ST/LEG/SER.F/1

SUMMARIES OF
Judgments, Advisory Opinions and Orders
OF THE
International Court of Justice

1948–1991

UNITED NATIONS

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FOREWORD

The International Court of Justice was founded as the principal judicial organ of the United Nations on 26 June 1945, when its Statute was adopted in San Francisco at the same time as the Charter of the Organization and annexed to it as an integral part. The Statute of the Court is based very closely on the one that had governed the work of the Court's predecessor, the Permanent Court of International Justice, which, though provision for its foundation had been made in the Covenant of the League of Nations, had never become an organ of the League.

While the International Court of Justice is endowed with the independence necessary to its judicial role and, in accordance with its Statute, has its seat in The Hague, hence at some distance from the daily business of the other main organs, its integration into the United Nations system is underscored in the Charter not only by the definition of its contentious and advisory functions in Chapter XIV, but also by references in Chapter VI, concerning the pacific settlement of disputes, which in Article 33 mentions judicial settlement in general and in Article 36 enjoins the Security Council to bear in mind that legal disputes between States should as a general rule be referred to the Court.

It is therefore fitting that the United Nations Secretariat, in collaboration with the Registry of the Court, should from time to time issue publications designed to increase public awareness of what the Court is and does or facilitate access to its jurisprudence. These joint efforts are essential, in particular, under the auspices of the United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law. In the past, through cooperation with the Department of Public Information of the United Nations Secretariat, these joint efforts have resulted in the publication in several languages of a general work entitled *The International Court of Justice* and of a booklet containing succinct case summaries of a purely factual nature. Both of these publications are updated from time to time, and a growing demand for them has necessitated regular reprinting.

In recent years, Governments have shown an increasing awareness of the Court's potential and brought it more cases than ever before. A rekindling of interest among scholars and the public has been no less noticeable. It is plainly desirable that this positive trend should continue to be sustained by the provision of accessible information at different levels of technicality. Here two unfulfilled needs have become increasingly evident. In the first place, the Court's publications, in the official series which cover all its judicial work and are the sole authentic source of such information, appear exclusively in its only two official and working languages: English and French. Access to the full contents of the Court's decisions is thus denied to persons unable to understand either of those languages. In the second place, members of the public, journalists, lawyers, diplomats, or even specialists in international law without ready access to those series are ill served if they require something more detailed than the minimal summaries gathered into the booklet mentioned above, useful as those may be in providing a historical bird's-eye view of the Court's decisions. For the person in quest of deeper understanding, the problem is compounded by the fact that with the passage of time, the more a body of case-law is built up and consolidated, the more important it becomes to trace the thread of principle in the reasoning behind each decision.

Furthermore, over the years, a growing number of delegations have expressed a wish, both in the Sixth Committee of the General Assembly and in the Advisory Committee of the United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law, to the effect that the jurisprudence of the International Court of Justice should be the subject of a wider dissemination in all the official languages of the Organization. This concern found its way into paragraph 14 of General Assembly resolution 44/28 of 4 December 1989 and chapter IV, paragraph 8, of the "Programme for the activities to be commenced during the first term (1990-1992) of the United Nations Decade of International Law" contained in the annex to General Assembly resolution 45/40 of 28 November 1990, which reads in part:

> "It would be conducive to the teaching and dissemination of international law if all judgments and advisory opinions of the International Court of Justice were available in all official languages of the United Nations."

As a result of a cooperation effort by the Court's Registry and the Codification Division of the Office of Legal Affairs, and in the framework of the United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law and of the United Nations Decade of International Law, it has proved possible to take a significant step toward closing the information gap mentioned above by preparing the present compilation of the analytical summaries of the Court's decisions, to be issued now in all the official languages of the United Nations. These summaries are based closely on the texts which have, over the years, been regularly prepared by the Registry of the Court for information purposes and incorporated into press communiqués issued in English and French at the time of the pronouncement of the judgment or advisory opinion concerned.

Given the ad hoc origin of the summaries and the changes in approach or style which have inevitably occurred over a period of more than 40 years, this compilation cannot be expected to possess a completely homogeneous character. It was nevertheless decided, in the interest of authenticity, to reduce editing to a minimum. The reader, it is hoped, will find the publication no less useful.

In the United Nations booklet mentioned above, which gives brief accounts of the Court's decisions, the advisory opinions are treated separately, in a chapter apart from that on contentious decisions. While that arrangement has the merit of underlining, for the general public, the distinction between judgments delivered in cases between States and advisory decisions rendered at the request of an international organization or organ thereof, it has been felt preferable in the present publication, which is aimed at perhaps not quite as broad a readership, strictly to observe the chronology of the Court's decisions, in order to present as faithful and unbroken a picture as possible of the evolution of the Court's jurisprudence. The summary of each advisory opinion is therefore found in its chronological position.

It will be noticed that a number of Orders of the Court are also summarized in their chronological position. These are Orders of a more substantive nature, concerning for example requests for provisional measures or the constitution of a Chamber. Other Orders of the Court or its President, most of which concern such procedural matters as the fixing of time-limits, have not yet been made the subject of analysis and are therefore not covered.[1]

It is to be noted that, while the summaries have been prepared by the Court's Registry over the years for public information purposes, they do not involve the responsibility of the Court itself. They therefore cannot be quoted against the actual text of the judgments, advisory opinions or orders, of which they do not constitute an interpretation.

The present publication, which condenses in a single and handy volume the case-law of the Court for the period 1948-1991 and is intended to be updated on a regular basis in subsequent years, constitutes a new addition to the Publications programme of the Office of Legal Affairs, Codification Division, under the budgetary subprogramme "Making international law and United Nations legal activities more accessible", which already includes the *United Nations Legislative Series*, the *United Nations Juridical Yearbook* and the *Reports of International Arbitral Awards*.

All these publications also perform an important role in fulfilling the goals of the United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law.

It is to be noted that the present publication would not have been possible without the close cooperation between the International Court of Justice and its Registry and various units of the United Nations Secretariat, such as the Codification Division of the Office of Legal Affairs and its secretariat for the Programme of Assistance, the Office of Programme Planning, Budget and Finance and the Department of Conference Services and its Publications Board.

NOTES

[1]Specific information on the composition, governing texts and workings of the Court is contained in *I.C.J. Acts and Documents No. 5* and, each year, in an *I.C.J. Yearbook* covering the twelve months up to the end of the previous July. The Court also submits an annual report issued as a document of the General Assembly of the United Nations.

Chapter VII of each *I.C.J. Yearbook* explains the different series of the Court's publications and lists the modes of citation of the decisions rendered both by the present Court and by its predecessor.

1. CORFU CHANNEL CASE (PRELIMINARY OBJECTION)

Judgment of 25 March 1948

This case was brought before the Court on May 22nd, 1947, by an Application filed by the Government of the United Kingdom of Great Britain and Northern Ireland instituting proceedings against the Government of the People's Republic of Albania; on December 9th, 1947, the Albanian Government requested the Court to declare the Application inadmissible.

In its judgment the Court rejected the Albanian objection and fixed the time-limits for the subsequent proceedings on the merits.

The judgment was rendered by fifteen votes to one; the dissenting judge appended to the judgment a statement of the reasons for which he was unable to concur in it. Seven of the Members of the Court, whilst concurring in the judgment of the Court, appended a statement of supplementary considerations.

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In its judgment, the Court recalls the conditions in which the case was referred to it and, in the first place, the incident which gave rise to the dispute.

On October 22nd, 1946, two British destroyers struck mines in Albanian territorial waters in the Corfu Channel. The explosions caused damage to the vessels and loss of life. Holding that the responsibility of the Albanian Government was involved, the Government of the United Kingdom, following upon diplomatic correspondence with Tirana, submitted the matter to the Security Council. That body invited Albania, which is not a Member of the United Nations, to participate in the discussions, on condition that she accepted all the obligations of a Member in a similar case. Albania accepted and, on April 9th, 1947, the Security Council adopted a resolution recommending the Governments concerned immediately to refer the dispute to the Court in accordance with the provisions of its Statute.

Thereupon the Government of the United Kingdom addressed an Application to the Court asking for a decision to the effect that the Albanian Government was internationally responsible for the consequences of the incidents referred to above and that it must make reparation or pay compensation. The Application adduced various provisions of the Charter, *inter alia*, Article 25 (which provides that Members agree to accept and carry out the decisions of the Security Council), on which it founded the jurisdiction of the Court.

On July 23rd, 1947, the Albanian Government deposited with the Registry of the Court a letter dated July 2nd in which it expressed the opinion that the Application of the United Kingdom was not in conformity with the Security Council's recommendation of April 9th, 1947, because the institution of proceedings by unilateral application was not justified by the Charter, by the Statute or by general international law. Nevertheless, it fully accepted the Security Council's recommendation profoundly convinced of the justice of its case and resolved to neglect no opportunity of giving evidence of its devotion to the principles of friendly collaboration between nations and of the pacific settlement of disputes, it was prepared, notwithstanding the irregularity in the action taken by the United Kingdom Government, to appear before the Court. It made, however, most explicit reservations respecting the manner in which the case had been brought before the Court and more especially respecting the interpretation which the Application sought to place on Article 25 of the Charter with reference to the binding character of the Security Council's recommendations. It emphasized that its acceptance of the Court's jurisdiction for this case could not constitute a precedent for the future.

Following upon the deposit of the Albanian Government's letter, an Order was made fixing the time-limits for the presentation of a Memorial by the Government of the United Kingdom and of a Counter-Memorial by the Albanian Government. Within the time-limit fixed for the latter, the Albanian Government submitted a "preliminary objection to the Application on the ground of inadmissibility". The Court was requested, in the first place, to place on record that, in accepting the Security Council's recommendation of April 9th, 1947, the Albanian Government had only undertaken to submit the dispute to the Court in accordance with the provisions of the Statute and, in the second place, to give judgment that the Application of the United Kingdom was inadmissible, because it contravened the provisions of Articles 40 and 36 of the Statute.

Having thus indicated the circumstances in which it is called upon to adjudicate, the Court proceeds to consider the submissions of the Albanian preliminary objection. It places on record, as requested by the Albanian Government, that the obligation incumbent upon that Government as a result of its acceptance of the Security Council's recommendation could only be carried out in accordance with the provisions of the Statute. It points out, however, that Albania had subsequently contracted other obligations, the date and exact scope of which it establishes later on in the Judgment.

The Court next turns to the second submission. It appears to constitute an objection on the ground of the inadmissibility of the Application in that it refers to Article 40 of the Statute: accordingly it seems to relate to a procedural irregularity resulting from the fact that the main proceedings were instituted by Application instead of by special agreement. But it also cites Article 36 which relates exclusively to the Court's jurisdiction and the criticism, which in the body of the objection are directed against the Application, are concerned with an alleged lack of compulsory jurisdiction.

This argument, which leaves the intention of the Albanian Government somewhat obscure, may be explained by the connection which the Government of the United Kingdom, for its part, had made between the institution of proceedings by Application, and the existence, alleged by it, of a case of compulsory jurisdiction. However, that may be, the Court does not consider that it needs to express an opinion on this point, since it holds that the letter of July 2nd, 1947, addressed by the Albanian Government to the Court, constitutes a voluntary acceptance of its jurisdiction. This letter removes all difficulties concerning both the question of the admissibility of the Application and the question of the Court's jurisdiction.

When, in fact, the Albanian Government states in its letter that it is prepared, notwithstanding the "irregularity in the action taken by the Government of the United Kingdom, to appear before the Court", it is clear that it waived the right to adduce the objection that the Application was inadmissible.

And when it expressly refers to "its acceptance of the Court's jurisdiction to this case", these words constitute a voluntary and indisputable acceptance of the Court's jurisdiction.

In this connection, the Court recalls that while the consent of the parties confers jurisdiction on the Court, such consent need not be expressed in any special form. In particular, as the Permanent Court of International Justice decided in 1928, the previous formal conclusion of a special agreement is unnecessary. In submitting the case by Application, the United Kingdom gave the Albanian Government an opportunity of accepting the jurisdiction of the Court; and this acceptance was given in the Albanian letter of July 2nd, 1947. Moreover, separate action of this kind was appropriate to the respective positions of the Parties in a case where there is, in fact, a claimant, the United Kingdom, and a defendant, Albania.

Accordingly, the Court cannot hold to be irregular the institution of proceedings by Application which is not precluded by any provision.

It is true that in its letter of July 2nd, 1947, the Albanian Government made reservations respecting the manner in which the case had been brought before the Court and the interpretation which the United Kingdom sought to place on Article 25 of the Charter with reference to the binding character of the Security Council's recommendations. But it rests with the Court to interpret the letter, this interpretation being binding upon the parties; and the Court holds that the reservations contained in the letter are intended only to maintain a principle and to prevent the establishment of a precedent for the future. It also adds that it is clear that no question of a precedent could arise unless the letter signified in the present case the acceptance of the Court's jurisdiction on the merits.

For these reasons, the Court rejects the objection; and it fixes time-limits for the subsequent pleadings on the merits.

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2. CONDITIONS OF ADMISSION OF A STATE TO MEMBERSHIP IN THE UNITED NATIONS (ARTICLE 4 OF CHARTER)

Advisory Opinion of 28 May 1948

The General Assembly of the United Nations asked the Court to give an advisory opinion on the question concerning the conditions of admission of a State to membership in the United Nations (Article 4 of the Charter).

> "Is a Member of the United Nations which is called upon, in virtue of Article 4 of the Charter, to pronounce itself by its vote, either in the Security Council or in the General Assembly, on the admission of a State to membership in the United Nations, juridically entitled to make its consent to the admission dependent on conditions not expressly provided by paragraph 1 of the said Article? In particular, can such a Member, while it recognizes the conditions set forth in that provision to be fulfilled by the State concerned, subject its affirmative vote to the additional condition that other States be admitted to membership in the United Nations together with that State?"

The Court answered this question in the negative by nine votes to six. The six dissenting judges joined to it a statement of the reasons for their dissent. Two other Members of the Court who agreed with the Opinion added a further statement of their views.

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The Opinion begins by giving an account of the procedure. The request for an Opinion was notified to all signatories of the Charter, i.e., to all Members of the United Nations, who were informed that the Court was prepared to receive information from them. Accordingly, written statements were sent in on behalf of the Governments of the following States: China, El Salvador, Guatemala, Honduras, India, Canada, U.S.A., Greece, Yugoslavia, Belgium, Iraq, Ukraine, U.S.S.R., Australia and Siam. Oral statements were made by the representative of the Secretary-General of the United Nations and by representatives of the French, Yugoslav, Belgian, Czechoslovak and Polish Governments.

The Court then makes a few preliminary observations on the question itself. Although the Members are bound to conform to the requirements of Article 4 in giving their votes, the question does not relate to the actual vote, the reasons for which are a matter of individual judgment and are clearly subject to no control, but to the statements made by a Member concerning the vote it proposes to give. The Court is not called upon to define the meaning and scope of the conditions in Article 4 of the Charter, on which admission is made dependent. It must merely state whether these conditions are exhaustive. If they are, a Member is not legally entitled to make admission depend on conditions not expressly provided in the article. The meaning of a treaty provision has thus to be determined, which is a problem of interpretation.

It was nevertheless contended that the question was not legal, but political. The Court was unable to attribute a political character to a request which, framed in abstract terms, invites it to undertake an essentially judicial task by entrusting it with the interpretation of a treaty provision. It is not concerned with the motives which may have inspired the request, nor has it to deal with the views expressed in the Security Council on the various cases with which the Council dealt. Consequently, the Court holds itself to be competent even to interpret Article 4 of the Charter; for nowhere is any provision to be found forbidding it to exercise in regard to this clause in a multilateral treaty, an interpretative function which falls within the normal exercise of its judicial powers.

The Court then analyses Article 4, paragraph 1, of the Charter. The conditions therein enumerated are five: a candidate must be (1) a State; (2) peace-loving; (3) must accept the obligations of the Charter; (4) must be able to carry out these obligations; (5) must be willing to do so. All these conditions are subject to the judgment of the Organization, i.e., of the Security Council and of the General Assembly and, in the last resort, of the Members of the Organization. As the question relates, not to the vote, but to the reasons which a Member gives before voting, it is concerned with the individual attitude of each Member called upon to pronounce itself on the question of admission.

Are these conditions exhaustive? The English and French texts of the provision have the same meaning: to establish a legal rule which, while it fixes the conditions of admission, determines also the reasons for which admission may be refused. The term "Membership in the United Nations is open to all other peace-loving States" indicates that States which fulfil the conditions stated have the qualifications requisite for admission. The provision would lose its significance if other conditions could be demanded. These conditions are exhaustive, and are not merely stated by way of information or example. They are not merely the necessary conditions, but also the conditions which suffice.

It was argued that these conditions represented an indispensable minimum in the sense that political considerations could be superimposed on them, and form an obstacle to admission. This interpretation is inconsistent with paragraph 2 of the Article, which provides for "the admission of any *such* State." It would lead to conferring on Members an indefinite and practically unlimited power to impose new conditions; such a power could not be reconciled with the character of a rule which establishes a close connection between membership and the observance of the principles and obligations of the Charter, and thus clearly constitutes a legal regulation of the question of admission. If the authors of the Charter had meant to leave Members free to import into the application of this provision considerations extraneous to the principles and obligations of the Charter, they would undoubtedly have adopted a different wording. The Court considers the provision sufficiently clear; consequently, it follows the constant practice of the Permanent Court of International Justice and holds that there is no occasion to resort to preparatory work to interpret its meaning. Moreover, the interpretation given by the Court had already been adopted by the Security Council, as is shown in Article 60 of the Council's Rules of Procedure.

It does not, however, follow from the exhaustive character of Article 4 that an appreciation is precluded of such circumstances of fact as would enable the existence of the requisite conditions to be verified. The Article does not forbid the taking into account of any factor which it is possible reasonably and in good faith to connect with the conditions laid down. The taking into account of such factors is implied in the very wide and elastic nature of the conditions. No relevant political factor, that is to say, none connected with the conditions of admission, is excluded.

The conditions in Article 4 are exhaustive and no argument to the contrary can be drawn from paragraph 2 of the Article which is only concerned with the procedure for admission. Nor can an argument be drawn from the political character of the organs of the United Nations dealing with admission. For this character cannot release them from observance of the treaty provisions by which they are governed, when these provisions constitute limitations on their power; this shows that there is no conflict between the functions of the political organs and the exhaustive character of the prescribed conditions.

The Court then passes to the second part of the question, namely, whether a State, while it recognizes that the conditions set forth in Article 4 are fulfilled by a candidate, can subordinate its affirmative vote to the simultaneous admission of other States.

Judged on the basis of the rule which the Court adopts in its interpretation of Article 4, such a demand constitutes a new condition; for it is entirely unconnected with those prescribed in Article 4. It is also in an entirely different category, since it makes admission dependent not on the conditions required of applicants, but on extraneous considerations concerning other States. It would, moreover, prevent each application for admission from being examined and voted on separately and on its own merits. This would be contrary to the letter and spirit of the Charter.

For these reasons, the Court answered the question put to it in the negative.

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3. CORFU CHANNEL CASE (MERITS)

Judgment of 9 April 1949

The Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland–Albania) arose from incidents that occurred on October 22nd, 1946, in the Corfu Strait: two British destroyers struck mines in Albanian waters and suffered damage, including serious loss of life. The United Kingdom first seized the Security Council of the United Nations which, by a Resolution of April 9th, 1947, recommended the two Governments to submit the dispute to the Court. The United Kingdom accordingly submitted an Application which, after an objection to its admissibility had been raised by Albania, was the subject of a Judgment, dated March 25th, 1948, in which the Court declared that it possessed jurisdiction. On the same day the two Parties concluded a Special Agreement asking the Court to give judgment on the following questions:

1. Is Albania responsible for the explosions, and is there a duty to pay compensation?

2. Has the United Kingdom violated international law by the acts of its Navy in Albanian waters, first on the day on which the explosions occurred and, secondly, on November 12th and 13th, 1946, when it undertook a sweep of the Strait?

In its Judgment the Court declared on the first question, by 11 votes against 5, that Albania was responsible.

In regard to the second question, it declared by 14 votes against 2 that the United Kingdom did not violate Albanian sovereignty on October 22nd; but it declared unanimously that it violated that sovereignty on November 12th/13th, and that this declaration, in itself, constituted appropriate satisfaction.

The facts are as follows. On October 22nd, 1946, two British cruisers and two destroyers, coming from the south, entered the North Corfu Strait. The channel they were following, which was in Albanian waters, was regarded as safe: it had been swept in 1944 and check-swept in 1945. One of the destroyers, the *Saumarez*, when off Saranda, struck a mine and was gravely damaged. The other destroyer, the *Volage*, was sent to her assistance and, while towing her, struck another mine and was also seriously damaged. Forty-five British officers and sailors lost their lives, and forty-two others were wounded.

An incident had already occurred in these waters on May 15th, 1946: an Albanian battery had fired in the direction of two British cruisers. The United Kingdom Government had protested, stating that innocent passage through straits is a right recognized by international law; the Albanian Government had replied that foreign warships and merchant vessels had no right to pass through Albanian territorial waters without prior authorisation; and on August 2nd, 1946, the United Kingdom Government had replied that if, in the future, fire was opened on a British warship passing through the channel, the fire would be returned. Finally, on September 21st, 1946, the Admiralty in London had cabled to the British Commander-in-Chief in the Mediterranean to the following effect: "Establishment of diplomatic relations with Albania is again under consideration by His Majesty's Government who wish to know whether the Albanian Government have learnt to behave themselves. Information is requested whether any ships under your command have passed through the North Corfu Strait since August and, if not, whether you intend them to do so shortly."

After the explosions on October 22nd, the United Kingdom Government sent a Note to Tirana announcing its intention to sweep the Corfu Channel shortly. The reply was that this consent would not be given unless the operation in question took place outside Albanian territorial waters and that any sweep undertaken in those waters would be a violation of Albania's sovereignty.

The sweep effected by the British Navy took place on November 12th/13th 1946, in Albanian territorial waters and within the limits of the channel previously swept. Twenty-two moored mines were cut; they were mines of the German GY type.

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The first question put by the Special Agreement is that of Albania's responsibility, under international law, for the explosions on October 22nd, 1946.

The Court finds, in the first place, that the explosions were caused by mines belonging to the minefield discovered on November 13th. It is not, indeed, contested that this minefield had been recently laid; it was in the channel, which had been previously swept and check-swept and could be regarded as safe, that the explosions had taken place. The nature of the damage shows that it was due to mines of the same type as those swept on November 13th; finally, the theory that the mines discovered on November 13th might have been laid after the explosions on October 22nd is too improbable to be accepted.

In these circumstances the question arises what is the legal basis of Albania's responsibility? The Court does not feel that it need pay serious attention to the suggestion that Albania herself laid the mines: that suggestion was only put forward *pro memoria*, without evidence in support, and could not be reconciled with the undisputed fact that, on the whole Albanian littoral, there are only a few launches and motor boats. But the United Kingdom also alleged the connivance of Albania: that the minelaying had been carried out by two Yugoslav warships by the request of Albania, or with her acquiescence. The Court finds that this collusion has not been proved. A charge of such exceptional gravity against a State would require a degree of certainty that has not been reached here, and the origin of the mines laid in Albanian territorial waters remains a matter for conjecture.

The United Kingdom also argued that, whoever might be the authors of the minelaying, it could not have been effected without Albania's knowledge. True, the mere fact that mines were laid in Albanian waters neither involves *prima facie* responsibility nor does it shift the burden of proof. On the other hand, the exclusive control exercised by a State within its frontiers may make it impossible to furnish direct proof of facts which would involve its responsibility in case of a violation of international law. The State which is the victim must, in that case, be allowed a more liberal recourse to inferences of fact and circumstantial evidence; such indirect evidence must be regarded as of especial weight when based on a series of facts, linked together and leading logically to a single conclusion.

In the present case two series of facts, which corroborate one another, have to be considered.

The first relates to the Albanian Government's attitude before and after the catastrophe. The laying of the mines took place in a period in which it had shown its intention to keep a jealous watch on its territorial waters and in which it was requiring prior authorisation before they were entered, this vigilance sometimes going so far as to involve the use of force: all of which render the assertion of ignorance *a priori* improbable. Moreover, when the Albanian Government had become fully aware of the existence of a minefield, it protested strongly against the activity of the British Fleet, but not against the laying of the mines, though this act, if effected without her consent, would have been a very serious violation of her sovereignty; she did not notify shipping of the existence of the minefield, as would be required by international law; and she did not undertake any of the measures of judicial investigation which would seem to be incumbent on her in such a case. Such an attitude could only be explained if the Albanian Government, while knowing of the minelaying, desired the circumstances in which it was effected to remain secret.

The second series of facts relates to the possibility of observing the minelaying from the Albanian coast. Geographically, the channel is easily watched: it is dominated by heights offering excellent observation points, and it runs close to the coast (the nearest mine was 500 m. from the shore). The methodical and well-thought-out laying of the mines compelled the minelayers to remain from two to two-and-a-half hours in the waters between Cape Kiephali and the St. George's Monastery. In regard to that point, the naval experts appointed by the Court reported, after enquiry and investigation on the spot, that they considered it to be indisputable that, if a normal look-out was kept at Cape Kiephali, Denta Point, and St. George's Monastery, and if the look-outs were equipped with binoculars, under normal weather conditions for this area, the mine-laying operations must have been noticed by these coastguards. The existence of a look-out post at Denta Point was not established; but the Court, basing itself on the declarations of the Albanian Government that lock-out posts were stationed at other points, refers to the following conclusions in the experts' report: that in the case of minelaying 1) from the North towards the South, the minelayers would have been seen from Cape Kiephali; if from South towards the North, they would have been seen from Cape Kiephali and St. George's Monastery.

From all the facts and observations mentioned above, the Court draws the conclusion that the laying of the minefield could not have been accomplished without the knowledge of Albania. As regards the obligations resulting for her from this knowledge, they are not disputed. It was her duty to notify shipping and especially to warn the ships proceeding through the Strait on October 22nd of the danger to which

they were exposed. In fact, nothing was attempted by Albania to prevent the disaster, and these grave omissions involve her international responsibility.

The Special Agreement asks the Court to say whether, on this ground, there is "any duty" for Albania "to pay compensation" to the United Kingdom. This text gave rise to certain doubts: could the Court not only decide on the principle of compensation but also assess the amount? The Court answered in the affirmative and, by a special Order, it has fixed time-limits to enable the Parties to submit their views to it on this subject.

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The Court then goes on to the second question in the Special Agreement: Did the United Kingdom violate Albanian sovereignty on October 22nd, 1946, or on November 12th/13th, 1946?

The Albanian claim to make the passage of ships conditional on a prior authorisation conflicts with the generally admitted principle that States, in time of peace, have a right to send their warships through straits used for international navigation between two parts of the high seas, provided that the passage is innocent. The Corfu Strait belongs geographically to this category, even though it is only of secondary importance (in the sense that it is not a necessary route between two parts of the high seas) and irrespective of the volume of traffic passing through it. A fact of particular importance is that it constitutes a frontier between Albania and Greece, and that a part of the strait is wholly within the territorial waters of those States. It is a fact that the two States did not maintain normal relations, Greece having made territorial claims precisely with regard to a part of the coast bordering the strait. However, the Court is of opinion that Albania would have been justified in view of these exceptional circumstances, in issuing regulations in respect of the passage, but not in prohibiting such passage or in subjecting it to the requirement of special authorisation.

Albania has denied that the passage on October 22 was innocent. She alleges that it was a political mission and that the methods employed—the number of ships, their formation, armament, manoeuvres, etc.—showed an intention to intimidate. The Court examined the different Albanian contentions so far as they appeared relevant. Its conclusion is that the passage was innocent both in its principle, since it was designed to affirm a right which had been unjustly denied, and in its methods of execution, which were not unreasonable in view of the firing from the Albanian battery on May 15th.

As regards the operation on November 12th/13th, it was executed contrary to the clearly expressed wish of the Albanian Government; it did not have the consent of the international mine clearance organizations; it could not be justified as the exercise of the right of innocent passage. The United Kingdom has stated that its object was to secure the mines as quickly as possible for fear lest they should be taken away by the authors of the minelaying or by the Albanian authorities: this was presented either as a new and special application of the theory of intervention, by means of which the intervening State was acting to facilitate the task of the international tribunal, or as a method of self-protection or *self-help*. The Court cannot accept these lines of defence. It can only regard the alleged right of intervention as the manifestation of a policy of force which cannot find a place in international law. As regards the notion of *self-help*, the Court is also unable to accept it: between independent States the respect for territorial sovereignty is an essential foundation for international relations. Certainly, the Court recognises the Albanian Government's complete failure to carry out its duties after the explosions and the dilatory nature of its diplomatic Notes as extenuating circumstances for the action of the United Kingdom. But, to ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty. This declaration is in accordance with the request made by Albania through her counsel and is in itself appropriate satisfaction.

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To the Judgment of the Court there are attached one declaration and the dissenting opinions of Judges Alvarez, Winiarski, Zoricic, Badawi Pasha, Krylov and Azevedo, and also that of Dr. Ecer, Judge *ad hoc*.

4. REPARATION FOR INJURIES SUFFERED IN THE SERVICE OF THE UNITED NATIONS

Advisory Opinion of 11 April 1949

The question concerning reparation for injuries suffered in the service of the United Nations, was referred to the Court by the General Assembly of the United Nations (Resolution of the General Assembly dated December 3rd, 1948) in the following terms:

"I. In the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State, has the United Nations, as an Organization, the capacity to bring an international claim against the responsible *de jure* or *de facto* government with a view to obtaining the reparation due in respect of the damage caused (*a*) to the United Nations, (*b*) to the victim or to persons entitled through him?

"II. In the event of an affirmative reply on point I (*b*), how is action by the United Nations to be reconciled with such rights as may be possessed by the State of which the victim is a national?"

With respect to questions I (*a*) and I (*b*), the Court established a distinction according to whether the responsible State is a Member or not of the United Nations. The Court unanimously answered answered question I (*a*) in the affirmative. On question I (*b*) the Court was of opinion by 11 votes against 4 that the Organization has the capacity to bring an international claim whether or not the responsible State is a Member of the United Nations.

Finally, on point II, the Court was of opinion by 10 votes against 5 that when the United Nations as an organization is bringing a claim for reparation for damage caused to its agent, it can only do so by basing its claim upon a breach of obligations due to itself; respect for this rule will usually prevent a conflict between the action of the United Nations and such rights as the agent's national State may possess; moreover, this reconciliation must depend upon considerations applicable to each particular case, and upon agreements to be made between the Organization and individual States.

The dissenting Judges appended to the Opinion either a declaration or a statement of the reasons for which they cannot concur in the Opinion of the Court. Two other Members of the Court, while concurring in the Opinion, appended an additional statement.

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In its Advisory Opinion, the Court begins by reciting the circumstances of the procedure. The Request for Opinion was communicated to all States entitled to appear before the Court; they were further informed that the Court was prepared to receive information from them. Thus, written statements were sent by the following States: India, China, United States of America, United Kingdom of Great Britain and Northern Ireland and France. In addition, oral statements were presented before the Court by a representative of the Secretary-General of the United Nations, assisted by counsel, and by the representatives of the Belgian, French and United Kingdom Governments.

Then the Court makes a number of preliminary observations on the question submitted to it. It proceeds to define certain terms in the Request for Opinion, then it analyses the contents of the formula: "capacity to bring an international claim." This capacity certainly belongs to a State. Does it also belong to the Organization? This is tantamount to asking whether the Organization has international personality. In answering this question which is not settled by the actual terms of the Charter, the Court goes on to consider what characteristics the Charter was intended to give to the Organization. In this connection, the Court states that the Charter conferred upon the Organization rights and obligations which are different from those of its Members. The Court stresses, further, the important political tasks of the Organization: the maintenance of international peace and security. Accordingly the Court concludes that the Organization possessing as it does rights and obligations, has at the same time a large measure of international personality and the capacity to operate upon an international plane, although it is certainly not a super-State.

The Court then examines the very heart of the subject, namely, whether the sum of the international rights of the Organization comprises the right to bring an international claim to obtain reparation from a State in respect of the damage caused by the injury of an agent of the Organization in the course of the performance of his duties.

On the first point, I (*a*), of the Request for Opinion the Court unanimously reaches the conclusion that the Organization has the capacity to bring an international claim against a State (whether a Member or non-member) for damage resulting from a breach by that State of its obligations towards the Organization. The Court points out that it is not called upon to determine the precise extent of the reparation which the Organization would be entitled to recover; the measure of the reparation should depend upon a number of factors which the Court gives as examples.

Then the Court proceeds to examine question I (*b*), namely, whether the United Nations, as an Organization, has the capacity to bring an international claim with a view to obtaining the reparation due in respect of the damage caused, not to the Organization itself, but to the victim or to persons entitled through him.

In dealing with this point the Court analyses the question of diplomatic protection of nationals. The Court points out in this connection that really only the Organization has the capacity to present a claim in the circumstances referred to, inasmuch as at the basis of any international claim there must be a breach by the defendant State of an obligation towards the Organization. In the present case the State of which the victim is a national could not complain of a breach of an obligation towards itself. Here the obligation is assumed in favour of the Organization. However, the Court admits that the analogy of the traditional rule of diplomatic protection of nationals abroad does not in itself justify an affirmative reply. In fact, there exists no link of nationality between the Organization and its agents. This is a new situation and it must be analysed. Do the provisions of the Charter relating to the functions of the Organization imply that the latter is empowered to assure its agents limited protection? These powers, which are essential to the performance of the functions of the Organization, must be regarded as a necessary implication

arising from the Charter. In discharging its functions, the Organization may find it necessary to entrust its agents with important missions to be performed in disturbed parts of the world. These agents must be ensured of effective protection. It is only in this way that the agent will be able to carry out his duties satisfactorily. The Court therefore reaches the conclusion that the Organization has the capacity to exercise functional protection in respect of its agents. The situation is comparatively simple in the case of Member States, for these have assumed various obligations towards the Organization.

But what is the situation when a claim is brought against a State which is not a Member of the Organization? The Court is of opinion that the Members of the United Nations created an entity possessing objective international personality and not merely personality recognized by them alone. As in the case of Question I (*a*), the Court therefore answers Question I (*b*) in the affirmative.

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Question No. II of the General Assembly refers to the reconciliation of action by the United Nations with such rights as may be possessed by the State of which the victim is a national. In other words, what is involved is possible competition between the rights of diplomatic protection on the one hand and functional protection on the other. The Court does not state here which of these two categories of protection should have priority and in the case of Member States it stresses their duty to render every assistance provided by Article 2 of the Charter. It adds that the risk of competition between the Organization and the national State can be reduced or eliminated either by a general convention or by agreements entered into in each particular case, and it refers further to cases that have already arisen in which a practical solution has already been found.

Finally, the Court examines the case in which the agent bears the nationality of the defendant State. Since the claim brought by the Organization is not based upon the nationality of the victim but rather upon his status as an agent of the Organization, it does not matter whether or not the State to which the claim is addressed regards him as its own national. The legal situation is not modified thereby.

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5. CORFU CHANNEL CASE (ASSESSMENT OF AMOUNT OF COMPENSATION)

Judgment of 15 December 1949

In a Judgment given on April 9th, 1949, the Court held Albania responsible, under international law, for the explosions which occurred on October 22nd, 1946, in Albanian waters, and for the damage and loss of human life that resulted to the United Kingdom. In the same Judgment, the Court concluded that it had jurisdiction to assess the amount of the compensation, but it was not able to do so immediately, as certain information was lacking.

There were therefore further proceedings to enable the two parties to investigate, prove or dispute the sums claimed as compensation.

During these proceedings, Albania announced its view that, in accordance with the terms of the Special Agreement signed by the two parties, the Court had solely to consider the question of principle whether Albania was, or was not, obliged to pay compensation to the United Kingdom, and that, in Albania's view, the Court had no jurisdiction to fix what the amount of compensation should be. Consequently, Albania decided not to take any further part in the proceedings.

At a public hearing on November 17th, 1949, the Court, after hearing the representatives of the United Kingdom, ordered an examination of the figures and estimates produced by the United Kingdom to be entrusted to experts, owing to the technical nature of the question raised.

These experts, who were two specialists in naval construction and in warships, of Netherlands nationality, handed in their report on December 2nd; at a subsequent meeting of the Court, they answered questions put to them by certain Judges who desired further enlightenment.

In the Judgment summarized here the Court states that, as the Albanian Government has failed to defend its case, procedure in default of appearance is brought into operation. The Court having given a decision in its Judgment of April 9th that it has jurisdiction to assess the compensation, the matter is *res judicata* and no longer in discussion.

But even in procedure in default of appearance, the Court is bound to satisfy itself that the claim is well founded in fact and law.

The Court therefore considers successively the three heads of compensation in the United Kingdom claim: for the replacement of the destroyer *Saumarez*, which became a total loss as the result of the explosions in the Corfu Channel; for the damage sustained by the destroyer *Volage*; and finally in respect of the deaths and injuries of naval personnel.

On the first two heads of the claim the Court states that, in the view of the experts appointed by it, the figures given by the United Kingdom Government may be held to be an exact and reasonable estimate of the damage sustained.

As regards the claim for compensation in respect of naval personnel, the Court considers that the documents produced by the United Kingdom Government are sufficient proof.

The Court therefore gives judgment in favour of the claim of the United Kingdom and condemns Albania to pay to that country a total compensation of £843,947.

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6. COMPETENCE OF THE GENERAL ASSEMBLY FOR THE ADMISSION OF A STATE TO THE UNITED NATIONS

Advisory Opinion of 3 March 1950

The question concerning the competence of the General Assembly of the United Nations to admit a State to the United Nations had been referred for an advisory opinion to the Court by the Assembly in its Resolution dated November 22nd, 1949.

The question was framed in the following terms:

"Can the admission of a State to membership in the United Nations, pursuant to Article 4, paragraph 2, of the Charter, be effected by a decision of the General Assembly, when the Security Council has made no recommendation for admission by reason of the candidate failing to obtain the requisite majority or of the negative vote of a permanent Member upon a resolution so to recommend?"

The Court answered the question in the negative by twelve votes against two. The two dissenting Judges—Judge Alvarez and Judge Azevedo—each appended a statement of their dissenting opinion to the Court's Opinion.

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The Request for Opinion called upon the Court to interpret Article 4, paragraph 2, of the Charter. Before examining the merits of the question, the Court considered the objections that had been made to its doing so, either on the ground that it was not competent to interpret the Charter, or because of the alleged political character of the question.

So far as concerns its competence, the Court referred to its Opinion of May 28th, 1948, in which it declared that it could give an opinion on any legal question and that there was no provision which prohibited it from exercising, in regard to Article 4 of the Charter, a multilateral treaty, an interpretative function falling within the normal exercise of its judicial powers. With regard to the second objection, the Court further pointed out that it could not attribute a political character to a Request which, framed in abstract terms, invited it to undertake an essentially judicial task, the interpretation of a treaty provision. There was therefore no reason why it should not answer the question put to it by the Assembly.

That question envisaged solely the case in which the Security Council, having voted upon a recommendation, had concluded from its vote that the recommendation was not adopted because it failed to obtain the requisite majority, or because of the negative vote of a permanent Member of the Council. It thus had in view the case in which the Assembly was confronted with the absence of a recommendation from the Council. The Court was not asked to determine the rules governing the Council's voting procedure or to examine whether the negative vote of a permanent Member of the Council was effective to defeat a recommendation which had obtained seven or more votes. Indeed, the text of the question assumed in such a case the non-existence of a recommendation.

The question was therefore whether, in the absence of a recommendation by the Council, the Assembly could make a decision to admit a State.

The Court has no doubt as to the meaning of the relevant clause: paragraph 2 of Article 4 of the Charter. Two things were required to effect admission: a recommendation by the Council and a decision by the Assembly. The use in the article of the words "recommendation" and "upon" implied the idea that the recommendation was the foundation of the decision. Both these acts were indispensable to form the "judgment" of the Organization (paragraph 1 of Article 4), the recommendation being the condition precedent to the decision by which the admission was effected.

Attempts had been made to attribute a different meaning to this clause by invoking the *"travaux préparatoires"*. But the first duty of a tribunal which was called upon to interpret a text was to endeavour to give effect to the words used in the context in which they occurred, by attributing to them their natural and ordinary meaning. In the present case, there was no difficulty in ascertaining the natural and ordinary meaning of the words in question, and of giving effect to them. Having regard to these considerations, the Court considered that it was not permissible for it to resort to the *"travaux préparatoires"*.

The conclusions to which the Court was led by its examination of paragraph 2 of Article 4 were confirmed by the structure of the Charter, and particularly by the relations established between the General Assembly and the Security Council. Both these bodies were principal organs of the United Nations, and the Council was not in a subordinate position. Moreover, the organs to which Article 4 entrusted the judgment of the Organization in matters of admission had consistently recognised that admission could only be granted on the basis of a recommendation by the Council. If the Assembly had power to admit a State in the absence of a recommendation by the Council, the latter would be deprived of an important role in the exercise of one of the essential functions of the Organization. Nor would it be possible to admit that the absence of a recommendation was equivalent to an "unfavourable recommendation" upon which the General Assembly could base a decision to admit a State.

While keeping within the limits of the Request, it was enough for the Court to say that nowhere had the Assembly received the power to change, to the point of reversing, the meaning of a vote by the Council. In consequence, it was impossible to admit that the Assembly had power to attribute to a vote of the Security Council the character of a recommendation, when the Council itself considered that no such recommendation had been made.

Such were the reasons which led the Court to reply in the negative to the question put to it by the General Assembly.

7. INTERPRETATION OF PEACE TREATIES WITH BULGARIA, HUNGARY AND ROMANIA (FIRST PHASE)

Advisory Opinion of 30 March 1950

The question concerning the Interpretation of Peace Treaties with Bulgaria, Hungary and Romania had been referred to the Court for an advisory opinion by the General Assembly of the United Nations (G.A. resolution of 19 October, 1949).

By eleven votes to three the Court stated that disputes existed with those countries subject to the provisions for the settlement of disputes contained in the Treaties themselves; and that the Governments of the three countries were obligated to carry out the provisions of the Articles of those Treaties which relate to the settlement of disputes, including the provisions for the appointment of their representatives to the Treaty Commissions.

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The following are the circumstances in which the Court was led to deliver its opinion:

In April, 1949 the question of the observance of human rights in Bulgaria and Hungary having been referred to the General Assembly, the latter adopted a resolution in which it expressed its deep concern at the grave accusations made against the Governments of Bulgaria and Hungary in this connection, and drew their attention to their obligations under the Peace Treaties which they had signed with the Allied and Associated Powers, including the obligation to co-operate in the settlement of all these questions.

On 22nd October, 1949 the Assembly, confronted by the charges made in this connection by certain Powers against Bulgaria, Hungary and Romania, which charges were rejected by the latter, and noting that the Governments of these three countries had refused to designate their representatives to the Treaty Commissions for the settlement of disputes on the grounds that they were not legally obligated to do so, and deeply concerned with this situation, decided to refer the following question to the International Court of Justice for an Advisory Opinion:

I. Do the diplomatic exchanges between the three States and certain Allied and Associated Powers disclose disputes subject to the provisions for the settlement of disputes contained in the Treaties?

II. In the event of an affirmative reply, are the three States obligated to carry out the provisions of the Articles in the Peace Treaties for the settlement of disputes, including the provisions for the appointment of their representatives to the Commissions?

III. In the event of an affirmative reply to question II and if within thirty days from the date when the Court delivered its opinion the designation has not been made, is the Secretary-General of the United Nations authorised to appoint the third Member of the Commissions?

IV. In the event of an affirmative reply to Question III, would a Commission so composed be competent to make a definitive and binding decision in settlement of a dispute?

However, Questions III and IV which refer to a clause in the Peace Treaties under which the Secretary-General of the United Nations is charged to appoint, failing agreement between the parties, the third member of the Treaty Commissions, were not submitted to the Court for an immediate answer. The Court would have to consider them only if the appointment of national members to the Commission had not been effected within one month after the delivery of the opinion on Questions I and II.

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In its Opinion the Court answered Questions I and II.

The Court first considered whether Article 2, paragraph 7 of the Charter, which prevents the United Nations from intervening in matters which are essentially within the domestic jurisdiction of a State, barred it from delivering an Opinion in the present case. It noted on the one hand that the General Assembly justified the examination which it had undertaken by relying upon Article 55 of the Charter, which states that the United Nations shall promote universal respect for and observance of human rights and on the other that the request for an Opinion did not call upon the Court to deal with the alleged violations of the provisions of the Treaties concerning human rights: the object of the Request is directed solely to obtaining certain clarifications of a legal nature regarding the applicability of the procedure for the settlement of disputes as provided for in the Treaties. The interpretation of the terms of a Treaty for this purpose could not be considered as a question essentially within the domestic jurisdiction of a State, it is a question of international law which, by its very nature, lies within the competence of the Court.

The Court considered, on the other hand, whether the fact that Bulgaria, Hungary and Romania had expressed their opposition to the advisory proceedings should not determine it, by the application of the principles which govern the functioning of a judicial organ, to decline to give an answer. It pointed out that contentious procedure resulting in a judgment, and advisory procedure were different. It considered that it had the power to examine whether the circumstances of each case were of such a character as should lead it to decline to answer the Request. In the present case, which was clearly different from the Eastern Carelian case (1923) the Court held that it should not decline because the request was made with a view to enlightening the General Assembly on the applicability of the procedure for the settlement of disputes, and the Court was not asked to pronounce on the merits of these disputes. The Court gave an affirmative answer to Question I, pointing out on the one hand that disputes existed because certain charges had been brought against certain States, which the latter rejected, and on the other hand that these disputes were subject to the provisions of the Articles for the settlement of disputes contained in the Peace Treaties.

Taking up Question II, the Court determined its meaning and pointed out that it referred solely to the obligation upon Bulgaria, Hungary and Romania to carry out the Articles of the Peace Treaties concerning the settlement of disputes, including the obligation to appoint their representatives to the Treaty Commissions. The Court found that all the conditions required for the commencement of the stage of the set-

tlement of disputes by the Commissions, had been fulfilled. Consequently, it gave an affirmative answer to Question II.

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The Opinion of the Court was delivered in public, the Secretary-General of the United Nations and the States signatories to the Treaties having been duly notified. The text of the conclusions of the Opinion was cabled to those signatory States which were not represented at the Hearing.

Judge Azevedo, whilst concurring in the Opinion, appended to it his individual opinion. Judges Winiarski, Zoricic and Krylov, considering that the Court should have declined to give an Opinion, appended to the Opinion statements of their dissenting opinion.

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8. INTERNATIONAL STATUS OF SOUTH-WEST AFRICA

Advisory Opinion of 11 July 1950

The question concerning the International States of South West Africa had been referred for an advisory opinion to the Court by the General Assembly of the United Nations (G.A. resolution of 6 December 1949).

The Court decided unanimously that South-West Africa was a territory under the international Mandate assumed by the Union of South Africa on December 17th, 1920;

by 12 votes to 2 that the Union of South Africa continued to have the international obligations resulting from the Mandate, including the obligation to submit reports and transmit petitions from the inhabitants of that Territory, the supervisory functions to be exercised by the United Nations and the reference to the Permanent Court of International Justice to be replaced by reference to the International Court of Justice, in accordance with Article 7 of the Mandate and Article 37 of the Statute of the Court;

unanimously that the provisions of Chapter XII of the Charter were applicable to the Territory of South-West Africa in the sense that they provided a means by which the Territory may be brought under the Trusteeship system;

by 8 votes to 6 that the Charter did not impose on the Union of South Africa a legal obligation to place the Territory under Trusteeship;

and finally, unanimously that the Union of South Africa was not competent to modify the international status of South-West Africa, such competence resting with the Union acting with the consent of the United Nations.

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The circumstances in which the Court was called upon to give its opinion were the following:

The Territory of South-West Africa was one of the German overseas possessions in respect of which Germany, by Article 119 of the Treaty of Versailles renounced all her rights and titles in favour of the Principal Allied and Associated Powers. After the war of 1914-1918 this Territory was placed under a Mandate conferred upon the Union of South Africa which was to have full power of administration and legislation over the Territory as an integral portion of the Union. The Union Government was to exercise an international function of administration on behalf of the League, with the object of promoting the well-being and development of the inhabitants.

After the second world war, the Union of South Africa, alleging that the Mandate had lapsed, sought the recognition of the United Nations to the integration of the Territory in the Union.

The United Nations refused their consent to this integration and invited the Union of South Africa to place the Territory under Trusteeship, according to the provisions of Chapter XII of the Charter.

The Union of South Africa having refused to comply, the General Assembly of the United Nations, on December 6th, 1949, adopted the following resolution:

The General Assembly,

Recalling its previous resolutions 65 (I) of 14 December 1946, 141 (II) of 1 November 1947 and 227 (III) of 26 November 1948 concerning the Territory of South-West Africa,

Considering that it is desirable that the General Assembly, for its further consideration of the question, should obtain an advisory opinion on its legal aspects,

1. Decides to submit the following questions to the International Court of Justice with a request for an advisory opinion which shall be transmitted to the General Assembly before its fifth regular session, if possible:

"What is the international status of the Territory of South-West Africa and what are the international obligations of the Union of South Africa arising therefrom, in particular:

"(*a*) Does the Union of South Africa continue to have international obligations under the Mandate for South-West Africa and, if so, what are those obligations?

"(*b*) Are the provisions of Chapter XII of the Charter applicable and, if so, in what manner, to the Territory of South-West Africa?

"(*c*) Has the Union of South Africa the competence to modify the international status of the Territory of South-West Africa, or, in the event of a negative reply, where does competence rest to determine and modify the international status of the Territory?"

2. Requests the Secretary-General to transmit the present resolution to the International Court of Justice, in accordance with Article 65 of the Statute of the Court, accompanied by all documents likely to throw light upon the question.

The Secretary-General shall include among these documents the text of article 22 of the Covenant of the League of Nations; the text of the Mandate for German South-West Africa, confirmed by the Council of the League on 17 December 1920; relevant documentation concerning the objectives and the functions of the Mandates System; the text of the resolution adopted by the League of Nations on the

question of Mandates on 18 April 1946; the text of Articles 77 and 80 of the Charter and data on the discussion of these Articles in the San Francisco Conference and the General Assembly; the report of the Fourth Committee and the official records, including the annexes, of the consideration of the question of South-West Africa at the fourth session of the General Assembly.

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In its opinion the Court examined first if the Mandate conferred by the Principal Allied and Associated Powers on His Britannic Majesty, to be exercised on his behalf by the Union of South Africa, over the Territory of South-West Africa was still in existence. The Court declared that the League was not a "mandator" in the sense in which this term is used in the national law of certain states. The Mandate had only the name in common with the several notions of mandate in national law. The essentially international character of the functions of the Union appeared from the fact that these functions were subject to the supervision of the Council of the League and to the obligation to present annual reports to it; it also appeared from the fact that any Member of the League could submit to the Permanent Court of International Justice any dispute with the Union Government relating to the interpretation or the application of the provisions of the Mandate.

The international obligations assumed by the Union of South Africa were of two kinds. One kind was directly related to the administration of the Territory and corresponded to the sacred trust of civilization referred to in article 22 of the Covenant; the other related to the machinery for implementation and was closely linked to the supervision and control of the League. It corresponded to the "securities for the performance of this trust" referred to in the same Article.

The obligations of the first group represent the very essence of the sacred trust of civilization. Their *raison d'être* and original object remain. Since their fulfilment did not depend on the existence of the League of Nations, they could not be brought to an end merely because this supervisory organ ceased to exist. This view is confirmed by Article 80, paragraph 1, of the Charter, maintaining the rights of States and peoples and the terms of existing international instruments until the territories in question are placed under the trusteeship system. Moreover, the resolution of the League of Nations of April 18, 1946, said that the League's functions with respect to mandated territories would come to an end; it did not say that the Mandates themselves came to an end.

By this Resolution the Assembly of the League of Nations manifested its understanding that the Mandates would continue in existence until "other arrangements" were established and the Union of South Africa, in declarations made to the League of Nations as well as to the United Nations, had recognized that its obligations under the Mandate continued after the disappearance of the League. Interpretation placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument.

With regard to the second group of obligations, the Court said that some doubts might arise from the fact that the supervisory functions of the League with regard to mandated territories not placed under the new trusteeship system were neither expressly transferred to the United Nations, nor expressly assumed by that Organization. Nevertheless, the obligation incumbent upon a Mandatory State to accept international supervision and to submit reports is an important part of the Mandates System. It could not be concluded that the obligation to submit to supervision had disappeared merely because the supervisory organ had ceased to exist, when the United Nations had another international organ performing similar, though not identical, supervisory functions.

These general considerations were confirmed by Article 80, paragraph 1, of the Charter, which purports to safeguard not only the rights of States, but also the rights of the peoples of mandated territories until trusteeship agreements were concluded. The competence of the General Assembly of the United Nations to exercise such supervision and to receive and examine reports is derived from the provisions of Article 10 of the Charter, which authorizes the General Assembly to discuss any questions on any matters within the scope of the Charter, and make recommendations to the Members of the United Nations. Moreover, the Resolution of April 18th, 1946, of the Assembly of the League of Nations presupposes that the supervisory functions exercised by the League would be taken over by the United Nations.

The right of petition was not mentioned in the Covenant or the Mandate, but was organized by a decision of the Council of the League. The Court was of opinion that this right which the inhabitants of South-West Africa had thus acquired, was maintained by Article 80, paragraph 1, of the Charter, as this clause was interpreted above. The Court was therefore of the opinion that petitions are to be transmitted by the Government of the Union to the General Assembly of the United Nations, which is legally qualified to deal with them.

Therefore, South-West Africa is still to be considered a territory held under the Mandate of December 17th, 1920. The degree of supervision by the General Assembly should not exceed that which applied under the Mandates System. These observations apply to annual reports and petitions.

Having regard to Article 37 of the Statute of the International Court of Justice and Article 80, paragraph 1, of the Charter, the Court was of opinion that this clause in the Mandate was still in force, and therefore that the Union of South Africa was under an obligation to accept the compulsory jurisdiction of the Court according to those provisions.

With regard to question (*b*) the Court said that Chapter XII of the Charter applied to the Territory of South-West Africa in this sense, that it provides a means by which the Territory may be brought under the trusteeship system.

With regard to the second part of the question, dealing with the manner in which those provisions are applicable, the Court said that the provisions of this chapter did not impose upon the Union of South Africa an obligation to put the Territory under Trusteeship by means of a Trusteeship Agreement. This opinion is based on the permissive language of Articles 75 and 77. These Articles refer to an "agreement" which implies consent of the parties concerned. The fact that Article 77 refers to the "voluntary" placement of certain Territories under Trusteeship does not show that the placing of other territories under Trusteeship is compulsory. The word "voluntary" used with respect to territories in category (*c*) in Article 77 can be explained as having been used out of an abundance of caution and as an added assurance of free initiative to States having territories falling within that category.

The Court considered that if Article 80, paragraph 2 had been intended to create an obligation for a Mandatory State to negotiate and conclude an agreement, such intention would have been expressed in a direct manner. It considered also that this article did not create an obligation to enter into negotiations with a view to concluding a Trusteeship Agreement as this provision expressly refers to delay or postponement "of the negotiation and conclusion", and not to negotiations only. Moreover, it refers not merely to territories held under mandate but also to other territories. Finally the obligation merely to negotiate does not of itself assure the conclusion of Trusteeship Agreements. It is true that the Charter has contemplated and regulated only one single system, the international Trusteeship system. If it may be concluded that it was expected that the mandatory States would follow the normal course indicated by the Charter and conclude Trusteeship Agreements, the Court was unable to deduce from these general considerations any legal obligation for mandatory States to conclude or negotiate such agreements. It is not for the Court to pronounce on the political or moral duties which these considerations may involve.

With regard to question (*c*) the Court decided that the Union had no competence to modify unilaterally the international status of the Territory. It repeated that the normal way of modifying the international status of the Territory would be to place it under the Trusteeship System by means of a Trusteeship Agreement, in accordance with the provisions of Chapter XII of the Charter.

Article 7 of the Mandate required the authorisation of the Council of the League for any modifications of its terms. In accordance with the reply given to question (*a*) the Court said that those powers of supervision now belong to the General Assembly of the United Nations. Articles 79 and 85 of the Charter required that a trusteeship agreement be approved by the General Assembly. By analogy it could be inferred that the same procedure was applicable to any modification of the international status of a territory under Mandate which would not have for its purpose the placing of the territory under the trusteeship system.

Moreover, the Union of South Africa itself decided to submit the question of the future international status of the territory to the "judgment" of the General Assembly as the "competent international organ". In so doing, the Union recognised the competence of the General Assembly in the matter. On the basis of these considerations, the Court concluded that competence to determine and modify the international status of the Territory rested with the Union, acting in agreement with the United Nations.

Sir Arnold McNair and Judge Read appended to the Court's Opinion a statement of their separate opinions.

Availing themselves of the right conferred on them by Article 57 of the Statute, Judges Alvarez, De Visscher and Krylov appended to the Opinion statements of their dissenting opinions.

Vice-President Guerrero declared that he could not concur in the Court's opinion on the answer to question (*b*). For him, the Charter imposed on the South African Union an obligation to place the Territory under Trusteeship. On this point and on the text in general, he shared the views expressed by Judge De Visscher.

Judges Zoricic and Badawi Pasha declared that they were unable to concur in the answer given by the Court to the second part of the question under letter (*b*) and declared that they shared in the general views expressed on this point in the dissenting opinion of Judge De Visscher.

The Court's opinion was given in a public hearing. Oral statements were presented on behalf of the Secretary-General of the United Nations by the Assistant Secretary-General in charge of the Legal Department, and on behalf of the Governments of the Philippines and of the Union of South Africa.

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9. INTERPRETATION OF PEACE TREATIES WITH BULGARIA, HUNGARY AND ROMANIA (SECOND PHASE)

Advisory Opinion of 18 July 1950

The advisory opinion summarized here deals with the second phase of the question concerning the Interpretation of Peace Treaties signed with Bulgaria, Hungary and Romania. By a Resolution of October 22nd, 1949, the General Assembly of the United Nations had submitted to the Court for advisory opinion the following four questions:

"I. Do the diplomatic exchanges between Bulgaria, Hungary and Romania on the one hand and certain Allied and Associated Powers signatories to the Treaties of Peace on the other, concerning the implementation of Article 2 of the Treaties with Bulgaria and Hungary and Article 3 of the Treaty with Romania, disclose disputes subject to the provisions for the settlement of disputes contained in Article 36 of the Treaty of Peace with Bulgaria, Article 40 of the Treaty of Peace with Hungary and Article 38 of the Treaty of Peace with Romania?"

In the event of an affirmative reply to Question I:

"II. Are the Governments of Bulgaria, Hungary and Romania obligated to carry out the provisions of the Articles referred to in Question I, including the provisions for the appointment of their representatives to the Treaty Commissions?"

In the event of an affirmative reply to Question II and if within thirty days from the date when the Court delivers its opinion, the Governments concerned have not notified the Secretary-General that they have appointed their representatives to the Treaty Commissions, and the Secretary-General has so advised the International Court of Justice:

"III. If one party fails to appoint a representative to a Treaty Commission under the Treaties of Peace with Bulgaria, Hungary and Romania where that party is obligated to appoint a representative to the Treaty Commission, is the Secretary-General of the United Nations authorized to appoint the third member of the Commission upon the request of the other party to a dispute according to the provisions of the respective Treaties?"

In the event of an affirmative reply to Question III:

"IV. Would a Treaty Commission composed of a representative of one party and a third member appointed by the Secretary-General of the United Nations constitute a

Commission, within the meaning of the relevant Treaty articles, competent to make a definitive binding decision in settlement of a dispute?"

On March 30th, 1950, the Court answered the first two questions by saying that diplomatic exchanges disclosed the existence of disputes subject to the Treaty provisions for the settlement of disputes and that the Governments of Bulgaria, Hungary and Romania were under obligation to appoint their representatives to the Treaty Commissions.

On May 1st, 1950, the Acting Secretary-General of the United Nations notified the Court that, within 30 days of the date of the delivery of the Court's Advisory Opinion on the first two questions, he had not received information that any one of the three Governments concerned had appointed its representative to the Treaty Commissions.

On June 22nd, 1950, the Government of the United States of America sent a written statement. The United Kingdom Government had previously stated its views on Questions III and IV in the written statement submitted during the first phase of the case.

At public sittings held on June 27th and 28th, 1950, the Court heard oral statements submitted on behalf of the Secretary-General of the United Nations by the Assistant Secretary-General in charge of the Legal Department and on behalf of the Government of the United States of America and of the Government of the United Kingdom.

In its opinion the Court said that, although the literal sense did not completely exclude the possibility of appointing the third member before appointing both national commissioners, the natural and ordinary meaning of the term required that the latter be appointed before the third member. This clearly resulted from the sequence of events contemplated by the Article. Moreover, it was the normal order in arbitration practice and, in the absence of any express provision to the contrary, there was no reason to suppose that the parties wished to depart from it.

The Secretary-General's power to appoint a third member derived solely from the agreement of the parties, as expressed in the disputes clause of the treaties. By its very nature such a clause was to be strictly construed and could be applied only in the case expressly provided thereby. The case envisaged in the Treaties was that of the failure of the parties to agree upon the selection of the third member and not the much more serious one of a complete refusal of cooperation by one of them, taking the form of refusing to appoint its own Commissioner.

A change in the normal sequence of appointments could only be justified if it were shown by the attitude of the parties that they desired such a reversal to facilitate the constitution of Commissions in accordance with the terms of the Treaties. But such was not the present case. In these circumstances the appointment of the third member by the Secretary-General, instead of bringing about the constitution of a three-member Commission provided for by the Treaties, would result only in the constitution of a two-member Commission, not the kind of Commission for which the Treaties had provided. The opposition of the one national Commissioner could prevent the Commission from reaching any decision. It could decide only by unanimity, whereas the disputes clause provided for a majority decision. There was no doubt that the decisions of a two-member Commission, one of which was designated by one party only, would not have the same degree of moral authority as those of a three-member Commission.

In short, the Secretary-General would be authorized to proceed to the appointment of a third member only if it were possible to constitute a Commission in conformity with the Treaty provisions.

The Court had declared in its Opinion of March 30th that the Governments of Bulgaria, Hungary and Romania were under an obligation to appoint their representative to the Treaty Commissions. Refusal to fulfil a Treaty obligation would involve international responsibility. Nevertheless, such a refusal could not alter the conditions contemplated in the Treaties for the exercise of the Secretary-General's power of appointment. These conditions were not present in this case and their lack was not supplied by the fact that their absence was due to the breach of a Treaty obligation. The failure of machinery for settling disputes by reason of the practical impossibility of creating the Commission provided for in the Treaties was one thing; international responsibility another. One could not remedy the breach of a Treaty obligation by creating a Commission which was not the kind of Commission contemplated by the Treaties. It was the Court's duty to interpret Treaties, not to revise them.

