in so far as it concerned protection of Mr. Diallo in respect of alleged violations of rights belonging to Africom-Zaïre and Africontainers-Zaïre, the Respondent respectfully requests the Court to adjudge and declare that:

1. the Democratic Republic of the Congo has not committed any internationally wrongful acts towards Guinea in respect of Mr. Diallo’s individual personal rights;
2. the Democratic Republic of the Congo has not committed any internationally wrongful acts towards Guinea in respect of Mr. Diallo’s direct rights as associé in Africom-Zaïre and Africontainers-Zaïre;
3. accordingly, the Application of the Republic of Guinea is unfounded in fact and in law.”

in the Rejoinder:

“While expressly reserving the right to supplement and expand on its grounds in fact and in law and without admitting any statement that might be prejudicial to it, the Respondent requests the Court to adjudge and declare that:

1. the Democratic Republic of the Congo has not committed any internationally wrongful acts towards Guinea in respect of Mr. Diallo’s individual personal rights;
2. the Democratic Republic of the Congo has not committed any internationally wrongful acts towards Guinea in respect of Mr. Diallo’s direct rights as associé in Africom-Zaïre and Africontainers-Zaïre;
3. accordingly, the Application of the Republic of Guinea is unfounded in fact and in law.”

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

On behalf of the Government of Guinea,
at the hearing of 28 April 2010:

“1. On the grounds set out in its Memorial, its Reply and the oral argument now being concluded, the Republic of Guinea requests the International Court of Justice to adjudge and declare:

(a) that, in carrying out arbitrary arrest of its national, Mr. Ahmadou Sadio Diallo, and expelling him; in not at that time respecting his right to the benefit of the provisions of the 1963 Vienna Convention on Consular Relations; in submitting him to humiliating and degrading treatment; in depriving him of the exercise of his rights of ownership, oversight and management in respect of the companies which he founded in the DRC and in which he was the sole associé, in preventing him in that capacity from pursuing recovery of the numerous debts owed to the said companies both by the DRC itself and by other contractual partners; and in expropriating de facto Mr. Diallo’s property, the Democratic Republic of the Congo has committed internationally wrongful acts which engage its responsibility to the Republic of Guinea;

(b) that the Democratic Republic of the Congo is accordingly bound to make full reparation on account of the injury suffered by Mr. Diallo or by the Republic of Guinea in the person of its national;

(c) that such reparation shall take the form of compensation covering the totality of the injuries caused by the internationally wrongful acts of the Democratic Republic of the Congo, including loss of earnings, and shall also include interest.

2. The Republic of Guinea further requests the Court kindly to authorize it to submit an assessment of the amount of the compensation due to it on this account from the Democratic Republic of the Congo in a subsequent phase of the proceedings in the event that the two Parties should be unable to agree on the amount thereof within a period of six months following delivery of the Judgment.”

On behalf of the Government of the DRC,
at the hearing of 29 April 2010:

“In the light of the arguments referred to above and of the Court’s Judgment of 24 May 2007 on the preliminary objections, whereby the Court declared Guinea’s Application to be inadmissible in so far as it concerned protection of Mr. Diallo in respect of alleged violations of rights of Africom-Zaïre and Africontainers-Zaïre, the Respondent respectfully requests the Court to adjudge and declare that:

1. the Democratic Republic of the Congo has not committed any internationally wrongful acts towards Guinea in respect of Mr. Diallo’s individual personal rights;
2. the Democratic Republic of the Congo has not committed any internationally wrongful acts towards Guinea in respect of Mr. Diallo’s direct rights as associé in Africom-Zaïre and Africontainers-Zaïre;
3. accordingly, the Application of the Republic of Guinea is unfounded in fact and in law and no reparation is due.”
I. GENERAL FACTUAL BACKGROUND

15. The Court will begin with a brief description of the factual background to the present case, as previously recalled in its Judgment on preliminary objections of 24 May 2007 (Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II), pp. 590-591, paras. 13-15). It will return to each of the relevant facts in greater detail when it comes to examine the legal claims relating to them.

16. Mr. Ahmadou Sadio Diallo, a Guinean citizen, settled in the DRC in 1964. There, in 1974, he founded an import-export company, Africom-Zaire, a société privée à responsabilité limitée (private limited liability company, hereinafter “SPRL”) incorporated under Zairean law and entered in the Trade Register of the city of Kinshasa. In 1979 Mr. Diallo took part, as gérant (manager) of Africom-Zaire, in the founding of a Zairean SPRL specializing in the containerized transport of goods, Africontainers-Zaire. This company was entered in the Trade Register of the city of Kinshasa and Mr. Diallo became its gérant (see paragraphs 105-113 below).

17. At the end of the 1980s, Africom-Zaire and Africontainers-Zaire, acting through their gérant, Mr. Diallo, instituted proceedings against their business partners in an attempt to recover various debts. The various disputes between Africom-Zaire or Africontainers-Zaire, on the one hand, and their business partners, on the other, continued throughout the 1990s and for the most part remain unresolved today (see paragraphs 109, 114, 136 and 130 below).

18. On 25 January 1988, Mr. Diallo was arrested and imprisoned. On 28 January 1989, the public prosecutor in Kinshasa ordered the release of Mr. Diallo after the case was closed for “inexpediency of prosecution”.

19. On 31 October 1995, the Zairean Prime Minister issued an expulsion decree against Mr. Diallo. On 5 November 1995, Mr. Diallo was arrested and placed in detention with a view to his expulsion. After having been released and rearrested, he was finally expelled from Congolese territory on 31 January 1996 (see paragraphs 50-60 below).

20. Having, in its Judgment of 24 May 2007, declared the Application of the Republic of Guinea to be admissible “in so far as it concerns protection of Mr. Diallo’s rights as an individual” and “in so far as it concerns protection of [his] direct rights as associé in Africom-Zaire and Africontainers-Zaire” (see paragraph 6 above), the Court will in turn consider below the questions of the protection of Mr. Diallo’s rights as an individual (see paragraphs 21-98) and of the protection of his direct rights as associé in Africom-Zaire and Africontainers-Zaire (see paragraphs 99-159). In the light of the conclusions it comes to on these questions, it will then examine the claims for reparation made by Guinea in its final submissions (see paragraphs 160-164).

II. PROTECTION OF MR. DIALLO’S RIGHTS AS AN INDIVIDUAL

21. In its arguments as finally stated, Guinea maintains that Mr. Diallo was the victim in 1988-1989 of arrest and detention measures taken by the DRC authorities in violation of international law and in 1995-1996 of arrest, detention and expulsion measures also in violation of international law. Guinea reasons from this that it is entitled to exercise diplomatic protection of its national in this connection.

22. The DRC maintains that the claim relating to the events in 1988-1989 was presented belatedly and must therefore be rejected as inadmissible. In the alternative, the DRC maintains that the said claim must be rejected because of failure to exhaust local remedies, or, otherwise, rejected on the merits. The DRC denies that Mr. Diallo’s treatment in 1995-1996 breached its obligations under international law.

23. The Court must therefore first rule on the DRC’s argument contesting the admissibility of the claim concerning the events in 1988-1989 before it can, if necessary, consider the merits of that claim. It will then need to consider the merits of the grievances relied upon by Guinea in support of its claim concerning the events in 1995-1996, the admissibility of which is no longer at issue in this phase of the proceedings.

A. The claim concerning the arrest and detention measures taken against Mr. Diallo in 1988-1989

24. After asserting that it was only in the Reply that Guinea first set out arguments in respect of the events in 1988-1989, the DRC in the Rejoinder challenged the admissibility of the claim in question as follows:

“The Applicant is clearly seeking to put forward a new claim by means of the Reply and consequently to amend the Application at an inappropriate stage of the proceedings. This new claim, which is not in any way linked to the main claim concerning the events of 1995 to 1996 forming the basis of this dispute, entitles the [Respondent] to raise the objection of failure to exhaust the local remedies available in the Congolese legal system with respect to the arrest and detention of 1988-1989.”

The DRC reiterated this objection in like terms during the oral proceedings.

25. Thus enunciated, the Respondent’s objection amounts to a challenge to the admissibility of the claim concerning the events of 1988-1989 on two separate grounds: first, Guinea is alleged to have raised the claim at a stage in the proceedings such that it was late, in view of the lack of a sufficient connection between it and the claim advanced in the Application instituting proceedings; second, this claim is alleged to be barred in any case by an objection based on Mr. Diallo’s failure first to exhaust the remedies available in the Congolese legal system.
26. The Court must commence by considering the first of these two grounds of inadmissibility. If it concludes that the claim was in fact late and must therefore be rejected without any consideration on the merits, there will be no need for the Court to proceed any further. If, on the other hand, it concludes that the claim was not asserted belatedly, it will need to consider whether the DRC is entitled to raise, at this stage of the proceedings, the objection of non-exhaustion of local remedies and, if so, whether that objection is warranted.

27. In order to decide whether the claim relating to the events in 1988-1989 was raised late, the Court must first ascertain exactly when the claim was first asserted in the present proceedings.

28. To begin, note should be taken that there is nothing in the Application instituting proceedings of 28 December 1998 referring to the events in 1988-1989. Granted, it is stated under the heading “Subject of the Dispute” as defined in the Application that Mr. Diallo was “unjustly imprisoned . . . despoiled . . . and then expelled”. But it is clear from the document annexed to the Application (the Application (Part Two), see paragraph 1 above) that the “imprisonment” in question began on 5 November 1995 and, according to Guinea, ended after a brief interruption with Mr. Diallo’s physical expulsion on 31 January 1996 at Kinshasa airport. Nowhere in the Application proper or in the annex to it is there any reference to Mr. Diallo’s arrest and detention in 1988-1989.