Nor could the principle that a clause must be interpreted so as to give it practical effect justify the Court in attributing to the provisions a meaning which would be contrary to their letter and spirit.

The fact that an arbitration commission may make a valid decision although the original number of its members is later reduced, for instance, by withdrawal of one of the arbitrators, did not permit drawing an analogy with the case of the appointment of a third member by the Secretary-General in circumstances other than those contemplated in the Treaties, because this raised precisely the question of the initial validity of the constitution of the Commission.

Nor could it be said that a negative answer to Question III would seriously jeopardize the future of the many similar arbitration clauses in other treaties. The practice of arbitration showed that, whereas draftsmen of arbitration conventions often took care to provide for the consequences of the inability of the parties to agree upon the appointment of a third member, they had, apart from exceptional cases, refrained from contemplating the possibility of a refusal by a party to appoint its own Commissioner. The few Treaties containing express provisions on the matter indicated that the signatory States in those cases felt the impossibility of remedying the situation simply by way of interpretation of the Treaties. In fact, the risk was a small one as, normally, each party had a direct interest in the appointment of its Commissioner and must, in any case, be presumed to observe its Treaty obligations. That this was not so in the present case did not justify the Court in exceeding its judicial function on the pretext of remedying a default for the occurrence of which the Treaties had made no provision.

For those reasons the Court decided to answer Question III in the negative and therefore it was not necessary for it to consider Question IV.

The Court's answer was given by 11 votes to 2.

Judge Krylov, while joining in the conclusions of the Opinion and the general line of argument, declared himself unable to concur in the reasons dealing with international responsibility as, in his opinion, this problem went beyond the scope of the question put to the Court.

Judge Read and Azevedo appended statements of their dissenting opinions.

10. ASYLUM CASE

Judgment of 20 November 1950

The origin of the Colombian-Peruvian Asylum case lies in the asylum granted on January 3rd, 1949, by the Colombian Ambassador in Lima to M. Victor Raúl Haya de la Torre, head of a political party in Peru, the American People's Revolutionary Alliance. On October 3rd, 1948, a military rebellion broke out in Peru and proceedings were instituted against Haya de la Torre for the instigation and direction of that rebellion. He was sought out by the Peruvian authorities, but without success; and after asylum had been granted to the refugee, the Colombian Ambassador in Lima requested a safe-conduct to enable Haya de la Torre, whom he qualified as a political offender, to leave the country. The Government of Peru refused, claiming that Haya de la Torre had committed common crimes and was not entitled to enjoy the benefits of asylum. Being unable to reach an agreement, the two Governments submitted to the Court certain questions concerning their dispute; these questions were set out in an Application submitted by Colombia and in a Counter-Claim submitted by Peru.

In its Judgment, the Court, by fourteen votes to two, declared that Colombia was not entitled to qualify unilaterally and in a manner binding upon Peru the nature of the offence; by fifteen votes to one, it declared that the Government of Peru was not bound to deliver a safe-conduct to the refugee. On the other hand, the Court rejected by fifteen votes to one the Peruvian contention that Haya de la Torre was accused of common crimes; the Court noted that the only count against Haya de la Torre was that of military rebellion and military rebellion was not, in itself, a common crime. Lastly, by ten votes to six, the Court, without criticising the attitude of the Colombian Ambassador in Lima, considered that the requirements for asylum to be granted in conformity with the relevant treaties were not fulfilled at the time when he received Haya de la Torre. Indeed, according to the interpretation which the Court put upon the Convention of Havana, asylum could not be an obstacle to proceedings instituted by legal authorities operating in accordance with the law.

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The facts following which the case was brought before the Court are set out in the Judgment:

On October 3rd, 1948, a military rebellion broke out in Peru; it was suppressed the same day. On the following day, a decree was published charging a political party, the American People's Revolutionary Party, with having prepared and directed the rebellion. The head of the Party, Victor Raúl Haya de la Torre, was denounced as being responsible. With other members of the party, he was prosecuted on a charge of military rebellion. As he was still at liberty on November 16th, summonses were published ordering him to appear before the Examining Magistrate. On January 3rd, 1949, he was granted asylum in the Colombian Embassy in Lima. Meanwhile, on October 27th, 1948, a Military Junta had assumed power in Peru and had published a decree providing for Courts-martial for summary judgment in cases of rebellion, sedition and rioting; but this decree was not applied to the legal proceedings against Haya de la Torre and others, and it has been declared before the Court that this Decree was not applicable to the said proceedings. Furthermore, during the period from October 4th to the beginning of February, 1949, Peru was in a state of siege.

On January 4th, 1949, the Colombian Ambassador in Lima informed the Peruvian Government of the asylum granted to Haya de la Torre; at the same time he asked that a safe-conduct be issued to enable the refugee to leave the country. On January 14th, he further stated that the refugee had been qualified as a political refugee. The Peruvian Government disputed this qualification and refused to grant a safe-conduct. A diplomatic correspondence ensued which terminated in the signature, in Lima, on August 31st, 1949, of an Act by which the two Governments agreed to submit the case to the International Court of Justice.

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Colombia maintained before the Court that, according to the Convention in force—the Bolivarian Agreement of 1911 on Extradition, the Havana Convention of 1928 on Asylum, the Montevideo Convention of 1933 on Political Asylum—and according to American International Law, she was entitled to qualify the nature of the offence for the purposes of the asylum. In this connection, the Court considered that, if the qualification in question were provisional, there could be no doubt on that point: the diplomatic representative would consider whether the required conditions had been satisfied, he would pronounce his opinion and if that opinion were contested, a controversy would then arise which might be settled according to the methods provided by the Parties.

But it resulted from the proceedings in the case that Colombia claimed the right of unilateral and definitive qualification binding upon Peru. The first of the Treaties which it invoked—the Bolivarian Agreement, which is the Treaty on extradition—confined itself in one Article to recognizing the institution of asylum in accordance with the principles of international law. But these principles do not entail the right of unilateral qualification. On the other hand, when the Bolivarian Agreement laid down rules for extradition, it was not possible to deduce from them conclusions concerning diplomatic asylum. In the case of extradition, the refugee was on the territory of the State of refuge: if asylum were granted to him, such decision would not derogate from the sovereignty of the States in which the offence was committed. On the contrary, in the case of diplomatic asylum, the refugee was on the territory of the State in which he had committed the offence: the decision to grant asylum derogated from the sovereignty of the territorial State and removed the offender from the jurisdiction of that State.

As for the second treaty invoked by Colombia—the Havana Convention—it did not recognize the right of unilateral qualification either explicitly or implicitly. The third treaty—the Convention of Montevideo—had not been ratified by Peru and could be invoked against that country.

Finally, as regarded American international law, Colombia had not proved the existence, either regionally or locally, of a constant and uniform practice of unilateral qualification as a right of the State of refuge and an obligation upon the ter-

ritorial State. The facts submitted to the Court disclosed too much contradiction and fluctuation to make it possible to discern therein a usage peculiar to Latin America and accepted as law.

It therefore followed that Colombia, as the State granting asylum, was not competent to qualify the nature of the offence by a unilateral and definitive decision binding on Peru.

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Colombia also maintained that Peru was under the obligation to issue a safe-conduct to enable the refugee to leave the country in safety. The Court, setting aside for the time being the question of whether asylum was regularly granted and maintained, noted that the clause in the Havana Convention which provided guaranties for the refugee was applicable solely to a case where the territorial State demanded the departure of the refugee from its territory: it was only after such a demand that the diplomatic Agent who granted asylum could, in turn, require a safe-conduct. There was, of course, a practice according to which the diplomatic Agent immediately requested a safe-conduct, which was granted to him: but this practice, which was to be explained by reasons of expediency, laid no obligation upon the territorial State.

In the present case, Peru had not demanded the departure of the refugee and was therefore not bound to deliver a safe-conduct.

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In a counter-claim, Peru had asked the Court to declare that asylum had been granted to Haya de la Torre in violation of the Havana Convention, first, because Haya de la Torre was accused, not of a political offence but of a common crime and, secondly, because the urgency which was required under the Havana Convention in order to justify asylum was absent in that case.

Having observed that Peru had at no time asked for the surrender of the refugee, the Court examined the first point. In this connection, the Court noted that the only charge against the refugee was that of military rebellion, which was not a common crime. Consequently, the Court rejected the counter-claim of Peru on that point, declaring it to be ill-founded.

On the question of urgency, the Court, having observed that the essential justification of asylum lay in the imminence or persistence of a danger to the person of the refugee, analysed the facts of the case.

Three months had elapsed between the military rebellion and the grant of asylum. There was no question of protecting Haya de la Torre for humanitarian considerations against the violent and uncontrolled action of irresponsible elements of the population; the danger which confronted Haya de la Torre was that of having to face legal proceedings. The Havana Convention was not intended to protect a citizen who had plotted against the institutions of his country from regular legal proceedings. It was not sufficient to be accused of a political offence in order to be entitled to receive asylum; asylum could only intervene against the action of justice in cases where arbitrary action was substituted for the rule of law. It had not been proved that the situation in Peru at the time implied the subordination of justice to the executive or the abolition of judicial guarantees.

Besides, the Havana Convention was unable to establish a legal system which would guarantee to persons accused of political offences the privilege of evading their national jurisdiction. Such a conception would come into conflict with one of the oldest traditions of Latin America, that of non-intervention. For if the Havana Convention had wished to ensure general protection to all persons prosecuted for political crimes in the course of revolutionary events, for the sole reason that it should be presumed that such events interfere with the administration of justice, this would lead to foreign interference of a particularly offensive nature in the domestic affairs of States.

As for the numerous cases cited by Colombia, the Court was of opinion that considerations of convenience or political expediency seemed to have prompted the territorial State to recognize asylum without such as decision being dictated by any feeling of legal obligation. Asylum in Latin America was an institution which owed its development largely to extra-legal factors.

Whilst declaring that at the time at which asylum was granted, on January 3rd, 1949, there was no case of urgency within the meaning of the Havana Convention, the Judgment declared that this in no way constituted a criticism of the Colombian Ambassador. His appreciation of the case was not a relevant factor to the question of the validity of the asylum: only the objective reality of the facts was of importance.

The Court therefore came to the conclusion that the grant of asylum was not in conformity with Article 2, paragraph 2, of the Havana Convention.

The two submissions of Colombia were rejected, the first by fourteen votes to two (Judge Azevedo and M. Caicedo, Judge *ad hoc*), the second by fifteen votes to one (Judge Caicedo). As for the counter-claim of the Government of Peru, it was rejected by fifteen votes to one in so far as it was founded on a violation of the Article of the Havana Convention providing that asylum shall not be granted to persons accused of common crimes. But on the second point, the counter-claim was allowed by ten votes to six. (Judges Alvarez, Zoricic, Badawi Pasha, Read and Azevedo and M. Caicedo, Judge *ad hoc*.)

The dissenting opinions of Judges Alvarez, Badawi Pasha, Read, Azevedo, and M. Caicedo, Judge *ad hoc*, were appended to the Judgment. In respect of the second point of the counter-claim, Judge Zoricic subscribed to the opinion of Judge Read.

11. REQUEST FOR INTERPRETATION OF THE JUDGMENT OF 20 NOVEMBER 1950 IN THE ASYLUM CASE

Judgment of 27 November 1950

The judgment deals with the request for an interpretation of the Judgment which the Court had delivered on November 20th, in the Asylum Case (Colombia-Peru). This request had been submitted to the Court in the name of the Colombian Government on the very day when the judgment to be interpreted was delivered.

By twelve votes to one the Court, including two judges *ad hoc*, one designated by the Colombian Government and the other by the Peruvian Government, held that the request was inadmissible.

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In its Judgment, the Court recalls that the first condition which must be fulfilled to enable it to give an interpretation under the provisions of the Statute, is that the real purpose of the request should be to obtain an interpretation of the Judgment. This means that its object must be solely to obtain clarification as to the meaning and scope of what had been decided by the Judgment with binding force. It is also necessary that there should be a dispute between the Parties as to the meaning and scope of that Judgment.

The Court then notes that the Government of Colombia asked it to reply to three questions: Is the Judgment of November 20th, 1950, to be construed as meaning:

(*a*) that legal effects are to be attributed to the qualification made by the Colombian Ambassador at Lima of the offence imputed to M. Haya de la Torre?

(*b*) that Peru is not entitled to demand surrender of the refugee, and that Colombia is not bound to surrender him?

(*c*) or, on the contrary, that Colombia is bound to surrender the refugee?

On the first question, the Court found that the point had not been submitted to it by the Parties: the Court had been asked to decide only on a submission presented by Colombia in abstract and general terms.

The other two questions in reality amount to an alternative, dealing with the surrender of the refugee. This point also had not been included in the submissions of the Parties: the Court therefore could make no decision upon it. It was for the Parties to present their respective claims on this point, which they abstained from doing. When Colombia claims to detect "gaps" in the Judgment, these gaps in reality concern new points on which decision cannot be obtained by means of an interpretation: this interpretation may in no way go beyond the limits of the Judgment, as fixed in advance by the submissions of the Parties.

Finally, the condition required by the Statute that there should be a dispute is not satisfied: no dispute between the Parties had been brought to the attention of the Court, and it is shown by the very date of the request for an interpretation that such a dispute could not possibly have arisen in any way whatever.

For these reasons, the Court declared that the request for an interpretation presented by Colombia was inadmissible.

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M. Caicedo Castilla, Judge *ad hoc* designated by the Colombian Government, declared that he was unable to join in the Judgment. His declaration is appended to the Judgment.

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12. RESERVATIONS TO THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

Advisory Opinion of 28 May 1951

The question concerning reservations to the Convention on the Prevention and Punishment of the Crime of Genocide had been referred for an advisory opinion to the Court by the General Assembly of the United Nations (G.A. resolution of November 16, 1950) in the following terms:

"In so far as concerns the Convention on the Prevention and Punishment of the Crime of Genocide in the event of a State ratifying or acceding to the Convention subject to a reservation made either on ratification or on accession, or on signature followed by ratification:

"I. Can the reserving State be regarded as being a party to the Convention while still maintaining its reservation if the reservation is objected to by one or more of the parties to the Convention but not by others?

"II. If the answer to question I is in the affirmative, what is the effect of the reservation as between the reserving State and:

(*a*) The parties which object to the reservation?

(*b*) Those which accept it?

"III. What would be the legal effect as regards the answer to question I if an objection to a reservation is made:

(*a*) By a signatory which has not yet ratified?

(*b*) By a State entitled to sign or accede but which has not yet done so?"

Written statements on the matter were submitted to the Court by the following States and Organizations:

The Organization of American States, the Union of Soviet Socialist Republics, the Hashemite Kingdom of Jordan, the United States of America, the United Kingdom of Great Brit-

ain and Northern Ireland, the Secretary-General of the United Nations, Israel, the International Labour Organisation, Poland, Czechoslovakia, the Netherlands, the People's Republic of Romania, the Ukrainian Soviet Socialist Republic, the People's Republic of Bulgaria, the Byelorussian Soviet Socialist Republic, the Republic of the Philippines.

In addition, the Court heard oral statements submitted on behalf of the Secretary-General of the United Nations and of the Governments of Israel, the United Kingdom and France.

By 7 votes to 5 the Court gave the following answers to the questions referred to:

On Question I:

a State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention; otherwise, that State cannot be regarded as being a party to the Convention.

On Question II:

(*a*) if a party to the Convention objects to a reservation which it considers to be incompatible with the object and purpose of the Convention, it can in fact consider that the reserving State is not a party to the Convention;

(*b*) if, on the other hand, a party accept the reservation as being compatible with the object and purpose of the Convention, it can in fact consider that the reserving State is a party to the Convention;

On Question III:

(*a*) an objection to a reservation made by a signatory State which has not yet ratified the Convention can have the legal effect indicated in the reply to Question I only upon ratification. Until that moment it merely serves as a notice to the other State of the eventual attitude of the signatory State;

(*b*) an objection to a reservation made by a State which is entitled to sign or accede but which has not yet done so is without legal effect.

Two dissenting opinions were appended to the Opinion: one by Vice-President Guerrero and Judges Sir Arnold McNair, Read and Hsu Mo, the other by Judge Alvarez.

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In its Opinion, the Court begins by refuting the arguments put forward by certain Governments against its competence to exercise its advisory functions in the present case. The Court then dealt with the questions referred to it, after having noted that they were expressly limited to the Convention on Genocide and were purely abstract in character.

The first question refers to whether a State which has made a reservation can, while maintaining it, be regarded as a party to the Convention on Genocide, when some of the parties object to the reservation. In its treaty relations, a State cannot be bound without its consent. A reservation can be effected only with its agreement. On the other hand, it is a recognised principle that a multilateral Convention is the result of an agreement freely concluded. To this principle was linked the notion of integrity of the Convention as adopted, a notion which, in its traditional concept, involved the proposition that no reservation was valid unless it was accepted by all contracting parties. This concept retains undisputed value as a principle, but as regards the Genocide Convention, its application is made more flexible by a variety of circumstances among which may be noted the universal character of the United Nations under whose auspices the Convention was concluded and the very wide degree of participation which the Convention itself has envisaged. This participation in conventions of this type has already given rise to greater flexibility in practice. More general resorts to reservations, very great allowance made to tacit assent to reservations, the admission of the State which has made the reservation as a party to the Convention in relation to the States which have accepted it, all these factors are manifestations of a new need for flexibility in the operation of multilateral conventions. Moreover, the Convention on Genocide, although adopted unanimously, is nevertheless the result of a series of majority votes—which may make it necessary for certain States to make reservations.

In the absence of an article in the Convention providing for reservations, one cannot infer that they are prohibited. In the absence of any express provisions on the subject, to determine the possibility of making reservations as well as their effects, one must consider their character, their purpose, their provisions, their mode of preparation and adoption. The preparation of the Convention on Genocide shows that an undertaking was reached within the General Assembly on the faculty to make reservations and that it is permitted to conclude therefrom that States, becoming parties to the Convention, gave their assent thereto.

What is the character of the reservations which may be made and the objections which may be raised thereto? The solution must be found in the special characteristics of the Convention on Genocide. The principles underlying the Convention are recognised by civilised nations as binding on States even without any conventional obligation. It was intended that the Convention would be universal in scope. Its purpose is purely humanitarian and civilising. The contracting States do not have any individual advantages or disadvantages nor interests of their own, but merely a common interest. This leads to the conclusion that the object and purpose of the Convention imply that it was the intention of the General Assembly and of the States which adopted it, that as many States as possible should participate. This purpose would be defeated if an objection to a minor reservation should produce complete exclusion from the Convention. On the other hand, the contracting parties could not have intended to sacrifice the very object of the Convention in favour of a vague desire to secure as many participants as possible. It follows that the compatibility of the reservation and the object and the purpose of the Convention is the criterion to determine the attitude of the State which makes the reservation and of the State which objects. Consequently, question I, on account of its abstract character, cannot be given an absolute answer. The appraisal of a reservation and the effect of objections depend upon the circumstances of each individual case.

The Court then examined question II by which it was requested to say what was the effect of a reservation as between the reserving State and the parties which object to it and those which accept it. The same considerations apply. No State can be bound by a reservation to which it has not consented, and therefore each State, on the basis of its individual appraisals of the reservations, within the limits of the criterion of the object and purpose stated above, will or will not consider the reserving State to be a party to the Convention. In the ordinary course of events, assent will only affect the relationship between the two States. It might aim, however, at the complete exclusion from the Convention in a case where it was expressed by the adoption of a position on the jurisdictional plane: certain parties might consider the assent

as incompatible with the purpose of the Convention, and might wish to settle the dispute either by special agreement or by the procedure laid down in the Convention itself.

The disadvantages which result from this possible divergence of views are real. They could have been remedied by an article on reservations. They are mitigated by the common duty of the contracting States to be guided in their judgment by the compatibility or incompatibility of the reservation with the object and purpose of the Convention. It must clearly be assumed that the contracting States are desirous of preserving intact at least what is essential to the object of the Convention.

The Court finally turned to question III concerning the effect of an objection made by a State entitled to sign and ratify but which had not yet done so, or by a State which has signed but has not yet ratified. In the former case, it would be inconceivable that a State possessing no rights under the Convention could exclude another State. The case of the signatory States is more favourable. They have taken certain steps necessary for the exercise of the right of being a party. This provisional status confers upon them a right to formulate as a precautionary measure objections which have themselves a provisional character. If signature is followed by ratification, the objection becomes final. Otherwise, it disappears. Therefore, the objection does not have an immediate legal effect but expresses and proclaims the attitude of each signatory State on becoming a party.

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13. HAYA DE LA TORRE CASE

Judgment of 13 June 1951

The Haya de la Torre case between Colombia and Peru, with Cuba as intervening Party, was brought before the Court under the following circumstances:

In a Judgment delivered on November 20th, 1950, the Court had defined the legal relations between Colombia and Peru in regard to questions which those States had submitted to it, concerning diplomatic asylum in general and, in particular, the asylum granted on January 3rd/4th, 1949, by the Colombian Ambassador at Lima to Victor Raul Haya de la Torre; the Court had found that, in this case, the asylum had not been granted in conformity with the Convention on Asylum signed at Havana in 1928. After the Judgment had been delivered, Peru requested Colombia to execute it, and called upon her to put an end to a protection improperly granted by surrendering the refugee. Colombia replied that to deliver the refugee would be not only to disregard the Judgment of November 20th, but also to violate the Havana Convention; and she instituted proceedings before the Court by an Application which was filed on December 13th, 1950.

In her Application, and during the procedure, Colombia asked the Court to state in what manner the Judgment of November 20th, 1950, was to be executed, and, furthermore, to declare that, in executing that Judgment, she was not bound to surrender Haya de la Torre. Peru, for her part, also asked the Court to state in what manner Colombia should execute the Judgment. She further asked, first, the rejection of the Colombian Submission requesting the Court to state, solely, that she was not bound to surrender Haya de la Torre, and, secondly, for a declaration that the asylum ought to have ceased immediately after the delivery of the Judgment of November 20th, 1950, and that it must in any case cease forthwith, in order that Peruvian justice might resume its normal course which had been suspended.

In its Haya de la Torre judgment the Court declared:

by a unanimous vote that it is not part of the Court's judicial functions to make a choice among the different ways in which the asylum may be brought to an end;

by thirteen votes against one, that Colombia is under no obligation to surrender Haya de la Torre to the Peruvian authorities;

by a unanimous vote that the asylum ought to have ceased after the delivery of the Judgment of November 20th, 1950, and must be brought to an end.

In its Judgment, the Court examines, in the first place, the admissibility of the Cuban Government's intervention. That Government, availing itself of the right which the Statute of the Court confers on States parties to a convention, the interpretation of which is in issue, had filed a Declaration of Intervention in which it set forth its views concerning the interpretation of the Havana Convention. The Government of Peru contended that the Intervention was inadmissible: that it was out of time, and was really in the nature of an attempt by a third State to appeal against the Judgment of November 20th. In regard to that point, the Court observes that every intervention is incidental to the proceedings in a case, that, consequently, a declaration filed as an intervention only acquires that character if it actually relates to the subject-matter of the pending proceedings. The subject matter of the present case relates to a new question—the surrender of Haya de la Torre to the Peruvian authorities—which was completely outside the Submissions of the parties and was in consequence not decided by the Judgment of November 20th. In these circumstances, the point which it is necessary to ascertain is whether the object of the intervention is the interpretation of the Havana Convention in regard to the question whether Colombia is under an obligation to surrender the refugee: as, according to the representative of the Government of Cuba, the intervention was based on the fact that it was necessary to interpret a new aspect of the Havana Convention, the Court decided to admit it.

The Court goes on to discuss the merits. It observes that both parties are seeking to obtain a decision as to the manner in which the Judgment of November 20th is to be executed. That Judgment, in deciding on the regularity of the asylum, confined itself to defining the legal relations which the Havana Convention had established, in regard to this matter, between the parties; it did not give any directions to the parties, and only entailed for them the obligation of compliance with the Judgment. However, the form in which the parties have formulated their submissions shows that they desire that the Court should make a choice among the various courses by which the asylum might be terminated. These courses are conditioned by facts and possibilities which, to a very large extent, the parties are alone in a position to appreciate. A choice among them could not be based on legal considerations, but only on grounds of practicability or of political expediency. Consequently, it is not part of the Court's judicial function to make such a choice, and it is impossible

for it to give effect to the submissions of the parties in this respect.

As regards the surrender of the refugee, this is a new question, which was only brought before the Court by the Application of December 13th, 1950, and which was not decided by the Judgment of November 20th. According to the Havana Convention, diplomatic asylum, which is a provisional measure for the temporary protection of political offenders, must be terminated as soon as possible. However, the Convention does not give a complete answer to the question of the manner in which an asylum must be terminated. As to persons guilty of common crimes, it expressly requires that they be surrendered to the local authorities. For political offenders it prescribes the grant of a safe-conduct for the departure from the country. But a safe-conduct can only be claimed if the asylum has been regularly granted and maintained and if the territorial State has required that the refugee should be sent out of the country. For cases in which the asylum has not been regularly granted and where the territorial State has made no such demand, the Convention makes no provision. To interpret this silence as imposing an obligation to surrender the refugee would be repugnant to the spirit which animated the Convention in conformity with the Latin American tradition in regard to asylum, a tradition in accordance with which a political refugee ought not to be surrendered. There is nothing in that tradition to indicate that an exception should be made in case of an irregular asylum. If it had been intended to abandon that tradition, an express provision to that effect would have been needed. The silence of the Convention implies that it was intended to leave the adjustment of the consequences of such situations to decisions inspired by considerations of convenience or simple political expediency.

It is true that, in principle, asylum cannot be opposed to the operation of the national justice, and the safety which arises from asylum cannot be construed as a protection against the laws and the jurisdiction of the legally constituted tribunals. The Court declared this in its Judgment of November 20th. But it would be an entirely different thing to say that there is an obligation to surrender a person accused of a political offence because the asylum was irregular. That would amount to rendering positive assistance to the local authorities in their prosecution of a political refugee, and would be greatly exceeding the findings of the Court in its Judgment of November 20th; such assistance could not be admitted without an express provision to that effect in the Convention. As concerns Haya de la Torre, the Court declared in its Judgment of November 20th, on the one hand, that it had not been proved that, before asylum was granted, he had been accused of common crimes; on the other hand, it found that the asylum had not been granted to him in conformity with the Convention. Consequently, and in view of the foregoing considerations, Colombia is not obliged to surrender him to the Peruvian authorities.

Finally, the Court examines the Peruvian submissions which Colombia asked it to dismiss, concerning the termination of the asylum. The Court states that the Judgment of November 20th, declaring that the asylum was irregularly granted entails a legal consequence, namely, that of putting an end to this irregularity by terminating the asylum. Peru is therefore legally entitled to claim that the asylum should cease. However, Peru has added that the asylum should cease "in order that Peruvian justice may resume its normal course which has been suspended." This addition, which appears to involve the indirect claim for the surrender of the refugee, cannot be accepted by the Court.

The Court thus arrives at the conclusion that the asylum must cease, but that Colombia is not bound to discharge her obligation by surrendering the refugee. There is no contradiction between these two findings, since surrender is not the only manner in which asylum may be terminated.

Having thus defined, in accordance with the Havana Convention, the legal relations between the parties with regard to the matters referred to it, the Court declares that it has completed its task. It is unable to give any practical advice as to the various courses which might be followed with a view to terminating the asylum, since, by so doing, it would depart from its judicial function. But it can be assumed that the parties, now that their mutual legal relations have been made clear, will be able to find a practical and satisfactory solution, seeking guidance from those considerations of courtesy and good neighbourliness which, in matters of asylum, have always held a prominent place in the relations between the Latin American Republics.

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14. FISHERIES CASE

Judgment of 18 December 1951

The Fisheries Case was brought before the Court by the United Kingdom of Great Britain and Northern Ireland against Norway.

By a Decree of July 12th, 1935, the Norwegian Government had, in the northern part of the country (north of the Arctic Circle) delimited the zone in which the fisheries were reserved to its own nationals. The United Kingdom asked the Court to state whether this delimitation was or was not contrary to international law. In its Judgment the Court found that neither the method employed for the delimitation by the Decree, nor the lines themselves fixed by the said Decree, are contrary to international law; the first finding is adopted by ten votes to two, and the second by eight votes to four.

Three Judges—MM. Alvarez, Hackworth and Hsu Mo—appended to the Judgment a declaration or an individual opinion stating the particular reasons for which they reached their conclusions; two other Judges—Sir Arnold McNair and Mr. J. E. Read—appended to the Judgment statements of their dissenting Opinions.

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The situation which gave rise to the dispute and the facts which preceded the filing of the British Application are recalled in the Judgment.

The coastal zone concerned in the dispute is of a distinctive configuration. Its length as the crow flies exceeds 1,500 kilometres. Mountainous along its whole length, very broken by fjords and bays, dotted with countless islands, islets and reefs (certain of which form a continuous archipelago

known as the *skjaergaard*, "rock rampart"), the coast does not constitute, as it does in practically all other countries in the world a clear dividing line between land and sea. The land configuration stretches out into the sea and what really constitutes the Norwegian coastline is the outer line of the land formations viewed as a whole. Along the coastal zone are situated shallow banks which are very rich in fish. These have been exploited from time immemorial by the inhabitants of the mainland and of the islands: they derive their livelihood essentially from such fishing.

In past centuries British fisherman had made incursions in the waters near the Norwegian coast. As a result of complaints from the King of Norway, they abstained from doing so at the beginning of the 17th century and for 300 years. But in 1906 British vessels appeared again. These were trawlers equipped with improved and powerful gear. The local population became perturbed, and measures were taken by Norway with a view to specifying the limits within which fishing was prohibited to foreigners. Incidents occurred, became more and more frequent, and on July 12th, 1935 the Norwegian Government delimited the Norwegian fisheries zone by Decree. Negotiations had been entered into by the two Governments; they were pursued after the Decree was enacted, but without success. A considerable number of British trawlers were arrested and condemned in 1948 and 1949. It was then that the United Kingdom Government instituted proceedings before the Court.

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The Judgment first specifies the subject of the dispute. The breadth of the belt of Norwegian territorial sea is not an issue: the four-mile limit claimed by Norway has been acknowledged by the United Kingdom. But the question is whether the lines laid down by the 1935 Decree for the purpose of delimiting the Norwegian fisheries zone have or have not been drawn in accordance with international law. (These lines, called "base-lines", are those from which the belt of the territorial sea is reckoned). The United Kingdom denies that they have been drawn in accordance with international law, and it relies on principles which it regards as applicable to the present case. For its part, Norway, whilst not denying that rules do exist, contends that those put forward by the United Kingdom are not applicable; and it further relies on its own system of delimitation which it asserts to be in every respect in conformity with international law. The Judgment first examines the applicability of the principles put forward by the United Kingdom, then the Norwegian system, and finally the conformity of that system with international law.

The first principle put forward by the United Kingdom is that the base-line must be low-water mark. This indeed is the criterion generally adopted in the practice of States. The parties agree as to this criterion, but they differ as to its application. The geographic realities described above, which inevitably lead to the conclusion that the relevant line is not that of the mainland, but rather that of the "*skjaergaard*", also lead to the rejection of the requirement that the base-line should always follow low-water mark. Drawn between appropriate points on this low-water mark, departing from the physical coastline to a reasonable extent, the base-line can only be determined by means of a geometric construction. Straight lines will be drawn across well-defined bays, minor curvatures of the coastline, and sea areas separating islands, islets and reefs, thus giving a simpler form to the belt of territorial waters. The drawing of such lines does not constitute an exception to a rule: it is this rugged coast, viewed as a whole, that calls for the method of straight base-lines.

Must there be a maximum length for straight lines, as contended by the United Kingdom, except in the case of the closing line of internal waters to which the United Kingdom concedes that Norway has a historic title? Although certain States have adopted the ten-mile rule for the closing lines of bays, others have adopted a different length: consequently the ten-mile rule has not acquired the authority of a general rule of international law, neither in respect of bays nor the waters separating the islands of an archipelago. Furthermore, the ten-mile rule is inapplicable as against Norway inasmuch as she has always opposed its application to the Norwegian coast.

Thus the Court, confining itself to the Conclusions of the United Kingdom, finds that the 1935 delimitation does not violate international law. But the delimitation of sea areas has always an international aspect since it interests States other than the coastal State; consequently, it cannot be dependent merely upon the will of the latter. In this connection certain basic considerations inherent in the nature of the territorial sea bring to light the following criteria which can provide guidance to Courts: since the territorial sea is closely dependent upon the land domain, the base-line must not depart to any appreciable extent from the general direction of the coast; certain waters are particularly closely linked to the land formations which divide or surround them (an idea which should be liberally applied in the present case, in view of the configuration of the coast); it may be necessary to have regard to certain economic interests peculiar to a region when their reality and importance are clearly evidenced by a long usage.

Norway puts forward the 1935 Decree as the application of a traditional system of delimitation in accordance with international law. In its view, international law takes into account the diversity of facts and concedes that the delimitation must be adapted to the special conditions obtaining in different regions. The Judgment notes that a Norwegian Decree of 1812, as well as a number of subsequent texts (Decrees, Reports, diplomatic correspondence) show that the method of straight lines, imposed by geography, has been established in the Norwegian system and consolidated by a constant and sufficiently long practice. The application of this system encountered no opposition from other States. Even the United Kingdom did not contest it for many years: it was only in 1933 that the United Kingdom made a formal and definite protest. And yet, traditionally concerned with maritime questions, it could not have been ignorant of the reiterated manifestations of Norwegian practice, which was so well-known. The general toleration of the international community therefore shows that the Norwegian system was not regarded as contrary to international law.

But, although the 1935 Decree did indeed conform to this method (one of the findings of the Court), the United Kingdom contends that certain of the base-lines adopted by the Decree are without justification from the point of view of the criteria stated above: it is contended that they do not respect the general direction of the coast and have not been drawn in a reasonable manner.

Having examined the sectors thus criticised, the Judgment concludes that the lines drawn are justified. In one case—that of Svaerholthavet—what is involved is indeed a basin having the character of a bay although it is divided into two large fjords. In another case—that of Lopphavet—the divergence between the base-line and the land formations is not such that

it is a distortion of the general direction of the Norwegian coast; furthermore, the Norwegian Government has relied upon an historic title clearly referable to the waters of Lopphavet: the exclusive privilege to fish and hunt whales granted in the 17th century to a Norwegian subject, from which it follows that these waters were regarded as falling exclusively within Norwegian sovereignty. In a third case—that of the Vestfjord—the difference is negligible: the settlement of such questions, which are local in character and of secondary importance, should be left to the coastal State.

For these reasons, the Judgment concludes that the method employed by the Decree of 1935 is not contrary to international law; and that the base-lines fixed by the Decree are not contrary to international law either.

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15. AMBATIELOS CASE (PRELIMINARY OBJECTION)

Judgment of 1 July 1952

The proceedings in the Ambatielos Case (Preliminary Objection), between Greece and the United Kingdom of Great Britain and Northern Ireland had been instituted by an Application by the Hellenic Government which, having taken up the case of one of its nationals, the shipowner Ambatielos, prayed the Court to declare that the claim which the latter had made against the Government of the United Kingdom must, in accordance with the terms of the Treaties concluded in 1886 and in 1926 between Greece and the United Kingdom, be submitted to arbitration. The Government of the United Kingdom, on the other hand, contended that the Court lacked jurisdiction to decide on that question. In its Judgment the Court found by ten votes to five that it had jurisdiction to decide whether the United Kingdom was under an obligation to submit to arbitration the difference as to the validity of the Ambatielos claim, in so far as this claim was based on the Anglo-Hellenic Treaty of 1886.

Judge Levi Carneiro and M. Spiropoulos, Judge *ad hoc*, appended their individual opinions to the Judgment. Five Judges—Sir Arnold McNair, Basdevant, Zoricic, Klaestad and Hsu Mo—appended their dissenting opinions to the Judgment.

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In its Judgment, the Court indicates the nature of Ambatielos's claim: it was alleged that he had suffered considerable loss in consequence of a contract which he concluded in 1919 with the Government of the United Kingdom (represented by the Ministry of Shipping) for the purchase of nine steamships which were then under construction, and in consequence of certain adverse judicial decisions in the English Courts in connection therewith. The Court refers to the treaty clauses relied on by the Parties: the Protocol annexed to the Treaty of 1886, which provides that controversies that may arise in connection with that treaty shall be referred to arbitration; the Treaty of 1926, which contains a similar clause; the Declaration accompanying that treaty, which states that the latter does not prejudice claims based on the Treaty of 1886 and that any difference that may arise in respect of such claims shall be submitted to arbitration in accordance with the provisions of the Protocol of 1886.

The Court then goes on to review the submissions of the Parties as they were developed during the proceedings. It is evident from this review that both Parties ask the Court to decide as to its jurisdiction and whether there is an obligation to submit the difference to arbitration. It is also evident that both Parties envisaged that the Court itself might undertake the function of arbitration, but there was some doubt as to the conditions which they would consider requisite, and in the absence of a clear agreement between the Parties on that point, the Court considers that it has no jurisdiction to go into all the merits of the present case.

The Court then proceeds to examine the different arguments put forward by the United Kingdom Government in support of its Preliminary Objection to the jurisdiction and those advanced by the Hellenic Government in reply thereto. Article 29 of the Treaty of 1926 enables either of the Parties to submit to the Court any dispute as to the interpretation or the application of any of the provisions of that Treaty. But it has no retroactive effect; accordingly, the Court finds it impossible to accept the theory advanced on behalf of the Hellenic Government, that where in the 1926 Treaty there are substantive provisions similar to substantive provisions of the 1886 Treaty, then under Article 29 of the 1926 Treaty the Court can adjudicate upon the validity of a claim based on an alleged breach of any of these similar provisions, even if the alleged breach took place wholly before the new Treaty came into force. It is therefore impossible to hold that any of its provisions must be deemed to have been in force earlier. Moreover, the Declaration accompanying the Treaty of 1926 makes no distinction between claims based on one class of provisions of the Treaty of 1886 and those based on another class; they are all placed on the same footing, and differences relating to their validity are referable to the same arbitral procedure.

The Government of the United Kingdom has contended—and that is the most important of its arguments—that the Declaration was not a part of the Treaty within the meaning of Article 29. The Court does not agree with that view. The Treaty, the customs schedule appended thereto and the Declaration were included by the plenipotentiaries in a single document, published in the same way in the English *Treaty Series*, and registered under a single number with the League of Nations. The instruments of ratification of the two Parties cite the three texts without making any distinction between them. The British instrument of ratification even declares that the Treaty is "word for word as follows": after which it goes on to cite the three texts in their entirety. Moreover, the very nature of the Declaration also points to the same conclusion. It records an understanding arrived at by the Parties before the Treaty of 1926 was signed as to what the Treaty, or as Counsel for the Government of the United Kingdom preferred to put it, the replacement of the Treaty of 1886 by the Treaty of 1926, would not prejudice. For these reasons, the Court holds that the provisions of the Declaration are provisions of the Treaty within the meaning of Article 29. Consequently, this Court has jurisdiction to decide any dispute as to the interpretation or application of the Declaration and, in a proper case, to adjudge that there should be a reference to a

Commission of Arbitration. Any differences as to the validity of the claims involved will, however, have to be arbitrated, as provided in the Declaration itself, by the Commission.

The United Kingdom has also contended that the Declaration only covered claims formulated before it came into force. But the Declaration contains no reference to any date. Moreover, the result of such an interpretation would be that claims based on the Treaty of 1886, but brought after the conclusion of the Treaty of 1926, would be left without a solution. They would not be subject to arbitration under either Treaty, although the provision on whose breach the claim was based might appear in both and might thus have been in force without a break since 1886. The Court cannot accept an interpretation which would have a result obviously contrary to the language of the Declaration and to the continuous will of both Parties to submit all differences to arbitration of one kind or another.

For these reasons, the Court finds, by thirteen votes to two, that is is without jurisdiction to decide on the merits of the Ambatielos claim; and by ten votes to five, that it has jurisdiction to decide whether the United Kingdom is under an obligation to submit to arbitration, in accordance with the Declaration of 1926, the difference as to the validity of the Ambatielos claim, in so far as this claim is based on the Treaty of 1886.

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16. ANGLO-IRANIAN OIL CO. CASE (PRELIMINARY OBJECTION)

Judgment of 22 July 1952

The Anglo-Iranian Oil Company case had been submitted to the Court by the United Kingdom Government on May 26th, 1951, and had been the subject of an Objection on the ground of lack of jurisdiction by the Government of Iran.

By nine votes against five, the Court declared that it lacked jurisdiction. The Judgment was followed by a separate opinion by Sir Arnold McNair, President of the Court, who, while concurring in the conclusion reached in the Judgment, for which he had voted, added some reasons of his own which had led him to that conclusion. The Judgment was also followed by four dissenting opinions by Judges Alvarez, Hackworth, Read and Levi Carneiro.

On July 5th, 1951, the Court had indicated interim measures of protection in this case, pending its final decision, stating expressly that the question of the jurisdiction of the merits was in no way prejudged. In its Judgment, the Court declared that the Order of July 5th, 1951, ceased to be operative and that the provisional measures lapsed at the same time.

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The Judgment begins by recapitulating the facts. In April, 1933, an agreement was concluded between the Government of Iran and the Anglo-Iranian Oil Company. In March, April and May, 1951, laws were passed in Iran, enunciating the principle of the nationalisation of the oil industry in Iran and establishing procedure for the enforcement of this principle. The result of these laws was a dispute between Iran and the Company. The United Kingdom adopted the cause of the latter, and in virtue of its right of diplomatic protection it instituted proceedings before the Court, whereupon Iran disputed the Court's jurisdiction.

The Judgment refers to the principle according to which the will of the Parties is the basis of the Court's jurisdiction, and it notes that in the present case the jurisdiction depends on the Declarations accepting the compulsory jurisdiction of the Court made by Iran and by the United Kingdom under Article 36, paragraph 2, of the Statute. These Declarations contain the condition of reciprocity, and as that of Iran is more limited, it is upon that Declaration that the Court must base itself.

According to this Declaration, the Court has jurisdiction only when a dispute relates to the application of a treaty or convention accepted by Iran. But Iran maintains that, according to the actual wording of the text, the jurisdiction is limited to treaties subsequent to the Declaration. The United Kingdom maintains, on the contrary, that earlier treaties may also come into consideration. In the view of the Court, both contentions might, strictly speaking, be regarded as compatible with the text. But the Court cannot base itself on a purely grammatical interpretation: it must seek the interpretation which is in harmony with a natural and reasonable way of reading the text, having due regard to the intention of Iran at the time when it formulated the Declaration. A natural and reasonable way of reading the text leads to the conclusion that only treaties subsequent to the ratification come into consideration. In order to reach an opposite conclusion, special and clearly established reasons would be required: but the United Kingdom was not able to produce them. On the contrary, it may be admitted that Iran had special reasons for drafting her Declaration in a very restrictive manner, and for excluding the earlier treaties. For, at that time, Iran had denounced all the treaties with other States relating to the régime of capitulations; she was uncertain as to the legal effect of these unilateral denunciations. In such circumstances, it is unlikely that she should have been willing on her own initiative to agree to submit to an international court disputes relating to all these treaties. Moreover, the Iranian law by which the Najlis approved and adopted the Declaration, before it was ratified, provides a decisive confirmation of Iran's intention, for it states that the treaties and conventions which come into consideration are those which "the Government will have accepted after the ratification".

The earlier treaties are thus excluded by the Declaration, and the United Kingdom cannot therefore rely on them. It has invoked some subsequent treaties: namely those of 1934 with Denmark and Switzerland, and that of 1937 with Turkey, by which Iran had undertaken to treat the nationals of those Powers in accordance with the principles and practice of ordinary international law. The United Kingdom claims that the Anglo-Iranian Oil Company has not been treated in accordance with those principles and that practice; and in order to rely on the above-mentioned treaties, though concluded with third parties, it founds itself on the most-favoured-nation clause contained in two instruments which it concluded with Iran: the treaty of 1857 and the commercial

convention of 1903. But the two latter treaties, which form the sole legal connection with the treaties of 1934 and 1937, are anterior to the Declaration: the United Kingdom cannot therefore rely on them, and, consequently, it cannot invoke the subsequent treaties concluded by Iran with third States.

But did the settlement of the dispute between Iran and the United Kingdom, effected in 1933 through the mediation of the League of Nations, result in an agreement between the two Governments which may be regarded as a treaty or convention? The United Kingdom maintains that it did: it claims that the agreement signed in 1933 between the United Kingdom and the Company had a double character: being at once a concessionary contract and a treaty between the two States. In the view of the Court, that it not the case. The United Kingdom is not a party to the contract, which does not constitute a link between the two Governments or in any way regulate the relations between them. Under the contract, Iran cannot claim from the United Kingdom any rights which it may claim from the Company, nor can it be called upon to perform towards the United Kingdom any obligations which it is bound to perform towards the Company. This juridical situation is not altered by the fact that the concessionary contract was negotiated through the good offices of the Council of the League of Nations, acting through its rapporteur. The United Kingdom in submitting its dispute with Iran to the League Council, was only exercising its right of diplomatic protection in favour of one of its nationals.

Thus the Court arrives at the conclusion that it lacks jurisdiction.

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17. CASE CONCERNING RIGHTS OF NATIONALS OF THE UNITED STATES OF AMERICA IN MOROCCO

Judgment of 27 August 1952

The proceedings in the case concerning rights of nationals of the United States of America in Morocco were instituted against the United States by an Application of the Government of the French Republic.

The submissions of the Parties related to the following principal points:

The application to nationals of the United States of the Residential Decree of December 30th, 1948, by which imports without official allocation of currency (imports from the United States) were, in the French Zone of Morocco, subjected to a system of licensing control;

The extent of the consular jurisdiction which the United States may exercise in the French Zone of Morocco;

The right to levy taxes on nationals of the United States in Morocco (the question of fiscal immunity); with particular reference to the consumption taxes provided for by the Shereefian Dahir of February 28th, 1948;

The method of assessing the value, under Article 95 of the General Act of Algeciras of 1906, of goods imported into Morocco.

In its Judgment, the Court held:

1. (Unanimously) The Residential Decree of December 30th, 1948, exempted France from control of imports, while the United States was subjected to such control; it thus involved a discrimination in favour of France. This differential treatment was not compatible with the Act of Algeciras, by virtue of which the United States can claim to be treated as favourably as France, as far as economic matters in Morocco are concerned. The French submissions, that this Decree is in conformity with the economic system which is applicable to Morocco, must therefore be rejected.

2. (Unanimously) With regard to consular jurisdiction in the French Zone of Morocco, the United States is entitled to exercise such jurisdiction in accordance with the terms of its Treaty with Morocco of September 16th, 1836, that is to say, in all disputes, civil or criminal, between citizens or protégés of the United States.

3. (By ten votes to one) It is also entitled to exercise consular jurisdiction in all cases, civil or criminal, brought against citizens or protégés of the United States, to the extent required by the provisions of the Act of Algeciras relating to consular jurisdiction.

4. (By six votes to five) But the other submissions of the United States relating to consular jurisdiction are rejected: it is not entitled to exercise consular jurisdiction in other cases in the French Zone of Morocco. Its rights in this connection, which were acquired solely by the effect of the most-favoured-nation clause, came to an end with the termination by Great Britain of all its rights and privileges of a capitulatory character by the Franco-British Convention of 1937.

5. (Unanimously) The United States had contended that its nationals were not subject, in principle, to the application of Moroccan laws, unless these laws had received its prior assent. There is, however, no provision in any of the Treaties conferring upon the United States such a right, a right linked with the régime of capitulations which can only exist as a corollary of consular jurisdiction, so that if the co-operation of the United States Consular Courts is required to enforce a law (see 2 and 3 above), the assent of the United States is essential. But, subject to this, the contention of the United States is ill-founded. If the application of a law to citizens of the United States without its assent is contrary to international law, any dispute which may arise therefrom should be dealt with according to the ordinary methods for the settlement of international disputes.

6. (By six votes to five) No treaty provides any basis for the claim of the United States to fiscal immunity for its citizens. Nor can such an immunity, capitulatory in origin, be justified by the effect of the most-favoured-nation clause, since no other State enjoys it for the benefit of its nationals.

7. (By seven votes to four) As to the consumption taxes imposed by the Dahir of February 28th, 1948, these are payable on all goods, whether imported into Morocco or produced there: they are not, therefore, customs duties, the maximum rate for which was fixed at 12½% by the Signatory Powers of the Act of Algeciras. Citizens of the United States are no more exempt from these taxes than from any others.

8. (By six votes to five) Article 95 of the Act of Algeciras lays down no strict rule for the valuation of imported goods. A study of the practice since 1906 and of the preliminary work of the Conference of Algeciras leads the Court to

the view that this Article requires an interpretation which is more flexible than those respectively contended for by France and the United States. Various factors must be taken into consideration by the Customs authorities: the value of merchandise in the country of origin and its value in the local Moroccan market are both elements in the appraisal of its value.

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A declaration is appended to the Judgment by Judge Hsu Mo, who expresses the opinion that the United States is not entitled to exercise consular jurisdiction in cases involving the application to United States citizens of those provisions of the Act of Algeciras which, for their enforcement, carried certain sanctions.

A joint dissenting opinion, signed by Judges Hackworth, Badawi, Carneiro and Sir Benegal Rau, is also appended to the Judgment.

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18. AMBATIELOS CASE (MERITS)

Judgment of 19 May 1953

The proceedings in the Ambatielos case (Merits: Obligation to Arbitrate), between Greece and the United Kingdom of Great Britain and Northern Ireland had been instituted by an Application by the Hellenic Government, which, having taken up the case of one of its nationals, the shipowner Ambatielos, prayed the Court to declare that the claim which the latter had made against the Government of the United Kingdom should be submitted to arbitration in accordance with Anglo-Greek Agreements concluded in 1886 (Treaty and Protocol) and in 1926 (Declaration). Following a Preliminary Objection lodged by the United Kingdom, the Court found that it had jurisdiction to adjudicate on this question by a Judgment delivered on July 1st, 1952.

In its Judgment on the merits the Court found by ten votes to four that the United Kingdom was under an obligation to submit to arbitration, in accordance with the Declaration of 1926, the difference as to the validity, under the Treaty of 1886, of the Ambatielos claim.

Sir Arnold McNair, President, Judges Basdevant, Klaestad and Road appended to the Judgment a joint statement of their dissenting opinion.

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In its Judgment, the Court begins by defining the question before it: is the United Kingdom under an obligation to accept arbitration of the difference between that Government and the Hellenic Government concerning the validity of the Ambatielos claim, in so far as this claim is based on the Treaty of 1886? The distinctive character of this case is that quite unlike the *Mavrommatis Palestine Concessions*, decided by the Permanent Court of International Justice in 1924 the Court is called upon to decide, not its own jurisdiction, but whether a dispute should be referred to another tribunal for arbitration.

The Parties have rested their case on the Declaration of 1926 and the Judgment of the Court of July 1st, 1952. The Declaration was agreed upon for the purpose of safeguarding the interests of the Parties with respect to claims on behalf of private persons based on the Treaty of 1886, for which, on the termination of that Treaty, there would have been no remedy in the event of the failure of the Parties to arrive at amicable settlements. The Agreement of 1926 relates to a limited category of differences which the Agreement of 1886 provided should be settled by arbitration, namely differences as to the validity of claims on behalf of private persons based on the Treaty of 1886. But in both cases the Parties were prompted by the same motives and adopted the same method of arbitration. By the Judgment of July 1st, 1952, the merits of the Ambatielos claim were found to be outside the jurisdiction of the Court which consists solely of deciding whether the United Kingdom is under an obligation to accept arbitration. The limited jurisdiction of the Court is to be clearly distinguished from the jurisdiction of the Commission of Arbitration. The Court must refrain from pronouncing final judgment upon any question of fact or law falling within the merits; its task will have been completed when it has decided whether the difference with regard to the Ambatielos claim is a difference as to the validity of a claim on behalf of a private person based on the provisions of the Treaty of 1886 and whether, in consequence, there is an obligation binding the United Kingdom to accept arbitration.

What meaning is to be attributed to the word "based" on the Treaty of 1886? In the opinion of the Greek Government it would suffice that the claim should not *prima facie* appear to be unconnected with the Treaty. In the view of the United Kingdom, it is necessary for the Court to determine, as a substantive issue, whether the claim is actually or genuinely based on the Treaty. The Court is unable to accept either of these views. The first would constitute an insufficient reason; the second would lead to the substitution of the Court for the Commission of Arbitration in passing on a point which constitutes one of the principal elements of the claim. The Commission alone has jurisdiction to adjudicate on the merits; and it cannot be assumed that the Agreement of 1926 contemplates that the verification of the allegations of fact should be the duty of the Commission, while the determination of the question whether the facts alleged constitute a violation of the Treaty of 1886 should form the task of another tribunal.

At the time of the signature of the Declaration of 1926, the British and Greek Governments never intended that one of them alone or some other organ should decide whether a claim was genuinely based on the Treaty of 1886; it must have been their intention that the genuineness of the Treaty basis of any claim, if contested, should be authoritatively decided by the Commission of Arbitration, together with any other questions relating to the merits.

For the purpose of determining the obligation of the United Kingdom to accept arbitration, the expression *claims based* on the Treaty of 1886 cannot be understood as meaning claims actually supportable under that Treaty. Of course it is not enough that a claim should have a remote connection with the Treaty for it to be based on it; on the other hand it is not necessary that an unassailable legal basis should be

shown for an alleged Treaty violation. In its context, the expression means claims depending for support on the provisions of the Treaty of 1886, so that the claims will eventually stand or fall according as the provisions of the Treaty are construed in one way or another. Consequently, in respect of the Ambatielos claim, it is not necessary for the Court to find that the Hellenic Government's interpretation of the Treaty is the only correct interpretation: it is enough to determine whether the arguments advanced by the Hellenic Government in support of its interpretation are of a sufficiently plausible character to warrant a conclusion that the claim is based on the Treaty. In other words, if an interpretation appears to be an arguable one, whether or not it ultimately prevails, then there are reasonable grounds for concluding that the claim is based on the Treaty. The validity of the respective arguments would be determined by the Commission of Arbitration in passing upon the merits of the difference.

The Court then proceeds to deal with two of the contentions put forward by Greece and contested by the United Kingdom. One is based on the most-favoured-nation clause in Article X of the Treaty of 1886 which would permit Greece to invoke the benefits of Treaties concluded by the United Kingdom with third states and obtain redress for a denial of justice Mr. Ambatielos would have suffered—if the facts alleged were true.

The other contention, based on Article XV, rests on an interpretation of the words "free access to the Courts of Justice" appearing in that Article; again on the assumption that the facts alleged are true, it is contended that Mr. Ambatielos did not have "free access" to English courts.

Having regard to these contentions, as well as the divergence of views which give rise to them, and bearing in mind especially the possible interpretation put forward by the Hellenic Government of the provisions of the Treaty of 1886 which it invokes, the Court must conclude that this is a case in which the Hellenic Government is presenting a claim on behalf of a private person based on the Treaty of 1886, and that the difference between the Parties is the kind of difference which, according to the Agreement of 1926, should be submitted to arbitration.

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19. MINQUIERS AND ECREHOS CASE

Judgment of 17 November 1953

The Minquiers and Ecrehos case was submitted to the Court by virtue of a Special Agreement concluded between the United Kingdom and France on December 29th, 1950. In a unanimous decision, the Court found that sovereignty over the islets and rocks of the Ecrehos and the Minquiers groups, in so far as these islets and rocks are capable of appropriation, belongs to the United Kingdom.

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In its Judgment, the Court began by defining the task laid before it by the Parties. The two groups of islets in question lie between the British Channel Island of Jersey and the coast of France. The Ecrehos lie 3.9 sea miles from the former and 6.6 sea miles from the latter. The Minquiers group lie 9.8 sea miles from Jersey and 16.2 sea miles from the French mainland and 8 miles away from the Chausey islands which belong to France. Under the Special Agreement, the Court was asked to determine which of the Parties had produced the more convincing proof of title to these groups and any possibility of applying to them the status of *terra nullius* was set aside. In addition, the question of burden of proof was reserved: each Party therefore had to prove its alleged title and the facts upon which it relied. Finally, when the Special Agreement refers to islets and rocks, in so far as they are capable of appropriation, it must be considered that these terms relate to islets and rocks *physically* capable of appropriation. The Court did not have to determine in detail the facts relating to the particular units of the two groups.

The Court then examined the titles invoked by both Parties. The United Kingdom Government derives its title from the conquest of England by William Duke of Normandy in 1066. The union thus established between England and the Duchy of Normandy, including the Channel Islands, lasted until 1204, when Philip Augustus of France conquered continental Normandy. But, his attempts to occupy also the islands having been unsuccessful, the United Kingdom submitted the view that all of the Channel Islands, including the Ecrehos and the Minquiers, remained united with England and that this situation of fact was placed on a legal basis by subsequent treaties concluded between the two countries. The French Government contended for its part that, after 1204, the King of France held the Minquiers and the Ecrehos, together with some other islands close to the Continent, and referred to the same mediaeval treaties as those invoked by the United Kingdom.

The Court found that none of those treaties (Treaty of Paris of 1259, Treaty of Calais of 1360, Treaty of Troyes of 1420) specified which islands were held by the King of England or by the King of France. There are, however, other ancient documents which provide some indications as to the possession of the islets in dispute. The United Kingdom relied on them to show that the Channel Islands were considered as an entity and, since the more important islands were held by England, this country also possessed the groups in dispute. For the Court, there appears to be a strong presumption in favour of this view, without it being possible, however, to draw any definitive conclusion as to the sovereignty over the groups, since this question must ultimately depend on the evidence which relates directly to possession.

For its part, the French Government saw a presumption in favour of French sovereignty in the feudal link between the King of France, overlord of the whole of Normandy, and the King of England, his vassal for these territories. In this connection, it relies on a Judgment of the Court of France of 1202, which condemned John Lackland to forfeit all the lands which he held in fee of the King of France, including the whole of Normandy. But the United Kingdom Government contends that the feudal title of the French Kings in respect of Normandy was only nominal. It denies that the Channel Islands were received in fee of the King of France by the Duke of Normandy, and contests the validity, and even the existence, of the judgment of 1202. Without solving these historical controversies, the Court considered it sufficient to state that the legal effects attached to the dismember-

ment of the Duchy of Normandy in 1204, when Normandy was occupied by the French, have been superseded by the numerous events which occurred in the following centuries. In the opinion of the Court, what is of decisive importance is not indirect presumptions based on matters in the Middle Ages, but the evidence which relates directly to the possession of the groups.

Before considering this evidence, the Court first examined certain questions concerning both groups. The French Government contended that a Convention on fishery, concluded in 1839, although it did not settle the question of sovereignty, affected however that question. It is said that the groups in dispute were included in the common fishery zone created by the Convention. It is said also that the conclusion of this Convention precludes the Parties from relying on subsequent acts involving a manifestation of sovereignty. The Court was unable to accept these contentions because the Convention dealt with the waters only, and not the common user of the territory of the islets. In the special circumstances of the case, and in view of the date at which a dispute really arose between the two Governments about these groups, the Court shall consider all the acts of the Parties, unless any measure was taken with a view to improving the legal position of the Party concerned.

The Court then examined the situation of each group. With regard to the *Ecrehos* in particular, and on the basis of various mediaeval documents, it held the view that the King of England exercised his justice and levied his rights in these islets. Those documents also show that there was at that time a close relationship between the Ecrehos and Jersey.

From the beginning of the nineteenth century, the connection became closer again, because of the growing importance of oyster fishery. The Court attached probative value to various acts relating to the exercise by Jersey of jurisdiction and local administration and to legislation, such as criminal proceedings concerning the Ecrehos, the levying of taxes on habitable houses or huts built in the islets since 1889, the registration in Jersey of contracts dealing with real estate on the Ecrehos.

The French Government invoked the fact that in 1646 the States of Jersey prohibited fishing at the Ecrehos and the Chausey and restricted visits to the Ecrehos in 1692. It mentioned also diplomatic exchanges between the two Governments, in the beginning of the nineteenth century, to which were attached charts on which part of the Ecrehos at least was marked outside Jersey waters and treated as *res nullius*. In a note to the Foreign Office of December 15th, 1886, the French Government claimed for the first time sovereignty over the Ecrehos.

Appraising the relative strength of the opposing claims in the light of these facts, the Court found that sovereignty over the Ecrehos belonged to the United Kingdom.

With regard to the *Minquiers*, the Court noted that in 1615, 1616, 1617 and 1692, the Manorial court of the fief of Noirmont in Jersey exercised its jurisdiction in the case of wrecks found at the Minquiers, because of the territorial character of that jurisdiction.

Other evidence concerning the end of the eighteenth century, the nineteenth and the twentieth centuries concerned inquests on corpses found at the Minquiers, the erection on the islets of habitable houses or huts by persons from Jersey who paid property taxes on that account, the registration in Jersey of contracts of sale relating to real property in the Minquiers. These various facts show that Jersey authorities have, in several ways, exercised ordinary local administration in respect of the Minquiers during a long period of time and that, for a considerable part of the nineteenth century and the twentieth century, British authorities have exercised State functions in respect of this group.

The French Government alleged certain facts. It contended that the Minquiers were a dependency of the Chausey islands, granted by the Duke of Normandy to the Abbey of Mont-Saint-Michel in 1022. In 1784 a correspondence between French authorities concerned an application for a concession in respect of the Minquiers made by a French national. The Court held the view that this correspondence did not disclose anything which could support the present French claim to sovereignty, but that it revealed certain fears of creating difficulties with the English Crown. The French Government further contended that, since 1861, it has assumed the sole charge of the lighting and buoying of the Minquiers, without having encountered any objection from the United Kingdom. The Court said that the buoys placed by the French Government at the Minquiers were placed outside the reefs of the groups and purported to aid navigation to and from French ports and protect shipping against the dangerous reefs of the Minquiers. The French Government also relied on various official visits to the Minquiers and the erection in 1939 of a house on one of the islets with a subsidy from the Mayor of Granville, in continental Normandy.

The Court did not find that the facts invoked by the French Government were sufficient to show that France has a valid title to the Minquiers. As to the above-mentioned facts from the nineteenth and twentieth centuries in particular, such acts could hardly be considered as sufficient evidence of the intention of that Government to act as sovereign over the islets. Nor were those acts of such a character that they could be considered as involving a manifestation of State authority in respect of the islets.

In such circumstances, and having regard to the view expressed above with regard to the evidence produced by the United Kingdom Government, the Court was of opinion that the sovereignty over the Minquiers belongs to the United Kingdom.

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Availing themselves of the right conferred on them by Article 57 of the Statute, Judges Basdevant and Carneiro, while concurring in the decision of the Court, appended to the Judgment statements of their individual opinions. Judge Alvarez, while also concurring in the decision of the Court, made a declaration expressing regret that the Parties had attributed excessive importance to mediaeval evidence and had not sufficiently taken into account the state of international law or its present tendencies in regard to territorial sovereignty.

20. NOTTEBOHM CASE (PRELIMINARY OBJECTION)

Judgment of 18 November 1953

In its Judgment in the Nottebohm case (Preliminary Objection) between Liechtenstein and Guatemala, the Court decided, unanimously, to reject the preliminary objection to its jurisdiction which had been raised by Guatemala.

On December 17th, 1951, Liechtenstein had filed an Application instituting proceedings against Guatemala, claiming damages in respect of various measures which Guatemala had taken against the person and property of M. Nottebohm, in alleged contravention of international law. The Application referred to the declarations by which both Parties had accepted the compulsory jurisdiction of the Court.

Guatemala contended that the Court was without jurisdiction, the principal ground for its objection being that the validity of its declaration of acceptance of the compulsory jurisdiction of the Court expired a few weeks after the filing of the Application by Liechtenstein and, in any event, some considerable time before any settlement of the dispute by the Court.

In its Judgment, the Court came to the conclusion that the expiry on January 26th, 1952, of the five-year period for which Guatemala had accepted the compulsory jurisdiction of the Court in accordance with Article 36, paragraph 2, of the Statute did not affect any jurisdiction the Court might have to deal with the claim presented by Liechtenstein on December 17th, 1951. The Court rejected the preliminary objection and resumed the proceedings on the merits, fixing time-limits for the filing of the further pleadings.

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21. CASE OF THE MONETARY GOLD REMOVED FROM ROME IN 1943

Judgment of 15 June 1954

The Monetary Gold Case was brought before the Court by an Application of the Italian Republic against the French Republic, the United Kingdom of Great Britain and Northern Ireland and the United States of America.

The Court had been requested to determine certain legal questions upon which depended the delivery to Italy or to the United Kingdom of a quantity of monetary gold removed by the Germans from Rome in 1943, recovered in Germany and found to belong to Albania. The United Kingdom pointed out that the Court had found that Albania was under an obligation to pay compensation to the United Kingdom for the damage caused by the explosions in the Corfu Channel in 1946 and that the damages due to the United Kingdom had never been paid. For its part, Italy contended, in the first place, that she had a claim against Albania arising out of the measures of confiscation allegedly taken by the Albanian Government in 1945, and, in the second place, that her claim should have priority over that of the United Kingdom.

The Italian Government, relying on the Statement signed at Washington on April 25th, 1951 by the Governments of France, the United Kingdom and the United States, referred these two questions to the Court. But after filing her Application, Italy felt some doubt as to the jurisdiction of the Court and requested the Court to adjudicate on the question of jurisdiction as a preliminary issue.

It is upon the question of jurisdiction that the Court adjudicated in its Judgment. The Court found first, unanimously, that in the absence of the consent of Albania, it was not authorized to adjudicate upon Italy's claim against Albania; and, secondly, by thirteen votes to one, that the priority issue could only arise if the first question had been decided in favour of Italy.

Judge Levi Carneiro appended to the Judgment of the Court a statement of his dissenting opinion (on the second question); two other Members of the Court (President, Sir Arnold McNair, and Judge Read), while voting in favour of the decision, appended to the Judgment a declaration and individual opinion respectively.

The Judgment began by reciting the facts. The origin of the present case was to be found in Part III of the Agreement on Reparation from Germany (Paris, January 14th, 1946), which provided that the monetary gold found in Germany should be pooled for distribution among the countries entitled to receive a share of it. France, the United Kingdom and the United States were signatories of the Agreement, as well as Albania and other States; Italy adhered subsequently to Part III. The implementation of the provisions of Part III having been entrusted to the Governments of France, the United Kingdom and the United States, these three Governments appointed a Tripartite Commission to assist them in this matter. In respect of a quantity of gold removed from Rome in 1943, which belonged to the National Bank of Albania, the Tripartite Commission, confronted by competing claims of Albania and Italy, was unable to give a decision. The three Governments then agreed to submit the question to an arbitrator (Washington Agreement of April 25th, 1951). At the same time, they declared (Washington Statement of the same date) that if the finding of the arbitrator should be in favour of Albania, they would be confronted by another problem, since the gold was claimed by Italy and by the United Kingdom for reasons not covered by Part III of the Paris Agreement; and they decided that the gold would be delivered to the United Kingdom in partial satisfaction of the Judgment of the court of December 15th, 1949, in the Corfu Channel case unless within a certain time-limit from the date of the arbitrator's Opinion, either Albania applied to the Court requesting it to adjudicate on her rights, or Italy made an Application to the Court for the determination of the questions, first, whether by reason of any rights which she claimed to possess as a result of the Albanian law of January 13th, 1945, or under the provisions of the Italian Peace Treaty, the gold should be delivered to her rather than to Albania, and second, whether the Italian claim should or should not have priority over the claim of the United Kingdom, if this issue should arise.

Thus, within the prescribed time-limit, Italy made an Application to the Court which was communicated in the

customary manner to States entitled to appear before the Court and also transmitted to the Albanian Government.

Time-limits for the filing of the pleadings were then fixed by the Court. However, instead of presenting its Memorial on the merits, the Italian Government questioned the jurisdiction of the Court to adjudicate upon the first question relating to the validity of the Italian claim against Albania. The Parties having been requested to submit their views on the problem thus raised, the Italian Government contended that the Court did not have a sufficient basis for adjudication on the ground that the proceedings contemplated by the Washington Statement were in reality directed against Albania and that Albania was not a Party to the suit. As regards the United Kingdom, it saw in the challenge to the Court's jurisdiction made by Italy a ground for questioning the validity of the Application which, in the submission of the United Kingdom, should be regarded as not conforming to the Washington Statement or as invalid and void, or as withdrawn. The two other respondent Governments, France and the United States, did not deposit formal Submissions.

After thus reciting the facts, the Court dealt with the views of both sides, beginning with the Submissions of the United Kingdom which have just been summarized. Indeed, it was unusual that an applicant State should challenge the jurisdiction of the Court, but regard must be had for the circumstances of the case: it was the Washington Statement, emanating from the three Governments, that formulated the offer of jurisdiction accepted by Italy and pre-determined the subject-matter of the suit; and it was after taking the initial step that Italy felt some doubt and filed a Preliminary Objection on the basis of Article 62 of the Rules of Court. This Article did not preclude the raising of a preliminary objection by an applicant in such circumstances. By this Objection, Italy's acceptance of jurisdiction of the Court has not become less complete or less positive than was contemplated in the Washington Statement. To request the Court to settle the problem of jurisdiction was not tantamount to asking the Court not to determine the questions set out in the Application under any circumstances. The Application was a real one; and it remained real unless it was withdrawn; but it had not been withdrawn. Finally, the Application, if not invalid when it was filed, could not have become invalid by reason of the presentation of the objection to the jurisdiction.

Having thus found that it had been validly seised by the Application and that that Application still subsisted, the Court proceeded to consideration of the Italian Objection to the jurisdiction in order to decide whether or not it could adjudicate upon the merits of the questions submitted to it by the Application. The Court noted that, in respect of the relations between the three Governments and Italy, the Application was in conformity with the offer made in the Washington Statement, both as regards the subject-matter of the suit and the Parties to it; the Court therefore had jurisdiction to deal with the questions submitted in the Application. But was this jurisdiction co-extensive with the task entrusted to the Court?

In this connection the Court noted that it was not merely called upon to say whether the gold should be delivered to Italy or to the United Kingdom: it was requested to determine first certain legal questions upon which the solution of the problem depended. The first submission in the Application centred around a claim by Italy against Albania, a claim to indemnification for an alleged wrong. Italy believed that she possessed a right against Albania for the redress of an international wrong which, according to Italy, Albania had committed against her. In order, therefore, to determine whether Italy was entitled to receive the gold, it was necessary to determine whether Albania had committed any international wrong against Italy, and whether she was under an obligation to pay compensation to her; and, if so, to determine also the amount of compensation. In order to decide such questions, it was necessary to determine whether the Albanian law of January 13th, 1945 was contrary to international law. In the determination of these questions, which related to the lawful or unlawful character of certain actions of Albania *vis-à-vis* Italy, only two States, Italy and Albania, were directly interested.

To go into the merits of such questions would be to decide a dispute between Italy and Albania—which the Court could not do without the consent of Albania. If the Court did so, it would run counter to a well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent.

It has been contended that Albania might have intervened, since Article 62 of the Statute gives to a third State, which considers that it has an interest of a legal nature which may be affected by the decision in the case, the right to do so; that the Statute did not prevent proceedings from continuing, even when a third State which would be entitled to intervene refrained from doing so; and that consequently the fact that Albania had abstained from doing so should not make it impossible for the Court to give judgment. But in the present case, Albania's legal interests would not only be affected by a decision; they would constitute the very subject-matter of the decision. Therefore, the Statute could not be regarded, even by implication, as authorizing that proceedings could be continued in the absence of Albania.

The Court found that, although Italy and the three respondent States had conferred jurisdiction upon the Court, it could not exercise this jurisdiction to adjudicate on the first claim submitted by Italy. As for the second claim, which relates to the priority between the claims of Italy and the United Kingdom, it would only arise when it had been decided that, as between Italy and Albania, the gold should go to Italy. This claim was consequently dependent upon the first claim in the Application. The Court accordingly found that inasmuch as it could not adjudicate on the first Italian claim, it should refrain from examining the second.

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22. EFFECTS OF AWARDS OF COMPENSATION MADE BY THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL

Advisory Opinion of 13 July 1954

The question concerning the effect of awards of compensation made by the United Nations Administrative Tribunal had been submitted for an advisory opinion to the Court by the General Assembly of the United Nations, which, on December 9th, 1953, adopted the following Resolution for this purpose:

"*The General Assembly*,

"*Considering* the request for a supplementary appropriation of $179,420, made by the Secretary-General in his report (A/2534) for the purpose of covering the awards made by the United Nations Administrative Tribunal in eleven cases numbered 26, and 37 to 46 inclusive,

"*Considering* the concurrence in that appropriation by the Advisory Committee on Administrative and Budgetary Questions contained in its twenty-fourth report to the eighth session of the General Assembly (A/2580),

"*Considering*, nevertheless, that important legal questions have been raised in the course of debate in the Fifth Committee with respect to that appropriation,

"*Decides*

"To submit the following legal questions to the International Court of Justice for an advisory opinion:

" '(1) Having regard to the Statute of the United Nations Administrative Tribunal and to any other relevant instruments and to the relevant records, has the General Assembly the right on any grounds to refuse to give effect to an award of compensation made by that Tribunal in favour of a staff member of the United Nations whose contract of service has been terminated without his assent?

" '(2) If the answer given by the Court to question (1) is in the affirmative, what are the principal grounds upon which the General Assembly could lawfully exercise such a right?' "

The Court had given an opportunity to the Members of the United Nations and to the International Labour Organisation to submit their views on this matter. Written statements were presented on behalf of this Organisation and on behalf of France, Sweden, the Netherlands, Greece, the United Kingdom of Great Britain and Northern Ireland, the U.S.A., the Philippines, Mexico, Chile, Iraq, the Republic of China, Guatemala, Turkey and Ecuador. In the course of hearings held for this purpose, oral statements were submitted on behalf of the United States, France, Greece, the United Kingdom and the Netherlands.

The Secretary-General of the United Nations had transmitted to the Court all documents likely to throw light upon the question; a written and an oral statement were also presented on his behalf.

To the first question the Court replied that the General Assembly has not the right on any grounds to refuse to give effect to an award of compensation made by the Administrative Tribunal of the United Nations in favour of a staff member of the United Nations whose contract of service has been terminated without his assent. As the answer to the first question was in the negative, it was unnecessary for the Court to consider the second.

The Court's Opinion was reached by nine votes to three: the statements of the Opinions of the three dissenting Judges (Judge Alvarez, Judge Hackworth and Judge Levi Carneiro) are appended to the Opinion. One Judge who did not dissent (Judge Winiarski), while voting for the Opinion, appended thereto a statement of his separate Opinion.

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In its Opinion, the Court begins by analysing the first of the questions submitted to it. This question, which is general and abstract, is strictly limited in scope. If one compares its terms with those of the Statute of the Tribunal, it is clear that it concerns only awards made by the Tribunal within the limits of its statutory competence. It is, moreover, clear from the documents submitted to the Court that it contemplates only awards made by a properly constituted tribunal. Lastly, it relates solely to awards made by the Tribunal in favour of staff members whose contracts of service have been terminated without their assent.

The reply to be given to this question—which does not involve an examination of the judgments which gave rise to the request for an Advisory Opinion—depends on the Statute of the Tribunal and on the Staff Regulations and Rules. After examination of these texts, the Court finds that the Statute of the Tribunal employs terminology indicative of its judicial character: "pass judgment upon applications", "tribunal", "judgment". The provisions to the effect that "in the event of a dispute as to whether the Tribunal has competence, the matter shall be settled by the decision of the Tribunal" and that "the judgments shall be final and without appeal" are similarly provisions of a judicial character. It follows that the Tribunal is established as an independent and truly judicial body pronouncing final judgments without appeal within the limited field of its functions. The power conferred upon it to order the rescinding of decisions taken by the Secretary-General of the United Nations—the chief administrative officer of the Organization—confirms its judicial character: such a power could hardly have been conferred on an advisory or subordinate organ.

The Court next points out that, according to a well-established and generally recognized principle of law, a judgment rendered by such a judicial body is *res judicata* and has binding force between the parties to the dispute. Who, then, are to be regarded as parties bound by an award? The answer is to be found in the contracts of service. These are concluded between the staff member concerned and the Secretary-General, in his capacity as the chief administrative officer of the United Nations Organization, acting on behalf of that Organization as its representative. The Secretary-General engages the legal responsibility of the Organization, which is the juridical person on whose behalf he acts. If he terminates the contract of service without the assent of the staff member, and this action results in a dispute which is referred to the Administrative Tribunal, the parties to this dispute before the Tribunal are the staff member concerned and the United Nations Organization, represented by the Secretary-General, and these parties will become bound by the judgment of the Tribunal. The judgment, which is final and without appeal and not subject to any kind of review, has binding force upon the United Nations Organization as the

juridical person responsible for the proper observance of the contract of service. Since the Organization becomes legally bound to carry out the judgment, and to pay the compensation awarded to the staff member, it follows that the General Assembly, as an organ of the United Nations, must likewise be bound. This conclusion is confirmed by the provisions of the Statute of the Tribunal itself, which makes it clear that payment of compensation awarded by the Tribunal is an obligation of the United Nations as a whole—or, as the case may be, of the specialized agency concerned.

The Court next points out that if, as the result of a deliberate decision, the Statute of the Tribunal contains no provision for review of the judgments or for appeal, as it might have done, it does not follow that the Tribunal cannot itself revise a judgment in special circumstances when new facts of decisive importance have been discovered. The Tribunal has, indeed, already adopted such a course, which conforms with principles generally provided in statutes and laws issued for courts of justice.

But has the General Assembly itself, in certain exceptional circumstances, the right to refuse to give effect to judgments, in cases outside the scope of the question as defined above by the Court, in the case of awards made in excess of the Tribunal's competence or vitiated by some other defect? The Tribunal is one within the organized legal system of the United Nations, dealing exclusively with internal disputes between the members of the staff and the Organization; in these circumstances, the Court considers that in the absence of any express provisions to this effect, its judgments cannot be subject to review by any body other than the Tribunal itself. The General Assembly can always amend the Statute of the Tribunal and provide for review of its awards: in any event, in the opinion of the Court, the General Assembly itself, in view of its composition and functions, could hardly act as a judicial organ, all the more so as one party to the disputes is the Organization itself.

A number of arguments were put forward in support of the view that the General Assembly may be justified in refusing to give effect to awards of the Tribunal. The Court meets these arguments in the second part of its Opinion.

It was contended that the General Assembly has no legal power to establish a tribunal competent to render judgments binding on the United Nations. But although there are no express provisions to this effect in the Charter, it appears from the Charter itself that such a power is conferred by necessary implication. Indeed, it is essential, in order to ensure the efficient working of the Secretariat and to give effect to the paramount consideration of securing the highest standards of efficiency, competence and integrity.

It was also contended that the General Assembly could not establish a tribunal with authority to make decisions binding on the General Assembly itself. But the precise nature and scope of the measures by which the power of creating a tribunal was to be exercised—even though the power was an implied one—was a matter for determination by the General Assembly alone. It was further argued that the power thus exercised would be inconsistent with the budgetary power reserved to the General Assembly. But a budgetary power is not absolute. Where expenditure arises out of obligations, the General Assembly has no alternative but to honour these engagements, and awards of the Tribunal fall within this category.

It was also contended that the implied power of the General Assembly to establish a tribunal cannot be carried so far as to enable the tribunal to intervene in matters falling within the province of the Secretary-General. But by virtue of the provisions of the Charter, the General Assembly could at all times limit or control the powers of the Secretary-General in staff matters. It has authorized the intervention of the Tribunal in such matters within the limits of the jurisdiction which it conferred upon the Tribunal. Accordingly, when acting within these limits, the Tribunal is in no sense intervening in a Charter power of the Secretary-General, because the Secretary-General's legal powers in staff matters have already been limited in this respect by the General Assembly.

Moreover, the fact that the Tribunal is a subsidiary, subordinate or secondary organ is of no importance. What is of importance is the intention of the General Assembly in establishing the Tribunal, and what it intended to establish was a judicial body.

With regard to what has been called the precedent established by the League of Nations in 1946, the Court cannot follow it. The very special circumstances existing then were quite different from the present circumstances; there is a complete lack of identity between the two situations.

Having thus arrived at the conclusion that the first question submitted by the General Assembly must be answered in the negative, the Court finds that the second question does not arise.

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23. NOTTEBOHM CASE (SECOND PHASE)

Judgment of 6 April 1955

The Nottebohm case had been brought to the Court by an Application by the Principality of Liechtenstein against the Republic of Guatemala.

Liechtenstein claimed restitution and compensation on the ground that the Government of Guatemala had acted towards Mr. Friedrich Nottebohm, a citizen of Liechtenstein, in a manner contrary to international law. Guatemala, for its part, contended that the claim was inadmissible on a number of grounds, one of which related to the nationality of Nottebohm, for whose protection Liechtenstein had seised the Court.

In its Judgment the Court accepted this latter plea in bar and in consequence held Liechtenstein's claim to be inadmissible.

The Judgment was given by eleven votes to three. Judges Klaestad and Read, and M. Guggenheim, Judge *ad hoc*, appended to the Judgment statements of their dissenting opinions.

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In its Judgment the Court affirmed the fundamental importance of the plea in bar referred to above. In putting forward

this plea, Guatemala referred to the well-established principle that it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection. Liechtenstein considered itself to be acting in conformity with this principle and contended that Nottebohm was, in fact, its national by virtue of the naturalization conferred upon him.

The Court then considered the facts. Nottebohm, born at Hamburg, was still a German national when, in October 1939, he applied for naturalization in Liechtenstein. In 1905 he went to Guatemala, which he made the centre of his business activities, which increased and prospered. He sometimes went to Germany on business and to other countries for holidays, and also paid a few visits to Liechtenstein, where one of his brothers had lived since 1931; but he continued to have his fixed abode in Guatemala until 1943, that is to say, until the events which constituted the basis of the present dispute. In 1939 he left Guatemala at approximately the end of March; he seems to have gone to Hamburg and to have paid a few brief visits to Liechtenstein, where he was at the beginning of October 1939. It was then, on 9th October, 1939, a little more than a month after the opening of the Second World War, marked by Germany's attack on Poland, that he applied for naturalization in Liechtenstein.

The necessary conditions for the naturalization of foreigners in Liechtenstein are laid down by the Liechtenstein Law of 4th January, 1934. This Law requires among other things: that the applicant for naturalization must prove that acceptance into the Home Corporation (*Heimat verband*) of a Liechtenstein commune has been promised to him in case of acquisition of the nationality of the State; that, subject to waiver of this requirement under stated conditions, he must prove that he will lose his former nationality as the result of naturalization; that he has been resident in the Principality for at least three years, although this requirement can be dispensed with in circumstances deserving special consideration and by way of exception; that he has concluded an agreement concerning liability to taxation with the competent authorities and has paid a naturalization fee. The Law reveals concern that naturalization should only be granted with full knowledge of all the pertinent facts and adds that the grant of nationality is barred where circumstances are such as to cause apprehension that prejudice may enure to the State of Liechtenstein. As regards the procedure to be followed, the Government examines the application, obtains information concerning the applicant, submits the application to the Diet, and, if this application is approved, submits a request to the Reigning Prince who alone is entitled to confer nationality.

In his application for naturalization Nottebohm also applied for the previous conferment of citizenship of Mauren, a commune of Liechtenstein. He sought dispensation from the condition of three years' prior residence, without indicating the special circumstances warranting such a waiver. He undertook to pay (in Swiss francs) 25,000 francs to the Commune and 12,500 francs to the State, the costs of the proceedings, and an annual naturalization tax of 1,000 francs—subject to the proviso that the payment of these taxes was to be set off against ordinary taxes which would fall due if the applicant took up residence in Liechtenstein—and to deposit as security the sum of 30,000 Swiss francs. A Document dated 15th October, 1939 certifies that on that date the citizenship of Mauren had been conferred upon him. A Certificate of 17th October, 1939 evidences the payment of the taxes required to be paid. On 20th October Nottebohm took the oath of allegiance and on 23rd October an arrangement concerning liability to taxation was concluded. A Certificate of Nationality was also produced to the effect that Nottebohm had been naturalized by a Supreme Resolution of the Prince of 13th October, 1939. Nottebohm then obtained a Liechtenstein passport and had it visa-ed by the Consul General of Guatemala in Zurich on 1st December, 1939, and returned to Guatemala at the beginning of 1940, where he resumed his former business activities.

These being the facts, the Court considered whether the naturalization thus granted could be validly invoked against Guatemala, whether it bestowed upon Liechtenstein a sufficient title to exercise protection in respect of Nottebohm as against Guatemala and therefore entitled it to seise the Court of a claim relating to him. The Court did not propose to go beyond the limited scope of this question.

In order to establish that the Application must be held admissible, Liechtenstein argued that Guatemala had formerly recognized the naturalization which it now challenged. Examining Guatemala's attitude towards Nottebohm since his naturalization, the Court considered that Guatemala had not recognized Liechtenstein's title to exercise protection in respect to Nottebohm. It then considered whether the granting of nationality by Liechtenstein directly entailed an obligation on the part of Guatemala to recognize its effect; in other words, whether that unilateral act by Liechtenstein was one which could be relied upon against Guatemala in regard to the exercise of protection. The Court dealt with this question without considering that of the validity of Nottebohm's naturalization according to the Law of Liechtenstein.

Nationality is within the domestic jurisdiction of the State, which settles, by its own legislation, the rules relating to the acquisition of its nationality. But the issue which the Court must decide is not one which pertains to the legal system of Liechtenstein; to exercise protection is to place oneself on the plane of international law. International practice provides many examples of acts performed by States in the exercise of their domestic jurisdiction which do not necessarily or automatically have international effect. When two States have conferred their nationality upon the same individual and this situation is no longer confined within the limits of the domestic jurisdiction of one of these States but extends to the international field, international arbitrators or the Courts of third States which are called upon to deal with this situation would allow the contradiction to subsist if they confined themselves to the view that nationality is exclusively within the domestic jurisdiction of the State. In order to resolve the conflict they have, on the contrary, sought to ascertain whether nationality has been conferred in circumstances such as to give rise to an obligation on the part of the respondent State to recognize the effect of that nationality. In order to decide this question, they have evolved certain criteria. They have given their preference to the real and effective nationality, that which accorded with the facts, that based on stronger factual ties between the person concerned and one of these States whose nationality is involved. Different factors are taken into consideration, and their importance will vary from one case to the next: there is the habitual residence of the individual concerned but also the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc.

The same tendency prevails among writers. Moreover, the practice of certain States, which refrain from exercising protection in favour of a naturalized person when the latter has in fact severed his links with what is no longer for him anything but his nominal country, manifests the view that, in order to be invoked against another State, nationality must correspond with a factual situation.

The character thus recognized on the international level as pertaining to nationality is in no way inconsistent with the fact that international law leaves it to each State to lay down the rules governing the grant of its own nationality. This is so failing any general agreement on the rules relating to nationality. It has been considered that the best way of making such rules accord with the varying demographic conditions in different countries is to leave the fixing of such rules to the competence of each State. But, on the other hand, a State cannot claim that the rules it has laid down are entitled to recognition by another State unless it has acted in conformity with this general aim of making the nationality granted accord with an effective link between the State and the individual.

According to the practice of States, nationality constitutes the juridical expression of the fact that an individual is more closely connected with the population of a particular State. Conferred by a State, it only entitles that State to exercise protection if it constitutes a translation into juridical terms of the individual's connection with that State. Is this the case as regards Mr. Nottebohm? At the time of his naturalization, does Nottebohm appear to have been more closely attached by his tradition, his establishment, his interests, his activities, his family ties, his intentions for the near future, to Liechtenstein than to any other State?

In this connection the Court stated the essential facts of the case and pointed out that Nottebohm always retained his family and business connections with Germany and that there is nothing to indicate that his application for naturalization in Liechtenstein was motivated by any desire to dissociate himself from the Government of his country. On the other hand, he had been settled for 34 years in Guatemala, which was the centre of his interests and his business activities. He stayed there until his removal as a result of war measures in 1943, and complains of Guatemala's refusal to readmit him. Members of Nottebohm's family had, moreover, asserted his desire to spend his old age in Guatemala. In contrast, his actual connections with Liechtenstein were extremely tenuous. If Nottebohm went to that country in 1946, this was because of the refusal of Guatemala to admit him. There is thus the absence of any bond of attachment with Liechtenstein, but there is a long-standing and close connection between him and Guatemala, a link which his naturalization in no way weakened. That naturalization was not based on any real prior connection with Liechtenstein, nor did it in any way alter the manner of life of the person upon whom it was conferred in exceptional circumstances of speed and accommodation. In both respects, it was lacking in the genuineness requisite to an act of such importance, if it is to be entitled to be respected by a State in the position of Guatemala. It was granted without regard to the concept of nationality adopted in international relations. Naturalization was asked for not so much for the purpose of obtaining a legal recognition of Nottebohm's membership in fact in the population of Liechtenstein, as it was to enable him to substitute for his status as a national of a belligerent State that of the subject of a neutral State, with the sole aim of thus coming within the protection of Liechtenstein but not of becoming wedded to its traditions, its interests, its way of life or of assuming the obligations—other than fiscal obligations—and exercising the rights pertaining to the status thus acquired.

For these reasons the Court held the claim of Liechtenstein to be inadmissible.

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24. VOTING PROCEDURE ON QUESTIONS RELATING TO REPORTS AND PETITIONS CONCERNING THE TERRITORY OF SOUTH-WEST AFRICA

Advisory Opinion of 7 June 1955

The question concerning the voting procedure to be followed by the General Assembly of the United Nations in making decisions on questions relating to reports and petitions concerning the territory of South-West Africa had been submitted for advisory opinion to the Court by the General Assembly, which, on November 23rd, 1954, adopted the following Resolution for this purpose:

"*The General Assembly*,

"*Having accepted*, by resolution 449 A (V) of 13 December 1950, the advisory opinion of the International Court of Justice of 11 July 1950 with respect to South-West Africa,

"*Having regard, in particular*, to the Court's opinion on the general question, namely, 'that South-West Africa is a Territory under the international Mandate assumed by the Union of South Africa on 17 December 1920', and to the Court's opinion on question (*a*), namely, 'that the Union of South Africa continues to have the international obligations stated in Article 22 of the Covenant of the League of Nations and in the Mandate for South-West Africa as well as the obligation to transmit petitions from the inhabitants of that Territory, the supervisory functions to be exercised by the United Nations, to which the annual reports and the petitions are to be submitted, and the reference to the Permanent Court of International Justice to be replaced by a reference to the International Court of Justice, in accordance with Article 7 of the Mandate and Article 37 of the Statute of the Court;',

"*Having expressed*, in resolution 749 A (VIII) of 28 November 1953, its opinion 'that without United Nations supervision the inhabitants of the Territory are deprived of the international supervision envisaged by the Covenant of the League of Nations' and its belief 'that it would not fulfil its obligation towards the inhabitants of South-West Africa if it were not to assume the supervisory responsibilities with regard to the Territory of South-West Africa which were formerly exercised by the League of Nations',

"*Having regard* to the opinion of the International Court of Justice that 'the degree of supervision to be exercised by the General Assembly should not . . . exceed that which applied under the Mandates System, and should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations' and that 'these observations are particularly applicable to annual reports and petitions',

"*Having adopted*, by resolution 844 (IX) of 11 October 1954, a special rule F on the voting procedure to be fol-

lowed by the General Assembly in taking decisions on questions relating to reports and petitions concerning the Territory of South-West Africa,

"*Having adopted* this rule in a desire 'to apply, as far as possible, and pending the conclusion of an agreement between the United Nations and the Union of South Africa, the procedure followed in that respect by the Council of the League of Nations',

"*Considering* that some elucidation of the advisory opinion is desirable,

"*Requests* the International Court of Justice to give an advisory opinion on the following questions:

"(*a*) Is the following rule on the voting procedure to be followed by the General Assembly a correct interpretation of the advisory opinion of the International Court of Justice of 11 July 1950:

" 'Decisions of the General Assembly on questions relating to reports and petitions concerning the Territory of South-West Africa shall be regarded as important questions within the meaning of Article 18, paragraph 2, of the Charter of the United Nations.'?

"(*b*) If this interpretation of the advisory opinion of the Court is not correct, what voting procedure should be followed by the General Assembly in taking decisions on questions relating to reports and petitions concerning the Territory of South-West Africa?"

On receipt of the Request, the Court had given an opportunity to the Members of the United Nations to submit their views. The Governments of the United States of America, of the Republic of Poland and of India submitted written statements. The Governments of Israel and of the Republic of China, while not submitting written statements, referred to the views expressed by their representatives in the General Assembly. The Government of Yugoslavia indicated that it was of the opinion that the question had been dealt with exhaustively by the Advisory Opinion of 1950. Lastly, the Secretary-General of the United Nations transmitted to the Court the documents likely to throw light upon the question and an introductory note commenting on these documents. There were no oral proceedings.

In its Opinion the Court replied in the affirmative to the first question put: the Rule set out in (*a*) of the Resolution is a correct interpretation of the Opinion given by the Court in 1950. This reply made it unnecessary for the Court to consider the second question.

The Opinion of the Court was unanimous. Three Members of the Court—Judges Basdevant, Klaestad and Lauterpacht—while accepting the operative clause of the Opinion, reached their conclusions on different grounds and appended to the Opinion statements of their separate opinions. Another Member of the Court, Judge Kojevnikov, who also accepted the operative clause of the Opinion, appended thereto a declaration.

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In its Opinion, the Court briefly states the facts leading up to the Request for Opinion. In its Advisory Opinion of 1950, it had said that the Union of South Africa continued to have the international obligations binding upon it, in respect of the territory of South-West Africa, in accordance with the Covenant of the League of Nations and the Mandate for the territory, and that the supervisory functions were to be exercised by the United Nations. That Opinion was accepted the same year by the General Assembly as a basis for supervision over the administration of the territory. Negotiations ensued between the United Nations and the Union of South Africa, but these were unsuccessful. In 1954, a Committee of the General Assembly drafted sets of rules of which one, Rule F (set out under (*a*) of the Resolution of November 23rd, 1954, above), related to the way in which decisions of the General Assembly with regard to reports and petitions were to be made. It is with regard to this Rule that the Court's Opinion has been sought. The Assembly was primarily concerned with the question whether Rule F corresponds to a correct interpretation of the following passage from the Opinion of 1950:

"The degree of supervision to be exercised by the General Assembly should not therefore exceed that which applied under the Mandates System, and should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations."

Having thus defined the question put to it, the Court considers whether the first part of this sentence ("The degree of supervision to be exercised by the General Assembly should not therefore exceed that which applied under the Mandates System") can be correctly interpreted as extending to the voting system to be followed by the General Assembly when making decisions with regard to reports and petitions concerning the territory of South-West Africa. It comes to the conclusion that the words "the degree of supervision" relate to the extent of the substantive supervision and not to the manner in which the collective will of the General Assembly is expressed; they do not relate to procedural matters. The first part of the sentence means that the General Assembly should not adopt such methods of supervision or impose such conditions on the Mandatory as are inconsistent with the terms of the Mandate or with a proper degree of supervision measured by the standard and the methods applied by the Council of the League of Nations. Consequently, Rule F cannot be regarded as relevant to the "degree of supervision", and it follows that it cannot be considered as instituting a greater degree of supervision than that which was envisaged by the Court in its Opinion of 1950.

This interpretation is confirmed by an examination of the circumstances which led the Court to use the words in question. In its Opinion of 1950, it was necessary for it to say what were the obligations binding upon the Union of South Africa. It found that the obligations relating to the administration of the territory, and corresponding to the sacred trust of civilization referred to in Article 22 of the Covenant, did not lapse on the dissolution of the League of Nations. As to the obligations relating to supervision of the administration, the Court, taking into consideration the provisions of the Charter, found that supervision should henceforth be exercised by the General Assembly, but that it should not exceed that which applied under the Mandates System. But the Court had not then had to deal with the system of voting. In recognizing that the competence of the General Assembly to exercise its supervisory functions was based on the Charter, it implicitly recognized that the decisions of that organ in this connection must be taken in accordance with the relevant provisions of the Charter, that is, the provisions of Article 18. If the Court had intended that the limits to the degree of supervision should be understood to include the maintenance of the system of voting followed by the Council of the League of Nations, it would have been contradicting itself and running counter to the provisions of the Charter. Accordingly, the Court finds that the first part of the sentence must be interpreted as relating to substantive matters and not to the

system of voting which was applicable in the time of the League of Nations.

The Court then proceeds to consider the second part of the sentence, according to which the degree of supervision "should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations": does Rule F accord with this requirement? Whereas the first part of the sentence relates to substantive matters, the second part is procedural in character and the word "procedure" there used refers to those procedural steps whereby supervision is to be effected. But the voting system of the General Assembly was not in contemplation when the Court used these words. Indeed, the question of conformity of the voting system of the General Assembly with that of the Council of the League of Nations presents insurmountable difficulties of a juridical nature, for the voting system of an organ is one of its distinguishing features. It is related to its composition and functions and cannot be transplanted upon another organ without disregarding one of the characteristics of the latter.

There is therefore no incompatibility between Rule F and the Opinion of 1950. It would, however, seem clear that, both in adopting Rule F and in referring the question to the Court, the General Assembly was proceeding on the assumption that the Court had used the word "procedure" as including the voting system. Even so, the conclusion would be the same. In the Opinion of 1950, the Court had said that the General Assembly derived its competence to exercise its supervisory functions from the Charter; it is therefore within the framework of the Charter that it must find the rules governing the making of its decisions in connection with those functions. It would be legally impossible for it, on the one hand, to rely on the Charter in receiving and examining reports and petitions concerning South-West Africa and, on the other hand, to reach decisions relating to these reports and petitions in accordance with a voting system entirely alien to that prescribed by the Charter.

As to the expression "as far as possible", this was designed to allow for adjustments necessitated by the fact that the Council of the League of Nations was governed by an instrument different from that which governed the General Assembly. For the latter, in the matter of determining how to make decisions relating to reports and petitions, there was but one course open. It had before it Article 18 of the Charter, which prescribes the methods for taking decisions. The Opinion of 1950 left the General Assembly with Article 18 of the Charter as the sole legal basis for the voting system applicable. It was on that basis that Rule F was adopted. In adopting that Rule, it acted within the bounds of legal possibility.

Rule F therefore corresponds to a correct interpretation of the Opinion of 1950.

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25. ADMISSIBILITY OF HEARINGS OF PETITIONERS BY THE COMMITTEE ON SOUTH-WEST AFRICA

Advisory Opinion of 1 June 1956

The question relating to the admissibility of hearings of petitioners by the Committee on South West Africa of the General Assembly of the United Nations had been submitted to the Court for an advisory opinion by the General Assembly which, on December 3rd, 1955, adopted the following Resolution for this purpose:

"*The General Assembly*,

"*Having been requested* by the Committee on South West Africa to decide whether or not the oral hearing of petitioners on matters relating to the Territory of South West Africa is admissible before that Committee (A/2913/Add.2),

"*Having instructed* the Committee, in General Assembly resolution 749 A (VIII) of 28 November 1953, to examine petitions as far as possible in accordance with the procedure of the former Mandates System,

"*Requests* the International Court of Justice to give an advisory opinion on the following question:

" 'Is it consistent with the advisory opinion of the International Court of Justice of 11 July 1950 for the Committee on South West Africa, established by General Assembly resolution 749 A (VIII) of 28 November 1953, to grant oral hearings to petitioners on matters relating to the Territory of South West Africa?' "

On receipt of the Request for an Opinion, the Court gave an opportunity to States Members of the United Nations to present their views. The Government of the United States of America and the Government of the Republic of China submitted written statements, and a representative of the Government of the United Kingdom of Great Britain and Northern Ireland made an oral statement at a public sitting of the Court. The Secretary-General of the United Nations transmitted the documents likely to throw light upon the question, together with an introductory note.

The Court's Opinion, which was adopted by eight votes to five, gave an affirmative answer to the question put to it. Two Members of the Court—Judges Winiarski and Kojevnikov—while voting in favour of the Opinion, appended declarations thereto. Judge Sir Hersch Lauterpacht, who also voted for the Opinion, appended thereto a separate Opinion. The five Members of the Court who voted against the Advisory Opinion—Vice-President Badawi and Judges Basdevant, Hsu Mo, Armand-Ugon and Moreno Quintana—appended to the Opinion of the Court a joint dissenting opinion.

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In its Opinion, the Court first indicates its understanding of the question submitted to it. It understands it as relating to persons who have submitted written petitions to the Committee on South West Africa, in conformity with its Rules of Procedure. It also considers that it relates not to the authority of the Committee to grant hearings in its own right but to the question whether it is legally open to the General Assembly to authorize the Committee to grant hearings.

The General Assembly asks whether the grant of hearings would be consistent with the Advisory Opinion delivered by the Court in 1950. In order to answer that question, the Court must have regard to the whole of that Opinion and its general purport and meaning. It therefore analyses the Opinion. The

operative part indicates that the obligations of the Mandatory continue unimpaired with this difference, that the supervisory functions formerly exercised by the Council of the League of Nations are now to be exercised by the United Nations. The organ now exercising these supervisory functions, that is, the General Assembly, is legally qualified to carry out an effective and adequate supervision of the administration of the Mandated Territory. In the reasoning on which the Opinion is based, the Court made it clear that the obligations of the Mandatory, including the obligation to transmit reports and petitions and to submit to the supervision, were those which obtained under the Mandates System. These obligations could not be extended, and consequently the degree of supervision to be exercised by the General Assembly should not exceed that which applied under the Mandates System. Following its finding regarding the substitution of the General Assembly for the Council of the League of Nations in the exercise of supervision, the Court states that the degree of supervision should conform as far as possible to the procedure followed by the Council of the League of Nations. But the necessity for supervision continues to exist: the Charter preserves the rights of States and peoples under existing international agreements, which implies the existence of a supervisory organ. From this analysis of the Opinion of 1950, it is clear that its paramount purpose was to safeguard the sacred trust of civilization through the maintenance of effective international supervision: in interpreting any particular sentences in the Opinion, it is not permissible to attribute to them a meaning which would not be in conformity with this paramount purpose or with the operative part of the Opinion.

How was the question of the grant of oral hearings dealt with during the régime of the League of Nations? The texts do not refer to hearings and no hearings were ever granted. Nor, however, do the texts refer to the right of petition, an innovation which was nevertheless introduced by the Council of the League to render its supervisory functions more effective: it was competent to do so, and it would also have been competent to authorize the Permanent Mandates Commission to grant hearings, had it seen fit to do so.

In this connexion, it had been contended that the Opinion of 1950 was intended to express the view that the Mandates System and the degree of supervision must be deemed to have been crystallized, so that the General Assembly could not do anything which the Council had not actually done, even if it had authority to do it. That is not the case. There is nothing in the Opinion of 1950 or in the relevant texts that can be construed as in any way restricting the authority of the General Assembly to less than that conferred on the Council of the League of Nations. It was proper for the Court to point out, in its Opinion of 1950, that the General Assembly could not enlarge its authority, but the Court was not called upon to determine whether the General Assembly could or could not exercise powers which the Council of the League had possessed but for the exercise of which no occasion had arisen.

Reliance had also been placed on the sentence in the Opinion of 1950, to the effect that the degree of supervision to be exercised by the General Assembly should not exceed that which applied under the Mandates System, and it had been suggested that the grant of hearings would involve such an excess in the degree of supervision. But, in the present circumstances, in which the Committee on South West Africa is working without the assistance of the Mandatory, hearings might enable it to be in a better position to judge the merits of petitions. That, however, is in the interest of the Mandatory as well as of the proper working of the Mandates System. It cannot therefore be presumed that the grant of hearings increases the burden upon the Mandatory. Nor is it possible to interpret the sentence in the Opinion of 1950 referred to above as being intended to restrict the activity of the General Assembly to measures which had actually been applied by the League of Nations. The context of the sentence is against such a construction, as is the Opinion given by the Court in 1955.

The Court lastly notes that, by reason of the lack of cooperation by the Mandatory, the Committee on South West Africa has been constrained to make provision for an alternative procedure for the receipt and treatment of petitions. The particular question which has been submitted to the Court arose out of a situation in which the Mandatory has maintained its refusal to assist in giving effect to the Opinion of 11 July 1950, and to co-operate with the United Nations by the submission of reports, and by the transmission of petitions in conformity with the procedure of the Mandates System. This sort of situation was provided for by the statement in the Court's Opinion of 1950 that the degree of supervision to be exercised by the General Assembly "should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations."

In conclusion, the Court holds that it would not be inconsistent with its Opinion of 11 July 1950 for the General Assembly to authorize a procedure for the grant of oral hearings by the Committee on South West Africa to petitioners who had already submitted written petitions: provided that the General Assembly was satisfied that such a course was necessary for the maintenance of effective international supervision of the administration of the Mandated Territory.

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26. JUDGMENTS OF THE ADMINISTRATIVE TRIBUNAL OF THE ILO UPON COMPLAINTS MADE AGAINST UNESCO

Advisory Opinion of 23 October 1956

This advisory opinion dealt with the matter of the judgments of the Administrative Tribunal of the International Labour Organisation (ILO) upon complaints made against the United Nations Educational, Scientific and Cultural Organization (Unesco).

By a Resolution adopted on November 25th, 1955, the Executive Board of Unesco decided to submit the following legal questions to the International Court of Justice for an advisory opinion:

> "I. Was the Administrative Tribunal competent, under Article II of its Statute, to hear the complaints introduced against Unesco on 5 February 1955 by Messrs. Duberg and Leff and Mrs. Wilcox, and on 28 June 1955 by Mrs. Bernstein?

"II. In the case of an affirmative answer to question I:

"(*a*) Was the Administrative Tribunal competent to determine whether the power of the Director-General not to renew fixed-term appointments has been exercised for the good of the service and in the interest of the Organization?

"(*b*) Was the Administrative Tribunal competent to pronounce on the attitude which the Director-General, under the terms of the Constitution of Unesco, ought to maintain in his relations with a Member State, particularly as regards the execution of the policy of the Government authorities of that Member State?

"III. In any case, what is the validity of the decisions given by the Administrative Tribunal in its Judgments Nos. 17, 18, 19 and 21?"

Upon the receipt of a Request for an Opinion the Court gave those States Members of Unesco which were entitled to appear before the Court, as well as the ILO and international organizations which had recognized the jurisdiction of the Administrative Tribunal of the ILO, an opportunity to present their views. Several States availed themselves of this opportunity. Unesco did likewise: to its written statements, the Organization appended the observations which had been formulated by counsel acting on behalf of the officials concerned. Adequate information having thus been made available to it, the Court did not hold oral hearings.

The Court having decided by 9 votes to 4 to comply with the Request for an Opinion, gave an affirmative answer to Question I by 10 votes to 3. By 9 votes to 4, the Court was of opinion that Question II did not call for an answer by the Court and, with regard to Question III, by 10 votes to 3, that the validity of the Judgments was no longer open to challenge.

Judge Kojevnikov, whilst voting in favour of the decision of the Court to comply with the Request for an Opinion, and of the final part of the Opinion itself with regard to Questions I and III declared that he was unable to concur in the view of the Court on Question II.

Three Judges, Messrs. Winiarski and Klaestad and Sir Muhammad Zafrulla Khan, appended to the Opinion of the Court statements of their separate Opinions. President Hackworth, Vice-President Badawi and Judges Read and Cordova appended to the Opinion of the Court statements of their dissenting Opinions.

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In its Opinion, the Court noted that the facts were essentially the same in all four cases and referred solely to the case of Mr. Peter Duberg (Judgment No. 17). He had held a fixed-term appointment with Unesco which was due to expire on December 31st, 1954. In 1953 and 1954 he had refused to answer two questionnaires of the Government of the United States designed to make available to the Director-General of Unesco certain information concerning United States citizens employed by that Organization. Having received an invitation to appear before the International Organizations' Employees Loyalty Board of the United States Civil Service Commission he refused to do so and on July 13th, 1954 so informed the Director-General of Unesco. On August 13th, the Director-General informed Duberg that since he was unable to accept his conduct as being consistent with the high standards of integrity which were required of those employed by the Organization, he would not offer him a new appointment on the expiry of his contract. Previously, in a Memorandum issued on July 6th, 1954, the Director-General had announced his decision that all holders of fixed-term contracts expiring at the end of 1954 or at the beginning of 1955, who had achieved the required standards of efficiency, competence and integrity would be offered renewals of their appointments. Despite the opinion to the contrary given by the Unesco Appeals Board to which Duberg had applied, the decision not to renew his contract was maintained. On February 5th, 1955, Duberg brought his complaint before the Administrative Tribunal of the ILO which, in its Judgment of April 26th, 1955, declared itself competent and adjudicated on the merits. These were the circumstances in which the Executive Board of Unesco, challenging the jurisdiction of the Tribunal in that case and consequently the validity of the Judgment, requested an opinion from the Court in reliance upon the provisions of Article XII of the Statute of the Tribunal.

The Court considered at the outset whether it should comply with the Request. It noted in the first place that under Article XII the Opinion would be binding, an effect which went beyond the scope attributed by the Charter of the United Nations and by the Statute of the Court to an Advisory Opinion. However, the provision in question, which was nothing but a rule of conduct for the Executive Board, in no wise affected the way in which the Court functioned.

Furthermore, the advisory procedure thus brought into being appeared as serving, in a way, the object of an appeal against the Judgments of the Tribunal. The advisory proceedings which thus took the place of contentious proceedings were designed to provide that certain challenges relating to the validity of Judgments rendered by the Tribunal in proceedings between an official and the international organization concerned should be brought before the Court whereas under the Statute of the Court only States may be parties in cases before it. The Court was not called upon to consider the merits of such a solution; it must consider only the question whether its Statute and its judicial character did or did not stand in the way of its participating therein. However, contrary to accepted practice, the advisory proceedings which had been instituted in the present case involved a certain absence of equality between Unesco and the officials concerned. In the first place, under the provisions of the Statute of the Administrative Tribunal only the Executive Board of Unesco was entitled to institute these proceedings. But this inequality was antecedent to the examination of the question by the Court and did not affect the manner in which the Court undertook that examination. In the second place, in connection with the actual procedure before the Court, although the Statute and the Rules of Court made available to Unesco the necessary facilities for the presentation of its views, in the case of the officials, the position was different. But this difficulty was met on the one hand because the observations of the officials were made available to the Court through the intermediary of Unesco and on the other because the oral proceedings had been dispensed with. In view of this there would appear to have been no compelling reason why the Court should refuse to comply with the Request for an Opinion.

The Court then dealt with the first question put to it. It noted that according to the words of the provision of the Statute of the Administrative Tribunal, it was necessary, in order to establish the jurisdiction of the Tribunal to hear a complaint by an official, that he should allege non-observance of

the terms of appointment or of the provisions of the Staff Regulations. It was therefore necessary that the complaint should appear to have a substantial and not merely an artificial connection with the terms and the provisions invoked although it was not required that the facts alleged should necessarily lead to the results alleged by the complainants, for the latter constituted the substance of the issue before the Tribunal.

In the cases in question, the officials had put forward an interpretation of their contracts and of the Staff Regulations to the effect that they had a right to the renewal of their contracts. Was this assertion sufficiently well-founded to establish the competence of the Tribunal? To answer that question, it was necessary to consider the contracts not only by reference to their letter but also in relation to the actual conditions in which they were entered into and the place which they occupied in the Organization. In the practice of the United Nations and of the Specialized Agencies, holders of fixed-term contracts, although not assimilated to holders of permanent or indeterminate contracts, had often been treated as entitled to be considered for continued employment, consistently with the requirements and the general good of the Organization. This practice should serve as a warning against an interpretation of fixed-term contracts which, by considering exclusively the literal meaning of their provision relating to duration would mean that on the expiry of the fixed period a fixed-term contract could not be relied upon for the purpose of impugning a refusal to renew. Such an interpretation, moreover, would fail to take into account the nature of renewal of such a contract, which indeed constituted a continuing period of the former contract, with the result that there was a legal relationship between the renewal and the original appointment. This relationship which constituted the legal basis of the complaints of the officials showed itself once more in the Director-General's Administrative Memorandum of July 6th, 1954, cited above. The Court considered that it could be reasonably maintained that an administrative notice framed in such general terms might be regarded as binding on the Organization. If the Director-General thought fit to refuse an official the benefit of the general offer thus extended, any dispute which might arise with regard to the matter fell within the jurisdiction of the Administrative Tribunal.

Furthermore, the Court noted that before the Tribunal both the complainants and Unesco had placed themselves on the ground of the provisions of the Staff Regulations, within whose terms the Administrative Memorandum of July 6th also fell. In the view of the Court the Memorandum constituted a modification of the Staff Rules which the Director-General was authorised to make under the Staff Regulations. It also referred, expressly or by implication, to the text of the Staff Regulations and in particular to the notion of integrity around which centred the controversy submitted to the Administrative Tribunal. Accordingly, whether looked at from the point of view of non-observance of the terms of appointment or of that of non-observance of Staff Regulations the complainants had a legitimate ground for complaint and the Tribunal was justified in confirming its jurisdiction.

For these reasons the Court gave an affirmative answer to Question I. With regard to Question II the Court pointed out that a Request for an Opinion expressly presented within the orbit of Article XII of the Statute of the Administrative Tribunal ought to be limited to a challenge of a decision of the Tribunal confirming its jurisdiction or to cases of fundamental fault of procedure. Since Question II referred to neither of these two grounds of challenge the Court is not in the position to answer Question II.

The Court, having thus rejected the contention relating to the jurisdiction of the Administrative Tribunal, the only contention raised by the Executive Board of Unesco, answered Question III by recognizing that the validity of the four Judgments was no longer open to challenge.

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27. CASE OF CERTAIN NORWEGIAN LOANS

Judgment of 6 July 1957

Proceedings in the case of certain Norwegian loans, between France and Norway, had been instituted by an Application of the French Government which requested the Court to adjudge that certain loans issued on the French market and on other foreign markets by the Kingdom of Norway, the Mortgage Bank of the Kingdom of Norway and the Smallholding and Workers' Housing Bank, stipulated in gold the amount of the borrower's obligation and that the borrower could only discharge the substance of his debt by the payment of the gold value of the coupons and of the redeemed bonds. The Application expressly referred to Article 36(2) of the Statute of the Court and to the Declarations of Acceptance of the compulsory jurisdiction made by France and by Norway. For its part, the Norwegian Government raised certain Preliminary Objections which, at the request of the French Government which the Norwegian Government did not oppose, the Court joined to the merits.

In its Judgment the Court upheld one of the grounds relied upon by Norway, which the Court considered more direct and conclusive: the Objection to the effect that Norway was entitled, by virtue of the condition of reciprocity, to invoke the reservation relating to national jurisdiction contained in the French Declaration; and that this reservation excluded from the jurisdiction of the court the dispute which has been referred to it by the Application of the French Government. Considering that it was not necessary to examine the other Norwegian Objections or the other submissions of the Parties, the Court found by twelve votes to three that it was without jurisdiction to adjudicate upon the dispute.

Judge Moreno Quintana declared that he considered that the Court was without jurisdiction for a reason different from that given in the Judgment. Vice President Badawi and Judge Sir Hersch Lauterpacht appended to the Judgment of the Court statements of their individual opinions. Judges Guerrero, Basdevant and Read appended to the Judgment of the Court statements of their dissenting opinions.

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In its Judgment the Court recalled the facts. The loans in question were floated between 1885 and 1909; the French Government contended that the bonds contained a gold

clause which varied in form from bond to bond, but which that Government regarded as sufficient in the case of each bond, this being disputed by the Norwegian Government. The convertibility into gold of notes of the Bank of Norway having been suspended on various dates since 1914, a Norwegian law of December 15th, 1923, provided that "where a debtor has lawfully agreed to pay in gold a pecuniary debt in kroner and where the creditor refuses to accept payment in Bank of Norway notes on the basis of their nominal gold value, the debtor may request a postponement of payment for such period as the Bank is exempted from its obligation to redeem its notes in accordance with their nominal value". Protracted diplomatic correspondence ensued which lasted from 1925 to 1955, in which the French Government contended that it would not seem that a unilateral decision could be relied upon as against foreign creditors and requested the recognition of the rights claimed by the French holders of the bonds involved. The Norwegian Government, being unprepared to agree to the various proposals for international settlement put forward by France, maintained that the claims of the bondholders were within the jurisdiction of the Norwegian courts and involved solely the interpretation and application of Norwegian law. The French bondholders refrained from submitting their case to the Norwegian courts. It was in these circumstances that the French Government referred the matter to the Court.

Such being the facts, the Court at the outset directed its attention to the Preliminary Objections of the Norwegian Government, beginning with the first of these Objections which related directly to the jurisdiction of the Court and which had two aspects. In the first place, it was contended that the Court, whose function is to decide in accordance with international law such disputes as are submitted to it, can be seised by means of a unilateral application, only of legal disputes falling within one of the four categories of disputes enumerated in paragraph 2 of Article 36 of the Statute and relating to international law. In the view of the Norwegian Government, the loan contracts were governed by municipal law and not by international law. In the second place, the Norwegian Government declared that if there should still be some doubt on this point it would rely upon the reservation made in the following terms by the French Government in its Declaration accepting the compulsory jurisdiction of the Court: "This declaration does not apply to differences relating to matters which are essentially within the national jurisdiction as understood by the Government of the French Republic". The Norwegian Government considered that by virtue of the clause of reciprocity which is embodied in Article 36, paragraph 3, of the Statute and contained in the corresponding Norwegian Declaration, Norway had the right to rely upon the restrictions placed by France on her own undertakings. Convinced that the dispute was within the domestic jurisdiction, the Norwegian Government requested the Court to decline, on grounds that it lacked jurisdiction, the function which the French Government would have it assume.

The Court considered the second ground of this Objection and noted that the jurisdiction of the Court in the present case depended upon the Declarations made by the Parties on condition of reciprocity; and that since two unilateral declarations were involved such jurisdiction was conferred upon the Court only to the extent to which the Declarations coincided in conferring it. Consequently, the common will of the Parties, which was the basis of the Court's jurisdiction, existed within the narrower limits indicated by the French reservation. The Court reaffirmed this method of defining the limits of its jurisdiction which had already been adopted by the Permanent Court of International Justice. In accordance with the condition of reciprocity Norway, equally with France, was entitled to except from the compulsory jurisdiction of the Court disputes understood by Norway to be essentially within its national jurisdiction.

The French Government pointed out that between France and Norway there existed a treaty which made the payment of any contractual debt a question of international law and that in this connection the two States could not therefore speak of domestic jurisdiction. But the aim of the treaty referred to, the Second Hague Convention of 1907 respecting the limitation of the employment of force for the recovery of contract debts, was not to introduce compulsory arbitration; the only obligation imposed by the Convention was that an intervening power should not have recourse to force before it had tried arbitration. The Court could, therefore, find no reason why the fact that the two Parties were signatories to the Second Hague Convention should deprive Norway of the right to invoke the reservation in the French Declaration. The French Government also referred to the Franco Norwegian Arbitration Convention of 1904 and to the General Act of Geneva of September 26th, 1928. Neither of these references, however, could be regarded as sufficient to justify the view that the Application of the French Government was based upon the Convention or the General Act: the Court would not be justified in seeking a basis for its jurisdiction different from that which the French Government itself set out in its Application and by reference to which the case had been presented by both Parties to the Court.

The Court noted that from one point of view it might be said that the ground of the first Objection which was based on the reservation in the French Declaration was solely subsidiary in character. But in the opinion of the Court, the second ground could not be regarded as subsidiary in the sense that Norway would invoke the French reservation only in the event of the first ground of this Objection being held to be legally unfounded. The Court's competence was challenged on both grounds and the Court was free to base its decision on the ground which in its judgment was more direct and conclusive. Not only did the Norwegian Government invoke the French reservation, but it maintained the second ground of its first Objection throughout. Abandonment could not be presumed or inferred; it had to be declared expressly.

The Court did not consider that it should examine whether the French reservation was consistent with the undertaking of a legal obligation and was compatible with Article 36, paragraph 6, of the Statute. The validity of the reservation had not been questioned by the Parties. It was clear that France fully maintained its Declaration including the reservation, and that Norway relied upon the reservation. In consequence, the Court had before it a provision which both Parties to the dispute regarded as constituting an expression of their common will relating to the competence of the Court. The Court gave effect to the reservation as it stood and as the Parties recognised it.

For these reasons, the Court found that it was without jurisdiction to adjudicate upon the dispute which had been brought before it by the Application of the French Government.

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28. INTERHANDEL CASE (INTERIM PROTECTION)

Order of 24 October 1957

In the Interhandel case (Switzerland *v.* the United States of America), the Court found that there was no need to indicate interim measures of protection.

The Interhandel case was brought before the Court by an Application of the Swiss Government of October 2nd, 1957, by which the Court was asked to declare that the Government of the United States was under an obligation to restore to Interhandel, a company entered in the Commercial Register of Basle, its assets which had been vested in the United States as from 1942. On October 3rd, the Swiss Government asked the Court to indicate, as an interim measure of protection, and for as long as the case was pending, that the United States should not part with those assets and, in particular, not sell the shares of the General Aniline and Film Corporation.

The Request for the indication of interim measures of protection was dealt with as a matter of priority. During hearings on October 12th and 24th, the Court heard oral argument by the Parties on the subject. The Court also took cognisance of written statements subsequently presented by the Parties. The decision made by the Court relied upon a statement of October 19th by which the Government of the United States declared that it was not taking action at the present time to fix a time schedule for the sale of the shares in question.

The Government of the United States had contended that the Court had no jurisdiction to deal with the matter of the sale or disposition of the shares. On that point, the Order issued by the Court states that Preliminary Objections are dealt with by applying a procedure other than that which has been provided for requests for the indication of interim measures of protection; if the contention of the United States were maintained, it would fall to be dealt with by the Court in due course. In this connection, the Order states that this procedure in no way prejudices the jurisdiction of the Court to deal with the merits of the case and leaves unaffected the right of the respondent to submit arguments against such jurisdiction.

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Attached to the Order are:

—a Separate Opinion of Judge Klaestad who considers that the Court has no jurisdiction, in which Opinion President Hackworth and Judge Read concur;

—a Separate Opinion of Judge Sir Hersch Lauterpacht who, while being in agreement with the operative part of the Order also considers that the Court is without jurisdiction;

—a Declaration by Judge Wellington Koo who agrees with the operative part without sharing the reasons upon which it is based, and finally,

—a Declaration by Judge Kojevnikov who is unable to agree with the Order.

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On October 24th, 1957, the Court also issued an Order fixing time limits for the presentation of the Memorial of the Swiss Government on the merits and for the presentation of the Counter-Memorial or any Preliminary Objections of the Government of the United States. The rest of the procedure is reserved for further decision.

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29. CASE CONCERNING RIGHT OF PASSAGE OVER INDIAN TERRITORY (PRELIMINARY OBJECTIONS)

Judgment of 26 November 1957

The case concerning right of passage over Indian territory (Preliminary Objections) between Portugal and India was submitted by Application of the Portuguese Government requesting the Court to recognize and declare that Portugal was the holder or beneficiary of a right of passage between its territory of Damão (littoral Damão) and its enclaves of Dadra and Nagar-Aveli and between each of the latter and that this right comprises the faculty of transit for persons and goods, including armed forces, without restrictions or difficulties and in the manner and to the extent required by the effective exercise of Portuguese sovereignty in the said territories, that India has prevented and continues to prevent the exercise of the right in question, thus committing an offence to the detriment of Portuguese Sovereignty over the enclaves and violating its international obligations and to adjudge that India should put an immediate end to this situation by allowing Portugal to exercise the right of passage thus claimed. The Application expressly referred to Article 36, paragraph 2, of the Statute and to the Declarations by which Portugal and India have accepted the compulsory jurisdiction of the Court.

The Government of India for its part raised six Preliminary Objections to the jurisdiction of the Court which were based on the following grounds:

The First Preliminary Objection was to the effect that a condition in the Portuguese Declaration of December 19th, 1955, accepting the jurisdiction of the Court reserved for that Government "the right to exclude from the scope of the present Declaration at any time during its validity any given category or categories of disputes by notifying the Secretary-General of the United Nations and with effect from the moment of such notification" and was incompatible with the object and purpose of the Optional Clause, with the result that the Declaration of Acceptance was invalid.

The Second Preliminary Objection was based on the allegation that the Portuguese Application of December 22nd, 1955, was filed before a copy of the Declaration of Portugal accepting the compulsory jurisdiction of the Court could be transmitted to other Parties to the Statute by the Secretary-General in compliance with Article 36, paragraph 4, of the Statute. The filing of the Application had thus violated the

equality, mutuality and reciprocity to which India was entitled under the Optional Clause and under the express condition of reciprocity contained in its Declaration of February 28th, 1940, accepting the compulsory jurisdiction of the Court.