29. Nor are these facts mentioned in the Memorial Guinea filed pursuant to Article 49, paragraph 1, of the Rules of Court on 23 March 2001. That Memorial contains an extensive discussion of the facts which have given rise to the dispute. In respect of those corresponding to “arrest” and “detention”, the events of 1995-1996 are described in detail, in the section “The salient facts”, whereas no mention is made of any detention suffered by Mr. Diallo in 1988-1989. True, the Court is requested in the final “submissions” in the Memorial to declare that, “in arbitrarily arresting and expelling . . . Mr. Diallo” “[en procédant à l’arrestation arbitraire et à l’expulsion de . . . M. Diallo]”, the DRC committed acts engaging its international responsibility, without any further specification as to the date and nature of the “arbitrary arrest” [“l’arrestation arbitraire”] in question. But it is usual for the facts not to be treated in any detail in the “submissions” which a Memorial is required to contain pursuant to Article 49, paragraph 1, of the Rules of Court, because the submissions follow the statement of facts, which the same provision of the Rules of Court also requires, and they must be read in the light of that statement. In the case at hand, the “arbitrary arrest” referred to in the submissions in Guinea’s Memorial can only be the arrest Mr. Diallo suffered, according to the Applicant, in 1995-1996 in view of the carrying out of the expulsion decree issued against him in October 1995, not Mr. Diallo’s alleged arrest in 1988-1989, of which there is no mention.

30. It was not until the Applicant filed its Written Observations on the preliminary objections raised by the Respondent on 7 July 2003 that Mr. Diallo’s arrest and detention in 1988-1989 were referred to for the first time. But it is to be observed that the reference appears only in the first chapter, entitled “The salient facts”, solely in the context of the refusal of the Zairean authorities to pay sums to Africom-Zaire, and no further mention is made of these events in the later chapters devoted to the discussion from the legal perspective of the DRC’s objections to admissibility.

31. In the opinion of the Court, the claim in respect of the events in 1988-1989 cannot be deemed to have been presented by Guinea in its “Written Observations” of 7 July 2003. The purpose of those observations was to respond to the DRC’s objections in respect of admissibility, in accordance with the requirements of Article 79, paragraph 5, of the Rules of Court, in the 1978 version applicable to these proceedings. As these were preliminary objections, having been raised by the DRC within the time-limit for the filing of its Counter-Memorial, the proceedings on the merits had been suspended upon receipt by the Registry of the document setting them out, in accordance with Article 79, paragraph 3, of the Rules of Court, in the version applicable to the present proceedings. That is why Guinea confined itself in its Written Observations of 7 July 2003 to submitting at the end that the Court should “[r]eject the Preliminary Objections” and “[d]eclare the Application . . . admissible”. As those were incidental proceedings opened by virtue of the DRC’s preliminary objections, Guinea could not present any submission other than those concerning the merit of the objections and how the Court should deal with them. Accordingly, the “Written Observations” of 7 July 2003 cannot be interpreted as having introduced an additional claim by the Applicant into the proceedings. And it would have been especially difficult for the Respondent to have so interpreted them, given the object of the incidental proceedings. It is hardly surprising then that the DRC did not refer, either in the oral proceedings on the preliminary objections or in its Counter-Memorial, to the facts alleged by Guinea in respect of 1988-1989.

32. Guinea first presented its claim in respect of the events in 1988-1989 in its Reply, filed on 19 November 2008, after the Court had handed down its Judgment on the preliminary objections. The Reply describes in detail the circumstances surrounding Mr. Diallo’s arrest and detention in 1988-1989, states that these “inarguably figure among the wrongful acts for which Guinea is seeking to have the Respondent held internationally responsible” and indicates for the first time what, from the Applicant’s point of view, were the international obligations, notably treaty-based ones, breached by the Respondent in connection with the acts in question. Tellingly, whereas in the final submissions in the Memorial Guinea asked the Court to adjudge “that, in arbitrarily arresting and expelling . . . Mr. Ahmadou Sadio Diallo . . . the Democratic Republic of the Congo has committed . . . acts which engage its responsibility” [in the original French: “qu’en procédant à l’arrestation arbitraire et à l’expulsion de . . . M. Ahmadou Sadio Diallo . . . la République démocratique du Congo a commis . . . des actes qui engagent sa responsabilité” (emphasis added)], the submissions in the Reply are worded identically with the sole exception that the singular term emphasized above is replaced by the plural: “arbitrary arrests” [“des arrestations arbitraires”].

33. In response to the DRC’s objection based on the belated assertion of the claim in question, Guinea gave no explanation as to why this claim was introduced at such an advanced stage of the proceedings. It pointed out however that the Court stated in paragraph 45 of its Judgment of 24 May 2007 on the Respondent’s preliminary objections in the present case:
“in its Memorial on the merits, Guinea described in detail the violations of international law allegedly committed by the DRC against Mr. Diallo. Among those cited is the claim that Mr. Diallo was arbitrarily arrested and detained on two occasions, first in 1988 and then in 1995.” (I.C.J. Reports 2007 (II), p. 600, para. 45.)

34. The quoted passage erroneously refers to the arrest and detention in 1988 as included among the facts set out in the Memorial. This error of fact had no effect on the conclusion reached by the Court in 2007, namely, that Guinea’s Application was admissible in so far as it was aimed at exercising diplomatic protection of Mr. Diallo in respect of alleged violations of his rights as an individual. Guinea has not argued that the reference to the year 1988 in paragraph 45 of the 2007 Judgment has any binding effect on the Court at the present stage of the proceedings, and it clearly has no such effect, since the operative part of the Judgment would have been no different even if the error had not appeared in the quoted paragraph.

35. Having determined exactly when the claim concerning the events in 1988-1989 was introduced into the proceedings, the Court can now decide whether that claim should be considered late and inadmissible as a result. The Judgment handed down on 24 May 2007 on the DRC’s preliminary objections does not prevent the Respondent from now raising the objection that the additional claim was presented belatedly, since the claim was introduced, as just stated, after delivery of the 2007 Judgment.

36. On the subject of additional claims introduced — by an Applicant — in the course of proceedings, the Court has developed a jurisprudence which is now well settled and is based on the relevant provisions of the Statute and the Rules of Court, specifically Article 40, paragraph 1, of the former and Article 38, paragraph 2, and Article 49, paragraph 1, of the latter.

37. Article 40, paragraph 1, of the Statute of the Court provides:

“1. Cases are brought before the Court, as the case may be, either by the notification of the special agreement or by a written application addressed to the Registrar. In either case the subject of the dispute and the parties shall be indicated.” (Emphasis added.)

Article 38, paragraph 2, of the Rules of Court states:

“2. The application shall specify as far as possible the legal grounds upon which the jurisdiction of the Court is said to be based; it shall also specify the precise nature of the claim, together with a succinct statement of the facts and grounds on which the claim is based.” (Emphasis added.)

Article 49, paragraph 1, of the Rules of Court reads:

“1. A Memorial shall contain a statement of the relevant facts, a statement of law, and the submissions.” (Emphasis added.)

38. The Court has deemed these provisions “essential from the point of view of legal security and the good administration of justice” (Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992, p. 267, para. 69). It has further observed that they were already, in substance, part of the text of the Statute of the Permanent Court of International Justice, adopted in 1920, and of the text of the first Rules of that Court, adopted in 1922 (ibid.).

39. From these provisions, the Court has concluded that additional claims formulated in the course of proceedings are inadmissible if they would result, were they to be entertained, in transforming “the subject of the dispute originally brought before [the Court] under the terms of the Application” (Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007 (II), p. 695, para. 108). In this respect, it is the Application which is relevant and the Memorial, “though it may elucidate the terms of the Application, must not go beyond the limits of the claim as set out therein” (Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992, p. 267, para. 69, citing the Order of the Permanent Court of 4 February 1933 in the case concerning Prince von Pless Administration (Order of 4 February 1933, P.C.I.J., Series A/B, No. 52, p. 14)). A fortiori, a claim formulated subsequent to the Memorial, as is the case here, cannot transform the subject of the dispute as delimited by the terms of the Application.

40. The Court has however also made clear that “the mere fact that a claim is new is not in itself decisive for the issue of admissibility” and that:

“...In order to determine whether a new claim introduced during the course of the proceedings is admissible [it will need to consider whether, ‘although formally a new claim, the claim in question can be considered as included in the original claim in substance’.” (Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007 (II), p. 695, para. 110, in part quoting Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992, pp. 265-266, para. 65.)

41. In other words, a new claim is not inadmissible ipso facto; the decisive consideration is the nature of the connection between that claim and the one formulated in the Application instituting proceedings.

In this regard the Court has also had the occasion to point out that, to find that a new claim, as a matter of substance, has been included in the original claim, “it is not sufficient that there should be links between them of a general nature” (Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007 (II), p. 695, para. 110).

Drawing upon earlier cases, the Judgment handed down in the case concerning Certain Phosphate Lands in Nauru (Nauru v. Australia), (Preliminary Objections, Judgment, I.C.J. Reports 1992) formulated two alternative tests.
Either the additional claim must be implicit in the Application (as was the case of one of the Applicant’s final submissions in the case concerning Temple of Preah Vihear (Cambodia v. Thailand) (see the Judgment on the merits, I.C.J. Reports 1962, p. 36)) or it must arise directly out of the question which is the subject-matter of the Application (as was the case of one of Nicaragua’s final submissions in the case concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), cited above, paragraph 114).