The Third Preliminary Objection was based on the absence, prior to the filing of the Application, of diplomatic negotiations which would have made it possible to define the subject matter of the claim.

The Fourth Preliminary Objection requested the Court to declare that since India had ignored the Portuguese Declaration before the Application was filed, India had been unable to avail itself on the basis of reciprocity of the condition in the Portuguese Declaration enabling it to exclude from the jurisdiction of the Court the dispute which was the subject matter of the Application.

The Fifth Preliminary Objection was based on the reservation in the Indian Declaration of Acceptance which excludes from the jurisdiction of the Court disputes in regard to questions which by international law fall exclusively within the jurisdiction of the Government of India. That Government asserted that the facts and the legal considerations adduced before the Court did not permit the conclusion that there was a reasonably arguable case for the contention that the subject matter of the dispute was outside its domestic jurisdiction.

Finally, in *The Sixth Preliminary Objection*, the Government of India contended that the Court was without jurisdiction on the ground that India's Declaration of Acceptance was limited to "disputes arising after February 5th, 1930 with regard to situations or facts subsequent to the same date." The Government of India argued: first, that the dispute submitted to the Court by Portugal did not arise after February 5th, 1930 and, secondly, that in any case, it was a dispute with regard to situations and facts prior to that date.

The Government of Portugal had added to its Submissions a statement requesting the Court to recall to the Parties the universally admitted principle that they should facilitate the accomplishment of the task of the Court by abstaining from any measure capable of exercising a prejudicial effect in regard to the execution of its decision or which might bring about either an aggravation or an extension of the dispute. The Court did not consider that in the circumstances of the present case it should comply with this request of the Government of Portugal.

In its Judgment, the Court rejected the First and the Second Preliminary Objections by fourteen votes to three, the Third by sixteen votes to one and the Fourth by fifteen votes to two. By thirteen votes to four it joined the Fifth Objection to the merits and by fifteen votes to two joined the Sixth Objection to the merits. Finally, it declared that the proceedings on the merits were resumed and fixed as follows the time-limits for the rest of the proceedings:

For the filing of the Counter-Memorial of India, February 25th, 1958; for the filing of the Portuguese Reply, May 25th, 1958; for the filing of the Indian Rejoinder, July 25th, 1958.

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Judge Kojevnikov stated that he could not concur either in the operative clause or in the reasoning of the Judgment because, in his opinion, the Court should, at the present stage of the proceedings, have sustained one or indeed more of the Preliminary Objections.

Vice-President Badawi and Judge Klaestad appended to the Judgment statements of their dissenting opinions. M. Fernandes, Judge *ad hoc*, concurred in the dissenting opinion of Judge Klaestad and Mr. Chagla, Judge *ad hoc*, appended to the Judgment a statement of his dissenting opinion.

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With regard to the *First Preliminary Objection* to the effect that the Portuguese Declaration was invalid for the reason that the condition enabling Portugal to exclude at any time from the scope of that Declaration any given categories of disputes by mere notification to the Secretary-General, the Court said that the words used in the condition, construed in their ordinary sense, meant simply that a notification under that condition applied only to disputes brought before the Court *after* the date of the notification. No retroactive effect could thus be imputed to such a notification. In this connection the Court referred to the principle which it had laid down in the *Nottebohm* case in the following words: "An extrinsic fact such as the lapse of the Declaration by reason of the expiry of the period or of denunciation cannot deprive the Court of the jurisdiction already established." The Court added that this principle applied both to total denunciation, and to partial denunciation as contemplated in the impugned condition of the Portuguese Declaration.

India having contended that this condition had introduced into the Declaration a degree of uncertainty as to reciprocal rights and obligations which deprived the Acceptance of the compulsory jurisdiction of the Court of all practical value, the Court held that as Declarations and their alterations made under Article 36 of the Statute had to be deposited with the Secretary-General it followed that, when a case was submitted to the Court, it was always possible to ascertain what were, at that moment, the reciprocal obligations of the Parties in accordance with their respective Declarations. Although it was true that during the interval between the date of the notification to the Secretary-General and its receipt by the Parties to the Statute there might exist some element of uncertainty, such uncertainty was inherent in the operation of the system of the Optional Clause and did not affect the validity of the condition contained in the Portuguese Declaration. The Court noted that with regard to any degree of uncertainty resulting from the right of Portugal to avail itself at any time of the Condition in its Acceptance, the position was substantially the same as that created by the right claimed by many Signatories of the Optional Clause, including India, to terminate their Declarations of Acceptance by simple notification without notice. It recalled that India had done so on January 7th, 1956, when it notified the Secretary-General of the denunciation of its Declaration of February 28th, 1940 (relied upon by Portugal in its Application), for which it simultaneously substituted a new Declaration incorporating reservations which were absent from its previous Declaration. By doing so, India achieved in substance the object of the condition in Portugal's Declaration.

Moreover, in the view of the Court, there was no essential difference with regard to the degree of uncertainty between a situation resulting from right of total denunciation and that resulting from the condition in the Portuguese Declaration which left open the possibility of a partial denunciation. The Court further held that it was not possible to admit as a relevant differentiating factor that while in the case of total denunciation the denouncing State could no longer invoke any rights accruing under its Declaration, in the case of a par-

tial denunciation under the terms of the Portuguese Declaration Portugal could otherwise continue to claim the benefits of its Acceptance. The principle of reciprocity made it possible for other States including India to invoke against Portugal all the rights which it might thus continue to claim.

A third reason for the alleged invalidity of the Portuguese Condition was that it offended against the basic principle of reciprocity underlying the Optional Clause, inasmuch as it claimed for Portugal a right which in effect was denied to other Signatories whose Declarations did not contain a similar condition. The Court was unable to accept this contention. It held that if the position of the Parties as regards the exercise of their rights was in any way affected by the unavoidable interval between the receipt by the Secretary-General of the appropriate notification and its receipt or by the other Signatories, that delay operated equally in favour of or against all Signatories of the Optional Clause.

The Court also refused to accept the view that the Condition in the Portuguese Declaration was inconsistent with the principle of reciprocity inasmuch as it rendered inoperative that part of paragraph 2 of Article 36 which refers to the acceptance of the Optional Clause in relation to States accepting "the same obligation". It was not necessary that "the same obligation" should be irrevocably defined at the time of acceptance for the entire period of its duration; that expression simply meant no more than that, as between the States adhering to the Optional Clause, each and all of them were bound by such identical obligations as might exist at any time during which the acceptance was mutually binding.

As the Court found that the condition in the Portuguese Declaration was not inconsistent with the Statute, it was not necessary for it to consider the position whether, if it were invalid, its invalidity would affect the Declaration as a whole.

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The Court then dealt with the *Second Objection* based on the allegation that as the Application was filed before Portugal's acceptance of the Court's jurisdiction could be notified by the Secretary-General to the other Signatories, the filing of the Application violated the equality, mutuality and reciprocity to which India was entitled under the Optional Clause and under the express condition contained in its Declaration. The Court noted that two questions had to be considered: first, in filing its Application on the day following the deposit of its Declaration of Acceptance, did Portugal act in a manner contrary to the Statute; second, if not, did it thereby violate any right of India under the Statute or under its Declaration.

India maintained that before filing its Application Portugal ought to have allowed such period to elapse as would reasonably have permitted other Signatories of the Optional Clause to receive from the Secretary-General notification of the Portuguese Declaration.

The Court was unable to accept that contention. The contractual relation between the Parties and the compulsory jurisdiction of the Court resulting therefrom are established "*ipso facto* and without special agreement" by the fact of the making of the Declaration. A State accepting the jurisdiction of the Court must expect that an Application may be filed against it before the Court by a new declarant State on the same day on which that State deposits its Acceptance with the Secretary-General.

India had contended that acceptance of the Court's jurisdiction became effective only when the Secretary-General had transmitted a copy thereof to the Parties. The Court held that the declarant State was concerned only with the deposit of its Declaration with the Secretary-General and was not concerned with the duty of the Secretary-General or the manner of its fulfilment. The Court could not read into the Optional Clause the requirement that an interval should elapse subsequent to the deposit of the Declaration. Any such requirement would introduce an element of uncertainty into the operation of the Optional Clause system.

As India had not specified what actual right which she derived from the Statute and the Declaration had been adversely affected by the manner of the filing of the Application, the Court was unable to discover what right had in fact thus been violated.

Having arrived at the conclusion that the Application was filed in a manner which was neither contrary to the Statute nor in violation of any right of India, the Court dismissed the Second Preliminary Objection.

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The Court then dealt with the *Fourth Preliminary Objection* which was also concerned with the manner in which the Application was filed.

India contended that having regard to the manner in which the Application was filed, it had been unable to avail itself on the basis of reciprocity of the condition in the Portuguese Declaration and to exclude from the jurisdiction of the Court the dispute which was the subject matter of the Application. The Court merely recalled what it had said in dealing with the Second Objection, in particular that the Statute did not prescribe any interval between the deposit of a Declaration of Acceptance and the filing of an Application.

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On the *Third Preliminary Objection* which invoked the absence of diplomatic negotiations prior to the filing of the Application, the Court held that a substantial part of the exchanges or views between the Parties prior to the filing of the Application was devoted to the question of access to the enclaves, that the correspondence and notes laid before the Court revealed the repeated complaints of Portugal on account of denial of transit facilities, and that the correspondence showed that negotiations had reached a deadlock. Assuming that Article 36, paragraph 2, of the Statute by referring to legal disputes, did require a definition of the dispute through negotiations, the condition had been complied with.

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In its *Fifth Objection*, India relied on a reservation in its own Declaration of Acceptance which excludes from the jurisdiction of the Court disputes with regard to questions which by international law fall exclusively within the jurisdiction of the Government of India, and asserted that the facts and the legal considerations adduced before the Court did not permit the conclusion that there was a reasonably arguable case for the contention that the subject matter of the dispute was outside the exclusive domestic jurisdiction of India.

The Court noted that the facts on which the Submissions of India were based were not admitted by Portugal and that elucidation of those facts and their legal consequences would involve an examination of the practice of the British, Indian and Portuguese authorities in the matter of the right of passage, in particular to determine whether this practice showed that the Parties had envisaged this right as a question which according to international law was exclusively within the jurisdiction of the territorial sovereign. All these and similar questions could not be examined at this preliminary stage without prejudging the merits. Accordingly, the Court decided to join the Fifth Objection to the merits.

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Finally, in dealing with the *Sixth Objection* based on the reservation *ratione temporis* in the Indian Declaration limiting the Declaration to disputes arising after February 5th, 1930, with regard to situations or facts subsequent to that date, the Court noted that to ascertain the date on which the dispute had arisen it was necessary to examine whether or not the dispute was only a continuation of a dispute on the right of passage which had arisen before 1930. The Court having heard conflicting arguments regarding the nature of the passage formerly exercised was not in a position to determine these two questions at this stage.

Nor did the Court have at present sufficient evidence to enable it to pronounce on the question whether the dispute concerned situations or facts prior to 1930. Accordingly, it joined the Sixth Preliminary Objection to the merits.

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30. CASE CONCERNING THE APPLICATION OF THE CONVENTION OF 1902 GOVERNING THE GUARDIANSHIP OF INFANTS

Judgment of 28 November 1958

The case relating to the application of the Convention of 1902 governing the Guardianship of Infants, between the Netherlands and Sweden, was concerned with the validity of the measure of protective upbringing (*skyddsuppfostran*) taken by the Swedish authorities in respect of an infant, Marie Elisabeth Boll, of Netherlands nationality, residing in Sweden. Alleging that this measure was incompatible with the provisions of The Hague Convention of 1902 governing the guardianship of infants, according to which it is the national law of the infant that is applicable, the Netherlands, in their Application instituting proceedings, asked the Court to declare that the measure of protective upbringing is not in conformity with the obligations binding upon Sweden by virtue of the Convention and to order the termination of the measure.

By twelve votes to four, the Court rejected this request.

Judges Kojevnikov and Spiropoulos append declarations for the Judgment of the Court.

Judges Badawi, Sir Hersch Lauterpacht, Moreno Quintana, Wellington Koo and Sir Percy Spender, availing themselves of the right conferred upon them by Article 57 of the Statute, append to the Judgment of the Court statements of their separate opinions.

Vice-President Zafrulla Khan states that he agrees generally with Judge Wellington Koo.

Judges Winiarski and Cordova and M. Offerhaus, Judge *ad hoc*, availing themselves of the right conferred upon them by Article 57 of the Statute, append to the Judgment of the Court statements of their dissenting opinions.

Recalling the essential and undisputed facts underlying the case, the Judgment states that the Netherlands infant Marie Elisabeth Boll was born of the marriage of Johannes Boll, of Netherlands nationality, and Gerd Elisabeth Lindwall, who died on December 5th, 1953. On the application of the father, the Swedish authorities had, in the first place, on March 18th, 1954, registered the guardianship of the latter and appointed a *god man* of the infant, pursuant to Swedish law of guardianship. Subsequently, on April 26th, 1954, the infant was placed by the Swedish authorities under the regime of protective upbringing instituted under Article 22 (*a*) of the Swedish Law of June 6th, 1924, on the protection of children and young persons.

On June 2nd, 1954, the Amsterdam Cantonal Court had instituted guardianship according to Netherlands law. The father and the deputy-guardian had then appealed for the termination of the protective upbringing, but this appeal was rejected by the Provincial Government of Östergötland. On August 5th, 1954, the Court of First Instance of Dordrecht, upon the application of the Guardianship Council of that town and with the consent of the father, discharged the latter from his functions as guardian and appointed in his place a female guardian and ordered that the child should be handed over to the latter. On September 16th, 1954, the Swedish Court at Norrköping cancelled the previous registration of the guardianship of the father and dismissed an application for the removal of the Swedish *god man*. Lastly, on February 21st, 1956, the Swedish Supreme Administrative Court, by a final judgment, maintained the measure of protective upbringing.

The Judgment of the International Court of Justice states that, of all the decisions given in Sweden and in the Netherlands, those which relate to the organisation of guardianship do not concern the Court. The dispute relates to the Swedish decisions which instituted and maintained protective upbringing. It is only upon them that the Court is called upon to adjudicate.

In the opinion of the Government of the Netherlands, the Swedish protective upbringing prevents the infant from being handed over to the guardian, whereas the 1902 Convention provides that the guardianship of infants shall be governed by their national law. The exception to which Article 7 of the Convention relates is not applicable because Swedish protective upbringing is not a measure permitted by that Article and because the condition of urgency required was not satisfied.

For its part, the Government of Sweden does not dispute the fact that protective upbringing temporarily impedes the exercise of custody to which the guardian is entitled by virtue of Dutch law, but contends that this measure does not constitute a breach of the 1902 Convention, in the first place because, when the measure was taken, the right to custody belonging to the father was an attribute of the *puissance paternelle* which is not governed by the 1902 Convention; a

female guardian having succeeded to this right, the 1902 Convention does not apply in her case either. In the second place, the Swedish Law for the protection of children applies to every infant residing in Sweden; the Convention governs only conflicts of law in respect of guardianship; protective upbringing, being a measure within the category of *ordre public*, does not constitute a breach of the Convention. The contracting States retain the right to make the powers of a foreign guardian subject to the restrictions required by *ordre public*.

With reference to the first ground relied upon by Sweden, the Court observes that the distinction between the period during which the father was invested with the guardianship and the period when the guardianship was entrusted to a third party may lead to a distinction being drawn between the original institution of the regime of protective upbringing and its maintenance in face of the guardianship conferred upon a third party. The Court does not consider that it need be concerned with this distinction. The grounds for its decision are applicable to the whole of the dispute.

In judging of the correctness of the argument according to which protective upbringing constitutes a rival guardianship in competition with the Dutch guardianship, the Judgment notes that certain of the Swedish decisions concerning the administration of the property of the infant proceeded on the basis of recognition of the Dutch guardianship.

The judgment of the Supreme Administrative Court of February 21st, 1956, merits particular mention. The Supreme Administrative Court did not question the guardian's capacity to take proceedings; it thereby recognized her capacity. It did not raise protective upbringing to the status of an institution the effect of which would be completely to absorb the Dutch guardianship. It confined itself, for reasons outside the scope of the Court's examination, to not complying with the guardian's request. Finally, under the regime thus maintained, the person to whom the child was entrusted in application of the measure of protective upbringing has not the capacity and rights of a guardian.

Protective upbringing, as it appears according to the facts in the case, cannot be regarded as a rival guardianship to the guardianship established in the Netherlands in accordance with the 1902 Convention.

In dismissing the guardian's claim, the Swedish Supreme Administrative Court limited itself no doubt to adjudicating upon the maintenance of protective upbringing, but, at the same time, it placed an obstacle in the way of the full exercise of the right to custody belonging to the guardian.

In order to answer the question whether this constituted a failure to observe the 1902 Convention which provides that "the administration of a guardianship extends to the person . . . of the infant", the Court did not consider that it was necessary for it to ascertain the reasons for the decisions complained of. Having before it a measure instituted pursuant to a Swedish Law, it has to say whether the imposition and maintenance of this measure are incompatible with the Convention. To do that, it must determine what are the obligations imposed by the Convention, how far they extend, and whether the Convention intended to prohibit the application to a foreign infant of a law such as the Swedish Law on the protection of children.

The 1902 Convention provides for the application of the national law of the infant, which it expressly extends to the person and to all the property of the infant, but it goes no farther than that. Its purpose was to put an end to the divergences of view as to whether preference ought to be given to the national law of the infant, to that of his place of residence, etc., but without laying down, particularly in the domain of the right to custody, any immunity of an infant or of a guardian with respect to the whole body of the local law. The national law and the local law may present some points of contact. It does not follow, however, that in such cases the national law of the infant must always prevail over the local law and that the exercise of the powers of a guardian is always beyond the reach of local laws dealing with subjects other than the assignment of guardianship and the determination of the powers and duties of a guardian.

The local laws relating to compulsory education and the sanitary supervision of children, professional training or the participation of young people in certain work are applicable to foreigners. A guardian's right to custody under the national law of the infant cannot override the application of such laws to a foreign infant.

The Judgment states that the Swedish Law on the protection of children and young persons is not a law on guardianship and that it is applicable whether the infant be within the *puissance paternelle* or under guardianship. Was the 1902 Convention intended to prohibit the application of any law on a different subject matter, the indirect effect of which would be to restrict, though not to abolish, the guardian's right to custody? The Court considers that to take this view would be to go beyond the purpose of the Convention, which is confined to conflicts of laws. If the Convention had intended to regulate the domain of application of laws such as the Swedish Law on the protection of children, that law would have to be applied to Swedish infants in a foreign country. But no one has sought to attribute to it such an extraterritorial effect.

The Judgment recognises that guardianship and protective upbringing have certain common purposes. But though protective upbringing contributes to the protection of the child, it is, at the same time and above all, designed to protect society against dangers resulting from improper upbringing, inadequate hygiene, or moral corruption of young people. In order to achieve its aim of individual protection, guardianship, according to the Convention, needs to be governed by the national law of the infant. To achieve its aim, the aim of the social guarantee, the Swedish Law on the protection of children must apply to all young people living in Sweden.

It was contended that the 1902 Convention must be understood as containing an implied reservation authorizing, on the ground of *ordre public*, the overruling of the application of the foreign law recognized as normally the proper law. The Court did not consider it necessary to pronounce upon this contention. It sought to ascertain in a more direct manner whether, having regard to its purpose, the 1902 Convention lays down any rules which the Swedish authorities have disregarded.

In doing this, the Court found that the 1902 Convention had to meet a problem of the conflict of private law rules and that it gave the preference to the national law of the infant. But when the question is asked what is the domain of the applicability of the Swedish Law or of the Dutch Law on the protection of children, it is found that the measures provided for were taken in Sweden by an administrative organ which can act only in accordance with its own law. What a Swedish or Dutch court can do in matters of guardianship, namely, apply a foreign law, the authorities of those countries cannot do in the matter of protective upbringing. To extend the 1902 Convention to such a situation would lead to an impossibility. That Convention was designed to put an end to the competing claims of several laws to govern a single legal relationship. There are no such competing claims in the case of

laws for the protection of children and young persons. Such a law has not and cannot have any extraterritorial aspiration. An extensive interpretation of the Convention would lead to a negative solution if the application of Swedish law was refused to Dutch children living in Sweden, since Dutch law on the same subject could not be applied to them.

It is scarcely necessary to add, says the Court, that to arrive at a solution which would prevent the application of the Swedish Law on the protection of children to a foreign infant living in Sweden, would be to misconceive the social purpose of that Law. The Court stated that it could not readily subscribe to any construction of the 1902 Convention which would make it an obstacle on this point to social progress.

It thus seems to the Court that, in spite of their points of contact and of the encroachments revealed in practice, the Swedish Law on the protection of children does not come within the scope of the 1902 Convention on guardianship. The latter cannot therefore have given rise to obligations binding upon the signatory States in a field outside the matter with which it was concerned. Accordingly, the Court did not, in the present case, find any failure to observe the Convention on the part of Sweden.

For these reasons, the Court rejected the claim of the Government of the Netherlands.

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31. INTERHANDEL CASE (PRELIMINARY OBJECTIONS)

Judgment of 21 March 1959

The Interhandel Case, between Switzerland and the United States of America, was submitted to the Court by an Application of the Swiss Government on October 2nd, 1957, relating to a dispute which had arisen with regard to the claim by Switzerland to the restitution by the United States of America of the assets of the Interhandel Company. The Application invoked Article 36, paragraph 2, of the Statute of the Court and the acceptance of the compulsory jurisdiction of the Court by the United States and by Switzerland. For its part, the Government of the United States submitted preliminary objections to the jurisdiction of the Court.

The Court, upholding one of these objections, found the Swiss Application inadmissible.

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In its Judgment, the Court sets out the facts and circumstances out of which the dispute arose.

In 1942, the Government of the United States, under the Trading with the Enemy Act, vested almost all of the shares of the General Aniline and Film Corporation (GAF), a company incorporated in the United States, on the ground that those shares in reality belonged to the I.G. Farben Company of Frankfurt or that the GAF was in one way or another controlled by that enemy company. It is not disputed that until 1940 I.G. Farben controlled the GAF through the I.G. Chemie Company of Basle. However, according to the contention of the Swiss Government, the links between the German company and the Swiss company were finally severed in 1940. The Swiss company adopted the name of *Société internationale pour participations industrielles et commerciales S.A.* (Interhandel) and the largest item in its assets was its participation in the GAF. In 1945, under a provisional agreement between Switzerland, the United States, France and the United Kingdom, property in Switzerland belonging to Germans in Germany was blocked. The Swiss Compensation Office was entrusted with the task of uncovering such property. In the course of those investigations, the question of the character of Interhandel was raised, but the Office, considering it to have been proved that this company had severed its ties with the German company, did not regard it as necessary to undertake the blocking of its assets in Switzerland. For its part, the Government of the United States, considering that Interhandel was still controlled by I.G. Farben, continued to seek evidence of such control. In these circumstances, the Swiss Federal Authorities ordered the Swiss Compensation Office provisionally to block the assets of Interhandel.

On May 25th, 1946, an agreement was concluded in Washington between the Allies and Switzerland. Switzerland undertook to pursue its investigations and to liquidate German property in Switzerland. The Compensation Office was empowered to do this, in collaboration with a Joint Commission composed of representatives of each of the four Governments. In the event of disagreement between the Joint Commission and the Compensation Office, or if the party in interest so desired, the matter might be submitted to a Swiss Authority of Review. On the other hand, the Government of the United States was to unblock Swiss assets in the United States (Article IV). Finally, in case differences of opinion arose with regard to the application or interpretation of the Accord which could not be settled in any other way, recourse was to be had to arbitration.

After the conclusion of the Washington Accord, discussions with regard to Interhandel were continued without reaching any conclusion. By its decision of January 5th, 1948, the Swiss Authority of Review annulled the blocking of the Company's assets in Switzerland. In a Note of May 4th of the same year to the Department of State, the Swiss Legation in Washington invoked this decision and the Washington Accord to request the United States to restore to Interhandel the property which had been vested in the United States. On July 26th, the Department of State rejected this request, contending that the decision of the Swiss Authority of Review did not affect the assets vested in the United States. On October 21st, Interhandel, relying upon the provisions of the Trading with the Enemy Act, instituted proceedings in the United States courts. Up to 1957, these proceedings made little progress on the merits. A Swiss Note of August 9th, 1956, formulated proposals for the settlement of the dispute either by means of arbitration or conciliation as provided for in the Treaty between Switzerland and the United States of 1931, or by means of arbitration as provided for in the Washington Accord. These proposals were rejected by the Government of the United States in a Note of January 11th, 1957. Furthermore, in a Memorandum appended to the Note, it was said that Interhandel had finally failed in its suit in the United States courts. It was then that the Swiss Government addressed to the Court its Application instituting the proceedings.

The Court finds that the subject of the claim is expressed essentially in two propositions: the Court is asked to adjudge

and declare, as a *principal submission*, that the Government of the United States is under an obligation to restore the assets of Interhandel and, as an *alternative submission*, that the United States is under an obligation to submit the dispute to arbitration or to a conciliation procedure.

The Court then proceeds to consider the Preliminary Objections of the United States.

The First Objection seeks a declaration that the Court is without jurisdiction on the ground that the dispute arose before August 26th, 1946, the date on which the acceptance of the compulsory jurisdiction of the Court by the United States came into force. The declaration of the United States relates to legal disputes "hereafter arising" and the Government of the United States maintains that the dispute submitted to the Court goes back at least to the middle of the year 1945. An examination of the documents reveals that it was in the Note of the Swiss Legation in Washington dated May 4th, 1948, that a request for the return to Interhandel of the assets vested in the United States was formulated by Switzerland for the first time. As the negative reply was given on July 26th, 1948, the dispute can be placed at that date and the First Objection must be rejected so far as the principal Submission of Switzerland is concerned. In the alternative Submission, the point in dispute is the obligation of the Government of the United States to submit to arbitration or conciliation. This part of the dispute can only have arisen subsequently to that relating to the restitution of Interhandel's assets in the United States, since the procedure proposed by Switzerland was conceived as a means of settling the first dispute. In fact, the Swiss Government put forward this proposal for the first time in its Note of August 9th, 1956, and the Government of the United States rejected it by its Note of January 11th, 1957. The First Preliminary Objection cannot therefore be upheld with regard to the alternative Submission of Switzerland.

According to the *Second Preliminary Objection*, the dispute, even if it is subsequent to the Declaration of the United States, arose before July 28th, 1948, the date of the entry into force of the Swiss Declaration. The United States Declaration contains a clause limiting the Court's jurisdiction to disputes "hereafter arising", while no such qualifying clause is contained in the Swiss Declaration. But the reciprocity principle would require that as between the United States and Switzerland the Court's jurisdiction should be limited to disputes arising after July 28th, 1948. The Court remarks that reciprocity in the case of Declarations accepting the compulsory jurisdiction of the Court enables a Party to invoke a reservation which it has not expressed in its own Declaration but which the other Party has expressed in its Declaration. For example, Switzerland might, if in the position of Respondent, invoke the American reservation against the United States by virtue of reciprocity, if the United States attempted to refer to the Court a dispute which had arisen before August 26th, 1946. There the effect of reciprocity ends. It cannot justify a State, in this instance the United States, in relying upon a restriction which the other Party, Switzerland, has not included in its own Declaration. The Second Objection must therefore be rejected so far as the principal Submission of Switzerland is concerned. Since it has been found that the dispute concerning the obligation of the United States to agree to arbitration or conciliation did not arise until 1957, this objection must also be rejected so far as the alternative Submission is concerned.

The Court then considers the *Fourth Preliminary Objection* and, in the first place, Part (*b*) of that Objection, in which the Government of the United States submits that there is no jurisdiction in the Court to hear or determine any issues concerning the seizure and retention of the vested shares, for the reason that such seizure and retention are, according to international law, matters within the jurisdiction of the United States. With regard to the principal Submission, the Swiss Government invokes Article IV of the Washington Accord, concerning which the Government of the United States contends that it is of no relevance whatsoever. The Parties are in disagreement with regard to the meaning of the terms of this article. It is sufficient for the Court to note that Article IV may be of relevance for the solution of the dispute and that its interpretation relates to international law. On the other hand, the Government of the United States submits that according to international law the seizure and retention of enemy property in time of war are matters within the domestic jurisdiction of the United States. But the whole question is whether the assets of Interhandel are enemy or neutral property and this is a matter which must be decided in the light of the principles and rules of international law. In its alternative Submission, the Swiss Government invokes the Washington Accord and the Treaty of Arbitration and Conciliation of 1931. The interpretation and application of these provisions involve questions of international law. Part (*b*) of the Fourth Objection must therefore be rejected.

Part (*a*) of this Objection seeks a finding from the Court that it is without jurisdiction for the reason that the sale or disposition of the shares vested have been determined by the United States, pursuant to paragraph (*b*) of the conditions attached to its acceptance of the compulsory jurisdiction of the Court, to be a matter essentially within its domestic jurisdiction. It appears to the Court that part (*a*) of the Fourth Objection only applies to the claim of the Swiss Government regarding the restitution of the vested assets and, having regard to the decision of the Court in respect of the Third Objection, it is without object at the present stage of the proceedings.

The Third Preliminary Objection seeks a finding that there is no jurisdiction in the Court for the reason that Interhandel has not exhausted the local remedies available to it in the United States courts. Although framed as an objection to the jurisdiction of the Court, this Objection must be regarded as directed against the admissibility of the Application. Indeed, it would become devoid of object if the requirement of the prior exhaustion of local remedies were fulfilled. The Court has indicated in what conditions the Swiss Government considered itself entitled to institute proceedings by its Application of October 2nd, 1957. However, the Supreme Court of the United States has, since then, readmitted Interhandel into the suit and remanded the case to the District Court (decisions of October 14th, 1957, and June 16th, 1958). Interhandel can avail itself again of the remedies available under the Trading with the Enemy Act and its suit is still pending. The Swiss Government does not challenge the rule concerning the exhaustion of local remedies but contends that the present case is one in which an exception is authorized by the rule itself. In the first place, the measure taken against Interhandel was taken, not by a subordinate authority but by the Government of the United States. However, the Court must attach decisive importance to the fact that the laws of the United States make available to interested persons adequate remedies for the defence of their rights against the Executive. On the other hand, in proceedings based upon the Trading with the Enemy Act, the United States courts are, it is contended, not in a position to adjudicate in accordance with the rules of international law. But the decisions of the United States courts bear witness to the fact that United States courts are competent to apply international law in their decisions when necessary. Finally, as the character of the principal Submission of Switzerland is that of a claim for the imple-

mentation of the decision given on January 5th, 1948, by the Swiss Authority of Review, which decision the Swiss Government regards as an international judicial decision, there are, it is contended, no local remedies to exhaust, for the injury has been caused directly to the State. The Court confines itself to observing that this argument does not deprive the dispute which has been referred to it of the character of a dispute in which the Swiss Government appears as having adopted the cause of its national for the purpose of securing the restitution of the vested assets and that this is one of the very cases which give rise to the application of the rule of the exhaustion of local remedies. For all these reasons, the Court upholds the Third Preliminary Objection so far as the principal Submission of Switzerland is concerned. The Court considers, moreover, that any distinction so far as the rule of the exhaustion of local remedies is concerned between the various claims or between the various tribunals is unfounded. It accordingly upholds the Third Preliminary Objection also as regards the alternative Submission.

Consequently, the Court rejects the First Preliminary Objection (by ten votes to five) and also the Second (unanimously) and part (*b*) of the Fourth (by 14 votes to one). The Court finds that it is not necessary to adjudicate on part (*a*) of the Fourth Preliminary Objection (by ten votes to five) and it upholds the Third (by nine votes to six) and holds that the Application is inadmissible.

Judges Basdevant and Kojevnikov and Judge *ad hoc* Carry have appended declarations to the Judgment. Judges Hackworth, Cordova, Wellington Koo and Sir Percy Spender have appended statements of their separate opinions whilst Vice-President Zafrulla Kahn states that he agrees with Judge Hackworth.

President Klaestad and Judges Winiarski, Armand-Ugon, Sir Hersch Lauterpacht and Spiropoulos have appended to the Judgment statements of their dissenting opinions while Judge *ad hoc* Carry states in his declaration that he agrees with President Klaestad.

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32. CASE CONCERNING THE AERIAL INCIDENT OF 27 JULY 1955 (ISRAEL *v.* BULGARIA) (PRELIMINARY OBJECTIONS)

Judgment of 26 May 1959

The case concerning the aerial incident of July 27th, 1955 (Israel *v.* Bulgaria), was submitted to the Court by an Application of the Government of Israel, on October 16th, 1957, relating to a dispute which had arisen with regard to the destruction, on July 27th, 1955, by the Bulgarian anti-aircraft defence forces, of an aircraft belonging to El Al Israel Airlines Ltd. The Application invoked Article 36 of the Statute of the Court and the acceptance of the compulsory jurisdiction of the Court by Israel, on the one hand, in its Declaration of 1956 replacing that of 1950, and by Bulgaria, on the other hand, in 1921. The Bulgarian Government had filed Preliminary Objections to the jurisdiction of the Court.

The Court upheld the first of these objections, according to which the Declaration accepting the compulsory jurisdiction of the Permanent Court of International Justice made by Bulgaria in 1921 cannot be regarded as constituting an acceptance of the compulsory jurisdiction of the International Court of Justice. It therefore declared itself to be without jurisdiction.

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In its Judgment, the Court first considered the First Preliminary Objection by Bulgaria.

In order to find the basis for the jurisdiction of the Court, the Government of Israel invoked the Declaration of acceptance of compulsory jurisdiction signed by Bulgaria in 1921, at the same time as Protocol of Signature of the Statute of the Permanent Court of International Justice, and Article 36, paragraph 5, of the Statute of the International Court of Justice, which reads as follows:

> "Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms."

To justify the application of the latter provision to the Bulgarian Declaration of 1921, the Government of Israel relied on the fact that Bulgaria became a party to the Statute of the International Court of Justice on December 14th, 1955, as the result of its admission to the United Nations. The Bulgarian Government denied that Article 36, paragraph 5, transferred the effect of its Declaration to the jurisdiction of the International Court of Justice.

The Court had to determine whether Article 36, paragraph 5, is applicable to the Bulgarian Declaration. That it should apply in respect of declarations made by States which were represented at the San Francisco Conference and were signatories of the Charter and of the Statute can easily be understood. But is this provision meant also to cover declarations made by other States, including Bulgaria? The text does not say so explicitly.

The Court observes that at the time of the adoption of the Statute a fundamental difference existed between the position of the signatory States and of the other States which might subsequently be admitted to the United Nations. This difference derived from the situation which Article 36, paragraph 5, was meant to regulate, namely, the transfer to the International Court of Justice of declarations relating to the Permanent Court, which was on the point of disappearing. The question which the signatory States were easily able to resolve as between themselves at that time would arise in a quite different form in the future as regards the other States.

Article 36, paragraph 5, considered in its application to States signatories of the Statute, effected a simple operation. The position would have been quite different in respect of declarations by non-signatory States. For the latter, such a transfer must necessarily involve two distinct operations, which might be separated by a considerable interval of time. On the one hand, old declarations would have had to have been preserved with immediate effect; on the other hand, they would have had to be transferred to the jurisdiction of

the new Court. In addition to this fundamental difference in respect of the factors of the problem, there were special difficulties in resolving it in respect of acceptances by non-signatory States. In the case of signatory States, Article 36, paragraph 5, maintained an existing obligation while modifying its subject-matter. So far as non-signatory States were concerned, the Statute, in the absence of their consent, could neither maintain nor transform their original obligation. Shortly after the entry into force of the Statute, the dissolution of the Permanent Court freed them from that obligation. Accordingly, the question of a transformation of an existing obligation could no longer arise so far as they were concerned; all that could be envisaged in their case was the creation of a new obligation binding upon them. To extend Article 36, paragraph 5, to those States would be to allow that provision to do in their case something quite different from what it did in the case of signatory States. It is true that the States represented at San Francisco could have made an offer addressed to other States, for instance, an offer to consider their acceptance of the compulsory jurisdiction of the Permanent Court as an acceptance of the jurisdiction of the new Court, but there is nothing of this kind in Article 36, paragraph 5.

To restrict the application of this provision to the signatory States is to take into account the purpose for which it was adopted. At the time of its adoption, the impending dissolution of the Permanent Court and, in consequence, the lapsing of acceptances of its compulsory jurisdiction were in contemplation. Rather than expecting that the signatory States of the new Statute would deposit new declarations of acceptance, it was sought to provide for this transitory situation by a transitional provision. The situation is entirely different when, the old Court and the acceptance of its compulsory jurisdiction having long since disappeared, a State becomes party to the Statute of the new Court. To the extent that the records of the San Francisco Conference provide any indication as to the scope of the application of Article 36, paragraph 5, they confirm that this paragraph was intended to deal with declarations of signatory States only and not with a State in the situation of Bulgaria.

However, the Government of Israel construed Article 36, paragraph 5, as covering a declaration made by a State which had not participated in the San Francisco Conference and which only became a party to the Statute of the International Court of Justice much later.

The Court, considering the matter from this angle also, found that Article 36, paragraph 5, could not in any event be operative as regards Bulgaria until the date of its admission to the United Nations, namely, December 14th, 1955. At that date, however, the Declaration of 1921 was no longer in force in consequence of the dissolution of the Permanent Court in 1946. The acceptance set out in that Declaration of the compulsory jurisdiction of the Permanent Court was devoid of object, since that Court was no longer in existence. And there is nothing in Article 36, paragraph 5, to reveal any intention of preserving all the declarations which were in existence at the time of the signature or entry into force of the Charter, regardless of the moment when a State having made a declaration became a party to the Statute. The provision determines, in respect of a State to which it applies, the birth of the compulsory jurisdiction of the new Court. It makes it subject to two conditions: (1) that the State having made the declaration should be a party to the Statute; (2) that the declaration of that State should still be in force. Since the Bulgarian Declaration had lapsed before Bulgaria was admitted to the United Nations, it cannot be said that at that time that Declaration was still in force. The second condition is therefore not satisfied in the present case.

Thus the Court finds that Article 36, paragraph 5, is not applicable to the Bulgarian Declaration of 1921. This view is confirmed by the fact that it was the clear intention inspiring Article 36, paragraph 5, to preserve existing acceptances and not to restore legal force to undertakings which had expired. On the other hand, in seeking and obtaining admission to the United Nations, Bulgaria accepted all the provisions of the Statute, including Article 36. But Bulgaria's acceptance of Article 36, paragraph 5, does not constitute consent to the compulsory jurisdiction of the Court; such consent can validly be given only in accordance with Article 36, paragraph 2.

Article 36, paragraph 5, cannot therefore lead the Court to find that the Bulgarian Declaration of 1921 provides a basis for its jurisdiction to deal with the case. In these circumstances it is unnecessary for the Court to proceed to consideration of the other Bulgarian Preliminary Objections.

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Consequently, the Court finds, by twelve votes to four, that it is without jurisdiction to adjudicate upon the dispute brought before it by the Application of the Government of Israel.

Vice-President Zafrulla Khan has appended a Declaration to the Judgment. Judges Badawi and Armand-Ugon have appended statements of their Separate Opinions. Judges Sir Hersch Lauterpacht, Wellington Koo and Sir Percy Spender have appended to the Judgment a statement of their Joint Dissenting Opinion. Judge *ad hoc* Goitein has appended to the Judgment a statement of his Dissenting Opinion.

33. CASE CONCERNING SOVEREIGNTY OVER CERTAIN FRONTIER LAND

Judgment of 20 June 1959

The case concerning sovereignty over certain Frontier Land was submitted to the Court by Belgium and the Netherlands under a Special Agreement concluded between the two Governments on 7 March 1957.

By this Special Agreement, the Court was requested to determine whether sovereignty over the plots shown in the survey and known from 1836 to 1843 as Nos. 91 and 92, Section A, Zondereygen, belongs to the Kingdom of Belgium or to the Kingdom of the Netherlands. By ten votes to four, the Court found that sovereignty over these plots belonged to Belgium.

Sir Hersch Lauterpacht appended to the Judgment a Declaration explaining the reasons why he had voted in favour of a decision determining that the sovereignty over the disputed plots belonged to the Netherlands. Judge Spiropoulos also appended to the Judgment a Declaration explaining that, faced with a choice between two hypotheses leading to opposite results, he considered that preference ought to be given to the hypothesis which seemed to him to be the less speculative, that is to say, in his view, the hypothesis of the Netherlands. Judges Armand-Ugón and Moreno Quintana, availing themselves of the right conferred upon them by Article 57 of the Statute, appended to the Judgment statements of their Dissenting Opinions.

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In its Judgment, the Court finds that in the area north of the Belgian town of Turnhout there are a number of enclaves formed by the Belgian commune of Baerle-Duc and the Netherlands commune of Baarle-Nassau. The territory of the former is made up of a series of plots of land many of which are enclosed in the commune of Baarle-Nassau. Various portions of the commune of Baerle-Duc are not only isolated from the main territory of Belgium but also one from another.

Following on attempts to establish the boundaries between the two communes and the frontier between the two countries, a Minute known as the "Communal Minute" was drawn up by the authorities of the two communes between 1836 and 1841. A copy of this Minute was produced by the Netherlands. Under the heading "Section A, called Zondereygen", it states:

> "Plots numbers 78 to 111 inclusive belong to the commune of Baarle-Nassau."

Further, following the separation of the Netherlands from Belgium in 1839, a Mixed Boundary Commission was set up to determine the limits of the possessions of the two States. A Boundary Treaty, concluded between them in 1842, which entered into force in 1843, stated in Article 14 that

> "The *status quo* shall be maintained both with regard to the villages of Baarle-Nassau (Netherlands) and Baerle-Duc (Belgium) and with regard to the ways crossing them."

The work of the Mixed Boundary Commission resulted in the text of the Boundary Convention dated 8 August 1843, which was ratified on 3 October 1843. The descriptive minute of the frontier annexed to this Convention states in Article 90 the procedure that was followed when the determination of the frontier reached the territory of the communes of Baarle-Nassau and Baerle-Duc, and says that the Boundary Commissioners decided that the Communal Minute of 1841, "noting the plots composing the communes of Baerle-Duc and Baarle-Nassau, is transcribed word for word in the present Article".

In that part of the descriptive minute of 1843, however, which repeats the text of the Communal Minute of 1841, the following appears:

> "Plots numbers 78 to 90 inclusive belong to the commune of Baarle-Nassau.
>
> "Plots numbers 91 and 92 belong to Baerle-Duc.
>
> "Plots numbers 93 to 111 inclusive belong to Baarle-Nassau."

Further, the special map annexed to the Boundary Convention shows the disputed plots as belonging to Belgium.

The Belgian Government relies upon the terms of the Communal Minute as they appear in the Descriptive Minute, for the purpose of showing that plots Nos. 91 and 92 have been recognized as belonging to the commune of Baerle-Duc and that sovereignty over these plots belongs to Belgium.

The Netherlands Government, for its part, maintains that the Convention of 1843 did no more than recognize the existence of the *status quo* without determining it and that this *status quo* must be determined in accordance with the Communal Minute under which sovereignty over the disputed plots was recognized as vested in the Netherlands.

Alternatively, the Netherlands Government maintains that, even if the Boundary Convention purported to determine the sovereignty, the provision relating to the disputed plots was vitiated by mistake. It contends that a mere comparison between the terms of the Communal Minute and the Descriptive Minute establishes this.

As a further alternative, the Netherlands Government submits that, should it be held that the Boundary Convention determined the sovereignty in respect of the disputed plots and is not vitiated by mistake, acts of sovereignty exercised by it since 1843 over these plots have displaced the legal title flowing from the Convention and have established sovereignty in the Netherlands.

In its Judgment, the Court deals successively with these three contentions.

In order to answer the first question: Did the Convention of 1843 itself determine sovereignty over the plots or did it confine itself to a reference to the *status quo*?, the Court examines the work of the Boundary Commission as recorded in the Minutes. From this examination, it appears that, from 4 September 1841, the work of delimitation proceeded on the basis of the maintenance of the *status quo* and that, at the meeting on 4 April 1843, the Mixed Boundary Commission adopted the text of an article which provided, in the terms appearing in the Descriptive Minute, for the transcription word for word of the Communal Minute. Thereby the Mixed Commission attributed the disputed plots to Belgium.

The Court is of opinion that the authority of the Mixed Boundary Commission to demarcate the two communes is beyond question. This follows from Article 6 of the Treaty between the Netherlands and Belgium concluded in London on 19 April 1839, which provides:

"The said limits shall be marked out in conformity with those Articles, by Belgian and Dutch Commissioners of Demarcation who shall meet as soon as possible . . .",

and this is confirmed by the preamble to the Boundary Convention of 1843.

Any interpretation under which the Boundary Convention is regarded as leaving in suspense and abandoning for a subsequent appreciation of the *status quo* the determination of the right of one State or the other to the disputed plots would be incompatible with the common intention of the Parties as thus indicated.

On the first contention, the Court concludes that the Convention did determine as between the two States, to which State the various plots in each commune belonged and that, under its terms, the disputed plots were determined to belong to Belgium.

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On the second contention to the effect that the Convention is vitiated by mistake, the Court says in its Judgment that this contention may be stated as follows: The Descriptive Minute of 1843 specified that the Communal Minute of 1841 noting the plots composing the communes of Baerle-Duc and Baarle-Nassau should be transcribed "word for word" in Article 90 of the Descriptive Minute. A comparison of the copy of the Communal Minute produced by the Netherlands with the Descriptive Minute discloses, however, that there was not a "word for word" transcription of the former, inasmuch as the Descriptive Minute attributes plots Nos. 91 and 92 to Belgium, whereas this copy of the Communal Minute attributes them to Baarle-Nassau.

The Court considers that a mere comparison of these two documents does not establish the existence of a mistake. To succeed on this basis, the Netherlands must establish that the intention of the Mixed Boundary Commission was that the Descriptive Minute attached to and forming part of the Convention of 1843 should set out the text of the Communal Minute contained in the copy produced by the Netherlands.

The Court recalls the fact that the duty of the Mixed Commission was essentially to determine the *status quo*.

From the examination of the documents produced concerning the work of the Mixed Boundary Commission and from the correspondence relating thereto, the Court draws the conclusion that the two copies of the Communal Minute held by the Netherlands and Belgium Commissions were at variance on the attribution of the disputed plots to the two communes. It considers that the hypotheses advanced by the Netherlands, to explain how the copy of the Communal Minute in the hands of the Netherlands Commission was in the same terms as those used in the Descriptive Minute, fail to establish the existence of a mistake.

The Netherlands having contended that it need not establish the origin of the mistake, since a simple comparison between the two documents reveals sufficiently that a mistake was made, the Court replies that the matter is not capable of being disposed of on this narrow ground and that it must ascertain the intention of the Parties from the provisions of a treaty in the light of all the circumstances. It finds that, in April 1843 both Commissions had been in possession of copies of the Communal Minute since 1841. The difference between these copies in regard to the attribution of plots Nos. 91 and 92 was known to the two Commissions and must have been a subject of discussion between them. In the detailed maps drawn up to constitute part of the Boundary Convention, it was clearly shown, and in a manner which could not escape notice, that the plots belonged to Belgium. Further, the Commission was not a mere copyist; its duty was to ascertain what the *status quo* was. At its 225th meeting it attributed sovereignty over the disputed plots to Belgium. This decision found its expression in the Boundary Convention.

In the view of the Court, apart from a mere comparison of the text of the Descriptive Minute with the copy of the Communal Minute produced by the Netherlands, all attempts to establish and to explain the alleged mistake are based upon hypotheses which are not plausible and which are not accompanied by adequate proof. The Court says that it is satisfied that no case of mistake has been made out and that the validity and binding force of the provisions of the Convention of 1843 in respect of the disputed plots are not affected on that account.

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The final contention of the Netherlands is that the acts of sovereignty exercised by the Netherlands since 1843 have established sovereignty over the plots in the Netherlands. The question for the Court is therefore whether Belgium has lost its sovereignty by non-assertion of its rights and by acquiescence in acts of sovereignty alleged to have been exercised by the Netherlands at different times since 1843.

The Court recalls different acts performed by Belgium which show that Belgium has never abandoned its sovereignty—the publication of military staff maps, the inclusion of the plots in the survey records, the entry in the Records of the Survey Authorities at Baerle-Duc in 1896 and 1904 of transfer deeds. On the other hand, the Netherlands relies upon the entry in the Records of Baarle-Nassau of several land transfers relating to the plots, and the entry in the Communal Register of that commune of births, deaths and marriages. It was in July 1914 that an official Belgian enquiry led the Director of the Survey at Antwerp to inform the Belgian Minister for Finance that he thought it necessary for the matter to be submitted to the Belgian Minister for Foreign Affairs. The First World War then intervened. In August 1921, the Belgian Minister at The Hague drew the attention of the Netherlands Government to the fact that the two disputed plots belonging to Baerle-Duc were entered in the survey documents of both States. It was in 1922 that the Netherlands authorities for the first time claimed that the Communal Minute of 1841 had been inaccurately reproduced in the Descriptive Minute of 1843 and that plots 91 and 92 belonged to the Netherlands. The Netherlands relies, in addition to the incorporation of the plots in the Netherlands survey, the entry in its registers of land transfer deeds and registrations of births, deaths and marriages in the Communal Register of Baarle-Nassau, on the fact that it has collected Netherlands land tax on the two plots without any resistance or protest on the part of Belgium. Reliance is also placed by the Netherlands upon certain proceedings taken by the commune of Baerle-Duc before a Breda tribunal in 1851 and on various other acts which are claimed to constitute the exercise of Netherlands sovereignty over the plots without any opposition on the part of Belgium.

The Court finds that the acts relied upon are largely of a routine and administrative character and are the consequence of the inclusion by the Netherlands of the disputed plots in its survey, contrary to the Boundary Convention. They are insufficient to displace Belgian sovereignty established by that Convention.

The Court notes further that, in an unratified Convention between the two States going back to 1892, Belgium agreed to cede to the Netherlands the two disputed plots. This unratified Convention did not, of course, create any legal rights or obligations, but its terms show that, at that time, Belgium was asserting its sovereignty over the two plots and that the Netherlands knew it was so doing. The Netherlands did not, in 1892 or at any time thereafter until the dispute arose between the two States in 1922, repudiate the Belgian assertion of sovereignty. The Court finds that Belgian sovereignty established in 1843 over the disputed plots has not been extinguished.

For these reasons, the Court reaches the conclusion given above.

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34. CASE CONCERNING RIGHT OF PASSAGE OVER INDIAN TERRITORY (MERITS)

Judgment of 12 April 1960

The case concerning Right of Passage over Indian Territory (Portugal *v.* India) was referred to the Court by an Application filed on 22 December 1955. In that Application, the Government of Portugal stated that its territory in the Indian Peninsula included two enclaves surrounded by the Territory of India, Dadra and Nagar-Aveli. It was in respect of the communications between those enclaves and the coastal district of Daman, and between each other, that the question arose of a right of passage in favour of Portugal through Indian territory and of a correlative obligation binding upon India. The Application stated that in July 1954 the Government of India prevented Portugal from exercising that right of passage and that Portugal was thus placed in a position in which it became impossible for it to exercise its rights of sovereignty over the enclaves.

Following upon the Application, the Court was seised of six preliminary objections raised by the Government of India. By a Judgment given on 26 November 1957, the Court rejected the first four objections and joined the fifth and sixth objections to the Merits.

In its Judgment, the Court:

(*a*) rejected the Fifth Preliminary Objection by 13 votes to 2;

(*b*) rejected the Sixth Preliminary Objection by 11 votes to 4;

(*c*) found, by 11 votes to 4, that Portugal had in 1954 a right of passage over intervening Indian territory between the enclaves of Dadra and Nagar-Aveli and the coastal district of Daman and between these enclaves, to the extent necessary for the exercise of Portuguese sovereignty over the enclaves and subject to the regulation and control of India, in respect of private persons, civil officials and goods in general;

(*d*) found, by 8 votes to 7, that Portugal did not have in 1954 such a right of passage in respect of armed forces, armed police and arms and ammunition;

(*e*) found, by 9 votes to 6, that India had not acted contrary to its obligations resulting from Portugal's right of passage in respect of private persons, civil officials and goods in general.

The President and Judges Basdevant, Badawi, Kojevnikov and Spiropoulos appended Declarations to the Judgment of the Court. Judge Wellington Koo appended a Separate Opinion. Judges Winiarski and Badawi appended a Joint Dissenting Opinion. Judges Armand-Ugon, Moreno Quintana and Sir Percy Spender, and Judges *ad hoc* Chagla and Fernandes, appended Dissenting Opinions.

In its Judgment the Court referred to the Submissions filed by Portugal which in the first place requested the Court to adjudge and declare that a right of passage was possessed by Portugal and must be respected by India; this right was invoked by Portugal only to the extent necessary for the exercise of its sovereignty over the enclaves, and it was not contended that passage was accompanied by any immunity and made clear that such passage remained subject to the regulation and control of India, which must be exercised in good faith, India being under an obligation not to prevent the transit necessary for the exercise of Portuguese sovereignty. The Court then considered the date with reference to which it must ascertain whether the right invoked existed or did not exist. The question as to the existence of a right of passage having been put to the Court in respect of the dispute which had arisen with regard to obstacles placed by India in the way of passage, it was the eve of the creation of those obstacles that must be selected as the standpoint from which to ascertain whether or not such a right existed; the selection of that date would leave open the arguments of India regarding the subsequent lapse of the right of passage.

Portugal next asked the Court to adjudge and declare that India had not complied with the obligations incumbent upon it by virtue of the right of passage. But the Court pointed out that it had not been asked, either in the Application or in the final Submissions of the Parties, to decide whether or not India's attitude towards those who had instigated the overthrow of Portuguese authority at Dadra and Nagar-Aveli in July and August 1954 constituted a breach of the obligation, said to be binding upon it under general international law, to adopt suitable measures to prevent the incursion of subversive elements into the territory of another State.

Turning then to the future, the Submissions of Portugal requested the Court to decide that India must end the measures by which it opposed the exercise of the right of passage or, if the Court should be of opinion that there should be a temporary suspension of the right, to hold that that suspension should end as soon as the course of events disclosed that the justification for the suspension had disappeared. Portugal had previously invited the Court to hold that the arguments of India concerning its right to adopt an attitude of neutrality, the application of the United Nations Charter and the existence in the enclaves of a local government were without foundation. The Court, however, considered that it was no part of its judicial function to declare in the operative part of its Judgment that any of those arguments was or was not well founded.

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Before proceeding to the consideration of the Merits, the Court had to ascertain whether it had jurisdiction to do so, a jurisdiction which India had expressly contested.

In its Fifth Preliminary Objection the Government of India relied upon the reservation in its Declaration of 28 February 1940 accepting the jurisdiction of the Court, which excluded from that jurisdiction disputes with regard to questions which by international law fall exclusively within the jurisdiction of India. The Court pointed out that in the course of the proceedings both Parties had taken their stand on grounds which were on the plane of international law, and had on occasion expressly said so. The fifth objection could not therefore by upheld.

The Sixth Preliminary Objection likewise related to a limitation in the Declaration of 28 February 1940. India, which had accepted the jurisdiction of the Court "over all disputes arising after February 5th, 1930, with regard to situations or facts subsequent to the same date", contended that the dispute did not satisfy either of these two conditions. As to the first condition, the Court pointed out that the dispute could not have arisen until all its constituent elements had come into existence; among these were the obstacles which India was alleged to have placed in the way of exercise of passage by Portugal in 1954; even if only that part of the dispute relating to the Portuguese claim to a right of passage were to be considered, certain incidents had occurred before 1954, but they had not led the Parties to adopt clearly-defined legal positions as against each other; accordingly, there was no justification for saying that the dispute arose before 1954. As to the second condition, the Permanent Court of International Justice had in 1938 drawn a distinction between the situations or facts which constituted the source of the rights claimed by one of the Parties, and the situations or facts which were the source of the dispute. Only the latter were to be taken into account for the purpose of applying the Declaration. The dispute submitted to the Court was one with regard to the situation of the enclaves, which had given rise to Portugal's claim to a right of passage and, at the same time, with regard to the facts of 1954 which Portugal advanced as infringements of that right; it was from all of this that the dispute arose, and this whole, whatever may have been the earlier origin of one of its parts, came into existence only after 5 February 1930. The Court had not been asked for any finding whatsoever with regard to the past prior to that date; it was therefore of opinion that the sixth objection should not be upheld and, consequently, that it had jurisdiction.

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On the merits, India had contended in the first place that the right of passage claimed by Portugal was too vague and contradictory to enable the Court to pass judgment upon it by the application of the legal rules enumerated in Article 38 (1) of the Statute. There was no doubt that the day-to-day exercise of the right might give rise to delicate questions of application but that was not, in the view of the Court, sufficient ground for holding that the right was not susceptible of judicial determination.

Portugal had relied on the Treaty of Poona of 1779 and on *sanads* (decrees) issued by the Maratha ruler in 1783 and 1785, as having conferred on Portugal sovereignty over the enclaves with the right of passage to them; India had objected that what was alleged to be the Treaty of 1779 was not validly entered into and never became in law a treaty binding upon the Marathas. The Court, however, found that the Marathas did not at any time cast any doubt upon the validity or binding character of the Treaty. India had further contended that the Treaty and the two *sanads* did not operate to transfer sovereignty over the assigned villages to Portugal but only conferred, with respect to the villages, a revenue grant. The Court was unable to conclude from an examination of the various texts of the Treaty of 1779 that the language employed therein was intended to transfer sovereignty; the expressions used in the two *sanads*, on the other hand, established that what was granted to the Portuguese was only a revenue tenure called a *jagir* or *saranjam*, and not a single instance had been brought to the notice of the Court in which such a grant had been construed as amounting to a cession of sovereignty. There could, therefore, be no question of any enclave or of any right of passage for the purpose of exercising sovereignty over enclaves.

The Court found that the situation underwent a change with the advent of the British as sovereign of that part of the country in place of the Marathas: Portuguese sovereignty over the villages had been recognized by the British in fact and by implication and had subsequently been tacitly recognized by India. As a consequence the villages had acquired the character of Portuguese enclaves within Indian territory and there had developed between the Portuguese and the territorial sovereign with regard to passage to the enclaves a practice upon which Portugal relied for the purpose of establishing the right of passage claimed by it. It had been objected on behalf of India that no local custom could be established between only two States, but the Court found it difficult to see why the number of States between which a local custom might be established on the basis of long practice must necessarily be larger than two.

It was common ground between the Parties that during the British and post-British periods the passage of private persons and civil officials had not been subject to any restrictions beyond routine control. Merchandise other than arms and ammunition had also passed freely subject only, at certain times, to customs regulations and such regulation and control as were necessitated by considerations of security or revenue. The Court therefore concluded that, with regard to private persons, civil officials and goods in general there had existed a constant and uniform practice allowing free passage between Daman and the enclaves; it was, in view of all the circumstances of the case, satisfied that that practice had been accepted as law by the Parties and had given rise to a right and a correlative obligation.

As regards armed forces, armed police and arms and ammunition, the position was different.

It appeared that, during the British and post-British periods, Portuguese armed forces and armed police had not passed between Daman and the enclaves as of right, and that after 1878 such passage could only take place with previous authorization by the British and later by India, accorded either under a reciprocal arrangement already agreed to, or in individual cases: it had been argued that that permission was always granted, but there was nothing in the record to show that grant of permission was incumbent on the British or on India as an obligation.

A treaty of 26 December 1878 between Great Britain and Portugal had laid down that the armed forces of the two Governments should not enter the Indian dominions of the other, except in specified cases or in consequence of a formal request made by the party desiring such entry. Subsequent correspondence showed that this provision was applicable to passage between Daman and the enclaves: it had been argued

on behalf of Portugal that on twenty-three occasions armed forces crossed British territory between Daman and the enclaves without obtaining permission; but in 1890, the Government of Bombay had forwarded a complaint to the effect that armed men in the service of the Portuguese Government were in the habit of passing without formal request through a portion of British territory en route from Daman to Nagar-Aveli which would appear to constitute a breach of the Treaty; on 22 December, the Governor-General of Portuguese India had replied: "Portuguese troops never cross British territory without previous permission", and the Secretary-General of the Government of Portuguese India stated on 1 May 1891: "On the part of this Government injunctions will be given for the strictest observance of . . . the Treaty". The requirement of a formal request before passage of armed forces could take place had been repeated in an agreement of 1913. With regard to armed police, the Treaty of 1878 and the Agreement of 1913 had regulated passage on the basis of reciprocity, and an agreement of 1920 had provided that armed police below a certain rank should not enter the territory of the other party without consent previously obtained; finally, an agreement of 1940 concerning passage of Portuguese armed police over the road from Daman to Nagar-Aveli had provided that, if the party did not exceed ten in number, intimation of its passage should be given to the British authorities within twenty-four hours, but that, in other cases, "the existing practice should be followed and concurrence of the British authorities should be obtained by prior notice as heretofore."

As regards arms and ammunition, the Treaty of 1878 and rules framed under the Indian Arms Act of 1878 prohibited the importation of arms, ammunition or military stores from Portuguese India and its export to Portuguese India without a special licence. Subsequent practice showed that this provision applied to transit between Daman and the enclaves.

The finding of the Court that the practice established between the Parties had required for the passage of armed forces, armed police and arms and ammunition the permission of the British or Indian authorities rendered it unnecessary for the Court to determine whether or not, in the absence of the practice that actually prevailed, general international custom or general principles of law recognized by civilized nations, which had also been invoked by Portugal, could have been relied upon by Portugal in support of its claim to a right of passage in respect of these categories. The Court was dealing with a concrete case having special features: historically the case went back to a period when, and related to a region in which, the relations between neighbouring States were not regulated by precisely formulated rules but were governed largely by practice: finding a practice clearly established between two States, which was accepted by the Parties as governing the relations between them, the Court must attribute decisive effect to that practice. The Court was, therefore, of the view that no right of passage in favour of Portugal involving a correlative obligation on India had been established in respect of armed forces, armed police and arms and ammunition.

Having found that Portugal had, in 1954, a right of passage in respect of private persons, civil officials and goods in general, the Court lastly proceeded to consider whether India had acted contrary to its obligation resulting from Portugal's right of passage in respect of any of these categories. Portugal had not contended that India had acted contrary to that obligation before July 1954, but it complained that passage was thereafter denied to Portuguese nationals of European origin, to native Indian Portuguese in the employ of the Portuguese Government and to a delegation that the Governor of Daman proposed, in July 1954, to send to Nagar-Aveli and Dadra. The Court found that the events which had occurred in Dadra on 21-22 July 1954 and which had resulted in the overthrow of Portuguese authority in that enclave had created tension in the surrounding Indian district; having regard to that tension, the Court was of the view that India's refusal of passage was covered by its power of regulation and control of the right of passage of Portugal.

For these reasons, the Court reached the findings indicated above.

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35. CONSTITUTION OF THE MARITIME SAFETY COMMITTEE OF THE INTER-GOVERNMENTAL MARITIME CONSULTATIVE ORGANIZATION

Advisory Opinion of 8 June 1960

By resolution of 19 January 1959, transmitted to the Court and filed in the Registry on 25 March 1959, the Assembly of the Inter-Governmental Maritime Consultative Organization (IMCO) decided to request the Court to give an advisory opinion on the following question:

> "Is the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, which was elected on 15 January 1959, constituted in accordance with the Convention for the Establishment of the Organization?"

By nine votes to five, the Court gave a negative answer to the question. The President and Judge Moreno Quintana appended to the Opinion their dissenting opinions. In its Opinion the Court first recalled the facts.

The Convention referred to in the Request for an Advisory Opinion established a body known as the Inter-Governmental Maritime Consultative Organization, which consisted of an Assembly, a Council and a Maritime Safety Committee. This Committee was responsible for the consideration of any matter within the scope of the Organization directly affecting maritime safety. Its composition and the mode of designating its Members were governed by Article 28 (*a*) of the Convention which reads as follows:

> "*The Maritime Safety Committee shall consist of fourteen Members elected by the Assembly from the Members, governments of those nations having an important interest in maritime safety, of which not less than eight shall be the largest ship-owning nations*, and the remainder shall be elected so as to ensure adequate representation of Members, governments of other nations with an important interest in maritime safety, such as nations interested in the supply of large numbers of crews or in the carriage of large numbers of berthed and unberthed passengers, and of major geographical areas."

When the Assembly began its consideration of the election of Members of the Committee, it had before it a working

paper setting out, in descending order of total gross registered tonnage, the names of Member States. On this list Liberia was third and Panama eighth. In electing the eight Members which had to be the largest ship-owning nations, however, the Assembly elected neither Liberia nor Panama. The debates having revealed a wide divergence of views as to the interpretation of Article 28 (*a*), the question whether the Committee had been constituted in accordance with that Article was, on the proposal of Liberia, submitted to the Court.

The Court then considered the answer which should be given to that question.

It had been contended before the Court that the Assembly was entitled to refuse to elect Liberia and Panama for the following reasons: the Assembly, it was argued, was vested with a discretionary power to determine which Members of the Organization had an important interest in maritime safety; in electing the eight largest ship-owning nations, it was empowered to exclude those that in its judgment did not have an important interest in maritime safety; its discretionary power extended also to the determination of which nations were or were not the largest ship-owning nations.

The Court observed that it had been sought to find in the expression "elected", which applied to all the Members of the Committee, a notion of choice, but it was of opinion that that contention placed in a subordinate position the specific provision of Article 28 (*a*) in relation to the eight largest ship-owning nations. The underlying principle of the Article was that those nations should be in preponderance on the Committee. Whichever were those nations, they were necessarily to be appointed to the Committee: that they each possessed an important interest in maritime safety and had been accepted as axiomatic. The debate which had taken place upon the drafts of the Article in 1946 in the United Maritime Consultative Council and in 1948 at the United Nations Maritime Conference confirmed that principle.

The Court next considered the meaning of the words "the largest ship-owning nations". If Article 28 (*a*) were construed as conferring upon the Assembly an authority enabling it to choose those nations uncontrolled by any objective test of any kind, the structure built into the Article to ensure their predominance on the Committee would collapse. It was apparent that some basis of measurement must be applied. The largest ship-owning nations were to be elected on the strength of their tonnage. The only question was in what sense Article 28 (*a*) contemplated that ships should be owned by or belong to them. Liberia and Panama had contended that the sole test was registered tonnage but certain other States had submitted that the proper interpretation of the Article required that ships should belong to nationals of the State whose flag they flew. A comparison of the texts of Articles 60 and 28 (*a*) of the Convention for the Establishment of IMCO and an examination of the practice followed by the Assembly in the implementation of Articles 17 (*c*) and 41 of that Convention persuaded the Court to the view that it was unlikely that when Article 28 (*a*) was drafted any criterion other than registered tonnage was contemplated. That criterion was moreover practical, certain and capable of easy application; it was that which was most consonant with international practice, maritime usage and other international maritime conventions. The conclusion reached by the Court was that the largest ship-owning nations were those having the largest registered ship tonnage.

The Court finally observed that its interpretation of Article 28 (*a*) was consistent with the general purpose of the Convention and the special functions of the Maritime Safety Committee. The Court could not subscribe to an interpretation which would empower the Assembly to refuse membership of the Committee to a State regardless of the fact that it ranked among the first eight in terms of registered tonnage. Consequently, in electing neither Liberia nor Panama, which were included among the eight, the Assembly had failed to comply with Article 28 (*a*) of the Convention.

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36. CASE CONCERNING THE ARBITRAL AWARD MADE BY THE KING OF SPAIN ON 23 DECEMBER 1906

Judgment of 18 November 1960

The proceedings in the case concerning the Arbitral Award made by the King of Spain on 23 December 1906, regarding the determination of the frontier between Honduras and Nicaragua, were instituted by Honduras against Nicaragua by an Application filed on 1 July 1958. Honduras asked the Court to adjudge and declare that Nicaragua was under an obligation to give effect to the Award; Nicaragua asked it to adjudge and declare that the decision given by the King of Spain did not possess the character of a binding arbitral award and that it was in any case incapable of execution. By fourteen votes to one, the Court held that the Award was valid and binding and that Nicaragua was under an obligation to give effect to it.

Judge Moreno Quintana appended to the judgment a declaration; Judge Sir Percy Spender appended a separate opinion and M. Urrutia Holguín, Judge *ad hoc*, a dissenting opinion.

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In its Judgment, the Court found that Honduras and Nicaragua had on 7 October 1894 concluded a treaty, referred to as the Gámez-Bonilla Treaty, under which a Mixed Boundary Commission was entrusted with the duty of demarcating the dividing line between the two countries (Article I), adhering, in so doing, to certain rules (Article II). The points not settled by the Commission were to be submitted to an arbitral tribunal composed of one representative of each of the two countries, and of one member of the Diplomatic Corps accredited to Guatemala to be elected by the first two (Article III). In case the diplomatic representative should decline the appointment, another election was to take place; when the membership of the Diplomatic Corps was exhausted, any foreign or Central American public figure might be elected, and, should that not be possible, the points in controversy were to be submitted to the Government of Spain or, failing that, to any South American government (Article V). The arbitral decision was to be held as a perfect, binding and perpetual treaty, not subject to appeal (Article VII). Finally, the Treaty was to be submitted to constitutional ratifications

(Article VIII) and to remain in force for a period of ten years (Article XI).

The Mixed Commission succeeded in fixing the boundary from the Pacific Coast to the *Portillo de Teotecacinte* but, with regard to the frontier from that point to the Atlantic Coast, it could only record its disagreement (1900-1901). With regard to that latter section of the boundary, the King of Spain on 23 December 1906 handed down an arbitral award the operative clause of which fixed the common boundary point on the Atlantic Coast as the mouth of the principal arm of the River Segovia or Coco, between Hara and the island of San Pío where Cape Gracias a Dios is situated; from that point, the frontier was to follow the thalweg of the Segovia or Coco upstream until it reached the place of its confluence with the Poteca or Bodega continuing along the thalweg of the Poteca or Bodega until the latter joined the Guineo or Namasli to terminate at the *Portillo de Teotecacinte*, the *sitio* of the same name remaining within the jurisdiction of Nicaragua.

The Foreign Minister of Nicaragua, in a Note dated 19 March 1912, had challenged the validity and binding character of the Award. This had given rise to a dispute between the parties. After unsuccessful attempts at settlement by direct negotiation or mediation, the Organization of American States had been led to deal with the dispute which Honduras and Nicaragua had undertaken to submit to the Court under an agreement reached at Washington on 21 July 1957.

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Honduras alleged that there was a presumption in favour of the binding character of the Award as it presented all the outward appearances of regularity and had been made after the parties had had every opportunity to put their respective cases before the arbitrator; it contended that the burden lay upon Nicaragua to rebut that presumption by furnishing proof that the Award was invalid. Nicaragua contended that, as Honduras relied upon the Award, it was under an obligation to prove that the person giving the decision had been invested with the powers of an arbitrator, and it argued that the King of Spain had not been so invested.

In the first place, Nicaragua had argued that the requirements of Articles III and V of the Gámez-Bonilla Treaty had not been complied with in the designation of the King of Spain as arbitrator. The record showed that the two national arbitrators had designated the Mexican Chargé d'affaires in Central America (1899), and later the Mexican Minister to Central America (1902), as the third member of the arbitral tribunal but that these two had in turn left Guatemala. Thereafter, on 2 October 1904, the two national arbitrators had met with the Spanish Minister to Central America whom they appointed "to be the chairman of a meeting preliminary to the arbitration", and, "by common consent and the requirements of Articles III and IV of the Gámez-Bonilla Treaty having previously been complied with", the King of Spain had been designated as arbitrator. The Court concluded that the requirements of the Gámez-Bonilla Treaty as interpreted by the two national arbitrators had been complied with. Subsequently the Presidents of Honduras and of Nicaragua expressed their satisfaction at the designation of the King of Spain (6 and 7 October 1904), the acceptance of the latter was communicated to the two countries on 17 October 1904 and the Foreign Minister of Nicaragua expressed his gratitude to the Spanish Minister of State in a Note of 21 December 1904. In these circumstances the Court was unable to hold that the designation of the King of Spain as arbitrator was invalid.

In the second place, Nicaragua had contended that the Gámez-Bonilla Treaty had lapsed before the King of Spain agreed to act as arbitrator (17 October 1904); it argued that the Treaty had come into effect on the date on which it was signed (7 October 1894) and that by virtue of Article XI it had lapsed on 7 October 1904. The reply of Honduras was that the Treaty had not come into effect until the exchange of ratifications (24 December 1896) and that it had consequently expired on 24 December 1906. There was no express provision in the Treaty with regard to the date of its entry into force but, taking into consideration its provisions with regard to the exchange of ratifications, the Court was of the view that the intention of the parties had been that it should come into force on the date of exchange of ratifications. It found it difficult to believe that the parties had had in mind an interpretation of the Treaty according to which it was due to expire five days after agreement was reached on the designation of the King of Spain as arbitrator (2 October 1904). If this were not the case, when confronted with the suggestion of the Spanish Minister to Central America on 21 and 24 October 1904 that the period of the Treaty might be extended, the two Governments would either have taken immediate appropriate measures for its renewal or extension, or they would have terminated all further proceedings in respect of the arbitration. The Court therefore concluded that the King's acceptance of his designation as arbitrator had been well within the currency of the Treaty.

Finally, the Court considered that, having regard to the fact that the designation of the King of Spain was freely agreed to by Nicaragua, that no objection was taken by Nicaragua to his jurisdiction, either on the ground of irregularity in his designation or on the ground that the Treaty had lapsed, and that Nicaragua had fully participated in the arbitral proceedings, it was no longer open to Nicaragua to rely on either of those contentions as furnishing a ground for the nullity of the Award.

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Nicaragua had urged that even under those conditions the Award was a nullity and Honduras had answered that the conduct and attitude of Nicaragua showed that it accepted the Award as binding and that in consequence of that acceptance and of its failure to raise any objection for a number of years, it was no longer open to Nicaragua to question the validity of the Award.

The Court recalled in the first place that, on 25 December 1906, the President of Nicaragua had sent a telegram to the President of Honduras in which he congratulated him on having won the day and observed that the irksome question of the delimitation of the frontier had been resolved in a satisfactory manner. Nicaragua had urged that the President was not then aware of the actual terms of the Award, but the Court pointed out that, from a telegram of the Minister of Nicaragua in Madrid of 24 December 1906, he had learned the course which the boundary line was to follow. In any event, the full terms of the Award must have become available to the Nicaraguan Government fairly soon since the Award was published in its Official Gazette on 28 January 1907. Even thereafter, the attitude of Nicaragua towards the Award had continued to be one of acceptance, subject to a desire to seek clarification of certain points which would facilitate the carrying into effect of the Award (the message of the President

of Nicaragua to the National Legislative Assembly of 1 December 1907, the Foreign Minister's report to the National Legislative Assembly of 26 December 1907, the decree of the National Legislative Assembly of 14 January 1908, etc.). No request for clarification had in fact been submitted to the King of Spain, and it was not until 19 March 1912 that the Foreign Minister of Nicaragua for the first time stated that the Arbitral Award was not "a clear, really valid, effective and compulsory Award".

In the judgment of the Court, Nicaragua, by express declaration and by conduct in conformity with Article VII of the Gámez-Bonilla Treaty, had recognized the Award as binding and it was no longer open to Nicaragua to go back upon that recognition. Nicaragua's failure to raise any question with regard to the validity of the Award for several years after it had become known to it confirmed that conclusion. However, even if there had not been repeated acts of recognition and even if its complaints had been put forward in proper time, the Award would still have to be recognized as valid. Nicaragua's first complaint was that the King of Spain had exceeded his jurisdiction by reason of non-observance of the rules laid down in Article II of the Gámez-Bonilla Treaty but the Court, having carefully considered the allegations of Nicaragua, was unable to arrive at the conclusion that the arbitrator had gone beyond the authority conferred upon him. Nicaragua had also contended that the Award was a nullity by reason of essential error, but the Court held that the evaluation of documents and of other evidence appertained to the discretionary power of the arbitrator and was not open to question. The last ground of nullity relied upon had been the alleged lack or inadequacy of reasons in support of the conclusions arrived at by the arbitrator but, in the opinion of the Court, that ground was without foundation.

It had further been argued by Nicaragua that the Award was not in any case capable of execution by reason of its omissions, contradictions, and obscurities: Nicaragua had contended that the mouth of a river was not a fixed point and could not serve as a common boundary between two States and that vital questions of navigation rights would be involved; it had further argued that the delimitation in the operative clause left a gap of a few kilometres from the junction of the Poteca or Bodega with the Guineo or Namaslí up to the *Portillo de Teotecacinte*. In view of the clear directive in the operative clause and the explanation in support of it, the Court did not consider that the Award was incapable of execution.

For these reasons the Court arrived at the conclusion stated above.

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37. CASE CONCERNING THE TEMPLE OF PREAH VIHEAR (PRELIMINARY OBJECTIONS)

Judgment of 26 May 1961

Proceedings in the case concerning the Temple of Preah Vihear (Preliminary Objections) between Cambodia and Thailand, which relates to the territorial sovereignty over the Temple of Preah Vihear, were instituted by an Application by the Government of Cambodia dated 30 September 1959. The Government of Thailand raised two preliminary objections to the jurisdiction.

The Court held, unanimously, that it had jurisdiction. Vice-President Alfaro and Judges Wellington Koo, Sir Gerald Fitzmaurice, and Tanaka appended declarations to the Judgment and Judges Sir Percy Spender and Morelli appended separate opinions.

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In its Judgment the Court noted that, in invoking the jurisdiction of the Court, Cambodia had based herself principally on the combined effect of her own acceptance of the compulsory jurisdiction of the Court and of a declaration made by Thailand on 20 May 1950 which was in the following terms:

> "I have the honour to inform you that by a declaration dated September 20, 1929, His Majesty's Government had accepted the compulsory jurisdiction of the Permanent Court of International Justice in conformity with Article 36, paragraph 2, of the Statute for a period of ten years and on condition of reciprocity. That declaration has been renewed on May 3, 1940, for another period of ten years.
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> "In accordance with the provisions of Article 36, paragraph 4, of the Statute of the International Court of Justice, I have now the honour to inform you that His Majesty's Government hereby renew the declaration above mentioned for a further period of ten years as from May 3, 1950, with the limits and subject to the same conditions and reservations as set forth in the first declaration of Sept. 20, 1929."

Thailand had raised a first preliminary objection on the ground that that declaration did not constitute a valid acceptance on her part of the compulsory jurisdiction of the Court. She in no way denied that she had fully intended to accept the compulsory jurisdiction but, according to her argument, she had drafted her declaration in terms revealed by the decision of the Court of 26 May 1959 in the case concerning the *Aerial Incident of 27 July 1955* (Israel *v.* Bulgaria) to have been ineffectual. Article 36, paragraph 5, of the Statute of the Court provided that:

> "Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties of the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms."

The Court had held that that provision applied only to the original parties to the Statute, and that, Bulgaria not having become a party to the Statute until 14 December 1955, her declaration of acceptance of the compulsory jurisdiction of the Permanent Court must be regarded as having lapsed on 19 April 1946, the date when the Permanent Court had ceased to exist. In the present case, Thailand had proceeded on the basis that her position was the same as that of Bulgaria, since she had become a party to the Statute only on 16 December 1946, some eight months after the demise of the Permanent Court. Her declaration of acceptance of the com-

pulsory jurisdiction of the Permanent Court would accordingly not have been transformed into an acceptance relating to the present Court, and all she actually would have achieved was a necessarily inoperative renewal of an acceptance of the compulsory jurisdiction of a tribunal that no longer existed.

The Court did not consider that its Judgment of 1959 had the consequences which Thailand claimed. Apart from the fact that that Judgment had no binding force except between the parties, the Court took the view that Thailand, by her declaration of 20 May 1950, had placed herself in a different position from Bulgaria. At that date, not only had Thailand's declaration of 1940 never been transformed into an acceptance of the compulsory jurisdiction of the present Court, but, indeed, it had expired, according to its own terms, two weeks earlier (on 6 May 1950). The declaration of 20 May 1950, a new and independent instrument, had not therefore been made under Article 36, paragraph 5, of the Statute, the operation of which, on any view, was wholly exhausted so far as Thailand was concerned.

In the course of the proceedings there had been some discussion as to whether a lapsed instrument could be renewed, but the Court considered that the real question was, what was the effect of the declaration of 1950. It had also been said that Thailand had in 1950 held a mistaken view and for that reason had used in her declaration language which the decision of 1959 had shown to be inadequate to achieve its purpose, but the Court did not consider that the issue in the present case was really one of error, It had also been argued that the intent without the deed did not suffice to constitute a valid legal transaction, but the Court considered that, in the case of acceptances of the compulsory jurisdiction, the only formality required was that of deposit with the Secretary-General of the United Nations, a formality which had been accomplished by Thailand in accordance with Article 36, paragraph 4, of the Statute.

The sole relevant question was therefore whether the language employed in Thailand's 1950 declaration did reveal a clear intention, in the terms of Article 36, paragraph 2, of the Statute, to recognise as compulsory the jurisdiction of the Court. If the Court applied its normal canons of interpretation, that declaration could have no other meaning than as an acceptance of the compulsory jurisdiction of the present Court, since there was no other Court to which it could have related. Thailand, which was fully aware of the non-existence of the former Court, could have had no other purpose in addressing the Secretary-General of the United Nations under paragraph 4 of Article 36 of the Statute than to recognise the compulsory jurisdiction of the present Court under paragraph 2 of that Article; nor indeed did she pretend otherwise. The remainder of the declaration had to be construed in the light of that cardinal fact, and in the general context of the declaration; the reference to the 1929 and 1940 declarations must be regarded simply as being a convenient method of indicating, without stating them in terms, what were the conditions upon which the acceptance was made.

The Court, therefore, considered that there could not remain any doubt as to what meaning and effect ought to be attributed to the 1950 declaration and it rejected the first preliminary objection of Thailand.

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The Court next found that that conclusion was sufficient to found the Court's jurisdiction and that it became unnecessary to proceed to a consideration of the second basis of jurisdiction invoked by Cambodia (certain treaty provisions for the judicial settlement of any disputes of the kind involved in the present case) and of Thailand's objection to that basis of jurisdiction.

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38. CASE CONCERNING THE TEMPLE OF PREAH VIHEAR (MERITS)

Judgment of 15 June 1962

Proceedings in the case concerning the Temple of Preah Vihear, between Cambodia and Thailand, were instituted on 6 October 1959 by an Application of the Government of Cambodia; the Government of Thailand having raised two preliminary objections, the Court, by its Judgment of 26 May 1961, found that it had jurisdiction.

In its Judgment on the merits the Court, by nine votes to three, found that the Temple of Preah Vihear was situated in territory under the sovereignty of Cambodia and, in consequence, that Thailand was under an obligation to withdraw any military or police forces, or other guards or keepers, stationed by her at the Temple, or in its vicinity on Cambodian territory.

By seven votes to five, the Court found that Thailand was under an obligation to restore to Cambodia any sculptures, stelae, fragments of monuments, sandstone model and ancient pottery which might, since the date of the occupation of the Temple by Thailand in 1954, have been removed from the Temple or the Temple area by the Thai authorities.

Judge Tanaka and Judge Morelli appended to the Judgment a Joint Declaration. Vice-President Alfaro and Judge Sir Gerald Fitzmaurice appended Separate Opinions; Judges Moreno Quintana, Wellington Koo and Sir Percy Spender appended Dissenting Opinions.

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In its Judgment, the Court found that the subject of the dispute was sovereignty over the region of the Temple of Preah Vihear. This ancient sanctuary, partially in ruins, stood on a promontory of the Dangrek range of mountains which constituted the boundary between Cambodia and Thailand. The dispute had its *fons et origo* in the boundary settlements made in the period 1904-1908 between France, then conducting the foreign relations of Indo-China, and Siam. The application of the Treaty of 13 February 1904 was, in particular, involved. That Treaty established the general character of the frontier the exact boundary of which was to be delimited by a Franco-Siamese Mixed Commission.

In the eastern sector of the Dangrek range, in which Preah Vihear was situated, the frontier was to follow the watershed line. For the purpose of delimiting that frontier, it was agreed, at a meeting held on 2 December 1906, that the Mixed Commission should travel along the Dangrek range carrying out all the necessary reconnaissance, and that a survey officer of the French section of the Commission should survey the whole of the eastern part of the range. It had not been contested that the Presidents of the French and Siamese sections duly made this journey, in the course of which they visited the Temple of Preah Vihear. In January-February 1907, the President of the French section had reported to his Government that the frontier-line had been definitely established. It therefore seemed clear that a frontier had been surveyed and fixed, although there was no record of any decision and no reference to the Dangrek region in any minutes of the meetings of the Commission after 2 December 1906. Moreover, at the time when the Commission might have met for the purpose of winding up its work, attention was directed towards the conclusion of a further Franco-Siamese boundary treaty, the Treaty of 23 March 1907.

The final stage of the delimitation was the preparation of maps. The Siamese Government, which did not dispose of adequate technical means, had requested that French officers should map the frontier region. These maps were completed in the autumn of 1907 by a team of French officers, some of whom had been members of the Mixed Commission, and they were communicated to the Siamese Government in 1908. Amongst them was a map of the Dangrek range showing Preah Vihear on the Cambodian side. It was on that map (filed as Annex I to its Memorial) that Cambodia had principally relied in support of her claim to sovereignty over the Temple. Thailand, on the other hand, had contended that the map, not being the work of the Mixed Commission, had no binding character; that the frontier indicated on it was not the true watershed line and that the true watershed line would place the Temple in Thailand; that the map had never been accepted by Thailand or, alternatively, that if Thailand had accepted it she had done so only because of a mistaken belief that the frontier indicated corresponded with the watershed line.

The Annex I map was never formally approved by the Mixed Commission, which had ceased to function some months before its production. While there could be no reasonable doubt that it was based on the work of the surveying officers in the Dangrek sector, the Court nevertheless concluded that, in its inception, it had no binding character. It was clear from the record, however, that the maps were communicated to the Siamese Government as purporting to represent the outcome of the work of delimitation; since there was no reaction on the part of the Siamese authorities, either then or for many years, they must be held to have acquiesced. The maps were moreover communicated to the Siamese members of the Mixed Commission, who said nothing, to the Siamese Minister of the Interior, Prince Damrong, who thanked the French Minister in Bangkok for them, and to the Siamese provincial governors, some of whom knew of Preah Vihear. If the Siamese authorities accepted the Annex I map without investigation, they could not now plead any error vitiating the reality of their consent.

The Siamese Government and later the Thai Government had raised no query about the Annex I map prior to its negotiations with Cambodia in Bangkok in 1958. But in 1934-1935 a survey had established a divergence between the map line and the true line of the watershed, and other maps had been produced showing the Temple as being in Thailand: Thailand had nevertheless continued also to use and indeed to publish maps showing Preah Vihear as lying in Cambodia. Moreover, in the course of the negotiations for the 1925 and 1937 Franco-Siamese Treaties, which confirmed the existing frontiers, and in 1947 in Washington before the Franco-Siamese Conciliation Commission, it would have been natural for Thailand to raise the matter: she did not do so. The natural inference was that she had accepted the frontier at Preah Vihear as it was drawn on the map, irrespective of its correspondence with the watershed line. Thailand had stated that having been, at all material times, in possession of Preah Vihear, she had had no need to raise the matter; she had indeed instanced the acts of her administrative authorities on the ground as evidence that she had never accepted the Annex I line at Preah Vihear. But the Court found it difficult to regard such local acts as negativing the consistent attitude of the central authorities. Moreover, when in 1930 Prince Damrong, on a visit to the Temple, was officially received there by the French Resident for the adjoining Cambodian province, Siam failed to react.

From these facts, the court concluded that Thailand had accepted the Annex I map. Even if there were any doubt in this connection, Thailand was not precluded from asserting that she had not accepted it since France and Cambodia had relied upon her acceptance and she had for fifty years enjoyed such benefits as the Treaty of 1904 has conferred on her. Furthermore, the acceptance of the Annex I map caused it to enter the treaty settlement; the Parties had at that time adopted an interpretation of that settlement which caused the map line to prevail over the provisions of the Treaty and, as there was no reason to think that the Parties had attached any special importance to the line of the watershed as such, as compared with the overriding importance of a final regulation of their own frontiers, the Court considered that the interpretation to be given now would be the same.

The Court therefore felt bound to pronounce in favour of the frontier indicated on the Annex I map in the disputed area and it became unnecessary to consider whether the line as mapped did in fact correspond to the true watershed line.

For these reasons, the Court upheld the submissions of Cambodia concerning sovereignty over Preah Vihear.

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39. CERTAIN EXPENSES OF THE UNITED NATIONS (ARTICLE 17, PARAGRAPH 2, OF THE CHARTER)

Advisory Opinion of 20 July 1962

The question of certain expenses of the United Nations (Article 17, paragraph 2, of the Charter) had been put to the Court for an advisory opinion by a resolution adopted by the General Assembly of the United Nations of 20 December 1961.

By nine votes to five the Court declared that the expenditures authorized in certain General Assembly resolutions enumerated in the request for opinion, relating to the United Nations operations in the Congo and in the Middle East undertaken in pursuance of Security Council and General Assembly resolutions likewise enumerated in the request, were "expenses of the Organization" within the meaning of Article 17, paragraph 2, of the Charter of the United Nations.

Judges Sir Percy Spender, Sir Gerald Fitzmaurice and Morelli appended to the Opinion of the Court statements of their Separate Opinions. President Winiarski and Judges Basdevant, Moreno Quintana, Koretsky and Bustamante y Rivero appended to the Opinion of the Court statements of their Dissenting Opinions.

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The President of the Court, in pursuance of Article 66, paragraph 2, of the Statute, having considered that the States Members of the United Nations were likely to be able to furnish information on the question, fixed 20 February 1962 as the time-limit within which the Court would be prepared to receive written statements from them. The following Members of the United Nations submitted statements, notes or letters setting forth their views: Australia, Bulgaria, Byelorussian Soviet Socialist Republic, Canada, Czechoslovakia, Denmark, France, Ireland, Italy, Japan, the Netherlands, Portugal, Romania, South Africa, Spain, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America and Upper Volta. At hearings held from 14 to 21 May the Court heard oral statements by the representatives of Canada, the Netherlands, Italy, the United Kingdom of Great Britain and Northern Ireland, Norway, Australia, Ireland, the Union of Soviet Socialist Republics and the United States of America.

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In its opinion the Court first recalled that it had been argued that the Court should refuse to give an opinion, the question put to it being of a political nature, and declared that it could not attribute a political character to a request which invited it to undertake an essentially judicial task, namely the interpretation of a treaty provision. In this connection the Court recalled the principles previously stated by the Permanent Court of International Justice in the Advisory Opinion concerning the *Status of Eastern Carelia* and by the present Court in the Advisory Opinions concerning the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase)* and *Judgments of the Administrative Tribunal of the ILO upon Complaints made against Unesco*, and found no "compelling reason" why it should not give the advisory opinion which the General Assembly had requested of it.

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The Court then examined the view that it should take into consideration the rejection of a French amendment to the request for advisory opinion. The amendment would have asked the Court to give an opinion on the question whether the expenditures related to the indicated operations had been "decided on in conformity with the provisions of the Charter".

On this point the Court observed that the rejection of the French amendment did not constitute a directive to the Court to exclude from its consideration the question whether certain expenditures were "decided on in conformity with the Charter", if the Court found such consideration appropriate. Nor could the Court agree that the rejection of the French amendment had any bearing upon the question whether the General Assembly had sought to preclude the Court from interpreting Article 17 in the light of other articles of the Charter, that is, in the whole context of the treaty.

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Turning then to the question which had been posed, the Court found that it involved an interpretation of Article 17, paragraph 2, of the Charter, and that the first question was that of identifying what are "the expenses of the Organization".

The text of Article 17, paragraph 2, referred to "the expenses of the Organization" without any further explicit definition. The interpretation of the word "expenses" had been linked with the word "budget" in paragraph 1 of that Article and it had been contended that in both cases the qualifying adjective "regular" or "administrative" should be understood to be implied. According to the Court this would be possible only if such qualification must necessarily be implied from the provisions of the Charter considered as a whole.

Concerning the word "budget" in paragraph 1 of Article 17, the Court found that the distinction between "administrative budgets" and "operational budgets" had not been absent from the minds of the drafters of the Charter since it was provided in paragraph 3 of the same Article that the General Assembly "shall examine the administrative budgets" of the specialized agencies: if the drafters had intended that paragraph 1 should be limited to the administrative budget of the United Nations organization itself, the word "administrative" would have been inserted in paragraph 1 as it had been in paragraph 3. Actually, the practice of the Organization had been from the outset to include in the budget items which would not fall within any of the definitions of "administrative budget" which had been advanced. The General Assembly had consistently included in the annual budget resolu-

tions provision for "unforeseen and extraordinary expenses" arising in relation to the "maintenance of peace and security". Every year from 1947 through 1959 the resolutions on these unforeseen and extraordinary expenses have been adopted without a dissenting vote, except for 1952, 1953 and 1954, owing to the fact that in those years the resolution included the specification of a controversial item—United Nations Korean war decorations. Finally, in 1961, the report of the Working Group of Fifteen on the Examination of the Administrative and Budgetary Procedures of the United Nations had recorded the adoption without opposition of a statement that "investigations and observation operations undertaken by the Organization to prevent possible aggression should be financed as part of the regular budget of the United Nations." Taking these facts into consideration, the Court concluded that there was no justification for reading into the text of Article 17, paragraph 1, any limiting or qualifying word before the word "budget".

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Turning to paragraph 2 of Article 17, the Court observed that, on its face, the term "expenses of the Organization" meant all the expenses and not just certain types of expenses which might be referred to as "regular expenses". Finding that an examination of other parts of the Charter showed the variety of expenses which must inevitably be included within the "expenses of the Organization", the Court did not perceive any basis for challenging the legality of the settled practice of including such expenses in the budgetary amounts which the General Assembly apportioned among the Members in accordance with the authority which was given to it by Article 17, paragraph 2.

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Passing then to the consideration of Article 17 from the standpoint of its place in the general structure and scheme of the Charter, the Court found that the general purposes of that Article were the vesting of control over the finances of the Organization and the levying of apportioned amounts of the expenses of the Organization. Replying to the argument that expenses resulting from operations for the maintenance of international peace and security were not "expenses of the Organization" within the meaning of Article 17, paragraph 2, of the Charter, inasmuch as they fell to be dealt with exclusively by the Security Council, and more especially through agreements negotiated in accordance with Article 43 of the Charter, the Court found that under Article 24 the responsibility of the Security Council in the matter was "primary", not exclusive. The Charter made it abundantly clear that the General Assembly was also to be concerned with international peace and security. Under paragraph 2 of Article 17 the General Assembly was given the power to apportion the expenses among the Members, which created the obligation of each to bear that part of the expenses which was apportioned to it. When those expenses included expenditures for the maintenance of peace and security, which were not otherwise provided for, it was the General Assembly which had the authority to apportion the latter amounts among the Members. None of the provisions determining the respective functions and powers of the Security Council and the General Assembly supported the view that such distribution excluded from the powers of the General Assembly the power to provide for the financing of measures designed to maintain peace and security.

Replying to the argument that with regard to the maintenance of international peace and security the budgetary authority of the General Assembly is limited by Article 11, paragraph 2, under which "any such question [relating to the maintenance of international peace and security] on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion", the Court considered that the action referred to in that provision was coercive or enforcement action. In this context, the word "action" must mean such action as was solely within the province of the Security Council, namely that indicated by the title of Chapter VII of the Charter: "action with respect to threats to the peace, breaches of the peace, and acts of aggression". If the interpretation of the word "action" in Article 11, paragraph 2, were that the General Assembly could make recommendations only of a general character affecting peace and security in the abstract, and not in relation to specific cases, the paragraph would not have provided that the General Assembly might make recommendations on questions brought before it by States or by the Security Council. Accordingly , the last sentence of Article 11, paragraph 2, had no application where the necessary action was not enforcement action.

The Court found therefore that the argument drawn from Article 11, paragraph 2, to limit the budgetary authority of the General Assembly in respect of the maintenance of international peace and security was unfounded.

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The Court then turned to the examination of the argument drawn from Article 43 of the Charter which provides that Members shall negotiate agreements with the Security Council on its initiative, for the purpose of maintaining international peace and security. The argument was that such agreements were intended to include specifications concerning the allocation of costs of such enforcement actions as might be taken by direction of the Security Council, and that it was only the Security Council which had the authority to arrange for meeting such costs.

After stating that Article 43 was not applicable, the Court added that even if it were applicable, the Court could not accept such an interpretation of its text for the following reasons. A Member State would be entitled, during the negotiation of such agreements, to insist, and the Security Council would be entitled to agree, that some part of the expense should be borne by the Organization. In that case such expense would form part of the expenses of the Organization and would fall to be apportioned by the General Assembly under Article 17. Moreover, it followed from Article 50 of the Charter that the Security Council might determine that an overburdened State was entitled to some financial assistance. Such financial assistance, if afforded by the Organization, as it might be, would clearly constitute part of the "expenses of the Organization". Furthermore, the Court considered that it could not be said that the Charter had left the Security Council impotent in the face of an emergency situation when agreements under Article 43 had not been concluded. It must lie within the power of the Security Council to police a situation even though it did not resort to enforcement action against a State. The costs of actions which the Security Council was authorized to take therefore constituted "expenses of the Organization within the meaning of Article 17, paragraph 2".

Having considered the general problem of the interpretation of Article 17, paragraph 2, in the light of the general structure of the Charter and of the respective functions of the General Assembly and the Security Council, with a view to determining the meaning of the phrase "the expenses of the Organization", the Court proceeded to examine the expenditures enumerated in the request for the advisory opinion. It agreed that such expenditures must be tested by their relationship to the purposes of the United Nations in the sense that if an expenditure were made for a purpose which was not one of the purposes of the United Nations, it could not be considered an "expense of the Organization". When the Organization took action which warranted the assertion that it was appropriate for the fulfilment of one of the purposes of the United Nations set forth in Article 1 of the Charter, the presumption was that such action was not *ultra vires* the Organization. If the action were taken by the wrong organ, it was irregular, but this would not necessarily mean that the expense incurred was not an expense of the Organization. Both national and international law contemplated cases in which the body corporate or politic might be bound by an *ultra vires* act of an agent. As the United Nations Charter included no procedure for determining the validity of the acts of the organs of the United Nations, each organ must, in the first place at least, determine its own jurisdiction. If the Security Council adopted a resolution purportedly for the maintenance of international peace and security and if, in accordance with such resolution, the Secretary-General incurred financial obligations, those amounts must be presumed to constitute "expenses of the Organization". Recalling its Opinion concerning *Effects of Awards of Compensation made by the United Nations Administrative Tribunal*, the Court declared that obligations of the Organization might be incurred by the Secretary-General acting on the authority of the Security Council or of the General Assembly, and that the General Assembly "has no alternative but to honour these engagements".

This reasoning, applied to the resolutions mentioned in the request for the advisory opinion, might suffice as a basis for the opinion of the Court. The Court went on, however, to examine separately the expenditures relating to the United Nations Emergency Force in the Middle East (UNEF) and those relating to the United Nations operations in the Congo (ONUC).

As regards UNEF, the Court recalled that it was to be set up with the consent of the Nations concerned, which dismissed the notion that it constituted measures of enforcement. On the other hand, it was apparent that the UNEF operations were undertaken to fulfil a prime purpose of the United Nations, that is, to promote and maintain a peaceful settlement of the situation. The Secretary-General had therefore properly exercised the authority given him to incur financial obligations; the expenses provided for by such obligations must be considered "expenses of the Organization". Replying to the argument that the General Assembly never, either directly or indirectly, regarded the expenses of UNEF as "expenses of the Organization within the meaning of Article 17, paragraph 2, of the Charter", the Court stated that it could not agree with this interpretation. Analyzing the resolutions relating to the financing of UNEF, the Court found that the establishment of a special account did not necessarily mean that the funds in it were not to be derived from contributions of Members as apportioned by the General Assembly. The resolutions on this matter, which had been adopted by the requisite two-thirds majority, must have rested upon the conclusion that the expenses of UNEF were "expenses of the Organization" since otherwise the General Assembly would have had no authority to decide that they "shall be borne by the United Nations" or to apportion them among the Members. The Court found therefore that, from year to year, the expenses of UNEF had been treated by the General Assembly as expenses of the Organization within the meaning of Article 17, paragraph 2.

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Turning next to the operations in the Congo, the Court recalled that they had been initially authorized by the Security Council in the resolution of 14 July 1960, which had been adopted without a dissenting vote. The resolution, in the light of the appeal from the Government of the Congo, the report of the Secretary-General and the debate in the Security Council, had clearly been adopted with a view to maintaining international peace and security. Reviewing the resolutions and reports of the Secretary-General relating to these operations, the Court found that in the light of such a record of reiterated consideration, confirmation, approval and ratification by the Security Council and by the General Assembly of the actions of the Secretary-General, it was impossible to reach the conclusion that the operations in the Congo usurped or impinged upon the prerogatives conferred by the Charter of the Security Council. These operations did not involve "preventive or enforcement measures" against any State under Charter VII and therefore did not constitute "action" as that term was used in Article 11. The financial obligations which the Secretary-General had incurred, in accordance with the clear and reiterated authority of both the Security Council and the General Assembly, constituted obligations of the Organization for which the General Assembly was entitled to make provision under the authority of Article 17, paragraph 2, of the Charter.

In relation to the financing of the operations in the Congo, the Court, recalling the General Assembly resolutions contemplating the apportionment of the expenses in accordance with the scale of assessment for the regular budget, concluded therefrom that the General Assembly had twice decided that even though certain expenses were "extraordinary" and "essentially different" from those under the "regular budget", they were none the less "expenses of the Organization" to be apportioned in accordance with the power granted to the General Assembly by Article 17, paragraph 2.

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Having thus pointed out on the one hand that the text of Article 17, paragraph 2, of the Charter could lead to the conclusion that the expenses of the Organization were the amounts paid out to defray the costs of carrying out the purposes of the Organization, and on the other hand that the examination of the resolutions authorizing the expenditures referred to in the request for the advisory opinion had led to the finding that they had been incurred with that end in view; and having also analyzed and found unfounded the arguments which had been advanced against the conclusion that the expenditures in question should be considered as expenses of the Organization within the meaning of Article 17, paragraph 2, of the Charter of the United Nations, the Court arrived at the conclusion that the question submitted to it by the General Assembly must be answered in the affirmative.

40. SOUTH-WEST AFRICA CASES (PRELIMINARY OBJECTIONS)

Judgment of 21 December 1962

The South West Africa cases (Ethiopia *v.* South Africa; Liberia *v.* South Africa), which relate to the continued existence of the Mandate for South West Africa and the duties and performance of South Africa as Mandatory thereunder, were instituted by Applications of the Governments of Ethiopia and Liberia filed in the Registry on 4 November 1960. The Government of South Africa raised preliminary objections to the jurisdiction of the Court to hear the cases.

By eight votes to seven the Court found that it had jurisdiction to adjudicate upon the merits of the dispute.

Judges Bustamante y Rivero and Jessup and Judge *ad hoc* Sir Louis Mbanefo appended Separate Opinions.

President Winiarski and Judge Basdevant appended Dissenting Opinions; Judges Sir Percy Spender and Sir Gerald Fitzmaurice appended a Joint Dissenting Opinion; Judge Morelli and Judge *ad hoc* van Wyk appended Dissenting Opinions.

Judge Spiropoulos appended a Declaration of his dissent.

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In its Judgment, the Court noted that to found the jurisdiction of the Court, the Applicants, having regard to Article 80, paragraph 1, of the Charter of the United Nations, relied on Article 7 of the Mandate of 17 December 1920 for South West Africa and Article 37 of the Statute of the Court.

Before undertaking an examination of the Preliminary Objections raised by South Africa, the Court found it necessary to decide a preliminary question relating to the existence of the dispute which is the subject of the Applications. On this point it found that it was not sufficient for one party to a contentious case to assert that a dispute existed with the other party. It must be shown that the claim of one party was positively opposed by the other. Tested by this criterion, there could be no doubt about the existence of a dispute between the parties before the Court, since it was clearly constituted by their opposing attitudes relating to the performance of the obligations of the Mandate by the Respondent as Mandatory.

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The Court then briefly recalled the origin, nature and characteristics of the Mandates System established by the Covenant of the League of Nations. The essential principles of this system consisted chiefly in the recognition of certain rights of the peoples of the underdeveloped territories; the establishment of a regime of tutelage for each of such peoples to be exercised by an advanced nation as a "Mandatory" "on behalf of the League of Nations"; and the recognition of "a sacred trust of civilisation" laid upon the League as an organized international community and upon its Members. The rights of the Mandatory in relation to the mandated territory and the inhabitants had their foundation in the obligations of the Mandatory and were, so to speak, mere tools given to enable it to fulfil its obligations.

The first of the Respondent's preliminary objections maintained that the Mandate for South West Africa had never been, or at any rate was since the dissolution of the League of Nations no longer, a treaty or convention in force within the meaning of Article 37 of the Statute of the Court. In presenting this preliminary objection in this form, the Respondent stated that it had always considered or assumed that the Mandate for South West Africa had been a "treaty or convention in itself, that is, an international agreement between the Mandatory on the one hand, and, on the other, the Council representing the League and/or its Members" but "that the alternative view might well be taken that in defining the terms of the Mandate, the Council was taking executive action in pursuance of the Covenant (which of course was a convention) and was not entering into an agreement which would itself be a treaty or convention". At the same time the Respondent added "this view . . . would regard the Council's Declaration as setting forth a resolution . . . which would, like any other valid resolution of the Council, owe its legal force to the fact of having been duly resolved by the Council in the exercise of powers conferred upon it by the Covenant". In the Court's opinion, this view was not well-founded. While the Mandate for South West Africa took the form of a resolution, it was obviously of a different character. It could not be regarded as embodying only an executive action in pursuance of the Covenant. In fact and in law it was an international agreement having the character of a treaty or convention.

It had been argued that the Mandate in question had not been registered in accordance with Article 18 of the Covenant, which provided: "No such treaty or international engagement shall be binding until so registered". If the Mandate had been *ab initio* null and void on the ground of non-registration, it would follow that the Respondent had not and had never had a legal title for its administration of the territory of South West Africa; it would therefore be impossible for it to maintain that it had had such a title up to the discovery of this ground of nullity. Article 18, designed to secure publicity and avoid secret treaties, could not apply in the same way in respect to treaties to which the League of Nations was one of the parties as in respect of treaties concluded among individual Member States.

Since the Mandate in question had had the character of a treaty or convention at its start, the next relevant question to be considered was whether, as such, it was still in force either as a whole including Article 7, or with respect to Article 7 itself. The Respondent contended that it was not in force, and this contention constituted the essence of the first preliminary objection. It was argued that the rights and obligations under the Mandate in relation to the administration of the territory being of an objective character still existed, while those rights and obligations relating to administrative supervision by the League and submission to the Permanent Court of International Justice, being of a contractual character, had necessarily become extinct on the dissolution of the League of Nations. The Respondent further argued that the casualties arising from the demise of the League of Nations included Article 7 of the Mandate by which the Respondent had agreed to submit to the jurisdiction of the Permanent Court of International Justice in any dispute whatever between it as Mandatory and another Member of the League of Nations relating to the interpretation or the application of the Mandate.

On this point the Court, recalling the Advisory Opinion which it had given in 1950 concerning the *International Status of South West Africa*, stated that its findings on the obligation of the Union Government to submit to international supervision were crystal clear. To exclude the obligations connected with the Mandate would be to exclude the very essence of the Mandate. The Court also recalled that while it had been divided in 1950 on other points, it had been unanimous on the finding that Article 7 of the Mandate relating to the obligation of the Union of South Africa to submit to the compulsory jurisdiction of the Court was still "in force". Nothing had since occurred which would warrant the Court reconsidering its conclusions. All important facts had been stated or referred to in the proceedings in 1950.

The Court found that though the League of Nations and the Permanent Court of International Justice had both ceased to exist, the obligation of the Respondent to submit to compulsory jurisdiction had been effectively transferred to the present Court before the dissolution of the League of Nations. The League had ceased to exist from April 1946; the Charter of the United Nations had entered into force in October 1945; the three parties to the present proceedings had deposited their ratifications in November 1945 and had become Members of the United Nations from the dates of those ratifications. They had since been subjected to the obligations, and entitled to the rights, under the Charter. By the effect of the provisions of Article 92 and 93 of the Charter and Article 37 of the Statute of the Court, the Respondent had bound itself, by ratifying the Charter at a time when the League of Nations and the Permanent Court were still in existence and when therefore Article 7 of the Mandate was also in full force, to accept the compulsory jurisdiction of the present Court in lieu of that of the Permanent Court.

This transferred obligation had been voluntarily assumed by the Respondent when joining the United Nations. The validity of Article 7, in the Court's view, had not been affected by the dissolution of the League, just as the Mandate as a whole was still in force for the reasons stated above.

The second preliminary objection centred on the term "another Member of the League of Nations" in Article 7, the second paragraph of which reads "the Mandatory agrees that, if any dispute whatever should arise between the Mandatory and *another Member of the League of Nations* relating to the interpretation or the application of the provisions of the Mandate, such dispute . . . shall be submitted to the Permanent Court of International Justice . . ."

It was contended that since all Member States of the League lost their membership and its accompanying rights when the League itself ceased to exist on 19 April 1946, there could no longer be "another Member of the League of Nations" today. According to this contention, no State had "*locus standi*" or was qualified to invoke the jurisdiction of the Court in any dispute with the Respondent as Mandatory.

The Court pointed out that interpretation according to the natural and ordinary meaning of the words employed was not an absolute rule, and that no reliance could be placed on it where it resulted in a meaning incompatible with the spirit, purpose and context of the provision to be interpreted.

Judicial protection of the sacred trust in each Mandate was an essential feature of the Mandates System. The administrative supervision by the League constituted a normal security to ensure full performance by the Mandatory of the "sacred trust" toward the inhabitants of the territory, but the specially assigned role of the Court was even more essential, since it was to serve as the final bulwark of protection by recourse to the Court against possible abuse or breaches of the Mandate.

Under the unanimity rule (Articles 4 and 5 of the Covenant), the Council could not impose its own view on the Mandatory. If the Mandatory continued to turn a deaf ear to the Council's admonitions, the only course left to defend the interests of the inhabitants in order to protect the sacred trust would be to obtain an adjudication by the Court on the matter connected with the interpretation or the application of the Mandate. But neither the Council nor the League was entitled to appear before the Court; the only effective recourse would be for a Member or Members of the League to invoke Article 7 and bring the dispute as one between them and the Mandatory to the Permanent Court for adjudication. It was for this all-important purpose that the provision had been couched in broad terms. It was thus seen what an essential part Article 7 had been intended to play as one of the securities in the Mandates System for the observance of the obligations by the Mandatory.

In the second place, besides the essentiality of judicial protection for the sacred trust and for the rights of Member States under the Mandate, and the lack of capacity on the part of the League or the Council to invoke such protection, the right to implead the Mandatory Power before the Permanent Court had been specially and expressly conferred on the Members of the League, evidently also because it was the most reliable procedure of ensuring protection by the Court.

The third reason for concluding that Article 7, with particular reference to the term "another Member of the League of Nations", continued to be applicable, was that obviously an agreement had been reached among all the Members of the League of Nations at the session in April 1946 to continue the different Mandates as far as it was practically feasible with reference to the obligations of the Mandatory Powers and therefore to maintain the rights of the Members of the League, notwithstanding the dissolution of the League itself. This agreement was evidenced not only by the contents of the League dissolution resolution of 18 April 1946 but also by the discussions relating to the question of Mandates in the First Committee of the Assembly and the whole set of surrounding circumstances. Those States which had been Members of the League at the time of its dissolution continued to have the right to invoke the compulsory jurisdiction of the Court as before the dissolution of the League, and that right continued to exist for as long as the Respondent held on to the right to administer the territory under the Mandate.

During the prolonged discussions which had been held both in the Assembly and in its First Committee the delegates of the Mandatory Powers present solemnly expressed their intention to continue to administer the territories entrusted to them in accordance with the general principles of the existing Mandates. In particular the delegate of South Africa, on 9 April 1946, stated ". . . the Union will continue to administer the territory scrupulously in accordance with the obligations of the Mandate . . . . The disappearance of those organs of the League concerned with the supervision of mandates . . . will necessarily preclude complete compliance with the letter of the Mandate. The Union Government will nevertheless regard the dissolution of the League as in no way diminishing its obligations under the Mandate . . .". There could have been no clearer recognition on the part of the Government of South Africa of the continuance of its obligations under the Mandate for South West Africa, including Article 7, after the dissolution of the League of Nations.

It was clear from the foregoing that there had been a unanimous agreement among all the Member States present at the Assembly meeting that the Mandates should be continued to

be exercised in accordance with the obligations therein defined. Manifestly, this continuance of obligations under the Mandate could not have begun to operate until the day after the dissolution of the League of Nations; hence the literal objections derived from the words "another Member of the League of Nations" were not meaningful, since the resolution of 18 April 1946 had been adopted precisely with a view to averting them and continuing the Mandate as a treaty between the Mandatory and the Members of the League of Nations.

In conclusion, any interpretation of the term "another Member of the League of Nations" must take into consideration all of the relevant facts and circumstances relating to the act of dissolution of the League, in order to ascertain the true intent and purposes of the Members of the Assembly in adopting the final resolution of 18 April 1946.

To deny the existence of the agreement it had been said that Article 7 was not an essential provision of the Mandate instrument for the protection of the sacred trust of civilisation. No comparable clause had been inserted in the Trusteeship Agreements for the territories previously held under three of the four "C" Mandates.

For the reasons stated above, the Court dismissed the first and second objections.

The third objection consisted essentially of the proposition that the dispute brought before the Court was not a dispute as envisaged in Article 7 of the Mandate. The Court recalled that Article 7 referred to "any dispute whatever" arising between the Mandatory and another Member of the League of Nations. The language used was broad, clear and precise and referred to any dispute whatever relating to all or any of the provisions of the Mandate, whether they related to substantive obligations of the Mandatory toward the inhabitants of the territory or toward the other Members of the League, or to its obligations to submit to supervision by the League or to protection under Article 7. The scope and purport of these provisions indicated that the Members of the League were understood to have a legal right or interest in the observance by the Mandatory of its obligations both toward the inhabitants and toward the League of Nations and its Members. While Article 6 of the Mandate provided for administrative supervision by the League, Article 7 in effect provided, with the express agreement of the Mandatory, for judicial protection by the Permanent Court. Protection of the material interests of the Members was of course included within its compass, but the well-being and development of the inhabitants were not less important.

The Court concluded that the present dispute was a dispute as envisaged in Article 7 of the Mandate and that the third preliminary objection must be dismissed.

The Court next considered the fourth and last objection, which in essence consisted of the proposition that if a dispute existed within the meaning of Article 7, it was not one which could not be settled by negotiation with the Applicants and that there had been no such negotiations with a view to its settlement.

In the Court's view, the fact that a deadlock had been reached in the collective negotiations in the past, and the fact that both the written pleadings and oral arguments of the Parties had clearly confirmed the continuance of this deadlock, compelled a conclusion that no reasonable probability existed that further negotiations would lead to a settlement. The Respondent having contended that no direct negotiations between it and the Applicants had ever been undertaken, the Court found that what mattered was not so much the form of negotiation as the attitude and views of the Parties on the substantive issues of the question involved.

Moreover, where the disputed questions were of common interest to a group of States on one side or the other in an organised body, parliamentary or conference diplomacy had often been found to be the most practical form of negotiation.

For the reasons stated, the fourth objection was not well-founded and should also be dismissed.

The Court concluded that Article 7 of the Mandate was a treaty or convention still in force within the meaning of Article 37 of the Statute of the Court and that the dispute was one which was envisaged in Article 7 and could not be settled by negotiation. Consequently the Court was competent to hear the dispute on the merits.

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41. CASE CONCERNING THE NORTHERN CAMEROONS

Judgment of 2 December 1963

Proceedings in the case concerning the Northern Cameroons, between the Federal Republic of Cameroon and the United Kingdom of Great Britain and Northern Ireland, were instituted by an Application of 30 May 1961 in which the Government of the Republic of Cameroon asked the Court to declare that, in the application of the Trusteeship Agreement for the Territory of the Cameroons under British Administration, the United Kingdom failed, with regard to the Northern Cameroons, to respect certain obligations flowing from that Agreement. The Government of the United Kingdom raised preliminary objections.

By 10 votes to 5 the Court found that it could not adjudicate upon the merits of the claim of the Republic of Cameroon.

Judges Spiropoulos and Koretsky appended to the Judgment Declarations of their dissent. Judge Jessup, while entirely agreeing with the reasoning in the Judgment of the Court, also appended a Declaration.

Judges Wellington Koo, Sir Percy Spender, Sir Gerald Fitzmaurice and Morelli appended Separate Opinions.

Judges Badawi and Bustamante y Rivero and Judge *ad hoc* Beb a Don appended Dissenting Opinions.

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In its Judgment, the Court recalled that the Cameroons had formed part of the possessions to which Germany renounced her rights under the Treaty of Versailles and which had been placed under the Mandates System of the League of Nations. It had been divided into two Mandates, the one administered by France and the other by the United Kingdom. The latter divided its territory into the Northern Cameroons, which was administered as part of Nigeria, and the Southern Cameroons, which was administered as a separate province of Nigeria. After the creation of the United Nations, the man-

dated territories of the Cameroons were placed under the international trusteeship system by trusteeship agreements approved by the General Assembly on 13 December 1946.

The territory under French administration attained independence as the Republic of Cameroon on 1 January 1960 and became a Member of the United Nations on 20 September 1960. In the case of the territory under United Kingdom administration, the United Nations General Assembly recommended that the Administering Authority organise plebiscites in order to ascertain the wishes of the inhabitants. Pursuant to these plebiscites the Southern Cameroons joined the Republic of Cameroon on 1 October 1961 and the Northern Cameroons on 1 June 1961 joined the Federation of Nigeria, which had itself become independent on 1 October 1960. On 21 April 1961 the General Assembly endorsed the results of the plebiscites and decided that the Trusteeship Agreement concerning the Cameroons under United Kingdom administration should be terminated upon the two parts of the territory joining the Republic of Cameroon and Nigeria respectively (resolution 1608 (XV)).

The Republic of Cameroon voted against the adoption of this resolution, after expressing its dissatisfaction with the manner in which the United Kingdom had administered the Northern Cameroons and had organised the plebiscites, maintaining that the political development of the territory and the normal course of the consultation with the people had been altered thereby. These criticisms, together with others, were developed in a White Book which was rebutted by the representatives of the United Kingdom and of Nigeria. Following the adoption of the resolution the Republic of Cameroon, on 1 May 1961, addressed a communication to the United Kingdom in which it referred to a dispute concerning the application of the Trusteeship Agreement and proposed the conclusion of a special agreement for the purpose of bringing the dispute before the Court. The United Kingdom gave a negative reply on 26 May 1961. Four days later the Republic of Cameroon submitted an Application to the Court.

The United Kingdom then raised a number of preliminary objections. The first was that there was no dispute between itself and the Republic of Cameroon, and that if any dispute had at the date of the Application existed it was between the Republic of Cameroon and the United Nations. The Court found in this connection that the opposing views of the parties as to the interpretation and application of the Trusteeship Agreement revealed the existence of a dispute, at the date of the Application, in the sense recognised by the jurisprudence of the Court.

Another of the United Kingdom's preliminary objections was based on Article 32 (2) of the Rules of Court, which provides that when a case is brought before the Court the Application must not only indicate the subject of the dispute but must also as far as possible state the precise nature of the claim and the grounds on which it is based. Adopting the view expressed by the Permanent Court of International Justice, the Court considered that, its jurisdiction being international, it was not bound to attach to matters of form the same degree of importance which they might possess in municipal law. It found that the Applicant had sufficiently complied with Article 32 (2) of the Rules and that this preliminary objection was accordingly without substance.

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The Court then said that a factual analysis undertaken in the light of certain guiding principles might suffice to conduce to the resolution of the issues to which the Court directed its attention.

As a Member of the United Nations, the Republic of Cameroon had a right to apply to the Court and by the filing of the Application the Court had been seised. But the seising of the Court was one thing, the administration of justice was another. Even if the Court, when seised, found that it had jurisdiction, it was not compelled in every case to exercise that jurisdiction. It exercised a judicial function which was circumscribed by inherent limitations. Like the Permanent Court, it could not depart from the essential rules guiding its activity as a Court.

Resolution 1608 (XV), by which the General Assembly decided that the Trusteeship Agreement should be terminated with respect to the Northern Cameroons on 1 June 1961, had had definitive legal effect. The Republic of Cameroon did not dispute that the decisions of the General Assembly would not be reversed or that the Trusteeship Agreement would not be revived by a Judgment of the Court on the merits, that the Northern Cameroons would not be joined to the Republic of Cameroon, that its union with Nigeria would not be invalidated, or that the United Kingdom would have no right or authority to take any action with a view to satisfying the underlying desires of the Republic of Cameroon. The function of the Court was to state the law, but its judgments must be capable of having some practical consequences.

After 1 June 1961, no Member of the United Nations could any longer claim any of the rights which might have been originally granted by the Trusteeship Agreement. It might be contended that if, during the life of the Trusteeship, the Trustee was responsible for some act in violation of its terms which resulted in damage to another Member of the United Nations or to one of its nationals, a claim for reparation would not be liquidated by the termination of the Trust, but the Application of the Republic of Cameroon sought only a finding of a breach of the law and included no claim for reparation. Even if it were common ground that the Trusteeship Agreement was designed to provide a form of judicial protection which any Member of the United Nations had a right to invoke in the general interest, the Court could not agree that that judicial protection survived the termination of the Trusteeship Agreement; in filing its Application on 30 May 1961, the Republic of Cameroon had exercised a procedural right which appertained to it, but, after 1 June 1961, the Republic of Cameroon would no longer have had any right to ask the Court to adjudicate at this stage upon questions affecting the rights of the inhabitants of the Territory and the general interest in the successful functioning of the Trusteeship System.

The Republic of Cameroon had contended that all it sought was a declaratory judgment of the Court, that prior to the termination of the Trusteeship Agreement the United Kingdom had breached its provisions. The Court might, in an appropriate case, make a declaratory judgment but such a judgment must have a continuing applicability. In this case there was a dispute about the interpretation and application of a treaty, but the treaty was no longer in force and there could be no opportunity for a future act of interpretation or application in accordance with any judgment the Court might render.

Whether or not at the moment the Application was filed there was jurisdiction in the Court to adjudicate upon the dispute, circumstances that had since arisen rendered any adjudication devoid of purpose. Under these conditions, for the Court to proceed further in the case would not, in its opinion, be a proper discharge of its duties. The answer to the question whether the judicial function was engaged might, in certain cases, need to wait upon an examination of the merits. In the

present case, however, it was already evident that it could not be engaged.

For these reasons the Court did not feel called upon to pass expressly upon the several submissions of the United Kingdom and found that it could not adjudicate upon the merits of the claim of the Federal Republic of Cameroon.

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42. CASE CONCERNING THE BARCELONA TRACTION, LIGHT AND POWER COMPANY, LIMITED (PRELIMINARY OBJECTIONS)

Judgment of 24 July 1964

Proceedings in the case concerning the Barcelona Traction, Light and Power Company, Limited (Belgium *v.* Spain) were instituted by an Application of 19 June 1962 in which the Belgian Government sought reparation for damage claimed to have been caused to Belgian nationals, shareholders in the Canadian Barcelona Traction Company, by the conduct of various organs of the Spanish State. The Spanish Government raised four Preliminary Objections.

The Court rejected the first Preliminary Objection by 12 votes to 4, and the second by 10 votes to 6. It joined the third Objection to the merits by 9 votes to 7 and the fourth by 10 votes to 6.

President Sir Percy Spender and Judges Spiropoulos, Koretsky and Jessup appended Declarations to the Judgment.

Vice-President Wellington Koo and Judges Tanaka and Bustamante y Rivero appended Separate Opinions.

Judge Morelli and Judge *ad hoc* Armand-Ugon appended Dissenting Opinions.

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First Preliminary Objection

In its Judgment, the Court recalled that Belgium had on 23 September 1958 filed with the Court an earlier Application against Spain in respect of the same facts, and Spain had then raised three Preliminary Objections. On 23 March 1961 the Applicant, availing itself of the right conferred upon it by Article 69, paragraph 2, of the Rules of Court, had informed the Court that it was not going on with the proceedings; notification having been received from the Respondent that it had no objection, the Court had removed the case from its List (10 April 1961). In its first Preliminary Objection, the Respondent contended that this discontinuance precluded the Applicant from bringing the present proceedings and advanced five arguments in support of its contention.

The Court accepted the first argument, to the effect that discontinuance is a purely procedural act the real significance of which must be sought in the attendant circumstances.

On the other hand, the Court was unable to accept the second argument, namely that a discontinuance must always be taken as signifying a renunciation of any further right of action unless the right to start new proceedings is expressly reserved. As the Applicant's notice of discontinuance contained no motivation and was very clearly confined to the proceedings instituted by the first Application, the Court considered that the onus of establishing that the discontinuance meant something more than a decision to terminate those proceedings was placed upon the Respondent.