42. These are the tests the Court now has to apply in the present case to determine whether Guinea’s claim in respect of the events in 1988-1989, which is “formally new” vis-à-vis the initial claim, is admissible.

43. The Court finds itself unable to consider this claim as being “implicit” in the original claim as set forth in the Application. Leaving aside the alleged violations of rights belonging to the companies owned by Mr. Diallo, in respect of which the Application was held inadmissible in the Judgment rendered on the preliminary objections, and the violations of Mr. Diallo’s direct rights as associé, to be dealt with below, the initial claim concerned violations of Mr. Diallo’s individual rights alleged by Guinea to have resulted from the arrest, detention and expulsion measures taken against him in 1995-1996. It is hard to see how allegations concerning other arrest and detention measures, taken at a different time and in different circumstances, could be regarded as “implicit” in the Application concerned with the events in 1995-1996. This is especially so given that the legal bases for Mr. Diallo’s arrests in 1988-1989, on the one hand, and 1995-1996, on the other, were completely different. His first detention was carried out as part of a criminal investigation into fraud opened by the Prosecutor’s Office in Kinshasa. The second was ordered with a view to implementing an expulsion decree, that is to say, as part of an administrative procedure. Among other consequences, it follows that the applicable international rules — which the DRC is accused of having violated — are different in part, and that the domestic remedies on whose prior exhaustion the exercise of diplomatic protection is as a rule contingent are also different in nature.

44. The last point deserves particular attention. Since, as noted above, the new claim was introduced only at the Reply stage, the Respondent was no longer able to assert preliminary objections to it, since such objections have to be submitted, under Article 79 of the Rules of Court as applicable to these proceedings, within the time-limit fixed for the delivery of the Counter-Memorial (and, under that Article as in force since 1 February 2001, within three months following delivery of the Memorial). A Respondent’s right to raise preliminary objections, that is to say, objections which the Court is required to rule on before the debate on the merits begins (see Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 26, para. 47), is a fundamental procedural right. This right is infringed if the Applicant asserts a substantively new claim after the Counter-Memorial, which is to say at a time when the Respondent can still raise objections to admissibility and jurisdiction, but not preliminary objections. This is especially so in a case involving diplomatic protection if, as in the present instance, the new claim concerns facts in respect of which the remedies available in the domestic system are different from those which could be pursued in respect of the facts underlying the initial claim.

45. Thus, it cannot be said that the additional claim in respect of the events in 1988-1989 was “implicit” in the initial Application.

46. For similar reasons, the Court sees no possibility of finding that the new claim “arises directly out of the question which is the subject-matter of the Application”. Obviously, the mere fact that two questions are closely related in subject-matter, in that they concern more or less comparable facts and similar rights, does not mean that one arises out of the other. Moreover, as already observed, the facts involved in Mr. Diallo’s detentions in 1988-1989 and in 1995-1996 are dissimilar in nature, the domestic legal framework is different in each case and the rights guaranteed by international law are far from perfectly coincident. It would be particularly odd to regard the claim concerning the events in 1988-1989 as “arising directly” out of the issue forming the subject-matter of the Application in that the claim concerns facts, perfectly well known to Guinea on the date the Application was filed, which long pre-date those in respect of which the Application (in that part of it concerning the alleged violation of Mr. Diallo’s individual rights) was presented.

47. For all of the reasons set out above, the Court finds that the claim concerning the arrest and detention measures to which Mr. Diallo was subject in 1988-1989 is inadmissible.

48. In light of the above finding, there is no need for the Court to consider whether the DRC is entitled to raise, at this stage in the proceedings, an objection to the claim in question based on the failure to exhaust local remedies, or, if so, whether the objection would be warranted.

**B. The claim concerning the arrest, detention and expulsion measures taken against Mr. Diallo in 1995-1996**

1. The facts

49. Some of the facts relating to the arrest, detention and expulsion measures taken against Mr. Diallo between October 1995 and January 1996 are acknowledged by both Parties; others, in contrast, are in dispute.

50. The facts on which the Parties are in agreement are as follows.

An expulsion decree was issued against Mr. Diallo on 31 October 1995. This decree, signed by the Prime Minister of Zaire, stated that: “[t]he presence and personal conduct [of Mr. Diallo] have breached Zairean public order, especially in the economic, financial and monetary areas, and continue to do so”.

On 5 November 1995, further to the above-mentioned decision and with a view to its implementation, Mr. Diallo was arrested and placed in detention in the premises of the immigration service.

On 10 January 1996, Mr. Diallo was released.
On 31 January 1996, Mr. Diallo was expelled to Abidjan, on a flight from Kinshasa airport. However, it would be wrong to regard this rule, based on the maxim *onus probandi incumbit auctoriti*, as an absolute one, to be applied in all circumstances. The determination of the burden of proof is a fact dependent on the particular case at hand and therefore it may vary. In the present case, it is necessary to establish the facts which led to the decision of the case.

55. In particular, where, as in these proceedings, it is alleged that a person has not been afforded, by public authority, certain procedural guarantees to which he was entitled, it cannot as a general rule be demanded of the Appellant that he proves that he was not afforded the guarantees required by law. It is on the contrary the public authority which must prove that it has complied with the procedural guarantees of which the person alleging a violation is deprived. It follows that, in case of disagreement between the Parties, the burden of proof lies on the Appellant to establish the facts relevant to the decision of the case.

56. It is for the Court to evaluate all the evidence produced by the two Parties and to decide which of them should be presumed to have established facts such as those which are at issue in the present case, neither party being alone in bearing the burden of proof.

57. As a general rule, it is for the party which alleges a fact in support of its claims to prove the existence of the facts relevant to the decision of the case, the Court must first address the question of the burden of proof.

58. The Court is not convinced by the DRC’s allegation that Mr. Diallo was released as early as 7 November 1995 and then only rearrested at the beginning of January 1996, before being freed again on 10 January. The Court’s assessment is based on the following reasons.

59. There are two documents in the case file which prove that Mr. Diallo was imprisoned on 10 January 1996, and that his release was on 25 January 1996. The letter of 30 November 1995 is therefore in no way conclusive.

The letter of 30 November 1995 is therefore in no way conclusive.

60. As a general rule, it is for the party which alleges a fact in support of its claims to prove the existence of the facts relevant to the decision of the case, the Court must first address the question of the burden of proof.

61. In particular, where, as in these proceedings, it is alleged that a person has not been afforded, by public authority, certain procedural guarantees to which he was entitled, it cannot as a general rule be demanded of the Appellant that he proves that he was not afforded the guarantees required by law. It is on the contrary the public authority which must prove that it has complied with the procedural guarantees of which the person alleging a violation is deprived. It follows that, in case of disagreement between the Parties, the burden of proof lies on the Appellant to establish the facts relevant to the decision of the case.

62. As a general rule, it is for the party which alleges a fact in support of its claims to prove the existence of the facts relevant to the decision of the case, the Court must first address the question of the burden of proof.

63. Faced with a disagreement between the Parties as to the existence of the facts relevant to the decision of the case, the Court must first address the question of the burden of proof.

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66. As a general rule, it is for the party which alleges a fact in support of its claims to prove the existence of the facts relevant to the decision of the case, the Court must first address the question of the burden of proof.

67. Faced with a disagreement between the Parties as to the existence of the facts relevant to the decision of the case, the Court must first address the question of the burden of proof.
59. Accordingly, the Court concludes that Mr. Diallo remained in continuous detention for 66 days, from 5 November 1995 to 10 January 1996.

60. On the other hand, the Court does not accept the Applicant’s assertion that Mr. Diallo was rearrested on 14 January 1996 and remained in detention until he was expelled on 31 January. This claim, which is contested by the Respondent, is not supported by any evidence at all; the Court also observes that, in the written proceedings, Guinea stated the date of this alleged arrest to be 17 and not 14 January. The Court therefore cannot regard the second period of detention claimed by the Applicant, lasting 17 days, as having been established. However, since the DRC has acknowledged that Mr. Diallo was detained, at the latest, on 25 January 1996, the Court will take it as established that he was in detention between 25 and 31 January 1996.

61. Nor can the Court accept the allegations of death threats said to have been made against Mr. Diallo by his guards, in the absence of any evidence in support of these allegations.

62. As regards the question of compliance of the authorities of the DRC with their obligations under Article 36 (1) (b) of the Vienna Convention on Consular Relations, the relevant facts will be examined at a later stage, when the Court deals with that question (see paragraphs 90-97 below).

2. Consideration of the facts in the light of the applicable international law

63. Guinea maintains that the circumstances in which Mr. Diallo was arrested, detained and expelled in 1995-1996 constitute in several respects a breach by the DRC of its international obligations.

First, the expulsion of Mr. Diallo is said to have breached Article 13 of the International Covenant on Civil and Political Rights (hereinafter the “Covenant”) of 16 December 1966, to which Guinea and the DRC became parties on 24 April 1978 and 1 February 1977 respectively, as well as Article 12, paragraph 4, of the African Charter on Human and Peoples’ Rights (hereinafter the “African Charter”) of 27 June 1981, which entered into force for Guinea on 21 October 1986, and for the DRC on 28 October 1987.