The Respondent, as its third argument, asserted that there had been an understanding between the Parties; it recalled that the representatives of the private Belgian interests concerned had made an approach with a view to opening negotiations and that the representatives of the Spanish interests had laid down as a prior condition the final withdrawal of the claim. According to the Respondent what was meant by this was that the discontinuance would put an end to any further right of action, but the Applicant denied that anything more was intended than the termination of the then current proceedings. The Court was unable to find at the governmental level any evidence of any such understanding as was alleged by the Respondent; it seemed that the problem had been deliberately avoided lest the foundation of the interchanges be shattered. Nor had the Respondent, on whom lay the onus of making its position clear, expressed any condition when it indicated that it did not object to the discontinuance.

The Respondent Government then advanced a fourth argument, having the character of a plea of estoppel, to the effect that, independently of the existence of any understanding, the Applicant had by its conduct misled the Respondent about the import of the discontinuance, but for which the Respondent would not have agreed to it, and would not thereby have suffered prejudice. The Court did not consider that the alleged misleading Belgian misrepresentations had been established and could not see what the Respondent stood to lose by agreeing to negotiate on the basis of a simple discontinuance; if it had not agreed to the discontinuance, the previous proceedings would simply have continued, whereas negotiations offered a possibility of finally settling the dispute. Moreover, if the negotiations were not successful and the case started again, it would still be possible once more to put forward the previous Preliminary Objections. Certainly the Applicant had framed its second Application with a foreknowledge of the probable nature of the Respondent's reply and taking it into account but, if the original proceedings had continued, the Applicant could likewise always have modified its submissions.

The final argument was of a different order. The Respondent alleged that the present proceedings were contrary to the spirit of the Hispano-Belgian Treaty of Conciliation, Judicial Settlement and Arbitration of 19 July 1927 which, according to the Applicant, conferred competence on the Court. The preliminary stages provided for by the Treaty having already been gone through in connection with the original proceedings, the Treaty could not be invoked a second time to seise the Court of the same complaints. The Court considered that the Treaty processes could not be regarded as exhausted so long as the right to bring new proceedings otherwise existed and until the case had been prosecuted to judgment.

For these reasons, the Court rejected the first Preliminary Objection.

Second Preliminary Objection

To found the jurisdiction of the Court the Applicant relied on the combined effect of Article 17 (4) of the 1927 Treaty between Belgium and Spain, according to which if the other methods of settlement provided for in that Treaty failed either party could bring any dispute of a legal nature before the Permanent Court of International Justice, and Article 37 of the Statute of the International Court of Justice, which reads as follows:

> "Whenever a treaty or convention in force provides for reference of a matter . . . to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice."

As the principal aspect of its objection, the Respondent maintained that although the 1927 Treaty might still be in force, Article 17 (4) had lapsed in April 1946 on the dissolution of the Permanent Court to which that article referred. No substitution of the present for the former Court had been effected in that article before the dissolution, Spain not being then a party to the Statute; in consequence, the 1927 Treaty had ceased to contain any valid jurisdictional clause when Spain was admitted to the United Nations and became *ipso facto* a party to the Statute (December 1955). In other words, Article 37 applied only between States which had become parties to the Statute previous to the dissolution of the Permanent Court, and that dissolution had brought about the extinction of jurisdictional clauses providing for recourse to the Permanent Court unless they had previously been transformed by the operation of Article 37 into clauses providing for recourse to the present Court.

The Court found that this line of reasoning had first been advanced by the Respondent after the decision given by the Court on 26 May 1959 in the case concerning the *Aerial Incident of 27 July 1955* (*Israel* v. *Bulgaria*). But that case had been concerned with a unilateral declaration in acceptance of the compulsory jurisdiction of the Permanent Court and not with a treaty. It thus had reference not to Article 37 but to Article 36, paragraph 5, of the Statute.

As regards Article 37, the Court recalled that in 1945 its drafters had intended to preserve as many jurisdictional clauses as possible from becoming inoperative by reason of the prospective dissolution of the Permanent Court. It was thus difficult to suppose that they would willingly have contemplated that the nullification of the jurisdictional clauses whose continuation it was desired to preserve would be brought about by the very event the effects of which Article 37 was intended to parry.

Only three conditions were actually stated in Article 37. They were that there should be a treaty in force; that it should contain a provision for the reference of a matter to the Permanent Court; and that the dispute should be between States parties to the Statute. In the present case the conclusion must be that the 1927 Treaty being in force and containing a provision for reference to the Permanent Court, and the parties to the dispute being parties to the Statute, the matter was one to be referred to the International Court of Justice, which was the competent forum.

It was objected that this view led to a situation in which the jurisdictional clause concerned was inoperative and then after a gap of years became operative again, and it was asked whether in those circumstances any true consent could have been given by the Respondent to the Court's jurisdiction. The Court observed that the notion of rights and obligations that are in abeyance but not extinguished was common; States becoming parties to the Statute after the dissolution of the Permanent Court must be taken to have known that one of the results of their admission would be the reactivation by reason of Article 37 of certain jurisdictional clauses. The contrary position maintained by the Respondent would create discrimination between States according as to whether they became parties to the Statute before or after the dissolution of the Permanent Court.

As regards Article 17 (4) more particularly, the Court considered that it was an integral part of the 1927 Treaty. It would be difficult to assert that the basic obligation to submit to compulsory adjudication provided for in the Treaty was exclusively dependent on the existence of a particular forum. If it happened that the forum went out of existence, the obligation became inoperative but remained substantively in existence and could be rendered operative once more if a new tribunal was supplied by the automatic operation of some other instrument. Article 37 of the Statute had precisely that effect. Accordingly, "International Court of Justice" must now be read for "Permanent Court of International Justice".

As a subsidiary plea, the Respondent contended that if Article 37 of the Statute operated to reactivate Article 17 (4) of the Treaty in December 1955, what came into existence at that date was a new obligation between the Parties; and that just as the original applied only to disputes arising after the Treaty date, so the new obligation could apply only to disputes arising after December 1955. The dispute was accordingly not covered since it had arisen previous to December 1955. In the opinion of the Court, when the obligation to submit to compulsory adjudication was revived as to its operation, it could only function in accordance with the Treaty providing for it and it continued to relate to any disputes arising after the Treaty date.

For these reasons the Court rejected the second Preliminary Objection both in its principal and in its subsidiary aspects.

Third and Fourth Preliminary Objections

The Respondent's third and fourth Preliminary Objections involved the question of whether the claim was admissible. The Applicant had submitted alternative pleas that these objections, unless rejected by the Court, should be joined to the merits.

By its third Preliminary Objection the Respondent denied the legal capacity of the Applicant to protect the Belgian interests on behalf of which it had submitted its claim. The acts complained of had taken place not in relation to any Belgian natural or juristic person but in relation to the Barcelona Traction Company, a juristic entity registered in Canada, the Belgian interests concerned being in the nature of shareholding interests in that company. The Respondent contended that international law does not recognize, in respect of injury caused by a State to the foreign company, any diplomatic protection of shareholders exercised by a State other than the national State of the company. The Applicant contested this view.

The Court found that the question of the *jus standi* of a government to protect the interests of shareholders raised an antecedent question of what was the juridical situation in respect of shareholding interests, as recognized by international law. The Applicant thus necessarily invoked rights which, so it contended, were conferred on it in respect of its nationals by the rules of international law concerning the treatment of foreigners. Hence a finding by the Court that it had no *jus standi* would be tantamount to a finding that those rights did not exist and that the claim was not well-founded in substance.

The third Objection had certain aspects which were of a preliminary character, but involved a number of closely interwoven strands of mixed law, fact and status to a degree such that the Court could not pronounce upon it at the present stage in full confidence that it was in possession of all the elements that might have a bearing on its decisions. The proceedings on the merits would thus place the Court in a better position to adjudicate with a full knowledge of the facts.

The foregoing considerations applied *a fortiori* to the fourth Preliminary Objection, wherein the Respondent alleged failure to exhaust local remedies. This allegation was in fact inextricably interwoven with the issues of denial of justice which constituted the major part of the merits of the case.

Accordingly, the Court joined the third and fourth Preliminary Objections to the merits.

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43. SOUTH-WEST AFRICA CASES (SECOND PHASE)

Judgment of 18 July 1966

The South West Africa cases (Ethiopia *v.* South Africa; Liberia *v.* South Africa), which relate to the continued existence of the Mandate for South West Africa and the duties and performance of South Africa as Mandatory thereunder, were instituted by Applications of the Governments of Ethiopia and Liberia filed in the Registry on 4 November 1960. By an Order of 20 May 1961 the Court joined the proceedings in the two cases. The Government of South Africa raised preliminary objections to the Court's proceeding to hear the merits of the case, but these were dismissed by the Court on 21 December 1962, the Court finding that it had jurisdiction to adjudicate upon the merits of the dispute.

In its Judgment on the second phase of the cases the Court, by the President's casting vote, the votes being equally divided (seven-seven), found that the Applicant States could not be considered to have established any legal right or interest in the subject matter of their claims and accordingly decided to reject them.

The President, Sir Percy Spender, has appended a Declaration to the Judgment. Judge Morelli and Judge *ad hoc* van Wyk have appended separate opinions. Vice-President Wellington Koo, Judges Koretsky, Tanaka, Jessup, Padilla Nervo and Forster and Judge *ad hoc* Sor Louis Mbanefo have appended dissenting opinions.

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The Applicants, acting in the capacity of States which were members of the former League of Nations, put forward various allegations of contraventions of the League of Nations Mandate for South West Africa by the Republic of South Africa.

The contentions of the Parties covered, *inter alia*, the following issues: whether the Mandate for South West Africa was still in force and, if so, whether the Mandatory's obligation to furnish annual reports on its administration to the Council of the League of Nations had become transformed into an obligation so to report to the General Assembly of the United Nations; whether the Respondent had, in accordance with the Mandate, promoted to the utmost the material and moral well-being and the social progress of the inhabitants of the territory; whether the Mandatory had contravened the prohibition in the Mandate of the "military training of the natives" and the establishment of military or naval bases or the erection of fortifications in the territory; and whether South Africa had contravened the provision in the Mandate that it (the Mandate) can only be modified with the consent of the Council of the League of Nations, by attempting to modify the Mandate without the consent of the United Nations General Assembly, which, it was contended by the Applicants, had replaced the Council of the League for this and other purposes.

Before dealing with these questions, however, the Court considered that there were two questions of an antecedent character, appertaining to the merits of the case, which might render an enquiry into other aspects of the case unnecessary. One was whether the Mandate still subsisted at all and the other was the question of the Applicants' standing in this phase of the proceedings—i.e. their legal right or interest regarding the subject matter of their claims. As the Court based its Judgment on a finding that the Applicants did not possess such a legal right or interest, it did not pronounce upon the question of whether the Mandate was still in force. Moreover, the Court emphasized that its 1962 decision on the question of competence was given without prejudice to the question of the survival of the Mandate—a question appertaining to the merits of the case, and not in issue in 1962 except in the sense that survival had to be assumed for the purpose of determining the purely jurisdictional issue—which was all that was then before the Court.

Turning to the basis of its decision in the present proceedings, the Court recalled that the mandates system was instituted by Article 22 of the Covenant of the League of Nations. There were three categories of mandates, 'A', 'B' and 'C' mandates, which had, however, various features in common as regards their structure. The principal element of each instrument of mandate consisted of the articles defining the mandatory's powers and its obligations in respect of the inhabitants of the territory and towards the League and its organs. The Court referred to these as the "conduct" provisions. In addition, each instrument of mandate contained articles conferring certain rights relative to the mandated territory directly upon the members of the League as individual States, or in favour of their nationals. The Court referred to rights of this kind as "special interests", embodied in the "special interests" provisions of the mandates.

In addition, every mandate contained a jurisdictional clause, which, with a single exception, was in identical terms, providing for a reference of disputes to the Permanent Court of International Justice, which, the Court had found in the first phase of the proceedings, was now, by virtue of Article 37 of the Court's Statute, to be construed as a reference to the present Court.

The Court drew a distinction between the "conduct" and the "special interests" provisions of the mandates, the present dispute relating exclusively to the former. The question to be decided was whether any legal right or interest was vested in members of the League of Nations individually as

regards the "conduct" clauses of the mandates—i.e., whether the various mandatories had any direct obligation towards the other members of the League individually, as regards the carrying out of the "conduct" provisions of the mandates. If the answer were that the Applicants could not be regarded as possessing the legal right or interest claimed, then even if the various allegations of contraventions of the Mandate for South West Africa were established, the Applicants would still not be entitled to the pronouncements and declarations which, in their final submissions, they asked the Court to make.

It was in their capacity as former members of the League of Nations that the Applicants appeared before the Court; and the rights they claimed were those that the members of the League were said to have been invested with in the time of the League. Accordingly, in order to determine the rights and obligations of the Parties relative to the Mandate, the Court had to place itself at the point in time when the mandates system was instituted. Any enquiry into the rights and obligations of the Parties must proceed principally on the basis of considering the texts of the instruments and provisions in the setting of their period.

Similarly, attention must be paid to the juridical character and structure of the institution, the League of Nations, within the framework of which the mandates system was organized. A fundamental element was that Article 2 of the Covenant provided that the "action of the League under this Covenant shall be effected through the instrumentality of an Assembly and of a Council, with a permanent Secretariat". Individual member States could not themselves act differently relative to League matters unless it was otherwise specially so provided by some article of the Covenant.

It was specified in Article 22 of the Covenant that the "best method of giving practical effect to [the] principle" that the "well-being and development" of those peoples in former enemy colonies "not yet able to stand by themselves" formed "a sacred trust of civilization" was that "the tutelage of such peoples should be entrusted to advanced nations . . . who are willing to accept it" and it specifically added that it was "on behalf of the League" that "this tutelage should be exercised by those nations as Mandatories". The mandatories were to be the agents of the League and not of each and every member of it individually.

Article 22 of the Covenant provided that "securities for the performance" of the sacred trust were to be "embodied in this Covenant". By paragraphs 7 and 9 of Article 22, every mandatory was to "render to the Council an annual report in reference to the territory"; and a Permanent Mandates Commission was to be constituted "to receive and examine" these annual reports and "to advise the Council on all matters relating to the observance of the mandates". In addition, it was provided, in the instruments of mandate themselves, that the annual reports were to be rendered "to the satisfaction of the Council".

Individual member States of the League could take part in the administrative process only through their participation in the activities of the organs by means of which the League was entitled to function. They had no right of direct intervention relative to the mandatories: this was the prerogative of the League organs.

The manner in which the mandate instruments were drafted only lends emphasis to the view that the members of the League generally were not considered as having any direct concern with the setting up of the various mandates. Furthermore, while the consent of the Council of the League was required for any modification of the terms of the mandate, it was not stated that the consent of individual members of the League was additionally required. Individual members of the League were not parties to the various instruments of mandate, though they did, to a limited extent, and in certain respects only, derive rights from them. They could draw from the instruments only such rights as these unequivocally conferred.

Had individual members of the League possessed the rights which the Applicants claimed them to have had, the position of a mandatory caught between the different expressions of view of some 40 or 50 States would have been untenable. Furthermore, the normal League voting rule was unanimity, and as the mandatory was a member of the Council on questions affecting its mandate, such questions could not be decided against the mandatory's contrary vote. This system was inconsistent with the position claimed for individual League members by the Applicants, and if, as members of the League, they did not possess the rights contended for, they did not possess them now.

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It had been attempted to derive a legal right or interest in the conduct of the Mandate from the simple existence, or principle, of the "sacred trust". The sacred trust, it was said, was a "sacred trust of civilization" and hence all civilized nations had an interest in seeing that it was carried out. But in order that this interest might take on a specifically legal character the sacred trust itself must be or become something more than a moral or humanitarian ideal. In order to generate legal rights and obligations, it must be given juridical expression and be clothed in legal form. The moral ideal must not be confused with the legal rules intended to give it effect. The principle of the "sacred trust" had no residual juridical content which could, so far as any particular mandate is concerned, operate *per se* to give rise to legal rights and obligations outside the system as a whole.

Nor could the Court accept the suggestion that even if the legal position of the Applicants and of other individual members of the League were as the Court held it to be, this was so only during the lifetime of the League, and that on the latter's dissolution the rights previously resident in the League itself, or in its competent organs, devolved upon the individual States which were members of it at the date of its dissolution. Although the Court held in 1962 that the members of a dissolved international organization can be deemed, though no longer members of it, to retain rights which, as members, they individually possessed when the organization was in being, this could not extend to ascribing to them, upon and by reason of the dissolution, rights which, even previously as members, they never did individually possess. Nor could anything that occurred subsequent to the dissolution of the League operate to invest its members with rights they did not previously have as members of the League. The Court could not read the unilateral declarations, or statements of intention, made by the various mandatories on the occasion of the dissolution of the League, expressing their willingness to continue to be guided by the mandates in their administration of the territories concerned, as conferring on the members of the League individually any new legal rights or interests of a kind they did not previously possess.

It might be said that in so far as the Court's view led to the conclusion that there was now no entity entitled to claim the due performance of the Mandate, it must be unacceptable, but if a correct legal reading of a given situation showed cer-

tain alleged rights to be non-existent, the consequences of this must be accepted. To postulate the existence of such rights in order to avert those consequences would be to engage in an essentially legislative task, in the service of political ends.

Turning to the contention that the Applicants' legal right or interest had been settled by the 1962 Judgment and could not now be reopened, the Court pointed out that a decision on a preliminary objection could never be preclusive of a matter appertaining to the merits, whether or not it had in fact been dealt with in connection with the preliminary objection. When preliminary objections were entered by the defendant party in a case, the proceedings on the merits were suspended, by virtue of Article 62, paragraph 3, of the Court's Rules. Thereafter, and until the proceedings on the merits were resumed, there could be no decision finally determining or prejudging any issue of merits. A judgment on a preliminary objection might touch on a point of merits, but this it could do only in a provisional way, to the extent necessary for deciding the question raised by the preliminary objection. It could not rank as a final decision on the point of merits involved.

While the 1962 Judgment decided that the Applicants were entitled to invoke the jurisdictional clause of the Mandate, it remained for them, on the merits, to establish that they had such a right or interest in the carrying out of the provisions which they invoked as to entitle them to the pronouncements and declarations they were seeking from the Court. There was no contradiction between a decision that the Applicants had the capacity to invoke the jurisdictional clause and a decision that the Applicants had not established the legal basis of their claim on the merits.

In respect of the contention that the jurisdictional clause of the Mandate conferred a substantive right to claim from the Mandatory the carrying out of the "conduct of the Mandate" provisions, it was to be observed that it would be remarkable if so important a right had been created in so casual and almost incidental a fashion. There was nothing about this particular jurisdictional clause, in fact, to differentiate it from many others, and it was an almost elementary principle of procedural law that a distinction had to be made between, on the one hand, the right to activate a court and the right of a court to examine the merits of a claim and, on the other, the plaintiff's legal right in respect of the subject matter of its claim, which it would have to establish to the satisfaction of the Court. Jurisdictional clauses were adjectival not substantive in their nature and effect: they did not determine whether parties had substantive rights, but only whether, if they had them, they could vindicate them by recourse to a tribunal.

The Court then considered the rights of members of the League Council under the jurisdictional clauses of the minorities treaties signed after the First World War, and distinguished these clauses from the jurisdictional clauses of the instruments of mandate. In the case of the mandates, the jurisdictional clause was intended to give the individual members of the League the means of protecting their "special interests" relative to the mandated territories; in the case of the minorities treaties, the right of action of the Members of the Council under the jurisdictional clause was only intended for the protection of minority populations. Furthermore, any "difference of opinion" was characterized in advance in the minorities treaties as being justiciable, because it was to be "held to be a dispute of an international character". Hence no question of any lack of legal right or interest could arise. The jurisdictional clause of the mandates, on the other hand, had none of the special characteristics or effects of those of the minorities treaties.

The Court next dealt with what had been called the broad and unambiguous language of the jurisdictional clause—the literal meaning of its reference to "any dispute whatever", coupled with the words "between the Mandatory and another Member of the League of Nations" and the phrase "relating . . . to the provisions of the Mandate", which, it was said, permitted a reference to the Court of a dispute about any provision of the Mandate. The Court was not of the opinion that the word "whatever" in Article 7, paragraph 2, of the Mandate did anything more than lend emphasis to a phrase that would have meant exactly the same without it. The phrase "any dispute" (whatever) did not mean anything intrinsically different from "a dispute"; nor did the reference to the "provisions" of the Mandate, in the plural, have any different effect from what would have resulted from saying "a provision". A considerable proportion of the acceptances of the Court's compulsory jurisdiction under paragraph 2 of Article 36 of its Statute were couched in language similarly broad and unambiguous and even wider. It could never be supposed that on the basis of this wide language the accepting State was absolved from establishing a legal right or interest in the subject matter of its claim. The Court could not entertain the proposition that a jurisdictional clause by conferring competence on the Court thereby and of itself conferred a substantive right.

The Court next adverted to the question of admissibility. It observed that the 1962 Judgment had simply found that it had "jurisdiction to adjudicate upon the merits" and that if any question of admissibility were involved it would fall to be decided now, as occurred in the merits phase of the *Nottebohm* case; if this were so the Court would determine the question in exactly the same way, i.e., looking at the matter from the point of view of the capacity of the Applicants to advance their present claim, the Court would hold that they had not got such capacity, and hence that the claim was inadmissible.

Finally, the Court dealt with what had been called the argument of "necessity". The gist of this was that since the Council of the League had no means of imposing its views on the Mandatory, and since no advisory opinion it might obtain from the Court would be binding on the latter, the Mandate could have been flouted at will. Hence, it was contended, it was essential, as an ultimate safeguard or security for the sacred trust, that each Member of the League should be deemed to have a legal right or interest in that matter and be able to take direct action relative to it. But in the functioning of the mandates system in practice, much trouble was taken to arrive, by argument, discussion, negotiation and co-operative effort, at generally acceptable conclusions and to avoid situations in which the Mandatory would be forced to acquiesce in the views of the rest of the Council short of casting an adverse vote. In this context, the existence of substantive rights for individual members of the League in the conduct of the mandates exercisable independently of the Council would have been out of place. Furthermore, leaving aside the improbability that, had the framers of the mandates system intended that it should be possible to impose a given policy on a mandatory, they would have left this to the haphazard and uncertain action of individual members of the League, it was scarcely likely that a system which deliberately made it possible for mandatories to block Council decisions by using their veto (though, so far as the Court was aware, this had never been done) should simultaneously invest individual members of the League with a legal right of complaint if the mandatory made use of this veto. In the international field, the existence of obligations that could not be enforced by any legal process had always been the rule

rather than the exception—and this was even more the case in 1920 than today.

Moreover, the argument of "necessity" amounted to a plea that the Court should allow the equivalent of an *actio popularis*, or right resident in any member of a community to take legal action in vindication of a public interest. But such a right was not known to international law as it stood at present: and the Court was unable to regard it as imported by "the general principles of law" referred to in Article 38, paragraph 1 (*c*), of its Statute.

In the final analysis, the whole "necessity" argument appeared to be based on considerations of an extra-legal character, the product of a process of after-knowledge. It was events subsequent to the period of the League, not anything inherent in the mandates system as it was originally conceived, that gave rise to the alleged "necessity", which, if it existed, lay in the political field and did not constitute necessity in the eyes of the law. The Court was not a legislative body. Parties to a dispute could always ask the Court to give a decision *ex aequo et bono*, in terms of paragraph 2 of Article 38. Failing that, the duty of the Court was plain: its duty was to apply the law as it found it, not to make it.

It might be urged that the Court was entitled to "fill in the gaps", in the application of a teleological principle of interpretation, according to which instruments must be given their maximum effect in order to ensure the achievement of their underlying purposes. This principle was a highly controversial one and it could, in any event, have no application to circumstances in which the Court would have to go beyond what could reasonably be regarded as being a process of interpretation and would have to engage in a process of rectification or revision. Rights could not be presumed to exist merely because it might seem desirable that they should. The Court could not remedy a deficiency if, in order to do so, it had to exceed the bounds of normal judicial action.

It might also be urged that the Court would be entitled to make good an omission resulting from the failure of those concerned to foresee what might happen and to have regard to what it might be presumed the framers of the mandate would have wished, or would even have made express provision for, had they had advance knowledge of what was to occur. The Court could not, however, presume what the wishes and intentions of those concerned would have been in anticipation of events that were neither foreseen nor foreseeable; and even if it could, it would certainly not be possible to make the assumptions contended for by the Applicants as to what those intentions were.

For the foregoing reasons, the Court decided to reject the claims of the Empire of Ethiopia and the Republic of Liberia.

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44. NORTH SEA CONTINENTAL SHELF CASES

Judgment of 20 February 1969

The Court delivered judgment, by 11 votes to 6, in the North Sea Continental Shelf cases.

The dispute, which was submitted to the Court on 20 February 1967, related to the delimitation of the continental shelf between the Federal Republic of Germany and Denmark on the one hand, and between the Federal Republic of Germany and the Netherlands on the other. The Parties asked the Court to state the principles and rules of international law applicable, and undertook thereafter to carry out the delimitations on that basis.

The Court rejected the contention of Denmark and the Netherlands to the effect that the delimitations in question had to be carried out in accordance with the principle of equidistance as defined in Article 6 of the 1958 Geneva Convention on the Continental Shelf, holding:

—that the Federal Republic, which had not ratified the Convention, was not legally bound by the provisions of Article 6;

—that the equidistance principle was not a necessary consequence of the general concept of continental shelf rights, and was not a rule of customary international law.

The Court also rejected the contentions of the Federal Republic in so far as these sought acceptance of the principle of an apportionment of the continental shelf into just and equitable shares. It held that each Party had an original right to those areas of the continental shelf which constituted the natural prolongation of its land territory into and under the sea. It was not a question of apportioning or sharing out those areas, but of delimiting them.

The Court found that the boundary lines in question were to be drawn by agreement between the Parties and in accordance with equitable principles, and it indicated certain factors to be taken into consideration for that purpose. It was now for the Parties to negotiate on the basis of such principles, as they have agreed to do.

The proceedings, relating to the delimitation as between the Parties of the areas of the North Sea continental shelf appertaining to each of them, were instituted on 20 February 1967 by the communication to the Registry of the Court of two Special Agreements, between Denmark and the Federal Republic and the Federal Republic and the Netherlands respectively. By an Order of 26 April 1968, the Court joined the proceedings in the two cases.

The Court decided the two cases in a single Judgment, which it adopted by eleven votes to six. Amongst the Members of the Court concurring in the Judgment, Judge Sir Muhammad Zafrulla Khan appended a declaration; and President Bustamante y Rivero and Judges Jessup, Padilla Nervo and Ammoun appended separate opinions. In the case of the non-concurring Judges, a declaration of his dissent was appended by Judge Bengzon; and Vice-President Koretsky, together with Judges Tanaka, Morelli and Lachs, and Judge *ad hoc* Sørensen, appended dissenting opinions.

In its Judgment, the Court examined in the context of the delimitations concerned the problems relating to the legal régime of the continental shelf raised by the contentions of the Parties.

The Facts and the Contentions of the Parties
(paras. 1–17 of the Judgment)

The two Special Agreements had asked the Court to declare the principles and rules of international law applicable to the delimitation as between the Parties of the areas of the North Sea continental shelf appertaining to each of them

beyond the partial boundaries in the immediate vicinity of the coast already determined between the Federal Republic and the Netherlands by an agreement of 1 December 1964 and between the Federal Republic and Denmark by an agreement of 9 June 1965. The Court was not asked actually to delimit the further boundaries involved, the Parties undertaking in their respective Special Agreements to effect such delimitation by agreement in pursuance of the Court's decision.

The waters of the North Sea were shallow, the whole seabed, except for the Norwegian Trough, consisting of continental shelf at a depth of less than 200 metres. Most of it had already been delimited between the coastal States concerned. The Federal Republic and Denmark and the Netherlands, respectively, had, however, been unable to agree on the prolongation of the partial boundaries referred to above, mainly because Denmark and the Netherlands had wished this prolongation to be effected on the basis of the equidistance principle, whereas the Federal Republic had considered that it would unduly curtail what the Federal Republic believed should be its proper share of continental shelf area, on the basis of proportionality to the length of its North Sea coastline. Neither of the boundaries in question would by itself produce this effect, but only both of them together—an element regarded by Denmark and the Netherlands as irrelevant to what they viewed as being two separate delimitations, to be carried out without reference to the other.

A boundary based on the equidistance principle, i.e., an "equidistance line", left to each of the Parties concerned all those portions of the continental shelf that were nearer to a point on its own coast than they were to any point on the coast of the other Party. In the case of a concave or recessing coast such as that of the Federal Republic on the North Sea, the effect of the equidistance method was to pull the line of the boundary inwards, in the direction of the concavity. Consequently, where two equidistance lines were drawn, they would, if the curvature were pronounced, inevitably meet at a relatively short distance from the coast, thus "cutting off" the coastal State from the area of the continental shelf outside. In contrast, the effect of convex or outwardly curving coasts, such as were, to a moderate extent, those of Denmark and the Netherlands, was to cause the equidistance lines to leave the coasts on divergent courses, thus having a widening tendency on the area of continental shelf off that coast.

It had been contended on behalf of Denmark and the Netherlands that the whole matter was governed by a mandatory rule of law which, reflecting the language of Article 6 of the Geneva Convention on the Continental Shelf of 29 April 1958, was designated by them as the "equidistance-special circumstances" rule. That rule was to the effect that in the absence of agreement by the parties to employ another method, all continental shelf boundaries had to be drawn by means of an equidistance line, unless "special circumstances" were recognized to exist. According to Denmark and the Netherlands, the configuration of the German North Sea coast did not of itself constitute, for either of the two boundary lines concerned, a special circumstance.

The Federal Republic, for its part, had contended that the correct rule, at any rate in such circumstances as those of the North Sea, was one according to which each of the States concerned should have a "just and equitable share" of the available continental shelf, in proportion to the length of its sea-frontage. It had also contended that in a sea shaped as is the North Sea, each of the States concerned was entitled to a continental shelf area extending up to the central point of that sea, or at least extending to its median line. Alternatively, the Federal Republic had claimed that if the equidistance method were held to be applicable, the configuration of the German North Sea coast constituted a special circumstance such as to justify a departure from that method of delimitation in this particular case.

The Apportionment Theory Rejected
(paras. 18–20 of the Judgment)

The Court felt unable to accept, in the particular form it had taken, the first contention put forward on behalf of the Federal Republic. Its task was to delimit, not to apportion the areas concerned. The process of delimitation involved establishing the boundaries of an area already, in principle, appertaining to the coastal State and not the determination *de novo* of such an area. The doctrine of the just and equitable share was wholly at variance with the most fundamental of all the rules of law relating to the continental shelf, namely, that the rights of the coastal State in respect of the area of continental shelf constituting a natural prolongation of its land territory under the sea existed *ipso facto* and *ab initio*, by virtue of its sovereignty over the land. That right was inherent. In order to exercise it, no special legal acts had to be performed. It followed that the notion of apportioning an as yet undelimited area considered as a whole (which underlay the doctrine of the just and equitable share) was inconsistent with the basic concept of continental shelf entitlement.

Non-Applicability of Article 6 of the 1958 Continental Shelf Convention
(paras. 21–36 of the Judgment)

The Court then turned to the question whether in delimiting those areas the Federal Republic was under a legal obligation to accept the application of the equidistance principle. While it was probably true that no other method of delimitation had the same combination of practical convenience and certainty of application, those factors did not suffice of themselves to convert what was a method into a rule of law. Such a method would have to draw its legal force from other factors than the existence of those advantages.

The first question to be considered was whether the 1958 Geneva Convention on the Continental Shelf was binding for all the Parties in the case. Under the formal provisions of the Convention, it was in force for any individual State that had signed it within the time-limit provided, only if that State had also subsequently ratified it. Denmark and the Netherlands had both signed and ratified the Convention and were parties to it, but the Federal Republic, although one of the signatories of the Convention, had never ratified it, and was consequently not a party. It was admitted on behalf of Denmark and the Netherlands that in the circumstances the Convention could not, as such, be binding on the Federal Republic. But it was contended that the régime of Article 6 of the Convention had become binding on the Federal Republic, because, by conduct, by public statements and proclamations, and in other ways, the Republic had assumed the obligations of the Convention.

It was clear that only a very definite, very consistent course of conduct on the part of a State in the situation of the Federal Republic could justify upholding those contentions. When a number of States drew up a convention specifically providing for a particular method by which the intention to become bound by the régime of the convention was to be manifested, it was not lightly to be presumed that a State which had not carried out those formalities had nevertheless somehow become bound in another way. Furthermore, had the Federal Republic ratified the Geneva Convention, it could have entered a reservation to Article 6, by reason of the faculty to do so conferred by Article 12 of the Convention.

Only the existence of a situation of estoppel could lend substance to the contention of Denmark and the Netherlands—i.e., if the Federal Republic were now precluded from denying the applicability of the conventional régime, by reason of past conduct, declarations, etc., which not only clearly and consistently evinced acceptance of that régime, but also had caused Denmark or the Netherlands, in reliance on such conduct, detrimentally to change position or suffer some prejudice. Of this there was no evidence. Accordingly, Article 6 of the Geneva Convention was not, as such, applicable to the delimitations involved in the present proceedings.

The Equidistance Principle Not Inherent in the Basic Doctrine of the Continental Shelf
(paras. 37–59 of the Judgment)

It had been maintained by Denmark and the Netherlands that the Federal Republic was in any event, and quite apart from the Geneva Convention, bound to accept delimitation on an equidistance basis, since the use of that method was a rule of general or customary international law, automatically binding on the Federal Republic.

One argument advanced by them in support of this contention, which might be termed the *a priori* argument, started from the position that the rights of the coastal State to its continental shelf areas were based on its sovereignty over the land domain, of which the shelf area was the natural prolongation under the sea. From this notion of appurtenance was derived the view, which the Court accepted, that the coastal State's rights existed *ipso facto* and *ab initio*. Denmark and the Netherlands claimed that the test of appurtenance must be "proximity": all those parts of the shelf being considered as appurtenant to a particular coastal State which were closer to it than they were to any point on the coast of another State. Hence, delimitation had to be effected by a method which would leave to each one of the States concerned all those areas that were nearest to its own coast. As only an equidistance line would do this, only such a line could be valid, it was contended.

This view had much force; the greater part of a State's continental shelf areas would normally in fact be nearer to its coasts than to any other. But the real issue was whether it followed that every part of the area concerned must be placed in that way. The Court did not consider this to follow from the notion of proximity, which was a somewhat fluid one. More fundamental was the concept of the continental shelf as being the natural prolongation of the land domain. Even if proximity might afford one of the tests to be applied, and an important one in the right conditions, it might not necessarily be the only, nor in all circumstances the most appropriate, one. Submarine areas did not appertain to the coastal State merely because they were near it, nor did their appurtenance depend on any certainty of delimitation as to their boundaries. What conferred the *ipso jure* title was the fact that the submarine areas concerned might be deemed to be actually part of its territory in the sense that they were a prolongation of its land territory under the sea. Equidistance clearly could not be identified with the notion of natural prolongation, since the use of the equidistance method would frequently cause areas which were the natural prolongation of the territory of one State to be attributed to another. Hence, the notion of equidistance was not an inescapable *a priori* accompaniment of basic continental shelf doctrine.

A review of the genesis of the equidistance method of delimitation confirmed the foregoing conclusion. The "Truman Proclamation" issued by the Government of the United States on 28 September 1945 could be regarded as a starting-point of the positive law on the subject, and the chief doctrine it enunciated, that the coastal State had an original, natural and exclusive right to the continental shelf off its shores, had come to prevail over all others and was now reflected in the 1958 Geneva Convention. With regard to the delimitation of boundaries between the continental shelves of adjacent States, the Truman Proclamation had stated that such boundaries "shall be determined by the United States and the State concerned in accordance with equitable principles". These two concepts, of delimitation by mutual agreement and delimitation in accordance with equitable principles, had underlain all the subsequent history of the subject. It had been largely on the recommendation of a committee of experts that the principle of equidistance for the delimitation of continental shelf boundaries had been accepted by the United Nations International Law Commission in the text it had laid before the Geneva Conference of 1958 on the Law of the Sea which had adopted the Continental Shelf Convention. It could legitimately be assumed that the experts had been actuated by considerations not of legal theory but of practical convenience and cartography. Moreover, the article adopted by the Commission had given priority to delimitation by agreement and had contained an exception in favour of "special circumstances".

The Court consequently considered that Denmark and the Netherlands inverted the true order of things and that, far from an equidistance rule having been generated by an antecedent principle of proximity inherent in the whole concept of continental shelf appurtenance, the latter was rather a rationalization of the former.

The Equidistance Principle Not a Rule of Customary International Law
(paras. 60–82 of the Judgment)

The question remained whether through positive law processes the equidistance principle must now be regarded as a rule of customary international law.

Rejecting the contentions of Denmark and the Netherlands, the Court considered that the principle of equidistance, as it figured in Article 6 of the Geneva Convention, had not been proposed by the International Law Commission as an emerging rule of customary international law. This Article could not be said to have reflected or crystallized such a rule. This was confirmed by the fact that any State might make reservations in respect of Article 6, unlike Articles 1, 2 and 3, on signing, ratifying or acceding to the Convention. While certain other provisions of the Convention, although relating to matters that lay within the field of received customary law, were also not excluded from the faculty of reservation, they all related to rules of general maritime law very considerably antedating the Convention which were only incidental to continental shelf rights as such, and had been mentioned in the Convention simply to ensure that they were not prejudiced by the exercise of continental shelf rights. Article 6, however, related directly to continental shelf rights as such, and since it was not excluded from the faculty of reservation, it was a legitimate inference that it was not considered to reflect emergent customary law.

It had been argued on behalf of Denmark and the Netherlands that even if at the date of the Geneva Convention no rule of customary international law existed in favour of the equidistance principle, such a rule had nevertheless come into being since the Convention, partly because of its own impact, and partly on the basis of subsequent State practice. In order for this process to occur it was necessary that

Article 6 of the Convention should, at all events potentially, be of a norm-creating character. Article 6 was so framed, however, as to put the obligation to make use of the equidistance method after a primary obligation to effect delimitation by agreement. Furthermore, the part played by the notion of special circumstances in relation to the principle of equidistance, the controversies as to the exact meaning and scope of that notion, and the faculty of making reservations to Article 6 must all raise doubts as to the potentially norm-creating character of that Article.

Furthermore, while a very widespread and representative participation in a convention might show that a conventional rule had become a general rule of international law, in the present case the number of ratifications and accessions so far was hardly sufficient. As regards the time element, although the passage of only a short period of time was not necessarily a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, it was indispensable that State practice during that period, including that of States whose interests were specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked and should have occurred in such a way as to show a general recognition that a rule of law was involved. Some 15 cases had been cited in which the States concerned had agreed to draw or had drawn the boundaries concerned according to the principle of equidistance, but there was no evidence that they had so acted because they had felt legally compelled to draw them in that way by reason of a rule of customary law. The cases cited were inconclusive and insufficient evidence of a settled practice.

The Court consequently concluded that the Geneva Convention was not in its origins or inception declaratory of a mandatory rule of customary international law enjoining the use of the equidistance principle, its subsequent effect had not been constitutive of such a rule, and State practice up to date had equally been insufficient for the purpose.

The Principles and Rules of Law Applicable
(paras. 83–101 of the Judgment)

The legal situation was that the Parties were under no obligation to apply the equidistance principle either under the 1958 Convention or as a rule of general or customary international law. It consequently became unnecessary for the Court to consider whether or not the configuration of the German North Sea coast constituted a "special circumstance". It remained for the Court, however, to indicate to the Parties the principles and rules of law in the light of which delimitation was to be effected.

The basic principles in the matter of delimitation, deriving from the Truman Proclamation, were that it must be the object of agreement between the States concerned and that such agreement must be arrived at in accordance with equitable principles. The Parties were under an obligation to enter into negotiations with a view to arriving at an agreement and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; they were so to conduct themselves that the negotiations were meaningful, which would not be the case when one of them insisted upon its own position without contemplating any modification of it. This obligation was merely a special application of a principle underlying all international relations, which was moreover recognized in Article 33 of the Charter of the United Nations as one of the methods for the peaceful settlement of international disputes.

The Parties were under an obligation to act in such a way that in the particular case, and taking all the circumstances into account, equitable principles were applied. There was no question of the Court's decision being *ex aequo et bono*. It was precisely a rule of law that called for the application of equitable principles, and in such cases as the present ones the equidistance method could unquestionably lead to inequity. Other methods existed and might be employed, alone or in combination, according to the areas involved. Although the Parties intended themselves to apply the principles and rules laid down by the Court some indication was called for of the possible ways in which they might apply them.

For all the foregoing reasons, the Court found in each case that the use of the equidistance method of delimitation was not obligatory as between the Parties; that no other single method of delimitation was in all circumstances obligatory; that delimitation was to be effected by agreement in accordance with equitable principles and taking account of all relevant circumstances, in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constituted a natural prolongation of its land territory, without encroachment on the natural prolongation of the land territory of the other; and that, if such delimitation produced overlapping areas, they were to be divided between the Parties in agreed proportions, or, failing agreement, equally, unless they decided on a régime of joint jurisdiction, user, or exploitation.

In the course of negotiations, the factors to be taken into account were to include: the general configuration of the coasts of the Parties, as well as the presence of any special or unusual features; so far as known or readily ascertainable, the physical and geological structure and natural resources of the continental shelf areas involved; the element of a reasonable degree of proportionality between the extent of the continental shelf areas appertaining to each State and the length of its coast measured in the general direction of the coastline, taking into account the effects, actual or prospective, of any other continental shelf delimitations in the same region.

45. CASE CONCERNING THE BARCELONA TRACTION, LIGHT AND POWER COMPANY, LIMITED (SECOND PHASE)

Judgment of 5 February 1970

In its judgment in the second phase of the case concerning the Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium *v.* Spain), the Court rejected Belgium's claim by fifteen votes to one.

The claim, which was brought before the Court on 19 June 1962, arose out of the adjudication in bankruptcy in Spain of Barcelona Traction, a company incorporated in Canada. Its object was to seek reparation for damage alleged by Belgium to have been sustained by Belgian nationals, shareholders in the company, as a result of acts said to be contrary to international law committed towards the company by organs of the Spanish State.

The Court found that Belgium lacked *jus standi* to exercise diplomatic protection of shareholders in a Canadian company with respect to measures taken against that company in Spain.

Judges Petrén and Onyeama appended a joint declaration to the Judgment; Judge Lachs appended a declaration. President Bustamante y Rivero and Judges Sir Gerald Fitzmaurice, Tanaka, Jessup, Morelli, Padilla Nervo, Gros and Ammoun appended Separate Opinions.

Judge *ad hoc* Riphagen appended a Dissenting Opinion.

Background of Events in the Case
(paras. 8–24 of the Judgment)

The Barcelona Traction, Light and Power Company, Limited, was incorporated in 1911 in Toronto (Canada), where it has its head office. For the purpose of creating and developing an electric power production and distribution system in Catalonia (Spain) it formed a number of subsidiary companies, of which some had their registered offices in Canada and the others in Spain. In 1936 the subsidiary companies supplied the major part of Catalonia's electricity requirements. According to the Belgian Government, some years after the first world war Barcelona Traction's share capital came to be very largely held by Belgian nationals, but the Spanish Government contends that the Belgian nationality of the shareholders is not proven.

Barcelona Traction issued several series of bonds, principally in sterling. The sterling bonds were serviced out of transfers to Barcelona Traction effected by the subsidiary companies operating in Spain. In 1936 the servicing of the Barcelona Traction bonds was suspended on account of the Spanish civil war. After that war the Spanish exchange control authorities refused to authorize the transfer of the foreign currency necessary for the resumption of the servicing of the sterling bonds. Subsequently, when the Belgian Government complained of this, the Spanish Government stated that the transfers could not be authorized unless it were shown that the foreign currency was to be used to repay debts arising from the genuine importation of foreign capital into Spain, and that this had not been established.

In 1948 three Spanish holders of recently acquired Barcelona Traction sterling bonds petitioned the court of Reus (Province of Tarragona) for a declaration adjudging the company bankrupt, on account of failure to pay the interest on the bonds. On 12 February 1948 a judgment was given declaring the company bankrupt and ordering the seizure of the assets of Barcelona Traction and of two of its subsidiary companies. Pursuant to this judgment the principal management personnel of the two companies were dismissed and Spanish directors appointed. Shortly afterwards, these measures were extended to the other subsidiary companies. New shares of the subsidiary companies were created, which were sold by public auction in 1952 to a newly-formed company, Fuerzas Electricas de Cataluña, S.A. (Fecsa), which thereupon acquired complete control of the undertaking in Spain.

Proceedings were brought without success in the Spanish courts by various companies or persons. According to the Spanish Government, 2,736 orders were made in the case and 494 judgments given by lower and 37 by higher courts before it was submitted to the International Court of Justice. The Court found that in 1948 Barcelona Traction, which had not received a judicial notice of the bankruptcy proceedings, and was not represented before the Reus court, took no proceedings in the Spanish courts until 18 June and thus did not enter a plea of opposition against the bankruptcy judgment within the time-limit of eight days from the date of publication of the judgment laid down in Spanish legislation. The Belgian Government contends, however, that the notification and publication did not comply with the relevant legal requirements and that the eight-day time-limit never began to run.

Representations were made to the Spanish Government by the British, Canadian, United States and Belgian Governments as from 1948 or 1949. The interposition of the Canadian Government ceased entirely in 1955.

Proceedings before the International Court and the Nature of the Claim
(paras. 1–7 and 26–31 of the Judgment)

The Belgian Government filed a first Application with the Court against the Spanish Government in 1958. In 1961 it gave notice of discontinuance of the proceedings, with a view to negotiations between the representatives of the private interests concerned, and the case was removed from the Court's General List. The negotiations having failed, the Belgian Government on 19 June 1962 submitted to the Court a new Application. In 1963 the Spanish Government raised four preliminary objections to this Application. By its Judgment of 24 July 1964, the Court rejected the first and second objections and joined the third and fourth to the merits.

In the subsequent written and oral proceedings the Parties supplied abundant material and information. The Court observed that the unusual length of the proceedings was due to the very long time-limits requested by the Parties for the preparation of their written pleadings and to their repeated requests for an extension of those limits. The Court did not find that it should refuse those requests, but it remained convinced that it was in the interest of the authority of international justice for cases to be decided without unwarranted delay.

The claim submitted to the Court had been presented on behalf of natural and juristic persons, alleged to be Belgian nationals and shareholders in Barcelona Traction, a company incorporated in Canada and having its head office there. The object of the Application was reparation for damage allegedly caused to those persons by the conduct, said to be con-

trary to international law, of various organs of the Spanish State towards that company.

The third preliminary objection of the Spanish Government, which had been joined to the merits, was to the effect that the Belgian Government lacked capacity to submit any claim in respect of wrongs done to a Canadian company, even if the shareholders were Belgian. The fourth preliminary objection, which was also joined to the merits, was to the effect that local remedies available in Spain had not been exhausted.

The case submitted to the Court principally concerned three States, Belgium, Spain and Canada, and it was accordingly necessary to deal with a series of problems arising out of this triangular relationship.

The Belgian Government's jus standi
(paras. 32–101 of the Judgment)

The Court first addressed itself to the question, raised by the third preliminary objection, which had been joined to the merits, of the right of Belgium to exercise diplomatic protection of Belgian shareholders in a company incorporated in Canada, the measures complained of having been taken in relation not to any Belgian national but to the company itself.

The Court observed that when a State admitted into its territory foreign investments or foreign nationals it was bound to extend to them the protection of the law and assumed obligations concerning the treatment to be afforded them. But such obligations were not absolute. In order to bring a claim in respect of the breach of such an obligation, a State must first establish its right to do so.

In the field of diplomatic protection, international law was in continuous evolution and was called upon to recognize institutions of municipal law. In municipal law, the concept of the company was founded on a firm distinction between the rights of the company and those of the shareholder. Only the company, which was endowed with legal personality, could take action in respect of matters that were of a corporate character. A wrong done to the company frequently caused prejudice to its shareholders, but this did not imply that both were entitled to claim compensation. Whenever a shareholder's interests were harmed by an act done to the company, it was to the latter that he had to look to institute appropriate action. An act infringing only the company's rights did not involve responsibility towards the shareholders, even if their interests were affected. In order for the situation to be different, the act complained of must be aimed at the direct rights of the shareholder as such (which was not the case here since the Belgian Government had itself admitted that it had not based its claim on an infringement of the direct rights of the shareholders).

International law had to refer to those rules generally accepted by municipal legal systems. An injury to the shareholder's interests resulting from an injury to the rights of the company was insufficient to found a claim. Where it was a question of an unlawful act committed against a company representing foreign capital, the general rule of international law authorized the national State of the company alone to exercise diplomatic protection for the purpose of seeking redress. No rule of international law expressly conferred such a right on the shareholder's national State.

The Court considered whether there might not be, in the present case, special circumstances for which the general rule might not take effect. Two situations needed to be studied: (*a*) the case of the company having ceased to exist, and (*b*) the case of the protecting State of the company lacking capacity to take action. As regards the first of these possibilities, the Court observed that whilst Barcelona Traction had lost all its assets in Spain and been placed in receivership in Canada, it could not be contended that the corporate entity of the company had ceased to exist or that it had lost its capacity to take corporate action. So far as the second possibility was concerned, it was not disputed that the company had been incorporated in Canada and had its registered office in that country, and its Canadian nationality had received general recognition. The Canadian Government had exercised the protection of Barcelona Traction for a number of years. If at a certain point the Canadian Government ceased to act on behalf of Barcelona Traction, it nonetheless retained its capacity to do so, which the Spanish Government had not questioned. Whatever the reasons for the Canadian Government's change of attitude, that fact could not constitute a justification for the exercise of diplomatic protection by another government.

It had been maintained that a State could make a claim when investments by its nationals abroad, such investments being part of a State's national economic resources, were prejudicially affected in violation of the right of the State itself to have its nationals enjoy a certain treatment. But, in the present state of affairs, such a right could only result from a treaty or special agreement. And no instrument of such a kind was in force between Belgium and Spain.

It had also been maintained that, for reasons of equity, a State should be able, in certain cases, to take up the protection of its nationals, shareholders in a company which had been the victim of a violation of international law. The Court considered that the adoption of the theory of diplomatic protection of shareholders as such would open the door to competing claims on the part of different States, which could create an atmosphere of insecurity in international economic relations. In the particular circumstances of the present case, where the company's national State was able to act, the Court was not of the opinion that *jus standi* was conferred on the Belgian Government by considerations of equity.

The Court's Decision
(paras. 102 and 103 of the Judgment)

The Court took cognizance of the great amount of documentary and other evidence submitted by the Parties and fully appreciated the importance of the legal problems raised by the allegation which was at the root of the Belgian claim and which concerned denials of justice allegedly committed by organs of the Spanish State. However, the possession by the Belgian Government of a right of protection was a prerequisite for the examination of such problems. Since no *jus standi* before the Court had been established, it was not for the Court to pronounce upon any other aspect of the case.

Accordingly, the Court rejected the Belgian Government's claim by 15 votes to 1, 12 votes of the majority being based on the reasons set out above.

Declarations and Separate and Dissenting Opinions

Judge *ad hoc* Riphagen appended to the Judgment a Dissenting Opinion in which he stated that he was unable to concur in the Judgment as the legal reasoning followed by the Court appeared to him to fail to appreciate the nature of the rules of customary public international law applicable in the present case.

Among the fifteen members of the majority, three supported the operative provisions of the Judgment (rejecting

the Belgian Government's claim) for different reasons, and appended Separate Opinions to the Judgment. Judge Tanaka stated that the two preliminary objections joined to the merits ought to have been dismissed, but that the Belgian Government's allegation concerning denials of justice was unfounded. Judge Jessup came to the conclusion that a State, under certain circumstances, had a right to present a diplomatic claim on behalf of shareholders who were its nationals, but that Belgium had not succeeded in proving the Belgian nationality, between the critical dates, of those natural and juristic persons on whose behalf it had sought to claim. Judge Gros held that it was the State whose national economy was adversely affected that possessed the right to take action but that proof of Barcelona Traction's appurtenance to the Belgian economy had not been produced.

Among the twelve members of the majority who supported the operative provision of the Judgment on the basis of the reasoning set out in the Judgment (lack of *jus standi* on the part of the shareholders' national State), President Bustamante y Rivero and Judges Sir Gerald Fitzmaurice, Morelli, Padilla Nervo and Ammoun (Separate Opinions) and Judges Petrén and Onyeama (joint declaration) and Judge Lachs (declaration) stated that nevertheless there were certain differences between their reasoning and that contained in the Judgment, or that there were certain observations which they wished to add.

(Judge Sir Muhammad Zafrulla Khan had informed the President at the beginning of the Preliminary Objections stage that, having been consulted by one of the Parties concerning the case before his election as a Member of the Court, he considered that he ought not to participate in its decision.)

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46. LEGAL CONSEQUENCES FOR STATES OF THE CONTINUED PRESENCE OF SOUTH AFRICA IN NAMIBIA (SOUTH-WEST AFRICA) NOTWITHSTANDING SECURITY COUNCIL RESOLUTION 276 (1970)

Advisory Opinion of 21 June 1971

In its advisory opinion on the question put by the Security Council of the United Nations, "What are the legal consequences for States of the continued presence of South Africa in Namibia notwithstanding Security Council resolution 276 (1970)?", the Court was of opinion,

by 13 votes to 2,

(1) that, the continued presence of South Africa in Namibia being illegal, South Africa is under obligation to withdraw its administration from Namibia immediately and thus put an end to its occupation of the Territory;

by 11 votes to 4,

(2) that States Members of the United Nations are under obligation to recognize the illegality of South Africa's presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia, and to refrain from any acts and in particular any dealings with the Government of South Africa implying recognition of the legality of, or lending support or assistance to, such presence and administration;

(3) that it is incumbent upon States which are not Members of the United Nations to give assistance, within the scope of subparagraph (2) above, in the action which has been taken by the United Nations with regard to Namibia.

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For these proceedings the Court was composed as follows: President Sir Muhammad Zafrulla Khan; Vice-President Ammoun; Judges Sir Gerald Fitzmaurice, Padilla Nervo, Forster, Gros, Bengzon, Petrén, Lachs, Onyeama, Dillard, Ignacio-Pinto, de Castro, Morozov and Jiménez de Aréchaga.

The President of the Court, Sir Muhammad Zafrulla Khan, has appended a declaration to the Advisory Opinion. Vice-President Ammoun and Judges Padilla Nervo, Petrén, Onyeama, Dillard and de Castro have appended separate opinions. Judge Sir Gerald Fitzmaurice and Judge Gros have appended dissenting opinions.

Course of the Proceedings
(paras. 1–18 of the Advisory Opinion)

The Court first recalls that the request for the advisory opinion emanated from the United Nations Security Council, which decided to submit it by resolution 284 (1970) adopted on 29 July 1970. The Court goes on to recapitulate the different steps in the subsequent proceedings.

It refers in particular to the three Orders of 26 January 1971 whereby the Court decided not to accede to the objections raised by the Government of South Africa against the participation in the proceedings of three Members of the Court. These objections were based on statements which the Judges in question had made in a former capacity as representatives of their Governments in United Nations organs dealing with matters concerning Namibia, or on their participation in the same capacity in the work of those organs. The Court came to the conclusion that none of the three cases called for the application of Article 17, paragraph 2, of its Statute.

Objections against the Court's Dealing with the Question
(paras. 19–41 of the Advisory Opinion)

The Government of South Africa contended that the Court was not competent to deliver the opinion, because Security Council resolution 284 (1970) was invalid for the following reasons: (*a*) two permanent members of the Council abstained during the voting (Charter of the United Nations, Art. 27, para. 3); (*b*) as the question related to a dispute between South Africa and other Members of the United Nations, South Africa should have been invited to participate in the discussion (Charter, Art. 32) and the proviso requiring members of the Security Council which are parties to a dispute to abstain from voting should have been observed (Charter, Art. 27, para. 3). The Court points out that (*a*) for a long period the voluntary abstention of a permanent member has consistently been interpreted as not constituting a bar to the adoption of resolutions by the Security Council; (*b*) the question of Namibia was placed on the agenda of the Council as a *situation* and the South African Government failed to draw

the Council's attention to the necessity in its eyes of treating it as a *dispute*.

In the alternative the Government of South Africa maintained that even if the Court had competence it should nevertheless, as a matter of judicial propriety, refuse to give the opinion requested, on account of political pressure to which, it was contended, the Court had been or might be subjected. On 8 February 1971, at the opening of the public sittings, the President of the Court declared that it would not be proper for the Court to entertain those observations, bearing as they did on the very nature of the Court as the principal judicial organ of the United Nations, an organ which, in that capacity, acts only on the basis of law, independently of all outside influences or interventions whatsoever.

The Government of South Africa also advanced another reason for not giving the advisory opinion requested: that the question was in reality contentious, because it related to an existing dispute between South Africa and other States. The Court considers that it was asked to deal with a request put forward by a United Nations organ with a view to seeking legal advice on the consequences of its own decisions. The fact that, in order to give its answer, the Court might have to pronounce on legal questions upon which divergent views exist between South Africa and the United Nations does not convert the case into a dispute between States. (There was therefore no necessity to apply Article 83 of the Rules of Court, according to which, if an advisory opinion is requested upon a legal question "actually pending between two or more States", Article 31 of the Statute, dealing with judges *ad hoc*, is applicable; the Government of South Africa having requested leave to choose a judge *ad hoc*, the Court heard its observations on that point on 27 January 1971 but, in the light of the above considerations, decided by the Order of 29 January 1971 not to accede to that request.)

In sum, the Court saw no reason to decline to answer the request for an advisory opinion.

History of the Mandate
(paras. 42–86 of the Advisory Opinion)

Refuting the contentions of the South African Government and citing its own pronouncements in previous proceedings concerning South West Africa (Advisory Opinions of 1950, 1955 and 1956; Judgment of 1962), the Court recapitulates the history of the Mandate.

The mandates system established by Article 22 of the Covenant of the League of Nations was based upon two principles of paramount importance: the principle of non-annexation and the principle that the well-being and development of the peoples concerned formed a sacred trust of civilisation. Taking the developments of the past half-century into account, there can be little doubt that the ultimate objective of the sacred trust was self-determination and independence. The mandatory was to observe a number of obligations, and the Council of the League was to see that they were fulfilled. The rights of the mandatory as such had their foundation in those obligations.

When the League of Nations was dissolved, the raison d'etre and original object of these obligations remained. Since their fulfilment did not depend on the existence of the League, they could not be brought to an end merely because the supervisory organ had ceased to exist. The Members of the League had not declared, or accepted even by implication, that the mandates would be cancelled or lapse with the dissolution of the League.

The last resolution of the League Assembly and Article 80, paragraph 1, of the United Nations Charter maintained the obligations of mandatories. The International Court of Justice has consistently recognized that the Mandate survived the demise of the League, and South Africa also admitted as much for a number of years. Thus the supervisory element, which is an essential part of the Mandate, was bound to survive. The United Nations suggested a system of supervision which would not exceed that which applied under the mandates system, but this proposal was rejected by South Africa.

Resolutions by the General Assembly and the Security Council
(paras. 87–116 of the Advisory Opinion)

Eventually, in 1966, the General Assembly of the United Nations adopted resolution 2145 (XXI), whereby it decided that the Mandate was terminated and that South Africa had no other right to administer the Territory. Subsequently the Security Council adopted various resolutions including resolution 276 (1970) declaring the continued presence of South Africa in Namibia illegal. Objections challenging the validity of these resolutions having been raised, the Court points out that it does not possess powers of judicial review or appeal in relation to the United Nations organs in question. Nor does the validity of their resolutions form the subject of the request for advisory opinion. The Court nevertheless, in the exercise of its judicial function, and since these objections have been advanced, considers them in the course of its reasoning before determining the legal consequences arising from those resolutions.

It first recalls that the entry into force of the United Nations Charter established a relationship between all Members of the United Nations on the one side, and each mandatory Power on the other, and that one of the fundamental principles governing that relationship is that the party which disowns or does not fulfil its obligations cannot be recognized as retaining the rights which it claims to derive from the relationship. Resolution 2145 (XXI) determined that there had been a material breach of the Mandate, which South Africa had in fact disavowed.

It has been contended (*a*) that the Covenant of the League of Nations did not confer on the Council of the League power to terminate a mandate for misconduct of the mandatory and that the United Nations could not derive from the League greater powers than the latter itself had; (*b*) that, even if the Council of the League had possessed the power of revocation of the Mandate, it could not have been exercised unilaterally but only in co-operation with the Mandatory; (*c*) that resolution 2145 (XXI) made pronouncements which the General Assembly, not being a judicial organ, was not competent to make; (*d*) that a detailed factual investigation was called for; (*e*) that one part of resolution 2145 (XXI) decided in effect a transfer of territory.

The Court observes (*a*) that, according to a general principle of international law (incorporated in the Vienna Convention on the Law of Treaties), the right to terminate a treaty on account of breach must be presumed to exist in respect of all treaties, even if unexpressed; (*b*) that the consent of the wrongdoer to such a form of termination cannot be required; (*c*) that the United Nations, as a successor to the League, acting through its competent organ, must be seen above all as the supervisory institution competent to pronounce on the conduct of the Mandatory; (*d*) that the failure of South Africa to comply with the obligation to submit to supervision cannot be disputed; (*e*) that the General Assembly was not making a finding on facts, but formulating a legal situation; it would not be correct to assume that, because it is in principle vested

with recommendatory powers, it is debarred from adopting, in special cases within the framework of its competence, resolutions which make determinations or have operative design.

The General Assembly, however, lacked the necessary powers to ensure the withdrawal of South Africa from the Territory and therefore, acting in accordance with Article 11, paragraph 2, of the Charter, enlisted the co-operation of the Security Council. The Council for its part, when it adopted the resolutions concerned, was acting in the exercise of what it deemed to be its primary responsibility for the maintenance of peace and security. Article 24 of the Charter vests in the Security Council the necessary authority. Its decisions were taken in conformity with the purposes and principles of the Charter, under Article 25 of which it is for member States to comply with those decisions, even those members of the Security Council which voted against them and those Members of the United Nations who are not members of the Council.

Legal Consequences for States of the Continued Presence of South Africa in Namibia
(paras. 117–127 and 133 of the Advisory Opinion)

The Court stresses that a binding determination made by a competent organ of the United Nations to the effect that a situation is illegal cannot remain without consequence.

South Africa, being responsible for having created and maintained that situation, has the obligation to put an end to it and withdraw its administration from the Territory. By occupying the Territory without title, South Africa incurs international responsibilities arising from a continuing violation of an international obligation. It also remains accountable for any violations of the rights of the people of Namibia, or of its obligations under international law towards other States in respect of the exercise of its powers in relation to the Territory.

The member States of the United Nations are under obligation to recognize the illegality and invalidity of South Africa's continued presence in Namibia and to refrain from lending any support or any form of assistance to South Africa with reference to its occupation of Namibia. The precise determination of the acts permitted—what measures should be selected, what scope they should be given and by whom they should be applied—is a matter which lies within the competence of the appropriate political organs of the United Nations acting within their authority under the Charter. Thus it is for the Security Council to determine any further measures consequent upon the decisions already taken by it. The Court in consequence confines itself to giving advice on those dealings with the Government of South Africa which, under the Charter of the United Nations and general international law, should be considered as inconsistent with resolution 276 (1970) because they might imply recognizing South Africa's presence in Namibia as legal:

(*a*) Member States are under obligation (subject to (*d*) below) to abstain from entering into treaty relations with South Africa in all cases in which the Government of South Africa purports to act on behalf of or concerning Namibia. With respect to existing bilateral treaties member States must abstain from invoking or applying those treaties or provisions of treaties concluded by South Africa on behalf of or concerning Namibia which involve active intergovernmental co-operation. With respect to multilateral treaties, the same rule cannot be applied to certain general conventions such as those with humanitarian character, the non-performance of which may adversely affect the people of Namibia: it will be for the competent international organs to take specific measures in this respect.

(*b*) Member States are under obligation to abstain from sending diplomatic or special missions to South Africa including in their jurisdiction the territory of Namibia, to abstain from sending consular agents to Namibia, and to withdraw any such agents already there; and to make it clear to South Africa that the maintenance of diplomatic or consular relations does not imply any recognition of its authority with regard to Namibia.

(*c*) Member States are under obligation to abstain from entering into economic and other forms of relations with South Africa on behalf of or concerning Namibia which may entrench its authority over the territory.

(*d*) However, non-recognition should not result in depriving the people of Namibia of any advantages derived from international co-operation. In particular, the illegality or invalidity of acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate cannot be extended to such acts as the registration of births, deaths and marriages.

As to States not members of the United Nations, although they are not bound by Articles 24 and 25 of the Charter, they have been called upon by resolution 276 (1970) to give assistance in the action which has been taken by the United Nations with regard to Namibia. In the view of the Court, the termination of the Mandate and the declaration of the illegality of South Africa's presence in Namibia are opposable to all States in the sense of barring *erga omnes* the legality of the situation which is maintained in violation of international law. In particular, no State which enters into relations with South Africa concerning Namibia may expect the United Nations or its Members to recognize the validity or effects of any such relationship. The Mandate having been terminated by a decision of the international organization in which the supervisory authority was vested, it is for non-member States to act accordingly. All States should bear in mind that the entity injured by the illegal presence of South Africa in Namibia is a people which must look to the international community for assistance in its progress towards the goals for which the sacred trust was instituted.

Accordingly, the Court has given the replies reproduced above on page 1.

Propositions by South Africa concerning the Supply of Further Factual Information and the Possible Holding of a Plebiscite
(paras. 128–132 of the Advisory Opinion)

The Government of South Africa had expressed the desire to supply the Court with further factual information concerning the purposes and objectives of its policy of separate development, contending that to establish a breach of its substantive international obligations under the Mandate it would be necessary to prove that South Africa had failed to exercise its powers with a view to promoting the well-being and progress of the inhabitants. The Court found that no factual evidence was needed for the purpose of determining whether the policy of apartheid in Namibia was in conformity with the international obligations assumed by South Africa. It is undisputed that the official governmental policy pursued by South Africa in Namibia is to achieve a complete physical separation of races and ethnic groups. This means the enforcement of distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights. This the Court views as a fla-

grant violation of the purposes and principles of the Charter of the United Nations.

The Government of South Africa had also submitted a request that a plebiscite should be held in the Territory of Namibia under the joint supervision of the Court and the Government of South Africa. The Court having concluded that no further evidence was required, that the Mandate had been validly terminated and that in consequence South Africa's presence in Namibia was illegal and its acts on behalf of or concerning Namibia illegal and invalid, it was not able to entertain this proposal.

By a letter of 14 May 1971 the President informed the representatives of the States and organizations which had participated in the oral proceedings that the Court had decided not to accede to the two above-mentioned requests.

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DECLARATION AND SEPARATE OR DISSENTING OPINIONS

Subparagraph 1 of the operative clause of the Advisory Opinion (illegality of the presence of South Africa in Namibia—see page 1 of this Communiqué) was adopted by 13 votes to 2. Subparagraphs 2 and 3 were adopted by 11 votes to 4.

Judge Sir Gerald Fitzmaurice (dissenting opinion) considers that the Mandate was not validly revoked, that the Mandatory is still subject to the obligations of the Mandate whatever these may be, and that States Members of the United Nations are bound to respect the position unless and until it is changed by lawful means.

Judge Gros (dissenting opinion) disagrees with the Court's conclusions as to the legal validity and effects of General Assembly resolution 2145 (XXI), but considers that South Africa ought to agree to negotiate on the conversion of the Mandate into a United Nations trusteeship.

Judges Petrén and Onyeama (separate opinions) voted for subparagraph 1 of the operative clause but against subparagraphs 2 and 3, which in their view ascribe too broad a scope to the effects of non-recognition.

Judge Dillard (separate opinion), concurring in the operative clause, adds certain mainly cautionary comments on subparagraph 2.

Judges Sir Gerald Fitzmaurice, Gros, Petrén, Onyeama and Dillard also criticize certain decisions taken by the Court with reference to its composition.

The President (declaration) and Judges Padilla Nervo and de Castro (separate opinions) accept the operative clause in full.

The Vice-President (separate opinion), while sharing the views expressed in the Advisory Opinion, considers that the operative clause is not sufficiently explicit or decisive.

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47. FISHERIES JURISDICTION CASE (UNITED KINGDOM *v.* ICELAND) (INTERIM PROTECTION)

Order of 17 August 1972

48. FISHERIES JURISDICTION CASE (FEDERAL REPUBLIC OF GERMANY *v.* ICELAND) INTERIM PROTECTION

Order of 17 August 1972

In two separate Orders, issued on 17 August 1972, each adopted by fourteen votes to one, the Court indicated interim measures of protection in the Fisheries Jurisdiction cases (United Kingdom *v.* Iceland; Federal Republic of Germany *v.* Iceland).

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UNITED KINGDOM *v.* ICELAND

In the first of the two Orders, the Court indicated, pending its final decision in the proceedings instituted on 14 April 1972 by the Government of the United Kingdom against the Government of Iceland, the following provisional measures:

(*a*) the United Kingdom and the Republic of Iceland should each of them ensure that no action of any kind is taken which might aggravate or extend the dispute submitted to the Court;

(*b*) the United Kingdom and the Republic of Iceland should each of them ensure that no action is taken which might prejudice the rights of the other Party in respect of the carrying out of whatever decision on the merits the Court may render;

(*c*) the Republic of Iceland should refrain from taking any measures to enforce the Regulations of 14 July 1972 against vessels registered in the United Kingdom and engaged in fishing activities in the waters around Iceland outside the twelve-mile fishery zone;

(*d*) the Republic of Iceland should refrain from applying administrative, judicial or other measures against ships registered in the United Kingdom, their crews or other related persons, because of their having engaged in fishing activities in the waters around Iceland outside the twelve-mile fishery zone;

(*e*) the United Kingdom should ensure that vessels registered in the United Kingdom do not take an annual catch of more than *170,000 metric tons* of fish from the "Sea Area of Iceland" as defined by the International Council for the Exploration of the Sea as area Va;

(*f*) the United Kingdom Government should furnish the Government of Iceland and the Registry of the Court with all relevant information, orders issued and arrangements made

concerning the control and regulation of fish catches in the area.

The Court also indicated that unless it had meanwhile delivered its final judgment in the case, it would, at an appropriate time before 15 August 1973, review the matter at the request of either party in order to decide whether the foregoing measures should continue or needed to be modified or revoked.

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FEDERAL REPUBLIC OF GERMANY *v.* ICELAND

In the second Order, the Court indicated, pending its final decision in the proceedings instituted on 5 June 1972 by the Federal Republic of Germany against the Republic of Iceland, the following provisional measures:

[Paragraphs (*a*), (*b*), (*c*), (*d*) and (*f*) of the second Order are in the same form, *mutatis mutandis*, as in the first; paragraph (*e*) reads as follows:]

(*e*) the Federal Republic should ensure that vessels registered in the Federal Republic do not take an annual catch of more than *119,000 metric tons* of fish from the "Sea Area of Iceland" as defined by the International Council for the Exploration of the Sea as area Va;

The Court also indicated that unless it had meanwhile delivered its final judgment in the case, it would, at an appropriate time before 15 August 1973, review the matter at the request of either party in order to decide whether the foregoing measures should continue or needed to be modified or revoked.

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For the purposes of the proceedings leading to the issue of these Orders the Court was composed as follows: President Sir Muhammad Zafrulla Khan; Vice-President Ammoun; Judges Sir Gerald Fitzmaurice, Padilla Nervo, Forster, Gros, Bengzon, Petrén, Lachs, Onyeama, Dillard, Ignacio-Pinto, de Castro, Morozov, Jiménez de Aréchaga.

Vice-President Ammoun and Judges Forster and Jiménez de Aréchaga appended a Joint Declaration to each Order.

Judge Padilla Nervo appended a Dissenting Opinion to each Order.

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49. CASE CONCERNING THE APPEAL RELATING TO THE JURISDICTION OF THE ICAO COUNCIL

Judgment of 18 August 1972

In its judgment in the case concerning the Appeal relating to the Jurisdiction of the ICAO Council (India *v.* Pakistan), the Court, by 13 votes to 3, rejected the Government of Pakistan's objections on the question of its competence and found that it had jurisdiction to entertain India's appeal.

By 14 votes to 2, it held the Council of the International Civil Aviation Organization to be competent to entertain the Application and Complaint laid before it by the Government of Pakistan on 3 March 1971, and in consequence rejected the appeal made to the Court by the Government of India against the decision of the Council assuming jurisdiction in those respects.

For these proceedings the Court was composed as follows: Vice-President Ammoun (Acting President), President Sir Muhammad Zafrulla Khan, Judges Sir Gerald Fitzmaurice, Padilla Nervo, Forster, Gros, Bengzon, Petrén, Lachs, Onyeama, Dillard, Ignacio-Pinto, de Castro, Morozov and Jiménez de Aréchaga, and Judge *ad hoc* Nagendra Singh.

President Sir Muhammad Zafrulla Khan and Judge Lachs appended Declarations to the Judgment.

Judges Petrén, Onyeama, Dillard, de Castro and Jiménez de Aréchaga appended Separate Opinions.

Judge Morozov and Judge *ad hoc* Nagendra Singh appended Dissenting Opinions.

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The Facts and the Main Contentions of the Parties
(paras. 1–12 of the Judgment)

The Court has emphasized in its Judgment that it had nothing whatever to do with the facts and contentions of the Parties relative to the substance of the dispute between them, except in so far as those elements might relate to the purely jurisdictional issue which alone had been referred to it.

Under the International Civil Aviation Convention and the International Air Services Transit Agreement, both signed in Chicago in 1944, the civil aircraft of Pakistan had the right to overfly Indian territory. Hostilities interrupting overflights broke out between the two countries in August 1965, but in February 1966 they came to an agreement that there should be an immediate resumption of overflights on the same basis as before 1 August 1965. Pakistan interpreted that undertaking as meaning that overflights would be resumed on the basis of the Convention and Transit Agreement, but India maintained that those two Treaties had been suspended during the hostilities and were never as such revived, and that overflights were resumed on the basis of a special régime according to which they could take place only after permission had been granted by India. Pakistan denied that any such régime ever came into existence and maintained that the Treaties had never ceased to be applicable since 1966.

On 4 February 1971, following a hijacking incident involving the diversion of an Indian aircraft to Pakistan, India suspended overflights of its territory by Pakistan civil aircraft. On 3 March 1971 Pakistan, alleging that India was in breach of the two Treaties, submitted to the ICAO Council (*a*) an Application under Article 84 of the Chicago Convention and Article II, Section 2, of the Transit Agreement; (*b*) a Complaint under Article II, Section 1, of the Transit Agreement. India having raised preliminary objections to its jurisdiction, the Council declared itself competent by decisions given on 29 July 1971. On 30 August 1971 India appealed from those decisions, founding its right to do so and the Court's jurisdiction to entertain the appeal on Article 84 of

the Chicago Convention and Article II, Section 2, of the Transit Agreement (hereinafter called "the jurisdictional clauses of the Treaties").

Jurisdiction of the Court to entertain the Appeal
(paras. 13–26 of the Judgment)

Pakistan advanced certain objections to the jurisdiction of the Court to entertain the appeal. India pointed out that Pakistan had not raised those objections as *preliminary* objections under Article 62 of the Rules, but the Court observes that it must always satisfy itself that it has jurisdiction and, if necessary, go into that matter *proprio motu*. Pakistan had argued in the first place that India was precluded from affirming the competence of the Court by its contention, on the merits of the dispute, that the Treaties were not in force, which, if correct, would entail the inapplicability of their jurisdictional clauses. The Court, however, has held that Pakistan's argument hereon was not well founded, for the following reasons: (*a*) India had not said that these multilateral Treaties were not in force in the definitive sense, but that they had been suspended or were not as a matter of fact being applied as between India and Pakistan; (*b*) a merely unilateral suspension of a treaty could not *per se* render its jurisdictional clause inoperative; (*c*) the question of the Court's jurisdiction could not be governed by preclusive considerations; (*d*) parties must be free to invoke jurisdictional clauses without being made to run the risk of destroying their case on the merits.

Pakistan had further asserted that the jurisdictional clauses of the Treaties made provision solely for an appeal to the Court against a final decision of the Council on the merits of disputes, and not for an appeal against decisions of an interim or preliminary nature. The Court considers that a decision of the Council on its jurisdiction does not come within the same category as procedural or interlocutory decisions concerning time-limits, the production of documents etc., for (*a*) although a decision on jurisdiction does not decide the ultimate merits, it is nevertheless a decision of a substantive character, inasmuch as it might decide the whole case by bringing it to an end; (*b*) an objection to jurisdiction has the significance *inter alia* of affording one of the parties the possibility of avoiding a hearing on the merits; (*c*) a jurisdictional decision may often involve some consideration of the merits; (*d*) issues of jurisdiction can be as important and complicated as any that might arise on the merits; (*e*) to allow an international organ to examine the merits of a dispute when its competence to do so has not been established would be contrary to accepted standards of the good administration of justice.

With regard more particularly to its Complaint to the ICAO Council, Pakistan had submitted that it was relying on Article II, Section 1, of the Transit Agreement (whereas the Application relied on Article 84 of the Chicago Convention and on Article II of Section 2 of the Transit Agreement). The point here was that decisions taken by the Council on the basis of Article II, Section 1, are not appealable, because, unlike decisions taken under the other two provisions mentioned above, they do not concern illegal action or breaches of treaty but action lawful, yet prejudicial. The Court found that the actual Complaint of Pakistan did not, at least for the most part, relate to the kind of situation for which Section 1 of Article II was primarily intended, inasmuch as the injustice and hardship alleged therein were such as resulted from action said to be illegal because in breach of the Treaties. As the Complaint made exactly the same charges of breach of the Treaties as the Application, it could be assimilated to the latter for the purposes of appealability: unless that were so, paradoxical situations might arise.

To sum up, the objections to the Court's jurisdiction based on the alleged inapplicability of the Treaties as such or of their jurisdictional clauses could not be sustained. The Court was therefore invested with jurisdiction under those clauses and it became irrelevant to consider objections to other possible bases of the Court's jurisdiction.

Furthermore, since it was the first time any matter had come to the Court on appeal, the Court observed that in thus providing for an appeal to the Court from the decisions of the ICAO Council, the Treaties had enabled a certain measure of supervision by the Court of the validity of the Council's acts and that, from that standpoint, there was no ground for distinguishing between supervision as to jurisdiction and supervision as to merits.

Jurisdiction of the ICAO Council to entertain the merits of the case
(paras. 27–45 of the Judgment)

With regard to the correctness of the decisions given by the Council on 29 July 1971, the question was whether Pakistan's case before the Council disclosed, within the meaning of the jurisdictional clauses of the Treaties, a disagreement relating to the interpretation or application of one or more provisions of those instruments. If so, the Council was prima facie competent, whether considerations claimed to lie outside the Treaties might be involved or not.

India had sought to maintain that the dispute could be resolved without any reference to the Treaties and therefore lay outside the competence of the Council. It had contended that the Treaties had never been revived since 1965 and that India had in any case been entitled to terminate or suspend them as from 1971 by reason of a material breach of them for which Pakistan was responsible, arising out of the hijacking incident. India had further argued that the jurisdictional clauses of the Treaties allowed the Council to entertain only disagreements relating to the interpretation and application of those instruments, whereas the present case concerned their termination or suspension. The Court found that, although those contentions clearly belonged to the merits of the dispute, (*a*) such notices or communications as there had been on the part of India from 1965 to 1971 appeared to have related to overflights rather than to the Treaties as such; (*b*) India did not appear ever to have indicated which particular provisions of the Treaties were alleged to have been breached; (*c*) the justification given by India for the suspension of the Treaties in 1971 was said to lie not in the provisions of the Treaties themselves but in a principle of general international law, or of international treaty law. Furthermore, mere unilateral affirmation of those contentions, contested by the other party, could not be utilized so as to negative the Council's jurisdiction.

Turning to the positive aspects of the question, the Court found that Pakistan's claim disclosed the existence of a disagreement relating to the interpretation or application of the Treaties and that India's defences likewise involved questions of their interpretation or application. In the first place, Pakistan had cited specific provisions of the Treaties as having been infringed by India's denial of overflight rights, while India had made charges of a material breach of the Convention by Pakistan: in order to determine the validity of those charges and counter-charges, the Council would inevitably be obliged to interpret or apply the Treaties. In the second place, India had claimed that the Treaties had been replaced by a special régime, but it seemed clear that

Articles 82 and 83 of the Chicago Convention (relating to the abrogation of inconsistent arrangements and the registration of new agreements) must be involved whenever certain parties purported to replace the Convention or some part of it by other arrangements made between themselves; it followed that any special régime, or any disagreement concerning its existence, would raise issues concerning the interpretation or application of those articles. Finally Pakistan had argued that, if India maintained the contention which formed the substratum of its entire position, namely that the Treaties were terminated or suspended between the Parties, then such matters were regulated by Articles 89 and 95 of the Chicago Convention and Articles I and III of the Transit Agreement; but the two Parties had given divergent interpretations of those provisions, which related to war and emergency conditions and to the denunciation of the Treaties.

The Court concluded that the Council was invested with jurisdiction in the case and that the Court was not called upon to define further the exact extent of that jurisdiction, beyond what it had already indicated.

It had further been argued on behalf of India, though denied by Pakistan, that the Council's decisions assuming jurisdiction in the case had been vitiated by various procedural irregularities and that the Court should accordingly declare them null and void and send the case back to the Council for re-decision. The Court considered that the alleged irregularities, even supposing they were proved, did not prejudice in any fundamental way the requirements of a just procedure, and that whether the Council had jurisdiction was an objective question of law, the answer to which could not depend on what had occurred before the Council.

Declarations and Separate or Dissenting Opinions

Judge Morozov and Judge *ad hoc* Nagendra Singh (Dissenting Opinions) were unable to concur in the Court's decision on the jurisdiction of the ICAO Council.

President Sir Muhammad Zafrulla Khan (Declaration) and Judges Petrén and Onyeama (Separate Opinions) were unable to concur in the Court's decision on its own jurisdiction.

Judge Jiménez de Aréchaga (Separate Opinion) concurred in the operative clause of the Judgment but did not approve the Court's conclusion as to its jurisdiction to hear an appeal from the Council's decision on the Complaint of Pakistan, as distinct from its Application.

Judges Lachs (Declaration), Dillard and de Castro (Separate Opinions) added further observations.

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50. FISHERIES JURISDICTION CASE (UNITED KINGDOM *v.* ICELAND) (JURISDICTION OF THE COURT)

Judgment of 2 February 1973

In its Judgment on the question of its jurisdiction in the case concerning Fisheries Jurisdiction (United Kingdom *v.* Iceland), the Court found by 14 votes to 1 that it had jurisdiction to entertain the Application filed by the United Kingdom on 14 April 1972 and to deal with the merits of the dispute.

The Court was composed as follows: President Sir Muhammad Zafrulla Khan, Vice-President Ammoun and Judges Sir Gerald Fitzmaurice, Padilla Nervo, Forster, Gros, Bengzon, Petrén, Lachs, Onyeama, Dillard, Ignacio-Pinto, de Castro, Morozov and Jiménez de Aréchaga.

The President of the Court appended a declaration to the Judgment. Judge Sir Gerald Fitzmaurice appended a separate opinion, and Judge Padilla Nervo a dissenting opinion.

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Résumé of the Proceedings
(paras. 1–12 of the Judgment)

In its Judgment the Court recalls that on 14 April 1972 the Government of the United Kingdom instituted proceedings against Iceland in respect of a dispute concerning the proposed extension by the Icelandic Government of its exclusive fisheries jurisdiction to a distance of 50 nautical miles from the baselines around its coasts. By a letter of 29 May 1972 the Minister for Foreign Affairs of Iceland informed the Court that his Government was not willing to confer jurisdiction on it and would not appoint an Agent. By Orders of 17 and 18 August 1972 the Court indicated certain interim measures of protection at the request of the United Kingdom and decided that the first written pleadings should be addressed to the question of its jurisdiction to deal with the case. The Government of the United Kingdom filed a Memorial, and the Court heard oral argument on its behalf at a public hearing on 5 January 1973. The Government of Iceland has filed no pleadings and was not represented at the hearing.

It is, the Court observes, to be regretted that the Government of Iceland has failed to appear to plead the objections to the Court's jurisdiction which it is understood to entertain. Nevertheless the Court, in accordance with its Statute and its settled jurisprudence, must examine the question on its own initiative, a duty reinforced by Article 53 of the Statute, whereby, whenever one of the parties does not appear, the Court must satisfy itself that it has jurisdiction before finding on the merits. Although the Government of Iceland has not set out the facts and law on which its objection is based, or adduced any evidence, the Court proceeds to consider those objections which might, in its view, be raised against its jurisdiction. In so doing, it avoids not only all expressions of opinion on matters of substance, but also any pronouncement which might prejudge or appear to prejudge any eventual decision on the merits.

Compromissory clause of the 1961 Exchange of Notes
(paras. 13–23 of the Judgment)

To found the Court's jurisdiction, the Government of the United Kingdom relies on an Exchange of Notes which took place between it and the Government of Iceland on 11 March 1961, following an earlier dispute over fisheries. By that Exchange of Notes the United Kingdom undertook to recognise an exclusive Icelandic fishery zone up to a limit of 12

miles and to withdraw its fishing vessels from that zone over a period of 3 years. The Exchange of Notes featured a compromissory clause in the following terms:

"The Icelandic Government will continue to work for the implementation of the Althing Resolution of May 5, 1959, regarding the extension of fisheries jurisdiction around Iceland, but shall give to the United Kingdom Government six months' notice of such extension, and, in case of a dispute in relation to such extension, the matter shall, at the request of either party, be referred to the International Court of Justice."

The Court observes that there is no doubt as to the fulfilment by the Government of the United Kingdom of its part of this agreement or as to the fact that the Government of Iceland, in 1971, gave the notice provided for in the event of a further extension of its fisheries jurisdiction. Nor is there any doubt that a dispute has arisen, that it has been submitted to the Court by the United Kingdom and that, on the face of it, the dispute thus falls exactly within the terms of the compromissory clause.

Although, strictly speaking, the text of this clause is sufficiently clear for there to be no need to investigate the preparatory work, the Court reviews the history of the negotiations which led to the Exchange of Notes, finding confirmation therein of the parties' intention to provide the United Kingdom, in exchange for its recognition of the 12-mile limit and the withdrawal of its vessels, with a genuine assurance which constituted a *sine qua non* for the whole agreement, namely the right to challenge before the Court the validity of any further extension of Icelandic fisheries jurisdiction beyond the 12-mile limit.

It is thus apparent that the Court has jurisdiction.

Validity and duration of the 1961 Exchange of Notes
(paras. 24–45 of the Judgment)

The Court next considers whether, as has been contended, the agreement embodied in the 1961 Exchange of Notes either was initially void or has since ceased to operate.

In the above-mentioned letter of 29 May 1972 the Minister for Foreign Affairs of Iceland said that the 1961 Exchange of Notes had taken place at a time when the British Royal Navy had been using force to oppose the 12-mile fishery limit. The Court, however, notes that the agreement appears to have been freely negotiated on the basis of perfect equality and freedom of decision on both sides.

In the same letter the Minister for Foreign Affairs of Iceland expressed the view that "an undertaking for judicial settlement cannot be considered to be of a permanent nature", and the Government of Iceland had indeed, in an aide-mémoire of 31 August 1971, asserted that the object and purpose of the provision for recourse to judicial settlement had been fully achieved. The Court notes that the compromissory clause contains no express provision regarding duration. In fact, the right of the United Kingdom to challenge before the Court any claim by Iceland to extend its fisheries zone was subject to the assertion of such a claim and would last so long as Iceland might seek to implement the 1959 Althing resolution.

In a statement to the Althing (the Parliament of Iceland) on 9 November 1971, the Prime Minister of Iceland alluded to changes regarding "legal opinion on fisheries jurisdiction". His argument appeared to be that as the compromissory clause was the price that Iceland had paid at the time for the recognition by the United Kingdom of the 12-mile limit, the present general recognition of such a limit constituted a change of legal circumstances that relieved Iceland of its commitment. The Court observes that, on the contrary, since Iceland has received benefits from those parts of the agreement already executed, it behoves it to comply with its side of the bargain.

The letter and statement just mentioned also drew attention to "the changed circumstances resulting from the ever-increasing exploitation of the fishery resources in the seas surrounding Iceland". It is, notes the Court, admitted in international law that if a fundamental change of the circumstances which induced parties to accept a treaty radically transforms the extent of the obligations undertaken, this may, under certain conditions, afford the party affected a ground for invoking the termination or suspension of the treaty. It would appear that in the present case there is a serious difference of views between the Parties as to whether developments in fishing techniques in the waters around Iceland have resulted in fundamental or vital changes for that country. Such changes would, however, be relevant only for any eventual decision on the merits. It cannot be said that the change of circumstances alleged by Iceland has modified the scope of the jurisdictional obligation agreed to in the 1961 Exchange of Notes. Moreover, any question as to the jurisdiction of the Court, deriving from an alleged lapse of the obligation through changed circumstances, is for the Court to decide, by virtue of Article 36, paragraph 6, of its Statute.

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51. FISHERIES JURISDICTION CASE (FEDERAL REPUBLIC OF GERMANY *v.* ICELAND) (JURISDICTION OF THE COURT)

Judgment of 2 February 1973

In its Judgment on the question of its jurisdiction in the case concerning Fisheries Jurisdiction (Federal Republic of Germany *v.* Iceland), the Court found by 14 votes to 1 that it had jurisdiction to entertain the Application filed by the Federal Republic on 5 June 1972 and to deal with the merits of the dispute.

The Court was composed as follows: President Sir Muhammad Zafrulla Khan, Vice-President Ammoun and Judges Sir Gerald Fitzmaurice, Padilla Nervo, Forster, Gros, Bengzon, Petrén, Lachs, Onyeama, Dillard, Ignacio-Pinto, de Castro, Morozov and Jiménez de Aréchaga.

The President of the Court appended a declaration to the Judgment. Judge Sir Gerald Fitzmaurice appended a separate opinion, and Judge Padilla Nervo a dissenting opinion.

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Résumé of the Proceedings
(paras. 1–13 of the Judgment)

In its Judgment the Court recalls that on 5 June 1972 the Government of the Federal Republic of Germany instituted proceedings against Iceland in respect of a dispute concerning the proposed extension by the Icelandic Government of its exclusive fisheries jurisdiction to a distance of 50 nautical miles from the baselines round its coasts. By a letter of 27 June 1972 the Minister for Foreign Affairs of Iceland informed the Court that his Government was not willing to confer jurisdiction on it and would not appoint an Agent. By Orders of 17 and 18 August 1972 the Court indicated certain interim measures of protection at the request of the Federal Republic and decided that the first written pleadings should be addressed to the question of its jurisdiction to deal with the case. The Government of the Federal Republic of Germany filed a Memorial, whereas the Government of Iceland filed no pleadings.

Taking into account the proceedings instituted against Iceland by the United Kingdom on 14 April 1972 in the case concerning *Fisheries Jurisdiction* and the composition of the Court in this case, which includes a judge of United Kingdom nationality, the Court decided by eight votes to five that there was in the present phase, concerning the jurisdiction of the Court, a common interest in the sense of Article 31, paragraph 5, of the Statute which justified the refusal of the request of the Federal Republic of Germany for the appointment of a judge *ad hoc*.

On 8 January 1973 a public hearing was held in the course of which the Court heard oral argument on the question of its jurisdiction on behalf of the Federal Republic of Germany, but Iceland was not represented at the hearing.

In order to found the jurisdiction of the Court, the Government of the Federal Republic of Germany relies (*a*) on an Exchange of Notes between the Government of the Federal Republic and the Government of Iceland dated 19 July 1961, and (*b*) on a declaration for the purpose of securing access to the Court, in accordance with a Security Council resolution of 15 October 1946, which it made on 29 October 1971 and deposited with the Registrar of the Court on 22 November 1971. On 28 July 1972 the Minister for Foreign Affairs of Iceland pointed out in a telegram that the Federal Republic had thus accepted the jurisdiction of the Court only "after it had been notified by the Government of Iceland, in its aide-mémoire of 31 August 1971, that the object and purpose of the provision for recourse to judicial settlement of certain matters had been fully achieved". The Court observes that the binding force of the 1961 Exchange of Notes bears no relation to the date of deposit of the declaration required by the Security Council resolution and that the Government of the Federal Republic complied with the terms both of the resolution in question and of Article 36 of the Rules of Court.

It is, the Court observes, to be regretted that the Government of Iceland has failed to appear to plead the objections to the Court's jurisdiction which it is understood to entertain. Nevertheless the Court, in accordance with its Statute and its settled jurisprudence, must examine the question on its own initiative, a duty reinforced by Article 53 of the Statute whereby, whenever one of the parties does not appear, the Court must satisfy itself that it has jurisdiction before finding on the merits. Although the Government of Iceland has not set out the facts and law on which its objection is based, or adduced any evidence, the Court proceeds to consider those objections which might, in its view, be raised against its jurisdiction. In so doing, it avoids not only all expressions of opinion on matters of substance, but also any pronouncement which might prejudge or appear to prejudge any eventual decision on the merits.

Compromissory clause of the 1961 Exchange of Notes
(paras. 14–23 of the Judgment)

By the 1961 Exchange of Notes the Federal Republic of Germany undertook to recognize an exclusive Icelandic fishery zone up to a limit of 12 miles and to withdraw its fishing vessels from that zone over a period of less than 3 years. The Exchange of Notes featured a compromissory clause in the following terms:

> "The Government of the Republic of Iceland shall continue to work for the implementation of the Althing Resolution of 5 May, 1959, regarding the extension of the fishery jurisdiction of Iceland. However, it shall give the Government of the Federal Republic of Germany six months' notice of any such extension; in case of a dispute relating to such an extension, the matter shall, at the request of either party, be referred to the International Court of Justice."

The Court observes that there is no doubt as to the fulfilment by the Government of the Federal Republic of its part of this agreement and that the Government of Iceland, in 1971, gave the notice provided for in the event of a further extension of its fisheries jurisdiction. Nor is there any doubt that a dispute has arisen, that it has been submitted to the Court by the Federal Republic of Germany and that, on the face of it, the dispute thus falls exactly within the terms of the compromissory clause.

Although, strictly speaking, the text of this clause is sufficiently clear for there to be no need to investigate the preparatory work, the Court reviews the history of the negotiations

which led to the Exchange of Notes, finding confirmation therein of the parties' intention to provide the Federal Republic, in exchange for its recognition of the 12-mile limit and the withdrawal of its vessels, with the same assurance as that given a few weeks previously to the United Kingdom, including the right of challenging before the Court the validity of any further extension of Icelandic fisheries jurisdiction beyond the 12-mile limit.

It is thus apparent that the Court has jurisdiction.

Validity and duration of the 1961 Exchange of Notes
(paras. 24–25 of the Judgment)

The Court next considers whether, as has been contended, the agreement embodied in the 1961 Exchange of Notes either was initially void or has since ceased to operate.

In the above-mentioned letter of 27 June 1972 the Minister for Foreign Affairs of Iceland said that the 1961 Exchange of Notes "took place under extremely difficult circumstances" and the Federal Republic of Germany has interpreted this statement as appearing "to intimate that the conclusion of the 1961 Agreement had taken place, on the part of the Government of Iceland, under some kind of pressure and not by its own free will". The Court, however, notes that the agreement appears to have been freely negotiated on the basis of perfect equality and freedom of decision on both sides.

In the same letter the Minister for Foreign Affairs of Iceland expressed the view that "an undertaking for judicial settlement cannot be considered to be of a permanent nature" and, as indicated above, the Government of Iceland had indeed, in an aide-mémoire of 31 August 1971, asserted that the object and purpose of the provision for recourse to judicial settlement had been fully achieved. The Court notes that the compromissory clause contains no express provision regarding duration. In fact, the right of the Federal Republic of Germany to challenge before the Court any claim by Iceland to extend its fisheries zone was subject to the assertion of such a claim and would last so long as Iceland might seek to implement the 1959 Althing resolution.

In a statement to the Althing (the Parliament of Iceland) on 9 November 1971, the Prime Minister of Iceland alluded to changes regarding "legal opinion on fisheries jurisdiction". His argument appeared to be that as the compromissory clause was the price that Iceland had paid at the time for the recognition by the Federal Republic of Germany of the 12-mile limit, the present general recognition of such a limit constituted a change of legal circumstances that relieved Iceland of its commitment. The Court observes that, on the contrary, since Iceland has received benefits from those parts of the agreement already executed, it behoves it to comply with its side of the bargain.

The letter and statement just mentioned also drew attention to "the changed circumstances resulting from the ever increasing exploitation of the fishery resources in the seas surrounding Iceland". It is, notes the Court, admitted in international law that if a fundamental change of the circumstances which induced parties to accept a treaty radically transforms the extent of the obligations undertaken, this may, under certain conditions, afford the party affected a ground for invoking the termination or suspension of the treaty. It would appear that in the present case there is a divergence of views between the Parties as to whether there have been any fundamental changes in fishing techniques in the waters around Iceland. Such changes would, however, be relevant only for any eventual decision on the merits. It cannot be said that the change of circumstances alleged by Iceland has modified the scope of the jurisdictional obligation agreed to in the 1961 Exchange of Notes. Moreover, any question as to the jurisdiction of the Court, deriving from an alleged lapse of the obligation through changed circumstances, is for the Court to decide by virtue of Article 36, paragraph 6, of its Statute.

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52. NUCLEAR TESTS CASE (AUSTRALIA *v.* FRANCE) (INTERIM PROTECTION)

Order of 22 June 1973

The Court, by 8 votes to 6, made an Order indicating, pending its final decision in the case concerning Nuclear Tests (Australia *v.* France), the following provisional measures of protection:

The Governments of Australia and France should each of them ensure that no action of any kind is taken which might aggravate or extend the dispute submitted to the Court or prejudice the rights of the other Party in respect of the carrying out of whatever decision the Court may render in the case; and, in particular, the French Government should avoid nuclear tests causing the deposit of radio-active fall-out on Australian territory.

As President Lachs was for health reasons unable to participate, it was Vice-President Ammoun who, in accordance with Article 45 of the Statute, presided and read out the Order. Judge Dillard was likewise absent for health reasons, and the Court was therefore composed as follows:

Vice-President Ammoun, Acting President; Judges Forster, Gros, Bengzon, Petrén, Onyeama, Ignacio-Pinto, de Castro, Morozov, Jiménez de Aréchaga, Sir Humphrey Waldock, Nagendra Singh and Ruda; Judge *ad hoc* Sir Garfield Barwick.

Of the Members of the Court who voted in favour of the indication of provisional measures, Judges Jiménez de Aréchaga, Sir Humphrey Waldock, Nagendra Singh and Sir Garfield Barwick each appended a declaration. Of the judges who voted against the indication of the measures, Judges Forster, Gros, Petrén and Ignacio-Pinto each appended to the Order a dissenting opinion.

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In its Order, the Court recalls that on 9 May 1973 Australia instituted proceedings against France in respect of a dispute concerning the holding of atmospheric tests of nuclear weapons by the French Government in the Pacific Ocean. The Australian Government asked the Court to adjudge and declare that the carrying out of further atmospheric nuclear weapon tests in the South Pacific Ocean was not consistent

with applicable rules of international law, and to order that the French Republic should not carry out any further such tests. On the same date the Australian Government asked the Court to indicate interim measures of protection. In a letter from the Ambassador of France to the Netherlands, handed by him to the Registrar on 16 May 1973, the French Government stated that it considered that the Court was manifestly not competent in the case and that it could not accept the Court's jurisdiction, and that accordingly the French Government did not intend to appoint an agent, and requested the Court to remove the case from its list. A statement of the reasons which had led the French Government to these conclusions was annexed to the letter.

The Court has indicated interim measures on the basis of Article 41 of its Statute and taking into account the following considerations *inter alia:*

—the material submitted to the Court leads it to the conclusion, at the present stage of the proceedings, that the provisions invoked by the Applicant with regard to the Court's jurisdiction appear, prima facie, to afford a basis on which that jurisdiction might be founded;

—it cannot be assumed *a priori* that the claims of the Australian Government fall completely outside the purview of the Court's jurisdiction or that that Government may not be able to establish a legal interest in respect of these claims entitling the Court to admit the Application;

—for the purpose of the present proceedings, it suffices to observe that the information submitted to the Court does not exclude the possibility that damage to Australia might be shown to be caused by the deposit on Australian territory of radio-active fall-out resulting from such tests and to be irreparable.

The Court then says that it is unable to accede at the present stage of the proceedings to the request made by the French Government that the case be removed from the list. However, the decision given today in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case, or any question relating to the admissibility of the Application, or relating to the merits themselves, and leaves unaffected the right of the French Government to submit arguments in respect of those questions.

The Court further decides that the written pleadings shall first be addressed to the question of the jurisdiction of the Court to entertain the dispute, and of the admissibility of the Application, and fixes 21 September 1973 as the time-limit for the Memorial of the Government of Australia and 21 December 1973 as the time-limit for the Counter-Memorial of the French Government.

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53. NUCLEAR TESTS CASE (NEW ZEALAND *v.* FRANCE) (INTERIM PROTECTION)

Order of 22 June 1973

The Court, by 8 votes to 6, made an Order indicating, pending its final decision in the case concerning Nuclear Tests (New Zealand *v.* France), the following provisional measures of protection:

The Governments of New Zealand and France should each of them ensure that no action of any kind is taken which might aggravate or extend the dispute submitted to the Court or prejudice the rights of the other Party in respect of the carrying out of whatever decision the Court may render in the case; and, in particular, the French Government should avoid nuclear tests causing the deposit of radio-active fall-out on the territory of New Zealand, the Cook Islands, Niue or the Tokelau Islands.

As President Lachs was for health reasons unable to participate, it was Vice-President Ammoun who, in accordance with Article 45 of the Statute, presided and read out the Order. Judge Dillard was likewise absent for health reasons, and the Court was therefore composed as follows:

Vice-President Ammoun, Acting President; Judges Forster, Gros, Bengzon, Petrén, Onyeama, Ignacio-Pinto, de Castro, Morozov, Jiménez de Aréchaga, Sir Humphrey Waldock, Nagendra Singh and Ruda; Judge *ad hoc* Sir Garfield Barwick.

Of the Members of the Court who voted in favour of the indication of provisional measures, Judges Jiménez de Aréchaga, Sir Humphrey Waldock, Nagendra Singh and Sir Garfield Barwick each appended a declaration. Of the judges who voted against the indication of the measures, Judges Forster, Gros, Petrén and Ignacio-Pinto each appended to the Order a dissenting opinion.

In its Order, the Court recalls that on 9 May 1973 New Zealand instituted proceedings against France in respect of a dispute as to the legality of atmospheric nuclear tests in the South Pacific region. The New Zealand Government asked the Court to adjudge and declare that the conduct by the French Government of nuclear tests in the South Pacific region that give rise to radio-active fall-out constitutes a violation of New Zealand's rights under international law, and that these rights will be violated by any further such tests. On 14 May the New Zealand Government asked the Court to indicate interim measures of protection. In a letter from the Ambassador of France to the Netherlands, handed by him to the Registrar on 16 May 1973, the French Government stated that it considered that the Court was manifestly not competent in the case and that it could not accept the Court's jurisdiction, and that accordingly the French Government did not intend to appoint an agent, and requested the Court to remove the case from its list. A statement of the reasons which had led the French Government to these conclusions was annexed to the letter.

The Court has indicated interim measures on the basis of Article 41 of its Statute and taking into account the following considerations *inter alia:*

—the material submitted to the Court leads it to the conclusion, at the present stage of the proceedings, that the provisions invoked by the Applicant with regard to the Court's jurisdiction appear, prima facie, to afford a basis on which that jurisdiction might be founded;

—it cannot be assumed *a priori* that the claims of the New Zealand Government fall completely outside the purview of the Court's jurisdiction or that the Government may not be

able to establish a legal interest in respect of these claims entitling the Court to admit the Application;

—for the purpose of the present proceedings, it suffices to observe that the information submitted to the Court does not exclude the possibility that damage to New Zealand might be shown to be caused by the deposit on New Zealand territory of radio-active fall-out resulting from such tests and to be irreparable.

The Court then says that it is unable to accede at the present stage of the proceedings to the request made by the French Government that the case be removed from the list. However, the decision given today in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case, or any question relating to the admissibility of the Application, or relating to the merits themselves, and leaves unaffected the right of the French Government to submit arguments in respect of those questions.

The Court further decides that the written pleadings shall first be addressed to the question of the jurisdiction of the Court to entertain the dispute, and of the admissibility of the Application, and fixes 21 September 1973 as the time-limit for the Memorial of the Government of New Zealand and 21 December 1973 as the time-limit for the Counter-Memorial of the French Government.

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54. APPLICATION FOR REVIEW OF JUDGEMENT NO. 158 OF THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL

Advisory Opinion of 12 July 1973

A request for an advisory opinion had been submitted to the Court on 3 July 1972 by a letter of 28 June 1972 from the Secretary-General of the United Nations in the following terms:

"The Committee on Applications for Review of Administrative Tribunal Judgements has decided that there is a substantial basis within the meaning of Article 11 of the Statute of the Administrative Tribunal for the application for the review of Administrative Tribunal Judgement No. 158, delivered at Geneva on 28 April 1972.

"Accordingly, the Committee requests an advisory opinion of the International Court of Justice on the following questions:

"1. Has the Tribunal failed to exercise jurisdiction vested in it as contended in the applicant's application to the Committee on Applications for Review of Administrative Tribunal Judgements (A/AC.86/R.59)?

"2. Has the Tribunal committed a fundamental error in procedure which has occasioned a failure of justice as contended in the applicant's application to the Committee on Applications for Review of Administrative Tribunal Judgements (A/AC.86/R.59)?"

The Court decided, by 10 votes to 3, to comply with the request, and is of the opinion:

with regard to Question I, by 9 votes to 4, that the Administrative Tribunal has not failed to exercise the jurisdiction vested in it as contended in the applicant's application to the Committee on Applications for Review of Administrative Tribunal Judgements;

with regard to Question II, by 10 votes to 3, that the Administrative Tribunal has not committed a fundamental error in procedure which has occasioned a failure of justice as contended in the applicant's application to the Committee on Applications for Review of Administrative Tribunal Judgements.

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For these proceedings, the Court was composed as follows: President Lachs; Vice-President Ammoun; Judges Forster, Gros, Bengzon, Onyeama, Dillard, de Castro, Morozov, Jiménez de Aréchaga, Sir Humphrey Waldock, Nagendra Singh and Ruda.

President Lachs has appended a declaration to the Advisory Opinion, and Judges Forster and Nagendra Singh a joint declaration. Separate opinions have been appended by Judges Onyeama, Dillard and Jiménez de Aréchaga; and dissenting opinions by Vice-President Ammoun and Judges Gros, de Castro and Morozov.

Judges Petrén and Ignacio-Pinto did not take part in the proceedings, having by virtue of Article 24 of the Statute informed the President that they did not consider they should do so.

The Vice-President, Judge de Castro and Judge Dillard, though they had played a full part in the proceedings and participated in the vote, were prevented for reasons of health from taking part in the sitting for the reading of the Advisory Opinion.

Facts and Procedure
(paras. 1–13 of the Advisory Opinion)

In its Advisory Opinion, the Court recalls that Mr. Mohamed Fasla, an official of the United Nations Development Programme (UNDP), held a fixed-term contract which was due to expire on 31 December 1969. When his contract was not renewed, he appealed successively to the Joint Appeals Board and to the United Nations Administrative Tribunal. The Tribunal gave its decision in Judgement No. 158 at Geneva on 28 April 1972. On 26 May 1972 Mr. Fasla raised objections to the decision and asked the Committee on Applications for Review of Administrative Tribunal Judgements to request an advisory opinion of the Court. This the Committee decided to do on 20 June 1972.

In formulating the request for an advisory opinion, the Committee on Applications exercised a power conferred upon it by the General Assembly of the United Nations in resolution 957 (X) of 8 November 1955, by adding to the Statute of the United Nations Administrative Tribunal a new Article 11 providing *inter alia:*

"1. If . . . the person in respect of whom a judgement has been rendered by the Tribunal . . . objects to the judgement on the ground that the Tribunal . . . has failed to exercise jurisdiction vested in it . . . or has committed a fundamental error in procedure which has occasioned a failure of justice . . . the person concerned may . . . make a written application to the Committee established by paragraph 4 of this article asking the Committee to request

an advisory opinion of the International Court of Justice on the matter.

"2. . . . the Committee shall decide whether or not there is a substantial basis for the application. If the Committee decides that such a basis exists, it shall request an advisory opinion of the Court, and the Secretary-General shall arrange to transmit to the Court the views of the person referred to in paragraph 1.

"3. . . . the Secretary-General shall either give effect to the opinion of the Court or request the Tribunal to convene specially in order that it shall confirm its original judgement, or give a new judgement, in conformity with the opinion of the Court . . .

"4. For the purpose of this article, a Committee is established and authorized under paragraph 2 of Article 96 of the Charter to request advisory opinions of the Court. The Committee shall be composed of the Member States the representatives of which have served on the General Committee of the most recent regular session of the General Assembly . . . "

Pursuant to Article 65, paragraph 2, of the Statute of the Court, the Secretary-General of the United Nations transmitted to the Court on 29 August 1972 documents likely to throw light upon the question. Pursuant to Article 66, paragraph 2, of the Statute, the United Nations and its member States were informed that the Court would be prepared to receive written statements likely to furnish information on the question put to it. Within the time-limit fixed by an Order of 14 July 1972 (*I.C.J. Reports 1972*, p. 9), i.e., 20 September 1972, the United Nations submitted a written statement on behalf of the Secretary-General, together with the views of Mr. Fasla, transmitted to the Court in accordance with Article 11, paragraph 2, of the Statute of the Administrative Tribunal. Subsequently Mr. Fasla was authorized to present, through the Secretary-General, a corrected version of the statement of his views within a time-limit expiring on 5 December 1972. The time-limit for the submission of written comments under Article 66, paragraph 4, of the Statute of the Court having been fixed by the President at 27 November 1972 and then extended to 31 January 1973, written comments were filed on behalf of the United Nations, comprising the comments of the Secretary-General on the corrected version of the statement of the views of Mr. Fasla, and the comments of Mr. Fasla on the statement submitted on behalf of the Secretary-General. The United Nations and its member States had been informed on 6 October 1972 that it was not contemplated that public hearings for the submission of oral statements would be held in the case; this was confirmed by a decision of the Court on 25 January 1973.

Competence of the Court
(paras. 14–40 of the Advisory Opinion)

The proceedings represented the first occasion on which the Court had been called upon to consider a request for an advisory opinion made under the procedure laid down in Article 11 of the Statute of the Administrative Tribunal. Accordingly, although, in the statements and comments submitted to the Court, no question was raised either as to the competence of the Court to give the opinion or as to the propriety of its doing so, the Court examined those two questions in turn.

As to the Court's competence, the Court considered *inter alia* whether the Committee on Applications for Review could be considered one of the "organs of the United Nations" entitled to request advisory opinions under Article 96 of the Charter, and had any activities of its own which enabled it to be considered as requesting advisory opinions on legal questions arising within the scope of its activities, as provided by Article 96. The Court concluded that the Committee was an organ of the United Nations, duly constituted under Articles 7 and 22 of the Charter, and duly authorized under Article 96, paragraph 2, of the Charter to request advisory opinions of the Court. It followed that the Court was competent under Article 65 of its Statute to entertain a request for an advisory opinion from the Committee made within the scope of Article 11 of the Statute of the Administrative Tribunal.

The Court then considered whether the character of certain features of the review procedure should lead it to decline to answer the request for an opinion. It found that there did not appear to be anything in the character or operation of the Committee which required the Court to conclude that the review procedure was incompatible with the general principles governing the judicial process, and it rejected the objections based upon what was said to be an inherent inequality between the staff member, on the one hand, and the Secretary-General and member States, on the other. While not considering that the review procedure was free from difficulty, the Court had no doubt that, in the circumstances of the case, it should comply with the request for an advisory opinion.

Scope of the Questions Put to the Court
(paras. 41–48 of the Advisory Opinion)

The Court noted that the two questions formulated in the request were specifically limited to the grounds of objection raised and contentions put forward by Mr. Fasla in his application to the Committee. The two grounds advanced corresponded to two of the grounds of objection specified in Article 11 of the Statute of the Administrative Tribunal, namely failure to exercise jurisdiction and fundamental error in procedure. A challenge to a decision of the Tribunal on one of those two grounds could not properly be transformed into a proceeding against the substance of the decision.

Was There a Failure by the Administrative Tribunal to Exercise Jurisdiction Vested in It?
(paras. 49–87 of the Advisory Opinion)

In the Court's view, this first ground of challenge covered situations where the Tribunal had either consciously or inadvertently omitted to exercise jurisdictional powers vested in it and relevant for its decision of the case or of a particular material issue in the case.

In that connection, the Court rejected the contentions of Mr. Fasla that the Tribunal had failed to exercise jurisdiction in that it had not fully considered and passed upon his claims for damages for injury to professional reputation and career prospects and for reimbursement of costs, and in that it had omitted to order the recalculation of his remuneration and the correction and completion of his personal record.

The Court next examined certain contentions which had not been fully set forth by Mr. Fasla in his application to the Committee on Applications for Review but which he had enlarged upon in the statement of his views transmitted to the Court, according to which his recall and the non-renewal of his contract had been decided for unlawful reasons constituting a misuse of powers. The Court noted that, in his application to the Tribunal, Mr. Fasla had not requested the rescission of those decisions on grounds of illegality or improper motivation, and that the Tribunal could not be accused of failure to exercise jurisdiction on the ground that it had failed

to take measures which had not been requisite for its adjudication and which none of the parties had asked it to take.

Did the United Nations Administrative Tribunal Commit a Fundamental Error in Procedure Occasioning a Failure of Justice?
(paras. 88–100 of the Advisory Opinion)

The Court first determined the meaning and scope of the concept of fundamental error in procedure which had occasioned a failure of justice. In cases before the Administrative Tribunal the essence of the matter was that a staff member had a fundamental right to present his case, either orally or in writing, and to have it considered by the Tribunal before it determined his rights. An error in procedure was fundamental and constituted a failure of justice when it was of such a kind as to violate that right and in that sense to deprive the staff member of justice.

The Court noted that what Mr. Fasla formulated under the heading whether of failure to exercise jurisdiction or of fundamental error in procedure, or both simultaneously, appeared to be essentially the same complaints, concerning for the most part the manner in which the Tribunal had adjudicated the merits of his claims, rather than assertions of errors in procedure in the proper sense of the term. His only complaint concerning an error in procedure was the complaint that the Tribunal's decisions rejecting the claims had not been supported by any adequate reasoning. After considering this complaint, the Court concluded that, having regard to the form and content of the Judgement, its reasoning did not fall short of the requirements of the rule that a judgement of the Administrative Tribunal must state the reasons on which it was based.

The Court finally declared that there was no occasion for it to pronounce upon Mr. Fasla's request for costs in respect of the review proceedings. It confined itself to the observation that when the Committee found that there was a substantial basis for the application, it might be undesirable that the costs should have to be borne by the staff member.

For these reasons, the Court has given the decision indicated above.

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55. FISHERIES JURISDICTION CASE (UNITED KINGDOM *v.* ICELAND) (INTERIM PROTECTION)

Order of 12 July 1973

56. FISHERIES JURISDICTION CASE (FEDERAL REPUBLIC OF GERMANY *v.* ICELAND) (INTERIM PROTECTION)

Order of 12 July 1973

By Orders made on 12 July 1973 in each of the two Fisheries Jurisdiction cases (United Kingdom *v.* Iceland and Federal Republic of Germany *v.* Iceland) the Court, by 11 votes to 3, confirmed that the provisional measures indicated in operative paragraph 1 of the Orders of 17 August 1972 should, subject to the power of revocation or modification conferred on the Court by paragraph 7 of Article 61 of its 1946 Rules, remain operative until the Court has given final judgment in each case.

In making these two Orders the Court was composed as follows:

President Lachs; Vice-President Ammoun; Judges Forster, Gros, Bengzon, Petrén, Onyeama, Ignacio-Pinto, de Castro, Morozov, Jiménez de Aréchaga, Sir Humphrey Waldock, Nagendra Singh and Ruda.

To each of the two Orders Judge Ignacio-Pinto appended a declaration and Judges Gros and Petrén appended dissenting opinions, indicating their reasons for casting a negative vote.

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In the considerations the Court mentions in each Order, it recalls:

—that negotiations have taken place or are taking place between the States concerned with a view to reaching an interim arrangement pending final settlement of the disputes;

—that the provisional measures indicated by the Court do not exclude an interim arrangement which may be agreed upon by the Governments concerned, based on catch-limitation figures different from those indicated as maxima by the Court and on related restrictions concerning areas closed to fishing, number and type of vessels allowed and forms of control of the agreed provisions;

—that the Court, pending the final decision, and in the absence of such interim arrangement, must remain concerned to preserve, by the indication of provisional measures, the rights which may subsequently be adjudged by the Court to belong respectively to the Parties.

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It may be recalled that, in its Orders of 17 August 1972, made by 14 votes to 1, the Court, in operative paragraph 1, had indicated interim measures of protection to the effect, *inter alia*, that the Parties should each of them ensure that no action of any kind was taken which might aggravate or extend the disputes, that Iceland should refrain from taking any measures to enforce the new regulations promulgated on the subject of the limits of its exclusive fishery zone against vessels registered in the United Kingdom or in the Federal Republic of Germany, and that the vessels in question should not take annual catches of more than 170,000 or 119,000 metric tons respectively. The two Orders in question also contained an operative paragraph 2 in the following terms:

"Unless the Court has meanwhile delivered its final judgment in the case, it shall, at an appropriate time before

15 August 1973, review the matter at the request of either Party in order to decide whether the foregoing measures shall continue or need to be modified or revoked."

On 2 February 1973 the Court delivered two Judgments finding that it possessed jurisdiction to deal with each of the two cases and, on 15 February 1973, it made two Orders fixing the time-limits for the written proceedings on the merits in each case.

On 22 June 1973 the Agent for the United Kingdom requested the Court to confirm that the interim measures of protection indicated by the Court would continue until the Court had given final judgment in the case or until further order, and the Agent for the Federal Republic requested the Court to confirm the opinion of his Government that the Order of 17 August 1972 would continue to be operative after 15 August 1973.

By a telegram of 2 July 1973 the Government of Iceland (which has not appointed an agent or recognized the competence of the Court) submitted observations on these requests, protested against the continuation of the measures indicated, maintained that highly mobile fishing fleets should not be allowed to inflict a constant threat of deterioration of the fish stocks and endanger the viability of a one-source economy, and concluded that to freeze the present dangerous situation might cause irreparable harm to the interests of the Icelandic nation.

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57. FISHERIES JURISDICTION CASE (UNITED KINGDOM *v.* ICELAND) (MERITS)

Judgment of 25 July 1974

In its Judgment on the merits in the case concerning Fisheries Jurisdiction (United Kingdom *v.* Iceland), the Court, by ten votes to four:

(1) found that the Icelandic Regulations of 1972 constituting a unilateral extension of the exclusive fishing rights of Iceland to 50 nautical miles from the baselines are not opposable to the United Kingdom;

(2) found that Iceland is not entitled unilaterally to exclude United Kingdom fishing vessels from areas between the 12-mile and 50-mile limits, or unilaterally to impose restrictions on their activities in such areas;

(3) held that Iceland and the United Kingdom are under mutual obligations to undertake negotiations in good faith for an equitable solution of their differences;

(4) indicated certain factors which are to be taken into account in these negotiations (preferential rights of Iceland, established rights of the United Kingdom, interests of other States, conservation of fishery resources, joint examination of measures required).

The Court was composed as follows: President Lachs, Judges Forster, Gros, Bengzon, Petrén, Onyeama, Dillard, Ignacio-Pinto, de Castro, Morozov, Jiménéz de Aréchaga, Sir Humphrey Waldock, Nagendra Singh and Ruda.

Among the ten Members of the Court who voted in favour of the Judgment, the President and Judge Nagendra Singh appended declarations; Judges Forster, Bengzon, Jiménez de Aréchaga, Nagendra Singh (already mentioned) and Ruda appended a joint separate opinion, and Judges Dillard, de Castro and Sir Humphrey Waldock appended separate opinions.

Of the four judges who voted against the Judgment, Judge Ignacio-Pinto appended a declaration and Judges Gros, Petrén and Onyeama appended dissenting opinions.

In these declarations and opinions the judges concerned make clear and explain their positions.

Procedure—Failure of Party to Appear
(paras. 1–18 of the Judgment)

In its Judgment, the Court recalls that proceedings were instituted by the United Kingdom against Iceland on 14 April 1972. At the request of the United Kingdom, the Court indicated interim measures of protection by an Order dated 17 August 1972 and confirmed them by a further Order dated 12 July 1972. By a Judgment of 2 February 1973 the Court found that it had jurisdiction to deal with the merits of the dispute.

In its final submissions, the United Kingdom asked the Court to adjudge and declare:

(*a*) that the claim by Iceland to be entitled to a zone of exclusive fisheries jurisdiction extending 50 nautical miles from the baselines is without foundation in international law and is invalid;

(*b*) that, as against the United Kingdom, Iceland is not entitled unilaterally to assert an exclusive fisheries jurisdiction beyond the limit of 12 miles agreed to in an Exchange of Notes in 1961;

(*c*) that Iceland is not entitled unilaterally to exclude British fishing vessels from the area of the high seas beyond the 12-mile limit or unilaterally to impose restrictions on their activities in that area;

(*d*) that Iceland and the United Kingdom are under a duty to examine together, either bilaterally or with other interested States, the need on conservation grounds for the introduction of restrictions on fishing activities in the said area of the high seas and to negotiate for the establishment of such a régime in that area as will *inter alia* ensure for Iceland a preferential position consistent with its position as a State specially dependent on its fisheries.

Iceland did not take part in any phase of the proceedings. By a letter of 29 May 1972 Iceland informed the Court that it regarded the Exchange of Notes of 1961 as terminated; that in its view there was no basis under the Statute for the Court to exercise jurisdiction; and that, as it considered its vital interests to be involved, it was not willing to confer jurisdiction on the Court in any case involving the extent of its fishery limits. In a letter dated 11 January 1974, Iceland stated that it did not accept any of the statements of fact or any of the allegations or contentions of law submitted on behalf of the United Kingdom.

The United Kingdom having referred to Article 53 of the Statute, the Court had to determine whether the claim was founded in fact and law. The facts requiring the Court's consideration in adjudicating upon the claim were attested by documentary evidence whose accuracy there appeared to be no reason to doubt. As for the law, although it was to be

regretted that Iceland had failed to appear, the Court was nevertheless deemed to take notice of international law, which lay within its own judicial knowledge. Having taken account of the legal position of each Party and acted with particular circumspection in view of the absence of the respondent State, the Court considered that it had before it the elements necessary to enable it to deliver judgment.

History of the Dispute—Jurisdiction of the Court
(paras. 19–48 of the Judgment)

The Court recalled that in 1948 the Althing (the Parliament of Iceland) had passed a law concerning the Scientific Conservation of the Continental Shelf Fisheries which empowered the Government to establish conservation zones wherein all fisheries should be subject to Icelandic rules and control to the extent compatible with agreements with other countries. Subsequently the 1901 Anglo-Danish Convention which had fixed a limit for Iceland's exclusive right of fishery round its coasts was denounced by Iceland as from 1951, new Icelandic Regulations of 1958 proclaimed a 12-mile limit and the Althing declared by a resolution in 1959 "that recognition should be obtained of Iceland's right to the entire continental shelf area in conformity with the policy adopted by the Law of 1948". Following a number of incidents and a series of negotiations, Iceland and the United Kingdom agreed on an Exchange of Notes which took place on 11 March 1961 and specified *inter alia* that the United Kingdom would no longer object to a 12-mile fishery zone, that Iceland would continue to work for the implementation of the 1959 resolution regarding the extension of fisheries jurisdiction but would give the United Kingdom six months' notice of such extension and that "in case of a dispute in relation to such extension, the matter shall, at the request of either Party, be referred to the International Court of Justice".

In 1971, the Icelandic Government announced that the agreement on fisheries jurisdiction with the United Kingdom would be terminated and that the limit of exclusive Icelandic fisheries jurisdiction would be extended to 50 miles. In an aide-mémoire of 24 February 1972 the United Kingdom was formally notified of this intention. In reply the latter emphasized that the Exchange of Notes was not open to unilateral denunciation and that in its view the measure contemplated "would have no basis in international law". On 14 July 1972 new Regulations were introduced whereby Iceland's fishery limits would be extended to 50 miles as from 1 September 1972 and all fishing activities by foreign vessels inside those limits be prohibited. Their enforcement gave rise, while proceedings before the Court were continuing and Iceland was refusing to recognize the Court's decisions, to a series of incidents and negotiations which resulted on 13 November 1973 in an exchange of Notes constituting an interim agreement between the United Kingdom and Iceland. This agreement, concluded for two years, provided for temporary arrangements "pending a settlement of the substantive dispute and without prejudice to the legal position or rights of either Government in relation thereto".