Second, Mr. Diallo’s arrest and detention are said to have violated Article 9, paragraphs 1 and 2, of the Covenant, and Article 6 of the African Charter.

Third, Mr. Diallo is said to have suffered conditions in detention comparable to forms of inhuman or degrading treatment that are prohibited by international law.

Fourth and last, Mr. Diallo is said not to have been informed, when he was arrested, of his right to request consular assistance from his country, in violation of Article 36 (1) (b) of the Vienna Convention on Consular Relations of 24 April 1963, which entered into force for Guinea on 30 July 1988 and for the DRC on 14 August 1976.

The Court will examine in turn whether each of these assertions is well-founded.

(a) The alleged violation of Article 13 of the Covenant and Article 12, paragraph 4, of the African Charter

64. Article 13 of the Covenant reads as follows:

“An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.”

Likewise, Article 12, paragraph 4, of the African Charter provides that:

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

65. It follows from the terms of the two provisions cited above that the expulsion of an alien lawfully in the territory of a State which is a party to these instruments can only be compatible with the international obligations of that State if it is decided in accordance with “the law”, in other words the domestic law applicable in that respect. Compliance with international law is to some extent dependent here on compliance with internal law. However, it is clear that while “accordance with law” as thus defined is a necessary condition for compliance with the above-mentioned provisions, it is not the sufficient condition. First, the applicable domestic law must itself be compatible with the other requirements of the Covenant and the African Charter; second, an expulsion must not be arbitrary in nature, since protection against arbitrary treatment lies at the heart of the rights guaranteed by the international norms protecting human rights, in particular those set out in the two treaties applicable in this case.

66. The interpretation above is fully corroborated by the jurisprudence of the Human Rights Committee established by the Covenant to ensure compliance with that instrument by the States parties (see for example, in this respect, Maroufidou v. Sweden, No. 58/1979, para. 9.3; Human Rights Committee, General Comment No. 15: The position of aliens under the Covenant).

Since it was created, the Human Rights Committee has built up a considerable body of interpretative case law, in particular through its findings in response to the individual communications which may be submitted to it in respect of States parties to the first Optional Protocol, and in the form of its “General Comments”.

Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled.
Likewise, when the Court is called upon, as in these proceedings, to apply a regional instrument for the protection of human rights, it must take due account of the interpretation of that instrument. Consequently, although it would be possible in theory to discuss the validity of that interpretation, it is certainly not for the Court to adopt a different interpretation of Congolese domestic law for the purposes of the decision of this case. Therefore, it cannot be concluded that the decree expelling Mr. Diallo was not issued in accordance with law, by virtue of the fact that it was signed by the Prime Minister.

72. However, the Court is of the opinion that this decree did not comply with the provisions of Congolese law for two other reasons.

First, it was not preceded by consultation of the National Immigration Board, whose opinion was required by Article 16 of the above-mentioned Legislative Order concerning immigration control. The DRC has not contested either that Mr. Diallo’s situation placed him within the scope of this provision, or that the Board was notified of its existence. Further, the absence of any such consultation of the Board, which is the first part of the procedure required by Article 15 of the 1983 Legislative Order, is a breach of the ‘due process’ requirement of the African Charter on Human and Peoples’ Rights. Such a procedure is not only a procedural safeguard but must also have a practical effect. In the present case, the Board was not consulted, and the Board’s opinion, if it had been consulted, would have been negative. The decision to expel Mr. Diallo has thus been deprived of one of the guarantees conferred on aliens by Congolese law and aimed at protecting the persons in question against the risk of arbitrary treatment, the expulsion of Mr. Diallo being ‘in accordance with law’ by virtue of the fact that it was signed by the Prime Minister.

Second, the expulsion decree should have been ‘reasoned’, in accordance with Article 13 of the 1983 Legislative Order. In other words, it should have indicated the grounds for the decision taken. The fact is that the general, stereotyped reasoning included in the decree cannot in any way be regarded as meeting the requirements of the legislation. The decree confines itself to stating that the presence and conduct of Mr. Diallo have breached Zairian public order, especially in the area of public security, and that they were even more serious in the light of the circumstances. This reasoning is not sufficient. The formulation used by the author of the decree therefore amounts to an absence of reasoning for the expulsion measure.

The Court is not convinced by the first of these arguments. It is true that Article 15 of the Zairian Legislative Order of 12 September 1983 concerning immigration control, in the version in force at the time, conferred on the President of the Republic, and not the Prime Minister, the power to expel an alien. However, the DRC explained that since the entry into force of the new Constitutional Act of 9 April 1994, the powers conferred by particular legislative provisions on the President of the Republic are deemed to have been formally transferred to the Prime Minister, who shall exercise regulatory power by means of decrees deliberated upon in the Council of Ministers. Consequently, regardless of whether that transfer of power is legitimate or not, the procedure adopted in the present case was not in accordance with law. In any case, the President of the Republic is deemed to have been transferred to the Prime Minister, the Prime Minister being the highest national authority. The Court will return later in this Judgment to the question to which the President of the Republic is deemed to have been transferred to the Prime Minister, the Prime Minister being the highest national authority. The Court will return later in this Judgment to the question to which the President of the Republic is deemed to have been transferred to the Prime Minister, the Prime Minister being the highest national authority.

This interpretation of the Court, from which it follows that Constitution was adopted, does not seem manifestly incorrect. It has not been contested at the time in question by the national authorities. The DRC’s interpretation of its Constitution, from which it follows that the Constitution was adopted, does not seem manifestly incorrect. It has not been contested at the time in question by the national authorities.
74. Furthermore, the Court considers that Guinea is justified in contending that the right afforded by Article 13 to an alien who is subject to an expulsion measure to “submit the reasons against his expulsion and to have his case reviewed by . . . the competent authority” was not respected in the case of Mr. Diallo.

It is indeed certain that, neither before the expulsion decree was signed on 31 October 1995, nor subsequently but before the said decree was implemented on 31 January 1996, was Mr. Diallo allowed to submit his defence to a competent authority in order to have his arguments taken into consideration and a decision made on the appropriate response to be given to them.

It is true, as the DRC has pointed out, that Article 13 of the Covenant provides for an exception to the right of an alien to submit his reasons where “compelling reasons of national security” require otherwise. The Respondent maintains that this was precisely the case here. However, it has not provided the Court with any tangible information that might establish the existence of such “compelling reasons”. In principle, it is doubtful for the national authorities to consider the reasons of public order that may justify the adoption of one police measure or another. But when this involves setting aside an important procedural guarantee provided for by an international treaty, it cannot simply be left in the hands of the State in question to determine the circumstances which, exceptionally, allow that guarantee to be set aside. It is for the State to demonstrate that the “compelling reasons” required by the Covenant existed, or at the very least could reasonably have been concluded to have existed, taking account of the circumstances which surrounded the expulsion measure.

In the present case, no such demonstration has been provided by the Respondent.

On these grounds too, the Court concludes that Article 13 of the Covenant was violated in respect of the circumstances in which Mr. Diallo was expelled.

(b) The alleged violation of Article 9, paragraphs 1 and 2, of the Covenant and Article 6 of the African Charter

75. Article 9, paragraphs 1 and 2, of the Covenant provides that:

“1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.”

Article 6 of the African Charter provides that:

“Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.”

76. According to Guinea, the above-mentioned provisions were violated when Mr. Diallo was arrested and detained in 1995-1996 for the purpose of implementing the expulsion decree, for a number of reasons.

First, the deprivations of liberty which he suffered did not take place “in accordance with such procedure as [is] established by law” within the meaning of Article 9, paragraph 1, of the Covenant, or on the basis of “conditions previously laid down by law” within the meaning of Article 6 of the African Charter.

Second, they were “arbitrary” within the meaning of these provisions.

Third, Mr. Diallo was not informed, at the time of his arrests, of the reasons for those arrests, nor was he informed of the charges against him, which constituted a violation of Article 9, paragraph 2, of the Covenant.

The Court will examine in turn whether each of these assertions is well-founded.

77. First of all, it is necessary to make a general remark. The provisions of Article 9, paragraphs 1 and 2, of the Covenant, and those of Article 6 of the African Charter, apply in principle to any form of arrest or detention decided upon and carried out by a public authority, whatever its legal basis and the objective being pursued (see in this respect, with regard to the Covenant, the Human Rights Committee’s General Comment No. 8 of 30 June 1982 concerning the right to liberty and security of person (Human Rights Committee, CCPR General Comment No. 8: Article 9 (Right to Liberty and Security of Person))). The scope of these provisions is not, therefore, confined to criminal proceedings; they also apply, in principle, to measures which deprive individuals of their liberty that are taken in the context of an administrative procedure, such as those which may be necessary in order to effect the forcible removal of an alien from the national territory. In this latter case, it is of little importance whether the measure in question is characterized by domestic law as an “expulsion” or a “refoulement”. The position is only different as regards the requirement in Article 9, paragraph 2, of the Covenant that the arrested person be “informed of any charges” against him, a requirement which is only meaningful in the context of criminal proceedings.

78. The Court now turns to the first of Guinea’s three allegations, namely, that Mr. Diallo’s arrest and detention were not in accordance with the requirements of the law of the DRC. It should first be noted that Mr. Diallo’s arrest on 5 November 1995 and his detention until 31 January 1996 (see paragraph 58 above) were for the purpose of enabling the expulsion decree issued against him on 31 October 1995 to be effected. The second arrest, on 25 January 1996 at the latest, was also for the purpose of implementing that decree: the mention of a “refoulement” on account of “illegal residence” in the notice served on Mr. Diallo on 31 January 1996, the day when he was actually expelled, was clearly erroneous, as the DRC acknowledges.

79. Article 15 of the Legislative Order of 12 September 1983 concerning immigration control, as in force at the time of Mr. Diallo’s arrest and detention, provided that an alien “who is likely to evade implementation” of an expulsion measure may be imprisoned for an initial period of 48 hours, which may be “extended by 48 hours at a time, but shall not exceed eight days”. The
Court finds that Mr. Diallo's arrest and detention were not in accordance with these provisions. For the reasons discussed above (see paragraph 77), Guinea cannot effectively argue that at the time of each of his arrests (in November 1995 and January 1996), Mr. Diallo was not informed of the charge or charges against him, as the Applicant contends is required only when a person is arrested in the context of criminal proceedings, that was not the case for Mr. Diallo.

84. On the other hand, Guinea is justified in arguing that Mr. Diallo was not informed of the reasons for his arrest, as required by that provision. Mr. Diallo was notified of the expulsion decree at the time of his arrest on 5 November 1995, and that was the purpose of the arrest. Moreover, no information of this kind was provided to him; the DRC, which should have informed him sufficiently in advance of the reasons for that arrest for the purpose of challenging the lawfulness of the detention, has presented no such information, and the fact that he had attempted to recover debts which he believed were owed to his companies by, amongst others, the Zairean State or companies in which the State holds a substantial portion of the capital, could have been sufficient to indicate to Mr. Diallo that he had been arrested for the purpose of being expelled from the DRC. Moreover, on the day when he was actually expelled, Mr. Diallo was informed, which was not the case for Mr. Diallo. However, account should be taken here of the number and seriousness of the irregularities involving Mr. Diallo's detention. As noted above, he was held for a particularly long period of time, and it would appear that the authorities made no attempt to ascertain whether his detention was necessary.

85. Finally, the Court turns to the allegation relating to Article 9, paragraph 2, of the Covenant. The alleged violation of the prohibition on subjecting a detainee to mistreatment (c) of Article 7 of the Covenant, providing that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment", and Article 5 of the African Charter, stating that "every individual shall have the right to the respect for the inherent dignity of the human person...", are also pertinent in this area. Guinea consistently fought conditions thereof, because he was deprived of his right to communicate with his lawyers and with the Guinean Embassy, and because he received death threats from the guards.

86. The Applicant invokes in this connection Article 10, paragraph 1, of the Covenant, providing that "[i]ndividuals who claim to be victims of an unjust sentence shall have the right to have such sentence reviewed by a competent court", and Article 12, paragraph 4, of the African Charter, stating that "the right to invoke the intervention of the Court...", stating that "[t]he courts or, a fortiori, to the fact that he had attempted to recover debts which he believed were owed to his companies by, amongst others, the Zairean State or companies in which the State holds a substantial portion of the capital, could have been sufficient to indicate to Mr. Diallo that he had been arrested for the purpose of being expelled from the DRC. Moreover, on the day when he was actually expelled, Mr. Diallo was informed, which was not the case for Mr. Diallo. However, account should be taken here of the number and seriousness of the irregularities involving Mr. Diallo's detention. As noted above, he was held for a particularly long period of time, and it would appear that the authorities made no attempt to ascertain whether his detention was necessary.

87. The Court finds that Mr. Diallo's arrest and detention were not in accordance with these provisions. For the reasons discussed above (see paragraph 77), Guinea cannot effectively argue that at the time of each of his arrests (in November 1995 and January 1996), Mr. Diallo was not informed of the charges against him, as the Applicant contends is required only when a person is arrested in the context of criminal proceedings, that was not the case for Mr. Diallo. However, account should be taken here of the number and seriousness of the irregularities involving Mr. Diallo's detention. As noted above, he was held for a particularly long period of time, and it would appear that the authorities made no attempt to ascertain whether his detention was necessary. Moreover, the Court can but find not only that the decree itself was not reasoned in a sufficiently precise way, as was commented above, but that throughout the proceedings, the DRC has never been able to provide grounds which might constitute a convincing basis for Mr. Diallo's expulsion. Allegations of "corruption" and other offences have been made against Mr. Diallo, but no concrete evidence has been presented before the courts or, a fortiori, to the fact that he had attempted to recover debts which he believed were owed to his companies by, amongst others, the Zairean State or companies in which the State holds a substantial portion of the capital, could have been sufficient to indicate to Mr. Diallo that he had been arrested for the purpose of being expelled from the DRC. Moreover, on the day when he was actually expelled, Mr. Diallo was informed, which was not the case for Mr. Diallo. However, account should be taken here of the number and seriousness of the irregularities involving Mr. Diallo's detention. As noted above, he was held for a particularly long period of time, and it would appear that the authorities made no attempt to ascertain whether his detention was necessary.
There is no doubt, moreover, that the prohibition of inhuman and degrading treatment is among the rules of general international law which are binding on States in all circumstances, even apart from any treaty commitments.

88. The Court notes, however, that Guinea has failed to demonstrate convincingly that Mr. Diallo was subjected to such treatment during his detention. There is no evidence to substantiate the allegation that he received death threats. It seems that Mr. Diallo was able to communicate with his relatives and his lawyers without any great difficulty and, even if this had not been the case, such constraints would not per se have constituted treatment prohibited by Article 10, paragraph 1, of the Covenant and by general international law. The question of Mr. Diallo’s communications with the Guinean authorities is distinct from that of compliance with the provisions currently under examination and will be addressed under the next heading, in relation to Article 36, paragraph 1(b), of the Vienna Convention on Consular Relations. Finally, that Mr. Diallo was fed thanks to the provisions his relatives brought to his place of detention — which the DRC does not contest — is insufficient in itself to prove mistreatment, since access by the relatives to the individual deprived of his liberty was not hindered.

89. In conclusion, the Court finds that it has not been demonstrated that Mr. Diallo was subjected to treatment prohibited by Article 10, paragraph 1, of the Covenant.

(d) The alleged violation of the provisions of Article 36, paragraph 1(b), of the Vienna Convention on Consular Relations

90. Article 36, paragraph 1(b), of the Vienna Convention on Consular Relations provides that:

“[I]f he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph.”

91. These provisions, as is clear from their very wording, are applicable to any deprivation of liberty of whatever kind, even outside the context of pursuing perpetrators of criminal offences. They therefore apply in the present case, which the DRC does not contest.

92. According to Guinea, these provisions were violated when Mr. Diallo was arrested in November 1995 and January 1996, because he was not informed “without delay” at those times of his right to seek assistance from the consular authorities of his country.

93. At no point in the written proceedings or the first round of oral argument did the DRC contest the accuracy of Guinea’s allegations in this respect; it did not attempt to establish, or even claim, that the information called for by the last sentence of the quoted provision was supplied to Mr. Diallo, or that it was supplied “without delay”, as the text requires.

The Respondent replied to the Applicant’s allegation with two arguments: that Guinea had failed to prove that Mr. Diallo requested the Congolese authorities to notify the Guinean consular post without delay of his situation; and that the Guinean Ambassador in Kinshasa was aware of Mr. Diallo’s arrest and detention, as evidenced by the steps he took on his behalf.

94. It was only in replying to a question put by a judge during the hearing of 26 April 2010 that the DRC asserted for the first time that it had “orally informed Mr. Diallo immediately after his detention of the possibility of seeking consular assistance from his State” (written reply by the DRC handed in to the Registry on 27 April 2010 and confirmed orally at the hearing of 29 April, during the second round of oral argument).

95. The Court notes that the two arguments put forward by the DRC before the second round of oral pleadings lack any relevance. It is for the authorities of the State which proceeded with the arrest to inform on their own initiative the arrested person of his right to ask for his consulate to be notified; the fact that the person did not make such a request not only fails to justify non-compliance with the obligation to inform which is incumbent on the arresting State, but could also be explained in some cases precisely by the fact that the person had not been informed of his rights in that respect (Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004 (I), p. 46, para. 76). Moreover, the fact that the consular authorities of the national State of the arrested person have learned of the arrest through other channels does not remove any violation that may have been committed of the obligation to inform that person of his rights “without delay”.

96. As for the DRC’s assertion, made in the conditions described above, that Mr. Diallo was “orally informed” of his rights upon his arrest, the Court can but note that it was made very late in the proceedings, whereas the point was at issue from the beginning, and that there is not the slightest piece of evidence to corroborate it. The Court is therefore unable to give it any credit.

97. Consequently, the Court finds that there was a violation by the DRC of Article 36, paragraph 1(b), of the Vienna Convention on Consular Relations.

98. Guinea has further contended that Mr. Diallo’s expulsion, given the circumstances in which it was carried out, violated his right to property, guaranteed by Article 14 of the African Charter, because he had to leave behind most of his assets when he was forced to leave the Congo.
In the Court’s view, this aspect of the dispute has less to do with the lawfulness of Mr. Diallo’s expulsion in the light of the DRC’s international obligations and more to do with the internationally wrongful acts towards Guinea in respect of Mr. Diallo’s direct rights as associé. The Court will therefore examine it later in this Judgment, within the context of the ROtection of Mr. Diallo’s direct rights as associé in Africor-Zaire and Africontainers-Zaire.

In the judgment of 24 May 2007, the Court has already found that Mr. Diallo’s direct rights as associé in Africor-Zaire and Africontainers-Zaire have been breached. However, the Court did not determine, at that stage, which specific rights appertain to the status of associé. Therefore, it was necessary for the Court to clarify matters relating to the legal existence of the two companies and to determine Mr. Diallo’s participation and role in them, as well as the effects on these various rights of the action against Mr. Diallo. (I.C.J. Reports 2007 II, p. 606, para. 66.) In other words, direct rights as associé exist because companies have “juridical personalities distinct from those of the associés” (as stated in ibid. para. 62). The DRC argues that, in the present case, Mr. Diallo was the sole owner of the two companies, as can be deduced from certain French terms of DRC law in the English version of the present Judgment, namely, “parts sociales” and “gérant associé”. The Court will therefore examine in the first instance the existence and structure of those companies under DRC law. As the Court found in its Judgment of 24 May 2007, the rights of the parts sociales of the two companies are “contrairement à la loi” (as stated in ibid. p. 606, para. 64). The DRC contends that, for its part, considers that the number of parts sociales held by Mr. Diallo in Africor-Zaire has never been indisputably established; it adds that the two companies are still formally in existence and are therefore to be distinguished from Mr. Diallo as an agent, called the gérant, who may also be an associé in which case there is a gérant associé. Moreover, the DRC contends that, due to lack of any commercial activity, the two SPRLs were in a state of “undeclared bankruptcy” for many years before Mr. Diallo’s expulsion.

In the judgment of 24 May 2007, the Court has already found that Mr. Diallo’s direct rights as associé in Africor-Zaire and Africontainers-Zaire are two separate entities, incorporated under Zanzanian law in the form of sociétés privées à responsabilité limitée (SPRLs) and registered in the Trade Register of the city of Kinshasa. Because the SPRL, as a form of commercial company, is part of Congolese law, as defined by the decree of 1887 on commercial corporations, the Court will use certain French terms of DRC law in the English version of the present Judgment, namely, “parts sociales” and “gérant associé”. Under Article 36 of the Decree of 23 June 1860, the capital of an SPRL is divided into equal shares of “parts sociales” among the shareholders of the company. The capital of an SPRL is the sum of all the parts sociales that have been authorized by the resolution of the general shareholders’ meeting. The parts sociales are represented by share certificates that must bear the signature of the company’s general manager. All shareholders have equal rights and share in the profits of the company according to their respective participation in the capital. The management of an SPRL is entrusted to an agent, called the gérant, who may also be an associé in which case there is a gérant associé. The Court found in its Judgment of 24 May 2007 that, in the present case, Mr. Diallo was the sole owner of the two companies, as can be deduced from certain French terms of DRC law in the English version of the present Judgment, namely, “parts sociales” and “gérant associé” (I.C.J. Reports 2007 II, p. 606, para. 62). In other words, direct rights as associé exist because companies have “juridical personalities distinct from those of the associés” (as stated in ibid. para. 62). The DRC contends that, for its part, considers that the number of parts sociales held by Mr. Diallo in Africor-Zaire has never been indisputably established; it adds that the two companies are still formally in existence and are therefore to be distinguished from Mr. Diallo as an agent, called the gérant, who may also be an associé in which case there is a gérant associé. Moreover, the DRC contends that, due to lack of any commercial activity, the two SPRLs were in a state of “undeclared bankruptcy” for many years before Mr. Diallo’s expulsion.

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In its Judgment of 24 May 2007, the Court observed that, under the Decree of 27 February 1887, SPRLs are companies "which are formed by persons whose liability is limited to their capital contributions; which are not publicly held companies; and in which the parts sociales are owned by a single associé, or which, de facto, are fully controlled by the same associé." The Court thus concludes that, notwithstanding the fact that Mr. Diallo held such a significant part of the company's assets, it is not possible to quantify precisely the extent of his holding in Africom-Zaire, as the Court has not been able to determine whether Mr. Diallo has become the sole associé of that company at the time of his expulsion.

106. It is not disputed that Africom-Zaire, an import-export company, was founded in 1974 by Mr. Diallo, and that he was the gérant associé of the company throughout its existence. As mentioned below (see paragraph 110), it has been established that he was also the sole associé of Africom-Zaire in the relevant Articles of the 1887 Decree, which states that SPRLs are formed by more than one associé. In particular, the Court concluded that the company was held as follows: 40 per cent by Mr. Diallo, 30 per cent by Mr. Zala, 20 per cent by Mr. Kibeti, and 10 per cent by another person.

107. As the Court has not been able to quantify precisely the extent of Mr. Diallo's holding in Africom-Zaire, it is not possible to determine whether he has become the sole associé of the company as of the date of the 1887 Decree. Nevertheless, as the Court has not been able to determine the extent of Mr. Diallo's holding in that company, it has concluded that the company is still in existence.

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The Court also stated that "Congolese law accords an SPRL independent legal personality distinct from that of its associés, particularly in that the property of the company is entirely separated from that of the company to the extent that the company's rights and obligations are not attributable to the company's associés. Consequently, the company's debtors are not entitled to receive from the company's associés any property that may be due to the company." (emphasis added). And Article 78, which refers to the general meeting of the company, states that "the company's affairs shall be conducted by the general meeting, which shall also elect the gérant associé."
Relying on documents submitted to the Court, the DRC alleges that, following his expulsion, Mr. Diallo appointed a new gérant for Africontainers-Zaire, Mr. N’Kanza. The DRC observes that the DRC has failed to establish, by means of relevant corporate documents, that Mr. N’Kanza was appointed as gérant for Africontainers-Zaire. No evidence before the Court indicates that a general meeting of either of the two companies was held for the purposes of their dissolution or liquidation.

In the absence of a judicial liquidation or dissolution, the dissolution of a company, according to Article 22 of the Articles of Incorporation of the SPRL, may be appointed proxy of another, whereas he had become the sole gérant at the time of his expulsion.

Guinea argues that, contrary to the assertion by the DRC, Mr. Diallo did not appoint Mr. N’Kanza as a new gérant for Africontainers-Zaire. In particular, no evidence before the Court indicates that a general meeting was held at which the appointment of Mr. N’Kanza as gérant was approved for Africontainers-Zaire. The Court therefore concludes that the only gérant acting for either of the companies, both at the time of Mr. Diallo’s detention and after his expulsion, was Mr. Diallo himself.

The Court observes that the DRC has failed to establish, by means of relevant corporate documents, that Mr. Diallo was appointed gérant of Africontainers-Zaire. No evidence before the Court indicates that a general meeting was held at which the appointment of Mr. Diallo as gérant for Africontainers-Zaire was approved. The Court therefore concludes that the only gérant acting for either of the companies, both at the time of Mr. Diallo’s detention and after his expulsion, was Mr. Diallo himself.

Guinea also presents a claim in relation to the right to property concerning Mr. Diallo’s interests in Africom-Zaire and Africontainers-Zaire. The Court observes that the DRC has failed to establish, by means of relevant corporate documents, that Mr. N’Kanza was appointed as gérant for Africontainers-Zaire. However, no evidence before the Court indicates that a general meeting was held at which the appointment of Mr. N’Kanza as gérant for Africontainers-Zaire was approved.

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It follows from these provisions that an associated right to take part and vote in general meetings may be exercised by a vote expressed directly or through a proxy at a general meeting. There is no doubt in this connection that a vote expressed through a proxy at a general meeting has the same legal effect as a vote expressed directly by the shareholder. On the other hand, it is more difficult to infer the right of the court to attend general meetings in person. In the opinion of the court, the presence of the shareholder is necessary in order to exercise his rights. It is questionable whether the Congolese legislators could have intended such an outcome, which is far removed from the association societatis. Moreover, in respect of Africo-Zaire and Africontainers-Zaire, the Court has observed that a general meeting of Africo-Zaire was never convened during the ten years after 1980, not even for the purposes of annually considering and deciding on the balance sheet and profit and loss account and on the allocation of profits, as required by the 1887 Decree (see paragraph 135 below). Mr. Diallo could have appointed such a representative or agent of the other company.

According to Article 83 of the Congolese Decree of 27 February 1887, while the court finds that the Congolese Decree of 27 February 1887, while the company does not have the right to take part and vote in general meetings, the company has the right to appoint a representative or agent of the other company, as it lies with the general meeting, which is an organ of the company. Furthermore, the DRC affirms that because, under the 1887 Decree, a gérant who has not been
appointed in the Articles of Incorporation is appointed by the general meeting, the right invoked by Guinea to appoint a gérant is indistinguishable from the right of the associé to take part in the general meetings. According to the DRC, Guinea has failed to show that a general meeting was convened and that the DRC intervened with the other associés to prevent Mr. Diallo from participating in the appointment of a new gérant, or from being represented by another person of his choice. The DRC submits that Mr. Diallo did appoint Mr. N’Kanza as gérant of Africontainers-Zaire following his expulsion.

129. The Court observes that the appointment and functions of gérants are governed, in Congolese law, by the 1887 Decree on commercial corporations, and by the Articles of Incorporation of the company in question.

130. Under Article 64 of the 1887 Decree:

“A private limited company shall be managed by one or more persons, who may or may not be associés, called gérants.”

The appointment of gérants is governed by Article 65 of the 1887 Decree, which provides:

“Gérants shall be appointed either in the instrument of incorporation or by the general meeting, for a period which may be fixed or indeterminate.”

In addition, Article 69 of the 1887 Decree provides that:

“The statutes, the general meeting or the gérance may entrust the day-to-day management of the company and special powers to agents or other proxies, whether associés or not.”

131. Furthermore, Article 14 of Africontainers-Zaire’s Articles of Incorporation provides, inter alia, that:

“The company shall be managed by one or more gérants, who may or may not be associés, appointed by the general meeting.

Where more than one gérant is appointed, the general meeting shall decide whether they shall exercise their powers separately or jointly.”

Article 17, for its part, is couched in the following terms:

“The gérance may delegate to one of the associés or to third parties or confer on one of its managers any powers necessary for the performance of daily managerial duties. It shall determine the powers to be conferred and, where necessary, the remuneration of such agents; delegated powers may be revoked at any time.”

132. The Court will begin by dismissing the DRC’s argument that Mr. Diallo’s right to appoint a gérant could not have been violated because he in fact appointed a gérant for Africontainers-Zaire in the person of Mr. N’Kanza. It has already concluded that this allegation has not been proved (see paragraphs 111 and 112 above).

133. As regards the first assertion put forth by Guinea that the DRC has violated Mr. Diallo’s right to appoint a gérant, the Court recalls Article 65 of the 1887 Decree, which provides that “[g]érants shall be appointed either in the instrument of incorporation or by the general meeting”. The Court observes that, under this provision, every SPRL is required to be managed by at least one gérant. In principle, the appointment of the gérant takes place at the point when the SPRL is founded. It can also take place at a later stage, by decision of the general meeting. In that case, one organ of the company (the general meeting) exercises its powers in respect of another (the gérance). The appointment of the gérant therefore falls under the responsibility of the company itself, without constituting a right of the associé. Accordingly, the Court concludes that Guinea’s claim that the DRC has violated Mr. Diallo’s right to appoint a gérant must fail.

134. As regards the second assertion put forward by Guinea that the DRC has violated Mr. Diallo’s right to be appointed gérant, the Court notes that, in its 2007 Judgment on preliminary objections, it observed that:

“The DRC . . . agrees with Guinea on the fact that, in terms of Congolese law, the direct rights of associés are determined by the Decree of the Independent State of Congo of 27 February 1887 on commercial corporations. The rights of Mr. Diallo as associé of the companies Africom-Zaire and Africcontainers-Zaire are therefore theoretically as follows: ‘the right to dividends and to the proceeds of liquidation’, ‘the right to be appointed manager (gérant)’, ‘the right of the associé manager (gérant) not to be removed without cause’, ‘the right of the manager to represent the company’, ‘the right of oversight [of the management]’ and ‘the right to participate in general meetings’.” (I.C.J. Reports 2007 (II), p. 603, para. 53.)

It is clear that an associé has a right to be appointed gérant. However, this right cannot have been violated in this instance because Mr. Diallo has in fact been appointed as gérant, and still is the gérant of both companies in question. In this regard, the Court recalls its finding in its 2007 Judgment “that Mr. Diallo, who was associé in Africom-Zaire and Africcontainers-Zaire, also held the position of gérant in each of them” (ibid., p. 606, para. 66). This finding is confirmed in evidence put before the Court by the Parties in the present stage of the proceedings, in particular by evidence submitted by Guinea itself. Accordingly, the Court concludes that there is no violation of Mr. Diallo’s right to be appointed gérant.

135. The Court notes that, thirdly, Guinea has claimed that a right of Mr. Diallo to exercise his functions as gérant was violated. In this regard, Guinea has argued in its Reply that:

“following [Mr. Diallo’s] detention and expulsion by the Zairean authorities, it became impossible for him, in practical terms, to perform the role of ‘gérant’ from Guinea, because he was outside the country”.

The Court cannot accept this line of reasoning, and refers in this regard to Article 69 of the 1887 Decree, which provides that “the gérance may entrust the day-to-day management of the company and special powers to agents or other proxies, whether associés or not”. Moreover, with respect to Africontainers-Zaire, the Court also refers to Article 16 of its Articles of Incorporation, which provides that the “gérance is entitled to establish administrative bases in the Republic of Zaire and branches, offices, agencies, depots or trading outlets in any location whatsoever, whether in the Republic of Zaire or abroad”. While the performance of Mr. Diallo’s duties as gérant may have been rendered more difficult by his presence outside the country, Guinea has failed to demonstrate that it was impossible to carry out those duties. In addition, Guinea has not shown that Mr. Diallo attempted to appoint a proxy, who could have acted within the DRC on his instructions.

In fact, it is clear from various documents submitted to the Court that, even after Mr. Diallo’s expulsion, representatives of Africontainers-Zaire have continued to act on behalf of the company in the DRC and to negotiate contractual claims with the Gécamines company.

The Court accordingly concludes that Guinea’s claim that the DRC has violated a right of Mr. Diallo to exercise his functions as gérant must fail.

Finally, the Court observes that, fourthly, Guinea has claimed that the DRC has violated Mr. Diallo’s right not to be removed as gérant, referring to Article 67 of the 1887 Decree, which provides that:

“Unless the statutes provide otherwise, gérants associés appointed for the life of the company can be removed only for good cause, by a general meeting deliberating under the conditions required for amendments to the statutes.

Other gérants can be removed at any time.”

With reference to this provision, Guinea argues that Mr. Diallo was deprived of his right not to be removed as a gérant as long as the company was in existence. The Court observes, however, that no evidence has been provided to it that Mr. Diallo was deprived of his right to remain gérant, since no general meeting was ever convened for the purpose of removing him, or for any other purpose. There was therefore no possibility of having him removed “for good cause”. Although it may have become more difficult for Mr. Diallo to carry out his duties as gérant from outside the DRC following his expulsion, as discussed above, he remained, from a legal standpoint, the gérant of both Africom-Zaire and Africontainers-Zaire. Accordingly, the Court concludes that Guinea’s claim that the DRC has violated Mr. Diallo’s right not to be removed as gérant must fail.

The Court may add that, even if it were established that Mr. Diallo had been appointed gérant associé as long as the company was in existence and that he had been removed as gérant without good cause, the claim of Guinea would still stand on very weak ground. The right established by Article 67 of the 1887 Decree is a right of a combined gérant associé, not a simple right of an associé. To the extent that it is a right of the gérant, who is an organ of the company, the claim would be precluded by paragraph 98 (3) (c) of the Court’s 2007 Judgment.

In light of all the above, the Court concludes that the various assertions put forward by Guinea, grouped under the general claim of a violation of Mr. Diallo’s rights relating to the gérance, must be rejected.

C. The right to oversee and monitor the management

Guinea submits that, in detaining and expelling Mr. Diallo, the DRC deprived him of his right to oversee and monitor the actions of management and the operations of Africom-Zaire and Africontainers-Zaire, in violation of Articles 71 and 75 of the 1887 Decree. Referring to those provisions, Guinea contends that the right to oversee and monitor the actions of management is a right attaching to the status of associé, not a right of the company, especially where there are five or fewer associés. It argues that because Mr. Diallo was the sole associé of both companies, he enjoyed all the rights and powers of the commissaire or auditor under Article 75 of the 1887 Decree. It adds that those rights are also recognized by Article 19 of Africontainers-Zaire’s Articles of Incorporation.

The DRC submits that under Articles 71 and 75 of the 1887 Decree, as well as Article 19 and Article 25, paragraph 3, of Africontainers-Zaire’s Articles of Incorporation, the task of overseeing and monitoring the gérance of an SPRL is entrusted not to an associé individually, but to financial experts known as “statutory auditors” (commissaires aux comptes). In the view of the DRC, the right of the associé is limited to participating in the appointment of one or more such auditors at the general meeting. The DRC acknowledges that, under certain conditions, Congolese law accords associés the right to oversee and monitor the management of the company, but it argues that Guinea has failed to demonstrate that the DRC had ordered Africontainers-Zaire not to permit Mr. Diallo to monitor its operations.

Article 71 of the 1887 Decree provides as follows:

Article 71

“Oversight of the management shall be entrusted to one or more administrators, who need not be associés, called ‘auditors’.

If there are more than one of these, the statutes or the general meeting may require them to act on a collegiate basis.

If the number of associés does not exceed five, the appointment of auditors is not compulsory, and each associé shall have the powers of an auditor.”

Article 75 of that Decree is couched in the following terms:
Article 75

“The auditors’ task shall be to oversee and monitor, without restriction, all the actions performed by the management, all the company’s transactions and the register of associés.”

145. Article 19 of Africontainers-Zaire’s Articles of Incorporation provides:

“Each of the associés shall exercise supervision over the company. Should the company consist of more than five associés, supervision shall be exercised by at least one auditor appointed by the general meeting, which shall fix his/her term of office and remuneration.”

146. The Court concludes from the wording of Article 71, third paragraph, as cited above, that since both Africom-Zaire and Africontainers-Zaire had fewer than five associés, Mr. Diallo was permitted to act as auditor. However, the question arises of whether, under Congolese law, this provision applies in the case of a company where there is only one associé who is fully in charge and in control of it.

147. The Court considers that, even if a right to oversee and monitor the management exists in companies where only one associé is fully in charge and in control, Mr. Diallo could not have been deprived of the right to oversee and monitor the gérance of the two companies. While it may have been the case that Mr. Diallo’s detentions and expulsion from the DRC rendered the business activity of the companies more difficult, they simply could not have interfered with his ability to oversee and monitor the gérance, wherever he may have been.

148. Accordingly, the Court concludes that Guinea’s claim that the DRC has violated Mr. Diallo’s right to oversee and monitor the management fails.

D. The right to property of Mr. Diallo over his parts sociales in Africom-Zaire and Africontainers-Zaire

149. Guinea claims that Mr. Diallo, no longer enjoying control over, or effective use of, his rights as associé, has suffered the indirect expropriation of his parts sociales in Africom-Zaire and Africontainers-Zaire because his property rights have been interfered with to such an extent that he has been lastingly deprived of effective control over, or actual use of, or the value of those rights.

150. Guinea states that the acts of interference by the DRC with Mr. Diallo’s property rights in the parts sociales date back to 1988, when he was first placed in detention. Those acts allegedly resulted in the debts owed to the companies not being recovered and, by way of consequence, Mr. Diallo’s investment in the companies falling in value. According to Guinea, the interference by the DRC continued consequent to the Congolese authorities’ decision in 1995 to stay enforcement of the judgment for the plaintiff handed down in Africontainers v. Zaïre Shell, which resulted in reducing the value of Mr. Diallo’s parts sociales in the company. Guinea claims that the interference by the DRC culminated in the re-arrest and expulsion of Mr. Diallo who, as a result, was prevented from managing his companies and from participating in any way in the activities of their corporate organs and was deprived of any possibility of controlling and using his parts sociales. Guinea asserts that the indirect expropriation of Mr. Diallo’s rights constitutes an internationally wrongful act giving rise to the DRC’s international responsibility.

151. The essence of Guinea’s argument is that there is a factual element specific to this case, namely:

“That Mr. Diallo is the sole associé in the two companies, that is to say, the only owner and remuneration."

152. For its part, the DRC claims that there cannot have been any violation of any rights attaching to ownership of the parts sociales. In particular, as regards the right to dividends, it alleges that, even on the assumption that any have actually been distributed by the companies, Guinea would still have to show that Mr. Diallo was unable to receive them on account of the DRC. The DRC argues in this respect that Guinea has not established that Mr. Diallo could not directly receive his dividends abroad or that he was prevented from doing so by an act attributable to the DRC.

153. The DRC contends as well that it cannot be accused of having impeded the exercise of rights held by Mr. Diallo as owner of his parts sociales. Specifically, the DRC at no time ordered Africontainers-Zaire not to make payments in respect of Mr. Diallo’s parts sociales in the annual dividend allocation. With regard to Africom-Zaire, the DRC notes that Guinea has failed to provide evidence showing that Mr. Diallo was still an associé in this company at the time of his expulsion and, if so, how many parts sociales he held (see paragraph 106 above).

154. The DRC finally asserts that the value of Mr. Diallo’s parts sociales is unrelated to his presence in its territory. It rejects Guinea’s arguments that acts attributable to the DRC were at the origin of the loss of value of his parts sociales and, in general, the economic demise of his companies. On this subject, the DRC claims that both Africom-Zaire and Africontainers-Zaire had been in a state of “undeclared bankruptcy” for several years before Mr. Diallo’s expulsion, not having engaged in any commercial activity since, at least, 1991.

*
Mr. Diallo's right to property has not been established.

459. The Court concludes from the above that Guinea's allegations of infringement of Mr. Diallo's right to property over his parts sociales in Africorex-Zaire and Africontainers-Zaire have not been established.

460. Having concluded that the obligations under Articles 10 and 12 of the African Charter on Human and Peoples' Rights, and Article 36, paragraphs 10 and 12 of the Vienna Convention on Consular Relations (see paragraphs 73, 74, 85 and 97 above), it is for the Court now to determine, in light of Guinea's final submissions, what consequences flow from these internationally wrongful acts giving rise to the DRC's obligations towards the shareholders.

461. The Court's finding that the DRC has breached its legal obligations under Articles 9 and 13 of the Democratic Republic of the Congo (Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Second Phase, Judgment, I.C.J. Reports 1970, p. 41, para. 66, 74) must be considered in the context of the Court's findings in the present case. The Court observes that the notion of "national property" in the context of a national dispute is distinct from the notion of "property" in international law. The Court has already indicated that the DRC has not violated Mr. Diallo's direct right to take part and vote in general meetings of the companies, nor his right to be appointed gérant, nor his right to oversee and monitor the management (see paragraphs 117-148 above).

462. In respect of the DRC's alleged breach of Articles 6 and 12 of the African Charter on Human and Peoples' Rights, the Court has already found that there is no evidence that any dividends were ever declared or that any action was ever taken to wind up the companies, even less that any action attributable to the DRC has infringed Mr. Diallo's rights in respect of those matters. The Court is of the opinion that the Parties should indeed engage in negotiation in order to agree on the amount of compensation to be paid by the DRC to Guinea for the injury flowing from the wrongful detentions and expulsion of Mr. Diallo in 1995-1996, including the resulting loss of his personal belongings.
164. In light of the fact that the Application instituting proceedings in the present case was filed in December 1998, the Court considers that the sound administration of justice requires that those proceedings be brought to a final conclusion, and thus that the period for negotiating an agreement on compensation should be limited. Therefore, failing agreement between the Parties within six months following the delivery of the present Judgment on the amount of compensation to be paid by the DRC, the matter shall be settled by the Court in a subsequent phase of the proceedings. Having been sufficiently informed of the facts of the present case, the Court finds that a single exchange of written pleadings by the Parties would then be sufficient in order for it to decide on the amount of compensation.

165. For these reasons,

THE COURT,

(1) By eight votes to six,

*Findsthat the claim of the Republic of Guinea concerning the arrest and detention of Mr. Diallo in 1988-1989 is inadmissible;

IN FAVOUR: President Owada; Vice-President Tomka; Judges Abraham, Keith, Sepúlveda-Amor, Skotnikov, Greenwood; Judge ad hoc Mampuya;

AGAINST: Judges Al-Khasawneh, Simma, Bennouna, Cançado Trindade, Yusuf, Judge ad hoc Mahiou;

(2) Unanimously,

*Findsthat, in respect of the circumstances in which Mr. Diallo was expelled from Congolese territory on 31 January 1996, the Democratic Republic of the Congo violated Article 13 of the International Covenant on Civil and Political Rights and Article 12, paragraph 4, of the African Charter on Human and Peoples' Rights;

(3) Unanimously,

*Findsthat, in respect of the circumstances in which Mr. Diallo was arrested and detained in 1995-1996 with a view to his expulsion, the Democratic Republic of the Congo violated Article 9, paragraphs 1 and 2, of the International Covenant on Civil and Political Rights and Article 6 of the African Charter on Human and Peoples' Rights;

(4) By thirteen votes to one,

*Findsthat, by not informing Mr. Diallo without delay, upon his detention in 1995-1996, of his rights under Article 36, paragraph 1(b), of the Vienna Convention on Consular Relations, the Democratic Republic of the Congo violated the obligations incumbent upon it under that subparagraph;

IN FAVOUR: President Owada; Vice-President Tomka; Judges Al-Khasawneh, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood; Judge ad hoc Mahiou;

AGAINST: Judge ad hoc Mampuya;

(5) By twelve votes to two,

*Rejects all other submissions by the Republic of Guinea relating to the circumstances in which Mr. Diallo was arrested and detained in 1995-1996 with a view to his expulsion;

IN FAVOUR: President Owada; Vice-President Tomka; Judges Al-Khasawneh, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Yusuf, Greenwood; Judge ad hoc Mampuya;

AGAINST: Judge Cançado Trindade; Judge ad hoc Mahiou;

(6) By nine votes to five,

*Findsthat the Democratic Republic of the Congo has not violated Mr. Diallo’s direct rights as associé in Africom-Zaire and Africontainers-Zaire;

IN FAVOUR: President Owada; Vice-President Tomka; Judges Simma, Abraham, Keith, Sepúlveda-Amor, Skotnikov, Greenwood; Judge ad hoc Mampuya;

AGAINST: Judges Al-Khasawneh, Bennouna, Cançado Trindade, Yusuf, Judge ad hoc Mahiou;

(7) Unanimously,

*Findsthat the Democratic Republic of the Congo is under obligation to make appropriate reparation, in the form of compensation, to the Republic of Guinea for the injurious consequences of the violations of international obligations referred to in subparagraphs (2) and (3) above;

(8) Unanimously,

*Decidesthat, failing agreement between the Parties on this matter within six months from the date of this Judgment, the question of compensation due to the Republic of Guinea shall be settled by the Court, and reserves for this purpose the subsequent procedure in the case.
Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this thirtieth day of November, two thousand and ten, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Guinea and the Government of the Democratic Republic of the Congo, respectively.

(Signed) Hisashi OWADA,
President.

(Signed) Philippe COUVREUR,
Registrar.

Judges AL-KHASAWNEH, SIMMA, BENNOUNA, CANÇADO TRINDADE and YUSUF append a joint declaration to the Judgment of the Court; Judges AL-KHASAWNEH and YUSUF append a joint dissenting opinion to the Judgment of the Court; Judges KEITH and GREENWOOD append a joint declaration to the Judgment of the Court; Judge BENNOUNA appends a dissenting opinion to the Judgment of the Court; Judge CANÇADO TRINDADE appends a separate opinion to the Judgment of the Court; Judge ad hoc MAHIOU appends a dissenting opinion to the Judgment of the Court; Judge ad hoc MAMPUYA appends a separate opinion to the Judgment of the Court.

(Initialled) H. O.

(Initialled) Ph. C.