The Court considered that the existence of the interim agreement ought not to lead it to refrain from pronouncing judgment: it could not be said that the issues before the Court had become without object, since the dispute still continued; and, though it was beyond the powers of the Court to declare the law between the Parties as it might be at the date of expiration of the interim agreement, that could not relieve the Court from its obligation to render a judgment on the basis of the law as it now existed; furthermore, the Court ought not to discourage the making of interim arrangements in future disputes with the object of reducing friction.

Reverting to the 1961 Exchange of Notes, which in the Court's Judgment of 1973 was held to be a treaty in force, the Court emphasized that it would be too narrow an interpretation of the compromissory clause (quoted above) to conclude that it limited the Court's jurisdiction to giving an affirmative or a negative answer to the question of whether the Icelandic Regulations of 1972 were in conformity with international law. It seemed evident that the dispute between the Parties included disagreements as to their respective rights in the fishery resources and the adequacy of measures to conserve them. It was within the power of the Court to take into consideration all relevant elements.

Applicable Rules of International Law
(paras. 49–78 of the Judgment)

The first United Nations Conference on the Law of the Sea (Geneva, 1958) had adopted a Convention on the High Seas, Article 2 of which declared the principle of the freedom of the high seas, that is to say, freedom of navigation, freedom of fishing, etc., to "be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas".

The question of the breadth of the territorial sea and that of the extent of the coastal State's fishery jurisdiction had been left unsettled at the 1958 Conference and were not settled at a second Conference held in Geneva in 1960. However, arising out of the general consensus at that second Conference, two concepts had since crystallized as customary law: that of a fishery zone, between the territorial sea and the high seas, within which the coastal State could claim exclusive fisheries jurisdiction—it now being generally accepted that that zone could extend to the 12-mile limit—and the concept, in respect of waters adjacent to the zone of exclusive fishing rights, of preferential fishing rights in favour of the coastal State in a situation of special dependence on its fisheries. The Court was aware that in recent years a number of States had asserted an extension of their exclusive fishery limits. The Court was likewise aware of present endeavours, pursued under the auspices of the United Nations, to achieve in a third Conference on the Law of the Sea the further codification and progressive development of that branch of the law, as it was also of various proposals and preparatory documents produced in that framework. But, as a court of law, it could not render judgment *sub specie legis ferendae* or anticipate the law before the legislator had laid it down. It must take into account the existing rules of international law and the Exchange of Notes of 1961.

The concept of preferential fishing rights had originated in proposals submitted by Iceland at the Geneva Conference of 1958, which had confined itself to recommending that:

> ". . . where, for the purpose of conservation, it becomes necessary to limit the total catch of a stock or stocks of fish in an area of the high seas adjacent to the territorial sea of a coastal State, any other States fishing in that area should collaborate with the coastal State to secure just treatment of such situation, by establishing agreed measures which shall recognize any preferential requirements of the coastal State resulting from its dependence upon the fishery concerned while having regard to the interests of the other States".

At the 1960 Conference the same concept had been embodied in an amendment incorporated by a substantial vote into one of the proposals concerning the fishing zone. The contemporary practice of States showed that that concept, in addition to its increasing and widespread acceptance, was being implemented by agreements, either bilateral or

multilateral. In the present case, in which the exclusive fishery zone within the limit of 12 miles was not in dispute, the United Kingdom had expressly recognized the preferential rights of the other Party in the disputed waters situated beyond that limit. There could be no doubt of the exceptional dependence of Iceland on its fisheries and the situation appeared to have been reached when it was imperative to preserve fish stocks in the interests of rational and economic exploitation.

However, the very notion of preferential fishery rights for the coastal State in a situation of special dependence, though it implied a certain priority, could not imply the extinction of the concurrent rights of other States. The fact that Iceland was entitled to claim preferential rights did not suffice to justify its claim unilaterally to exclude British fishing vessels from all fishing beyond the limit of 12 miles agreed to in 1961.

The United Kingdom had pointed out that its vessels had been fishing in Icelandic waters for centuries, that they had done so in a manner comparable with their present activities for upwards of fifty years and that their exclusion would have very serious adverse consequences. There too the economic dependence and livelihood of whole communities were affected, and the United Kingdom shared the same interest in the conservation of fish stocks as Iceland, which had for its part admitted the existence of the Applicant's historic and special interests in fishing in the disputed waters. Iceland's 1972 Regulations were therefore not opposable to the United Kingdom; they disregarded the established rights of that State and also the Exchange of Notes of 1961, and they constituted an infringement of the principle (1958 Convention on the High Seas, Art. 2) of reasonable regard for the interests of other States, including the United Kingdom.

In order to reach an equitable solution of the present dispute it was necessary that the preferential fishing rights of Iceland should be reconciled with the traditional fishing rights of the United Kingdom through the appraisal at any given moment of the relative dependence of either State on the fisheries in question, while taking into account the rights of other States and the needs of conservation. Thus Iceland was not in law entitled unilaterally to exclude United Kingdom fishing vessels from areas to seaward of the limit of 12 miles agreed to in 1961 or unilaterally to impose restrictions on their activities. But that did not mean that the United Kingdom was under no obligation to Iceland with respect to fishing in the disputed waters in the 12-mile to 50-mile zone. Both Parties had the obligation to keep under review the fishery resources in those waters and to examine together, in the light of the information available, the measures required for the conservation and development, and equitable exploitation, of those resources, taking into account any international agreement that might at present be in force or might be reached after negotiation.

The most appropriate method for the solution of the dispute was clearly that of negotiation with a view to delimiting the rights and interests of the Parties and regulating equitably such questions as those of catch-limitation, share allocations and related restrictions. The obligation to negotiate flowed from the very nature of the respective rights of the Parties and corresponded to the provisions of the United Nations Charter concerning peaceful settlement of disputes. The Court could not accept the view that the common intention of the Parties was to be released from negotiating throughout the whole period covered by the 1973 interim agreement. The task before them would be to conduct their negotiations on the basis that each must in good faith pay reasonable regard to the legal rights of the other, to the facts of the particular situation and to the interests of other States with established fishing rights in the area.

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For those reasons, the Court gave (Judgment, para. 79) the decision indicated above.

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58. FISHERIES JURISDICTION CASE (FEDERAL REPUBLIC OF GERMANY *v.* ICELAND) (MERITS)

Judgment of 25 July 1974

In its Judgment on the merits in the case concerning Fisheries Jurisdiction (Federal Republic of Germany *v.* Iceland), the Court, by ten votes to four:

(1) found that the Icelandic Regulations of 1972 constituting a unilateral extension of the exclusive fishing rights of Iceland to 50 nautical miles from the baselines are not opposable to the Federal Republic of Germany;

(2) found that Iceland is not entitled unilaterally to exclude fishing vessels of the Federal Republic of Germany from areas between the 12-mile and 50-mile limits or unilaterally to impose restrictions on their activities in such areas;

(3) held that Iceland and the Federal Republic of Germany are under mutual obligations to undertake negotiations in good faith for an equitable solution of their differences;

(4) indicated certain factors which are to be taken into account in these negotiations (preferential rights of Iceland, established rights of the Federal Republic of Germany, interests of other States, conservation of fishery resources, joint examination of measures required);

(5) found that it is unable to accede to the submission of the Federal Republic concerning a claim to be entitled to compensation.

The Court was composed as follows: President Lachs; Judges Forster, Gros, Bengzon, Petrén, Onyeama, Dillard, Ignacio-Pinto, de Castro, Morozov, Jiménez de Aréchaga, Sir Humphrey Waldock, Nagendra Singh and Ruda.

Among the ten Members of the Court who voted in favour of the Judgment, the President and Judges Dillard and Nagendra Singh appended declarations; Judges Forster, Bengzon, Jiménez de Aréchaga, Nagendra Singh (already mentioned) and Ruda appended a joint separate opinion, and Judges de Castro and Sir Humphrey Waldock appended separate opinions.

Of the four judges who voted against the Judgment, Judge Ignacio-Pinto appended a declaration and Judges Gros, Petrén and Onyeama appended dissenting opinions.

In these declarations and opinions the judges concerned make clear and explain their positions.

Procedure—Failure of Party to Appear
(paras. 1–19 of the Judgment)

In its Judgment, the Court recalled that proceedings were instituted by the Federal Republic of Germany against Iceland on 26 May 1972. At the request of the Federal Republic of Germany, the Court indicated interim measures of protection by an Order dated 17 August 1972 and confirmed them by a further Order dated 12 July 1973. By a Judgment of 2 February 1973 the Court found that it had jurisdiction to deal with the merits of the dispute.

The Court did not include upon the bench any judge of the nationality of either of the Parties. In a letter dated 25 September 1973 the Federal Republic informed the Court that, as Iceland was declining to take part in the proceedings and to avail itself of the right to have a judge *ad hoc*, the Federal Republic did not feel it necessary to insist on the appointment of one. On 17 January 1974 the Court decided by 9 votes to 5 not to join the proceedings to those instituted by the United Kingdom against Iceland. In reaching this decision the Court took into account the fact that, while the basic legal issues in each case appeared to be identical, there were differences between the positions of the two Applicants, and between their respective submissions, and that joinder would be contrary to their wishes.

In its final submissions the Federal Republic asked the Court to adjudge and declare:

(*a*) that the unilateral extension by Iceland of its zone of exclusive fisheries jurisdiction to 50 nautical miles from the baselines has, as against the Federal Republic of Germany, no basis in international law;

(*b*) that the Icelandic Regulations issued for this purpose shall not be enforced against the Federal Republic of Germany or vessels registered therein;

(*c*) that if Iceland establishes a need for conservation measures in respect to fish stocks beyond the limit of 12 miles agreed to in an Exchange of Notes in 1961, such measures may be taken only on the basis of an agreement between the Parties, concluded either bilaterally or within a multilateral framework, with due regard to the special dependence of Iceland on its fisheries and to the traditional fisheries of the Federal Republic in the waters concerned;

(*d*) that the acts of interference by Icelandic coastal patrol boats with fishing vessels registered in the Federal Republic are unlawful under international law and that Iceland is under an obligation to make compensation therefor to the Federal Republic.

Iceland did not take part in any phase of the proceedings. By a letter of 27 June 1972 Iceland informed the Court that it regarded the Exchange of Notes of 1961 as terminated; that in its view there was no basis under the Statute for the Court to exercise jurisdiction; and that, as it considered its vital interests to be involved, it was not willing to confer jurisdiction on the Court in any case involving the extent of its fishery limits. In a letter dated 11 January 1974, Iceland stated that it did not accept any of the statements of fact or any of the allegations or contentions of law submitted on behalf of the Federal Republic.

In those circumstances, the Court, under the terms of Article 53 of the Statute, had to determine whether the claim was well founded in fact and law. The facts requiring the Court's consideration in adjudicating upon the claim were attested by documentary evidence whose accuracy there appeared to be no reason to doubt. As for the law, although it was to be regretted that Iceland had failed to appear, the Court was nevertheless deemed to take notice of international law, which lay within its own judicial knowledge. Having taken account of the legal position of each Party and acted with particular circumspection in view of the absence of the respondent State, the Court considered that it had before it the elements necessary to enable it to deliver judgment.

History of the Dispute—Jurisdiction of the Court
(paras. 20–40 of the Judgment)

The Court recalled that in 1948 the Althing (the Parliament of Iceland) passed a law concerning the Scientific Conservation of the Continental Shelf Fisheries which empowered the Government to establish conservation zones wherein all fisheries should be subject to Icelandic rules and control, to the extent compatible with agreements with other countries. In 1958 Iceland issued regulations extending the limits of its exclusive right of fishery round its coasts to 12 nautical miles, and in 1959 the Althing declared by a resolution "that recognition should be obtained of Iceland's right to the entire continental shelf area in conformity with the policy adopted by the Law of 1948". After refusing to recognize the validity of the new Regulations, the Federal Republic negotiated with Iceland and, on 19 July 1961, concluded with it an Exchange of Notes which specified *inter alia* that the Federal Republic would no longer object to a 12-mile fishery zone, that Iceland would continue to work for the implementation of the 1959 Resolution regarding the extension of fisheries jurisdiction but would give the Federal Republic six months' notice of such extension and that "in case of a dispute in relation to such an extension, the matter shall, at the request of either Party, be referred to the International Court of Justice".

In 1971 the Icelandic Government announced that the agreement on fisheries jurisdiction with the Federal Republic would be terminated and that the limit of Iceland's exclusive fisheries jurisdiction would be extended to 50 miles. By an aide-mémoire of 24 February 1972 the Federal Republic was formally notified of that intention and replied that, in its view, the measures contemplated would be "incompatible with the general rules of international law" and that the Exchange of Notes could not be denounced unilaterally. On 14 July 1972 new Regulations were introduced whereby Iceland's fishery limits would be extended to 50 miles as from 1 September 1972 and all fishing activities by foreign vessels inside those limits be prohibited. Their enforcement gave rise, while proceedings before the Court were continuing and Iceland was refusing to recognize the Court's decisions, to incidents, and to negotiations which did not lead to any agreement.

The Court, having in its Judgment of 1973 held the Exchange of Notes of 1961 to be a treaty in force, emphasized that it would be too narrow an interpretation of its compromissory clause (quoted above) to conclude that it limited the Court's jurisdiction to giving an affirmative or a negative answer to the question of whether the Icelandic Regulations of 1972 were in conformity with international law. It seemed evident that the dispute between the Parties included disagreements as to their respective rights in fishery resources and the adequacy of measures to conserve them. It was within the power of the Court to take into consideration all relevant elements.

Applicable Rules of International Law
(paras. 41–70 of the Judgment)

The first United Nations Conference on the Law of the Sea (Geneva, 1958) had adopted a Convention on the High Seas, Article 2 of which declared the principle of the freedom of the high seas, that is to say, freedom of navigation, freedom of fishing, etc., to "be exercised by all States with reasonable

regard to the interests of other States in their exercise of the freedom of the high seas".

The question of the breadth of the territorial sea and that of the extent of the coastal State's fishery jurisdiction had been left unsettled at the 1958 Conference and were not settled at a second Conference held in Geneva in 1960. However, arising out of the general consensus at that second Conference, two concepts had since crystallized as customary law: that of a fishery zone, between the territorial sea and the high seas, within which the coastal State could claim exclusive fisheries jurisdiction—it now being generally accepted that that zone could extend to the 12-mile limit—and the concept, in respect of waters adjacent to the zone of exclusive fishing rights, of preferential fishing rights in favour of the coastal State in a situation of special dependence on its fisheries. The Court was aware that in recent years a number of States had asserted an extension of their exclusive fishery limits. The Court was likewise aware of present endeavours, pursued under the auspices of the United Nations, to achieve in a third Conference on the Law of the Sea the further codification and progressive development of that branch of the law, as it was also of various proposals and preparatory documents produced in that framework. But, as a court of law, it could not render judgment *sub specie legis ferendae* or anticipate the law before the legislator had laid it down. It must take into account the existing rules of international law and the Exchange of Notes of 1961.

The concept of preferential fishing rights had originated in proposals submitted by Iceland at the Geneva Conference of 1958, which had confined itself to recommending that:

> ". . . where, for the purpose of conservation, it becomes necessary to limit the total catch of a stock or stocks of fish in an area of the high seas adjacent to the territorial sea of a coastal State, any other States fishing in that area should collaborate with the coastal State to secure just treatment of such situation, by establishing agreed measures which shall recognize any preferential requirements of the coastal State resulting from its dependence upon the fishery concerned while having regard to the interests of the other States".

At the 1960 Conference the same concept had been embodied in an amendment incorporated by a substantial vote into one of the proposals concerning the fishing zone. The contemporary practice of States showed that that concept, in addition to its increasing and widespread acceptance, was being implemented by agreements, either bilateral or multilateral. In the present case, in which the exclusive fishery zone within the limit of 12 miles was not in dispute, the Federal Republic of Germany had expressly recognized the preferential rights of the other Party in the disputed waters situated beyond that limit. There could be no doubt of the exceptional dependence of Iceland on its fisheries and the situation appeared to have been reached when it was imperative to preserve fish stocks in the interests of rational and economic exploitation.

However, the very notion of preferential fishery rights for the coastal State in a situation of special dependence, though it implied a certain priority, could not imply the extinction of the concurrent rights of other States. The fact that Iceland was entitled to claim preferential rights did not suffice to justify its claim unilaterally to exclude fishing vessels of the Federal Republic from all fishing beyond the limit of 12 miles agreed to in 1961.

The Federal Republic of Germany had pointed out that its vessels started fishing in the Icelandic area as long ago as the end of the nineteenth century, and had further stated that the loss of the fishing grounds concerned would have an appreciable impact on its economy. There too the economic dependence and livelihood of whole communities were affected, and the Federal Republic of Germany shared the same interest in the conservation of fish stocks as Iceland, which had for its part admitted the existence of the Applicant's historic and special interests in fishing in the disputed waters. Iceland's 1972 Regulations were therefore not opposable to the Federal Republic of Germany: they disregarded the established rights of that State and also the Exchange of Notes of 1961, and they constituted an infringement of the principle (1958 Convention on the High Seas, Art. 2) of reasonable regard for the interests of other States, including the Federal Republic.

In order to reach an equitable solution of the present dispute it was necessary that the preferential fishing rights of Iceland should be reconciled with the traditional fishing rights of the Federal Republic of Germany through the appraisal at any given moment of the relative dependence of either State on the fisheries in question, while taking into account the rights of other States and the needs of conservation. Thus Iceland was not in law entitled unilaterally to exclude fishing vessels of the Federal Republic from areas to seaward of the limit of 12 miles agreed to in 1961 or unilaterally to impose restrictions on their activities. But that did not mean that the Federal Republic of Germany was under no obligation to Iceland with respect to fishing in the disputed waters in the 12-mile to 50-mile zone. Both Parties had the obligation to keep under review the fishery resources in those waters and to examine together, in the light of the information available, the measures required for the conservation and development, and equitable exploitation, of those resources, taking into account any international agreement that might at present be in force or might be reached after negotiation.

The most appropriate method for the solution of the dispute was clearly that of negotiation with a view to delimiting the rights and interests of the Parties and regulating equitably such questions as those of catch-limitation, share allocations and related restrictions. The obligation to negotiate flowed from the very nature of the respective rights of the Parties and corresponded to the provisions of the United Nations Charter concerning peaceful settlement of disputes. The task before the Parties would be to conduct their negotiations on the basis that each must in good faith pay reasonable regard to the legal rights of the other, to the facts of the particular situation and to the interests of other States with established fishing rights in the area.

The interim measures indicated in the Order of 17 August 1972 would cease to have effect as from the date of the Judgment, but the Parties would not therefore be at liberty to conduct their fishing activities in the disputed waters without limitation. They would be under the obligation to pay reasonable regard to each other's rights and to conservation requirements pending the conclusion of the negotiations.

Claim to Be Entitled to Compensation
(paras. 71–76 of the Judgment)

The fourth submission of the Federal Republic of Germany (see above) raised the question of compensation for alleged acts of harassment of its fishing vessels by Icelandic coastal patrol boats. Arising directly out of the question which was the subject-matter of the Application, that submission fell within the scope of the Court's jurisdiction. However, it was presented in an abstract form and the Court was prevented from making an all-embracing finding of lia-

bility which would cover matters as to which it had only limited information and slender evidence.

For those reasons, the Court gave (Judgment, para. 77) the decision indicated above.

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59. NUCLEAR TESTS CASE (AUSTRALIA *v.* FRANCE)

Judgment of 20 December 1974

In its judgment in the case concerning Nuclear Tests (Australia *v.* France), the Court, by 9 votes to 6, has found that the claim of Australia no longer had any object and that the Court was therefore not called upon to give a decision thereon.

In the reasoning of its Judgment, the Court adduces *inter alia* the following considerations: Even before turning to questions of jurisdiction and admissibility, the Court has first to consider the essentially preliminary question as to whether a dispute exists and to analyse the claim submitted to it (paras. 22–24 of Judgment); the proceedings instituted before the Court on 9 May 1973 concerned the atmospheric nuclear tests conducted by France in the South Pacific (para. 16 of Judgment); the original and ultimate objective of Australia is to obtain a termination of those tests (paras. 32–41 of Judgment); France, by various public statements made in 1974, has announced its intention, following the completion of the 1974 series of atmospheric tests, to cease the conduct of such tests (paras. 32–41 of Judgment); the Court finds that the objective of Australia has in effect been accomplished, inasmuch as France has undertaken the obligation to hold no further nuclear tests in the atmosphere in the South Pacific (paras. 47–52 of Judgment); the dispute having thus disappeared, the claim no longer has any object and there is nothing on which to give judgment (paras. 55–59 of Judgment).

Upon the delivery of the Judgment, the Order of 22 June 1973 indicating interim measures of protection ceases to be operative and the measures in question lapse (para. 61 of Judgment).

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For the purposes of the Judgment the Court was composed as follows: President Lachs; Judges Forster, Gros, Bengzon, Petrén, Onyeama, Dillard, Ignacio-Pinto, de Castro, Morozov, Jiménez de Aréchaga, Sir Humphrey Waldock, Nagendra Singh and Ruda; Judge *ad hoc* Sir Garfield Barwick.

The President appended a declaration to the Judgment, and Judges Bengzon, Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock a joint declaration.

Of the nine Members of the Court who voted for the decision, Judges Forster, Gros, Petrén and Ignacio-Pinto appended separate opinions.

Of the six judges who voted against the decision, Judges Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock have appended a joint dissenting opinion, and Judges de Castro and Sir Garfield Barwick dissenting opinions.

These opinions make known and substantiate the positions adopted by the judges in question. (See also the following summary for further analysis.)

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60. NUCLEAR TESTS CASE (NEW ZEALAND *v.* FRANCE)

Judgment of 20 December 1974

In its judgment in the case concerning Nuclear Tests (New Zealand *v.* France), the Court, by 9 votes to 6, has found that the claim of New Zealand no longer had any object and that the Court was therefore not called upon to give a decision thereon.

In the reasoning of its Judgment, the Court adduces *inter alia* the following considerations: Even before turning to the questions of jurisdiction and admissibility, the Court has first to consider the essentially preliminary question as to whether a dispute exists and to analyse the claim submitted to it (paras. 22–24 of Judgment); the proceedings instituted before the Court on 9 May 1973 concerned the legality of atmospheric nuclear tests conducted by France in the South Pacific (para. 16 of Judgment); the original and ultimate objective of New Zealand is to obtain a termination of those tests (paras. 25–31 of Judgment); France, by various public statements made in 1974, has announced its intention, following the completion of the 1974 series of atmospheric tests, to cease the conduct of such tests (paras. 33–44 of Judgment); the Court finds that the objective of New Zealand has in effect been accomplished, inasmuch as France has undertaken the obligation to hold no further nuclear tests in the atmosphere in the South Pacific (paras. 50–55 of Judgment); the dispute having thus disappeared, the claim no longer has any object and there is nothing on which to give judgment (paras. 58–62 of Judgment).

Upon the delivery of the Judgment, the Order of 22 June 1973 indicating interim measures of protection ceases to be operative and the measures in question lapse (para. 64 of Judgment).

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For the purposes of the Judgment the Court was composed as follows: President Lachs; Judges Forster, Gros, Bengzon, Petrén, Onyeama, Dillard, Ignacio-Pinto, de Castro, Morozov, Jiménez de Aréchaga, Sir Humphrey Waldock, Nagendra Singh and Ruda; Judge *ad hoc* Sir Garfield Barwick.

Of the nine Members of the Court who voted for the decision, Judges Forster, Gros, Petrén and Ignacio-Pinto appended separate opinions.

Of the six judges who voted against the decision, Judges Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock appended a joint dissenting opinion, and Judges de Castro and Sir Garfield Barwick dissenting opinions.

These opinions make known and substantiate the positions adopted by the judges in question.

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Also on 20 December 1974, the Court made two Orders regarding applications submitted by the Government of Fiji for permission to intervene in the two cases concerning Nuclear Tests (Australia *v.* France; New Zealand *v.* France). In these Orders, which were not read in public, the Court found, following the above-mentioned Judgments, that these applications lapsed and that no further action thereon was called for. These Orders were voted unanimously by the Court in the same composition as for the Judgments. Judges Gros, Onyeama, Jiménez de Aréchaga and Sir Garfield Barwick appended declarations to them, and Judges Dillard and Sir Humphrey Waldock a joint declaration.

Although the Court delivered a separate Judgment for each of the two Nuclear Tests cases referred to above, they are analysed together in the summary which follows.

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Procedure
(paras. 1–20 of each Judgment)

In its Judgment, the Court recalls that on 9 May 1973 the Applicant instituted proceedings against France in respect of French atmospheric nuclear tests in the South Pacific. To found the jurisdiction of the Court, the Application relied on the General Act for the Pacific Settlement of International Disputes concluded at Geneva in 1928 and Articles 36 and 37 of the Statute of the Court. By a letter of 16 May 1973 France stated that it considered that the Court was manifestly not competent in the case, that it could not accept its jurisdiction and that it requested the removal of the case from the Court's list.

The Applicant having requested the Court to indicate interim measures of protection, the Court, by an Order of 22 June 1973, indicated *inter alia* that, pending its final decision, France should avoid nuclear tests causing the deposit of radio-active fall-out on the territory of the Applicant. By various communications the Applicant has informed the Court that further series of atmospheric tests took place in July-August 1973 and June-September 1974.

By the same Order of 22 June 1973, the Court, considering that it was necessary to begin by resolving the questions of the Court's jurisdiction and of the admissibility of the Application, decided that the proceedings should first be addressed to these questions. The Applicant filed a Memorial and presented argument at public hearings. It submitted that the Court had jurisdiction and that the Application was admissible. France did not file any Counter-Memorial and was not represented at the hearings; its attitude was defined in the above-mentioned letter of 16 May 1973.

With regard to the French request that the case be removed from the list—a request which the Court, in its Order of 22 June 1973, had duly noted while feeling unable to accede to it at that stage—the Court observes that it has had the opportunity of examining the request in the light of the subsequent proceedings. It finds that the present case is not one in which the procedure of summary removal from the list would be appropriate. It is to be regretted that France has failed to appear in order to put forward its arguments, but the Court nevertheless has to proceed and reach a conclusion, having regard to the evidence brought before it and the arguments addressed to it by the Applicant, and also to any documentary or other evidence which might be relevant.

Object of the Claim
(paras. 21–41 of the Judgment in the Australian case, and 21–44 in the New Zealand case)

The present phase of the proceedings concerns the jurisdiction of the Court and admissibility of the Application. In examining such questions, the Court is entitled, and in some circumstances may be required, to go into other questions which may not be strictly capable of classification as matters of jurisdiction or admissibility but are of such a nature as to require examination in priority to those matters. By virtue of an inherent jurisdiction which the Court possesses *qua* judicial organ, it has first to examine a question which it finds to be essentially preliminary, namely the existence of a dispute, for, whether or not the Court has jurisdiction in the present case, the resolution of that question could exert a decisive influence on the continuation of the proceedings. It is therefore necessary for it to make a detailed analysis of the claim submitted in the Application, which is required by Article 40 of the Statute to indicate the subject of the dispute.

In its Application, Australia asks the Court:

—to adjudge and declare that "the carrying out of further atmospheric nuclear weapon tests in the South Pacific Ocean is not consistent with applicable rules of international law" and to order "that the French Republic shall not carry out any further such tests".

New Zealand, in its Application, asks the Court:

—"to adjudge and declare: That the conduct by the French Government of nuclear tests in the South Pacific region that give rise to radio-active fall-out constitutes a violation of New Zealand's rights under international law, and that these rights will be violated by any further such tests".

It is essential to consider whether the Applicant requests a judgment which would only state the legal relationship between the Parties or a judgment requiring one of the Parties to take, or refrain from taking, some action. The Court has the power to interpret the submissions of the Parties and to exclude, when necessary, certain elements which are to be viewed, not as indications of what the Party is asking the Court to decide, but as reasons advanced why it should decide in the sense contended for. In the present case, if account is taken of the Application as a whole, the diplomatic exchanges between the Parties in recent years, the arguments of the Applicant before the Court and the public statements made on its behalf during and after the oral proceedings, it becomes evident that the Applicant's original and ultimate objective was and has remained to obtain a termination of French atmospheric nuclear tests in the South Pacific.

In these circumstances, the Court is bound to take note of further developments, both prior to and subsequent to the close of the oral proceedings, namely certain public statements by French authorities, of which some were mentioned before the Court at public hearings and others were made

subsequently. It would have been possible for the Court, had it considered that the interests of justice so required, to have afforded the Parties the opportunity, e.g., by reopening the oral proceedings, of addressing to the Court comments on the statements made since the close of those proceedings. Such a course, however, would have been justified only if the matter dealt with in those statements had been completely new or had not been raised during the proceedings, which is manifestly not the case. The Court is in possession not only of the statements made by the French authorities in question but also of the views of the Applicant on them.

The first of these statements is contained in a communiqué which was issued by the Office of the President of the French Republic on 8 June 1974 and transmitted in particular to the Applicant: ". . . in view of the stage reached in carrying out the French nuclear defence programme France will be in a position to pass on to the stage of underground explosions as soon as the series of tests planned for this summer is completed". Further statements are contained in a Note from the French Embassy in Wellington (10 June), a letter from the President of France to the Prime Minister of New Zealand (1 July), a press conference given by the President of the Republic (25 July), a speech made by the Minister for Foreign Affairs in the United Nations General Assembly (25 September) and a television interview and press conference by the Minister for Defence (16 August and 11 October). The Court considers that these statements convey an announcement by France of its intention to cease the conduct of atmospheric nuclear tests following the conclusion of the 1974 series.

Status and Scope of the French Statements
(paras. 42–60 of the Judgment in the Australian case, and 45–63 of the Judgment in the New Zealand case)

It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Nothing in the nature of a *quid pro quo,* nor any subsequent acceptance, nor even any reaction from other States is required for such declaration to take effect. Neither is the question of form decisive. The intention of being bound is to be ascertained by an interpretation of the act. The binding character of the undertaking results from the terms of the act and is based on good faith; interested States are entitled to require that the obligation be respected.

In the present case, the Applicant, while recognizing the possibility of the dispute being resolved by a unilateral declaration on the part of France, has stated that, in its view, the possibility of further atmospheric tests has been left open, even after the French statements mentioned above. The Court must, however, form its own view of the meaning and scope intended to be given to these unilateral declarations. Having regard to their intention and to the circumstances in which they were made, they must be held to constitute an engagement of the French State. France has conveyed to the world at large, including the Applicant, its intention effectively to terminate its atmospheric tests. It was bound to assume that other States might take note of these statements and rely on their being effective. It is true that France has not recognized that it is bound by any rule of international law to terminate its tests, but this does not affect the legal consequences of the statements in question; the unilateral undertaking resulting from them cannot be interpreted as having been made in implicit reliance on an arbitrary power of reconsideration.

Thus the Court faces a situation in which the objective of the Applicant has in effect been accomplished, inasmuch as the Court finds that France has undertaken the obligation to hold no further nuclear tests in the atmosphere in the South Pacific. The Applicant has sought an assurance from France that the tests would cease and France, on its own initiative, has made a series of statements to the effect that they will cease. The Court concludes that France has assumed an obligation as to conduct, concerning the effective cessation of the tests, and the fact that the Applicant has not exercised its right to discontinue the proceedings does not prevent the Court from making its own independent finding on the subject. As a court of law, it is called upon to resolve existing disputes between States: these disputes must continue to exist at the time when the Court makes its decision. In the present case, the dispute having disappeared, the claim no longer has any object and there is nothing on which to give judgment.

Once the Court has found that a State has entered into a commitment concerning its future conduct, it is not the Court's function to contemplate that it will not comply with it. However, if the basis of the Judgment were to be affected, the Applicant could request an examination of the situation in accordance with the provisions of the Statute.

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For these reasons, the Court finds that the claim no longer has any object and that it is therefore not called upon to give a decision thereon (para. 62 of the Judgment in the Australian case, and para. 65 of the Judgment in the New Zealand case).

61. WESTERN SAHARA

Advisory Opinion of 16 October 1975

In its Advisory Opinion which the General Assembly of the United Nations had requested on two questions concerning Western Sahara, the Court,

With regard to Question I, "Was Western Sahara (Río de Oro and Sakiet El Hamra) at the time of colonization by Spain a territory belonging to no one (*terra nullius*)?",

—decided by 13 votes to 3 to comply with the request for an advisory opinion;

—was unanimously of opinion that Western Sahara (Río de Oro and Sakiet El Hamra) at the time of colonization by Spain was not a territory belonging to no one (*terra nullius*).

With regard to Question II, "What were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity?", the Court

—decided by 14 votes to 2 to comply with the request for an advisory opinion;

—was of opinion, by 14 votes to 2, that there were legal ties between this territory and the Kingdom of Morocco of the kinds indicated in the penultimate paragraph of the Advisory Opinion;

—was of opinion, by 15 votes to 1, that there were legal ties between this territory and the Mauritanian entity of the kinds indicated in the penultimate paragraph of the Advisory Opinion.

The penultimate paragraph of the Advisory Opinion was to the effect that:

> The materials and information presented to the Court show the existence, at the time of Spanish colonization, of legal ties of allegiance between the Sultan of Morocco and some of the tribes living in the territory of Western Sahara. They equally show the existence of rights, including some rights relating to the land, which constituted legal ties between the Mauritanian entity, as understood by the Court, and the territory of Western Sahara. On the other hand, the Court's conclusion is that the materials and information presented to it do not establish any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian entity. Thus the Court has not found legal ties of such a nature as might affect the application of General Assembly resolution 1514 (XV) in the decolonization of Western Sahara and, in particular, of the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory.

For these proceedings the Court was composed as follows: President Lachs; Vice-President Ammoun; Judges Forster, Gros, Bengzon, Petrén, Onyeama, Dillard, Ignacio-Pinto, de Castro, Morozov, Jiménez de Aréchaga, Sir Humphrey Waldock, Nagendra Singh and Ruda; Judge *ad hoc* Boni.

Judges Gros, Ignacio-Pinto and Nagendra Singh appended declarations to the Advisory Opinion; Vice-President Ammoun and Judges Forster, Petrén, Dillard, de Castro and Boni appended separate opinions, and Judge Ruda a dissenting opinion.

In these declarations and opinions the judges concerned make clear and explain their positions.

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Course of the Proceedings
(paras. 1–13 of Advisory Opinion)

The Court first recalls that the General Assembly of the United Nations decided to submit two questions for the Court's advisory opinion by resolution 3292 (XXIX) adopted on 13 December 1974 and received in the Registry on 21 December. It retraces the subsequent steps in the proceedings, including the transmission of a dossier of documents by the Secretary-General of the United Nations (Statute, Art. 65, para. 2) and the presentation of written statements or letters and/or oral statements by 14 States, including Algeria, Mauritania, Morocco, Spain and Zaire (Statute, Art. 66).

Mauritania and Morocco each asked to be authorized to choose a judge *ad hoc* to sit in the proceedings. By an Order of 22 May 1975 (*I.C.J. Reports 1975*, p. 6), the Court found that Morocco was entitled under Articles 31 and 68 of the Statute and Article 89 of the Rules of Court to choose a person to sit as judge *ad hoc*, but that, in the case of Mauritania, the conditions for the application of those Articles had not been satisfied. At the same time the Court stated that those conclusions in no way prejudged its views with regard to the questions referred to it or any other question which might fall to be decided, including those of its competence to give an advisory opinion and the propriety of exercising that competence.

Competence of the Court
(paras. 14–22 of Advisory Opinion)

Under Article 65, paragraph 1, of the Statute, the Court may give an advisory opinion on any legal question at the request of any duly authorized body. The Court notes that the General Assembly of the United Nations is suitably authorized by Article 96, paragraph 1, of the Charter and that the two questions submitted are framed in terms of law and raise problems of international law. They are in principle questions of a legal character, even if they also embody questions of fact, and even if they do not call upon the Court to pronounce on existing rights and obligations. The Court is accordingly competent to entertain the request.

Propriety of Giving an Advisory Opinion
(paras. 23–74 of Advisory Opinion)

Spain put forward objections which in its view would render the giving of an opinion incompatible with the Court's judicial character. It referred in the first place to the fact that it had not given its consent to the Court's adjudicating upon the questions submitted. It maintained (*a*) that the subject of the questions was substantially identical to that of a dispute concerning Western Sahara which Morocco, in September 1974, had invited it to submit jointly to the Court, a proposal which it had refused: the advisory jurisdiction was therefore being used to circumvent the principle that the Court has no jurisdiction to settle a dispute without the consent of the parties; (*b*) that the case involved a dispute concerning the attribution of territorial sovereignty over Western Sahara and that the consent of States was always necessary for the adjudication of such disputes; (*c*) that in the circumstances of the case the Court could not fulfil the requirements of good administration of justice with regard to the determination of the facts.

The Court considers (*a*) that the General Assembly, while noting that a legal controversy over the status of Western Sahara had arisen during its discussions, did not have the object of bringing before the Court a dispute or legal controversy with a view to its subsequent peaceful settlement, but sought an advisory opinion which would be of assistance in the exercise of its functions concerning the decolonization of the territory, hence the legal position of Spain could not be compromised by the Court's answers to the questions submitted; (*b*) that those questions do not call upon the Court to adjudicate on existing territorial rights; (*c*) that it has been placed in possession of sufficient information and evidence.

Spain suggested in the second place that the questions submitted to the Court were academic and devoid of purpose or practical effect, in that the United Nations had already settled the method to be followed for the decolonization of Western Sahara, namely a consultation of the indigenous population by means of a referendum to be conducted by Spain under United Nations auspices. The Court examines the resolutions adopted by the General Assembly on the subject, from resolution 1514 (XV) of 14 December 1960, the Declaration on the Granting of Independence to Colonial Countries and Peoples, to resolution 3292 (XXIX) on Western Sahara, embodying the request for advisory opinion. It concludes that the decolonization process envisaged by the General Assembly is one which will respect the right of the population of Western Sahara to determine their future political status by their own freely expressed will. This right to self-determination, which is not affected by the request for advisory opinion and constitutes a basic assumption of the questions put to the Court, leaves the General Assembly a measure of discretion with respect to the forms and procedures by which it is to be realized. The Advisory Opinion will thus furnish the Assembly with elements of a legal character relevant to that further discussion of the problem to which resolution 3292 (XXIX) alludes.

Consequently the Court finds no compelling reason for refusing to give a reply to the two questions submitted to it in the request for advisory opinion.

Question I: "Was Western Sahara (Río de Oro and Sakiet El Hamra) at the Time of Colonization by Spain a Territory Belonging to No One (terra nullius)?"
(paras. 75–83 of Advisory Opinion)

For the purposes of the Advisory Opinion, the "time of colonization by Spain" may be considered as the period beginning in 1884, when Spain proclaimed its protectorate over the Río de Oro. It is therefore by reference to the law in force at that period that the legal concept of *terra nullius* must be interpreted. In law, "occupation" was a means of peaceably acquiring sovereignty over territory otherwise than by cession or succession; it was a cardinal condition of a valid "occupation" that the territory should be *terra nullius*. According to the State practice of that period, territories inhabited by tribes or peoples having a social and political organization were not regarded as *terrae nullius:* in their case sovereignty was not generally considered as effected through occupation, but through agreements concluded with local rulers. The information furnished to the Court shows (*a*) that at the time of colonization Western Sahara was inhabited by peoples which, if nomadic, were socially and politically organized in tribes and under chiefs competent to represent them; (*b*) that Spain did not proceed upon the basis that it was establishing its sovereignty over *terrae nullius:* thus in his Order of 26 December 1884 the King of Spain proclaimed that he was taking the Río de Oro under his protection on the basis of agreements entered into with the chiefs of local tribes.

The Court therefore gives a negative answer to Question I. In accordance with the terms of the request for advisory opinion, "if the answer to the first question is in the negative", the Court is to reply to Question II.

Question II: "What Were the Legal Ties of This Territory with the Kingdom of Morocco and the Mauritanian Entity?"
(paras. 84–161 of Advisory Opinion)

The meaning of the words "legal ties" has to be sought in the object and purpose of resolution 3292 (XXIX) of the United Nations General Assembly. It appears to the Court that they must be understood as referring to such legal ties as may affect the policy to be followed in the decolonization of Western Sahara. The Court cannot accept the view that the ties in question could be limited to ties established directly with the territory and without reference to the people who may be found in it. At the time of its colonization the territory had a sparse population that for the most part consisted of nomadic tribes the members of which traversed the desert on more or less regular routes, sometimes reaching as far as southern Morocco or regions of present-day Mauritania, Algeria or other States. These tribes were of the Islamic faith.

Morocco (paragraphs 90–129 of the Advisory Opinion) presented its claim to legal ties with Western Sahara as a claim to ties of sovereignty on the ground of an alleged immemorial possession of the territory and an uninterrupted exercise of authority. In the view of the Court, however, what must be of decisive importance in determining its answer to Question II must be evidence directly relating to effective display of authority in Western Sahara at the time of its colonization by Spain and in the period immediately preceding. Morocco requests that the Court should take account of the special structure of the Moroccan State. That State was founded on the common religious bond of Islam and on the allegiance of various tribes to the Sultan, through their caids or sheikhs, rather than on the notion of territory. It consisted partly of what was called the Bled Makhzen, areas actually subject to the Sultan, and partly of what was called the Bled Siba, areas in which the tribes were not submissive to him; at the relevant period, the areas immediately to the north of Western Sahara lay within the Bled Siba.

As evidence of its display of sovereignty in Western Sahara, Morocco invoked alleged acts of internal display of Moroccan authority, consisting principally of evidence said to show the allegiance of Saharan caids to the Sultan, including dahirs and other documents concerning the appointment of caids, the alleged imposition of Koranic and other taxes, and acts of military resistance to foreign penetration of the territory. Morocco also relied on certain international acts said to constitute recognition by other States of its sovereignty over the whole or part of Western Sahara, including (*a*) certain treaties concluded with Spain, the United States and Great Britain and Spain between 1767 and 1861, provisions of which dealt *inter alia* with the safety of persons shipwrecked on the coast of Wad Noun or its vicinity; (*b*) certain bilateral treaties of the late nineteenth and early twentieth centuries whereby Great Britain, Spain, France and Germany were said to have recognized that Moroccan sovereignty extended as far south as Cape Bojador or the boundary of the Río de Oro.

Having considered this evidence and the observations of the other States which took part in the proceedings, the Court

finds that neither the internal nor the international acts relied upon by Morocco indicate the existence at the relevant period of either the existence or the international recognition of legal ties of territorial sovereignty between Western Sahara and the Moroccan State. Even taking account of the specific structure of that State, they do not show that Morocco displayed any effective and exclusive State activity in Western Sahara. They do, however, provide indications that a legal tie of allegiance existed at the relevant period between the Sultan and some, but only some, of the nomadic peoples of the territory, through Tekna caids of the Noun region, and they show that the Sultan displayed, and was recognized by other States to possess, some authority or influence with respect to those tribes.

The term "Mauritanian entity" (paragraphs 130–152 of the Advisory Opinion) was first employed during the session of the General Assembly in 1974 at which resolution 3292 (XXIX), requesting an advisory opinion of the Court, was adopted. It denotes the cultural, geographical and social entity within which the Islamic Republic of Mauritania was to be created. According to Mauritania, that entity, at the relevant period, was the Bilad Shinguitti or Shinguitti country, a distinct human unit, characterized by a common language, way of life, religion and system of laws, featuring two types of political authority: emirates and tribal groups.

Expressly recognizing that these emirates and tribes did not constitute a State, Mauritania suggested that the concepts of "nation" and of "people" would be the most appropriate to explain the position of the Shinguitti people at the time of colonization. At that period, according to Mauritania, the Mauritanian entity extended from the Senegal river to the Wad Sakiet El Hamra. The territory at present under Spanish administration and the present territory of the Islamic Republic of Mauritania thus together constituted indissociable parts of a single entity and had legal ties with one another.

The information before the Court discloses that, while there existed among them many ties of a racial, linguistic, religious, cultural and economic nature, the emirates and many of the tribes in the entity were independent in relation to one another; they had no common institutions or organs. The Mauritanian entity therefore did not have the character of a personality or corporate entity distinct from the several emirates or tribes which comprised it. The Court concludes that at the time of colonization by Spain there did not exist between the territory of Western Sahara and the Mauritanian entity any tie of sovereignty, or of allegiance of tribes, or of simple inclusion in the same legal entity. Nevertheless, the General Assembly does not appear to have so framed Question II as to confine the question exclusively to those legal ties which imply territorial sovereignty, which would be to disregard the possible relevance of other legal ties to the decolonization process. The Court considers that, in the relevant period, the nomadic peoples of the Shinguitti country possessed rights, including some rights relating to the lands through which they migrated. These rights constituted legal ties between Western Sahara and the Mauritanian entity. They were ties which knew no frontier between the territories and were vital to the very maintenance of life in the region.

Morocco and Mauritania both laid stress on the overlapping character of the respective legal ties which they claimed Western Sahara to have had with them at the time of colonization (paragraphs 153–160 of the Advisory Opinion). Although their views appeared to have evolved considerably in that respect, the two States both stated at the end of the proceedings that there was a north appertaining to Morocco and a south appertaining to Mauritania without any geographical void in between, but with some overlapping as a result of the intersection of nomadic routes. The Court confines itself to noting that this geographical overlapping indicates the difficulty of disentangling the various relationships existing in the Western Sahara region at the time of colonization.

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For these reasons, the Court (paragraphs 162 and 163 of the Advisory Opinion) gives the replies indicated on pages 1 and 2 above.

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62. AEGEAN SEA CONTINENTAL SHELF CASE (INTERIM PROTECTION)

Order of 11 September 1976

This Order, made by the Court in the Aegean Sea Continental Shelf case, found, by twelve votes to one, that the circumstances, as they presented themselves to the Court, were not such as to require the exercise of its power under Article 41 of its Statute to indicate interim measures of protection.

The Court was composed as follows: President Jiménez de Aréchaga; Vice-President Nagendra Singh; Judges Forster, Gros, Lachs, Dillard, Morozov, Waldock, Ruda, Mosler, Elias and Tarazi; Judge *ad hoc* Stassinopoulos.

The President, the Vice-President and Judges Lachs, Morozov, Ruda, Mosler, Elias and Tarazi appended separate opinions to the Order of the Court. Judge *ad hoc* Stassinopoulos appended a dissenting opinion.

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In its Order the Court recalls that on 10 August 1976 Greece instituted proceedings against Turkey in respect of a dispute concerning the Aegean Sea Continental Shelf. Greece requested the Court *inter alia* to declare what is the course of the boundary between the portions of the continental shelf appertaining respectively to Greece and Turkey in the area, and to declare that Turkey is not entitled to undertake any activities on the Greek continental shelf, whether by exploration, exploitation, research or otherwise, without the consent of Greece.

On the same day Greece also requested the Court to indicate interim measures of protection to the effect that the Governments of both States should: (*a*) refrain, unless with the consent of each other and pending the final judgment of the Court, from all exploration activity or any scientific research with respect to the areas in dispute; (*b*) refrain from taking further military measures or actions which may endanger their peaceful relations.

At public hearings on 25, 26 and 27 August 1976 the Court heard observations presented on behalf of the Government of Greece on its request for the indication of interim measures

of protection. On 26 August the Turkish Government, which had not appointed an agent and was not represented at the hearings, communicated to the Registry of the Court certain written observations in which it submitted in particular that the Court had no jurisdiction to entertain the dispute and suggested that the request for interim measures be dismissed and the case removed from the list.

In justification of its request for interim measures Greece alleged: (*a*) that certain acts on the part of Turkey (the granting of petroleum exploration permits, the explorations of the vessel *MTA Sismik I*) constitute infringements of its exclusive sovereign rights to the exploration and exploitation of its continental shelf, and that the breach of the right of a coastal State to exclusivity of knowledge of its continental shelf constitutes irreparable prejudice; (*b*) that the activities complained of would, if continued, aggravate the dispute. Turkey contended: (*a*) that these activities cannot be regarded as involving any prejudice to the existence of any rights of Greece over the disputed area and that, even if they could, there would be no reason why such prejudice could not be compensated; (*b*) that Turkey has no intention of taking the initiative in the use of force.

So far as (*a*) is concerned, the Court, viewing the matter in the context of Article 41 of its Statute, is unable to find in the alleged breach of Greece's rights such a risk of irreparable prejudice to rights in issue as might require the exercise of the power to indicate interim measures of protection. With regard to (*b*) the Court considers that it is not to be presumed that either Government will fail to heed its obligations under the United Nations Charter or fail to heed Security Council resolution 395 (1976) of 25 August 1976, wherein the two Governments were urged "to do everything in their power to reduce the present tensions in the area" and called on "to resume direct negotiations over their differences".

The Court observes that, to pronounce on the present request for interim measures, it was not called upon to decide any question of its jurisdiction to entertain the dispute, and that its present decision in no way prejudges any question relating to its jurisdiction or the merits of the case. It is unable, at the present stage of the proceedings, to accede to Turkey's request that the case be removed from the list, but it will be necessary to resolve as the next step the question of its jurisdiction with respect to the case. The written pleadings are first to be addressed to that question and will be filed within time-limits the fixing of which the Court has reserved for further decision.

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63. AEGEAN SEA CONTINENTAL SHELF CASE (JURISDICTION OF THE COURT)

Judgment of 19 December 1978

In its judgment on the question of its jurisdiction in the case concerning the Aegean Sea Continental Shelf (Greece *v.* Turkey), the Court, by 12 votes to 2, found that it is without jurisdiction to entertain the Application filed by the Government of Greece.

The Court was composed as follows: President Jiménez de Aréchaga; Vice-President Nagendra Singh; Judges Forster, Gros, Lachs, Dillard, de Castro, Morozov, Sir Humphrey Waldock, Ruda, Mosler, Elias and Tarazi; Judge *ad hoc* Stassinopoulos.

Of the 12 Members of the Court who voted for the decision, Vice-President Nagendra Singh and Judges Gros, Lachs, Morozov and Tarazi have appended separate opinions or declarations.

Dissenting opinions have been appended to the Judgment by Judge de Castro and Judge *ad hoc* Stassinopoulos.

Procedure, and Summary of Negotiations
(paras. 1–31)

In its Judgment, the Court recalls that on 10 August 1976 Greece instituted proceedings against Turkey in respect of a dispute concerning the delimitation of the continental shelf appertaining to each of the two States in the Aegean Sea and their rights thereover. In a letter of 26 August 1976 Turkey expressed the view that the Court had no jurisdiction to entertain the Application.

Greece requested the Court to indicate interim measures of protection, but in an Order of 11 September 1976 the Court found that the circumstances were not such as to require them and decided that the written proceedings should first be addressed to the question of its jurisdiction to entertain the dispute. Greece subsequently filed a Memorial and presented oral arguments at public sittings, formally submitting that the Court had such jurisdiction. Turkey did not file any Counter-Memorial and was not represented at the hearings. Its attitude was, however, defined in the above-mentioned letter and in communications addressed to the Court on 24 April and 10 October 1978. (Paras. 1–14.)

While regretting that Turkey did not appear in order to put forward its arguments, the Court points out that it nevertheless had to examine *proprio motu* the question of its own jurisdiction, a duty reinforced by the terms of Article 53 of its Statute, according to which the Court, whenever a party does not appear, must, before finding upon the merits, satisfy itself that it has jurisdiction. (Para. 15.)

After giving a brief account of the negotiations which have taken place between Greece and Turkey since 1973 on the question of delimiting the continental shelf, the Court finds, contrary to suggestions by Turkey, that the active pursuit of negotiations concurrently with the proceedings is not, legally, any obstacle to its exercise of its judicial function, and that a legal dispute exists between Greece and Turkey in respect of the continental shelf in the Aegean Sea. (Paras. 16–31.)

First Basis of Jurisdiction Relied Upon: Article 17 of the General Act of 1928
(paras. 32–93)

In its Application the Greek Government specified two bases on which it claimed to found the jurisdiction of the Court in the dispute. The first was Article 17 of the General Act of 1928 for the Pacific Settlement of International Disputes, read with Article 36, paragraph 1, and Article 37 of the Statute of the Court.

Article 17 of the General Act reads as follows:

"All disputes with regard to which the parties are in

conflict as to their respective rights shall, subject to any reservations which may be made under Article 39, be submitted for decision to the Permanent Court of International Justice, unless the parties agree, in the manner hereinafter provided, to have resort to an arbitral tribunal. It is understood that the disputes referred to above include in particular those mentioned in Article 36 of the Statute of the Permanent Court of International Justice."

This Article thus provided for the reference of disputes to the Permanent Court of International Justice. That body was the predecessor of the present Court, which, by the effect of Article 37 of its own Statute, is substituted for it in any treaty or convention in force which provides for reference of a matter to the Permanent Court. Hence, if the General Act is to be considered a convention in force between Greece and Turkey, it may, when read with Article 37 and Article 36, paragraph 1, of the present Court's Statute, suffice to establish the latter's jurisdiction. (Paras. 32–34.)

The question of the status of the General Act of 1928 as a convention in force for the purposes of Article 37 of the Statute was raised, though not decided, in previous cases before the Court. In the present case the Greek Government contended that the Act must be presumed to be still in force as between Greece and Turkey; the Turkish Government, on the contrary, took the position that the Act was no longer in force. (Paras. 35–38.)

The Court notes that Greece drew attention to the fact that both the Greek and the Turkish instruments of accession to the Act were accompanied by reservations. Greece affirmed that these were irrelevant to the case. Turkey, on the other hand, took the position that, whether or not the General Act was assumed to be in force, Greece's instrument of accession, dated 14 September 1931, was subject to a clause, reservation (*b*), which would exclude the Court's competence with respect to the dispute. (Para. 39.)

The text of this reservation (*b*) is as follows:

"The following disputes are excluded from the procedures described in the General Act . . .

"(*b*) disputes concerning questions which by international law are solely within the domestic jurisdiction of States, and in particular disputes relating to the territorial status of Greece, including disputes relating to its rights of sovereignty over its ports and lines of communication."

The Court considers that, if Turkey's view of the effect of reservation (*b*) on the applicability of the Act as between Greece and Turkey with respect to the subject-matter of the dispute is justified, a finding on the question whether the Act is or is not in force would cease to be essential for the decision regarding the Court's jurisdiction. (Para. 40.)

According to Greece, the Court should leave reservation (*b*) out of account because the question of its effect on the applicability of the General Act was not raised regularly by Turkey in accordance with the Rules of Court, so that Turkey could not be regarded as having "enforced" the reservation as required by Article 39, paragraph 3, of the General Act, whereby: "If one of the parties to a dispute has made a reservation, the other parties may enforce the same reservation in regard to that party." In the Court's view, Turkey's invocation of reservation (*b*) in a formal statement made in response to a communication from the Court must be considered as constituting an "enforcement" of the reservation within the meaning of Article 39, paragraph 3, of the Act. The Court was therefore unable to leave out of its consideration a reservation the invocation of which had been properly brought to its notice earlier in the proceedings. (Paras. 41–47.)

Greece maintained that reservation (*b*) could not be considered as covering the dispute regarding the continental shelf of the Aegean Sea and therefore did not exclude the normal operation of Article 17 of the Act. It contended in particular that the reservation did not cover all disputes relating to the territorial status of Greece but only such as *both* related to its territorial status *and at the same time* concerned "questions which by international law are solely within the domestic jurisdiction of States". (Paras. 48 and 49.)

This contention depended on an essentially grammatical interpretation which hinged on the meaning to be ascribed to the expression "and in particular" ("*et, notamment,*" in the original French of the reservation). After considering this argument, the Court finds that the question whether that expression has the meaning attributed to it by Greece depends on the context in which it was used in the instrument of accession and is not a matter simply of the preponderant linguistic usage. The Court recalls that it cannot base itself on a purely grammatical interpretation of the text and observes that a number of substantive considerations point decisively to the conclusion that reservation (*b*) contained two separate and autonomous reservations. (Paras. 50–56.)

One such consideration was that in framing its declaration accepting the compulsory jurisdiction of the Permanent Court under the optional clause of the latter's Statute—a declaration made on 12 September 1929, only two years before the Greek accession to the General Act—Greece included a provision which, indisputably, was an autonomous reservation of "disputes relating to the territorial status of Greece". It can hardly be supposed that Greece, in its instrument of accession to the General Act, should have intended to give to its reservation of "disputes relating to the territorial status of Greece" a scope which differed fundamentally from that given to it in that declaration. That Greece had had such an intention was not borne out by the contemporary evidence placed before the Court relating to the making of the declaration and the deposit of the instrument of accession.

That being so, the Court finds that reservation (*b*) comprises two distinct and autonomous reservations, one affecting disputes concerning questions of domestic jurisdiction and the other reserving "disputes relating to the territorial status of Greece". (Paras. 57–68.)

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The Court then goes on to consider what "disputes relating to the territorial status of Greece" must be taken to mean.

Greece maintained that a restrictive view of the meaning must be taken, by reason of the historical context, and that those words related to territorial questions bound up with the territorial settlements established by the peace treaties after the first World War. In the Court's opinion, the historical evidence relied on by Greece seems rather to confirm that in reservation (*b*) the expression "territorial status" was used in its ordinary, generic sense of any matters properly to be considered as belonging to the concept of territorial status in public international law. The expression therefore included not only the particular legal régime but the territorial integrity and the boundaries of a State. (Paras. 69–76.)

Greece argued that the very idea of the continental shelf was wholly unknown in 1928 when the General Act was concluded, and in 1931 when Greece acceded to the Act. But, in the Court's view, since the expression "territorial status" was used in the Greek reservation as a generic term, the pre-

sumption necessarily arises that its meaning, as also that of the word "rights" in Article 17 of the General Act, was to follow the evolution of the law and to correspond with the meaning attached to it by the law in force at any given time. The Court therefore finds that the expression "disputes relating to the territorial status of Greece" must be interpreted in accordance with the rules of international law as they exist today and not as they existed in 1931. (Paras. 77–80.)

The Court then proceeds to examine whether, taking into account the developments in international law regarding the continental shelf, the expression "disputes relating to the territorial status of Greece" should or should not be understood as comprising disputes relating to the geographical extent of Greece's rights over the continental shelf in the Aegean Sea. Greece contended that the dispute concerned the delimitation of the continental shelf, said to be entirely extraneous to the notion of territorial status, and that the continental shelf, not being part of the territory, could not be considered as connected with territorial status. The Court observes that it would be difficult to accept the proposition that delimitation is entirely extraneous to the notion of territorial status, and points out that a dispute regarding delimitation of a continental shelf tends by its very nature to be one relating to territorial status, inasmuch as a coastal State's rights over the continental shelf derive from its sovereignty over the adjoining land. It follows that the territorial status of the coastal State comprises, *ipso jure*, the rights of exploration and exploitation over the continental shelf to which it is entitled under international law. (Paras. 80–89.)

Having regard to those considerations, the Court is of the opinion that the dispute is one which relates to the territorial status of Greece within the meaning of reservation (*b*) and that Turkey's invocation of the reservation had the effect of excluding the dispute from the application of Article 17 of the General Act. The General Act is therefore not a valid basis for the Court's jurisdiction. (Para. 90.)

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The Court also takes into consideration a suggestion that the General Act had never been applicable as between Turkey and Greece, by reason of the existence of the Greco-Turkish Treaty of Friendship, Neutrality, Conciliation and Arbitration signed on 30 October 1930. It finds that it is dispensed from any need to enter into the question of the effect of the 1930 treaty on the applicability of the General Act, because it has established that, by the effect of reservation (*b*), the Act is not applicable to the dispute, and because the 1930 treaty was not invoked as a basis for its jurisdiction. (Paras. 91–93.)

Second Basis of Jurisdiction Relied Upon: the Brussels Joint Communiqué of 31 May 1975
(paras. 94–108)

The second basis of jurisdiction relied upon by Greece was the Brussels Joint Communiqué of 31 May 1975. This was a communiqué issued directly to the press by the Prime Ministers of Greece and Turkey following a meeting between them on that date. It contained the following passage:

> "They [the two Prime Ministers] decided that those problems [between the two countries] should be resolved peacefully by means of negotiations and as regards the continental shelf of the Aegean Sea by the International Court at The Hague."

Greece maintained that this passage directly conferred jurisdiction on the Court, committed the parties to concluding any implementing agreement needed and, in the event of refusal by one of them to conclude such an agreement, permitted the other to refer the dispute unilaterally to the Court. Turkey, for its part, maintained that the communiqué did not "amount to an agreement under international law", and that in any event it did not comprise any undertaking to resort to the Court without a special agreement (*compromis*) or amount to an agreement by one State to submit to the jurisdiction of the Court upon the unilateral application of the other. (Paras. 94–99.)

In view of these divergent interpretations, the Court considers what light is thrown on the meaning of the communiqué by the context in which the meeting of 31 May 1975 took place and the document was drawn up. It finds nothing to justify the conclusion that Turkey was prepared to envisage any other reference to the Court than a joint submission of the dispute. In the information before it on what followed the Brussels communiqué the Court finds confirmation that the two Prime Ministers did not undertake any unconditional commitment to refer their continental shelf dispute to the Court. (Paras. 100–106.)

Hence the Brussels communiqué did not constitute an immediate and unqualified commitment on the part of the Prime Ministers of Greece and Turkey to accept the submission of the dispute to the Court unilaterally by Application. It follows that it does not furnish a valid basis for establishing the Court's jurisdiction. The Court adds that nothing it has said may be understood as precluding the dispute from being brought before the Court if and when the conditions for establishing its jurisdiction are satisfied. (Paras. 107 and 108.)

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For these reasons, the Court finds that it is without jurisdiction to entertain the Application filed by the Government of Greece on 10 August 1976. (Para. 109.)

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64. CASE CONCERNING UNITED STATES DIPLOMATIC AND CONSULAR STAFF IN TEHRAN (PROVISIONAL MEASURES)

Order of 15 December 1979

The Court unanimously made an Order indicating provisional measures to the effect that, pending the Court's final decision in the case concerning United States Diplomatic and Consular Staff in Tehran:

A. (i) The Government of the Islamic Republic of Iran should immediately ensure that the premises of the United States Embassy, Chancery and Consulates be restored to the possession of the United States authorities under their exclusive control, and should 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 should 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 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 should, as from that moment, afford to all the diplomatic and consular personnel of the United States the full 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;

B. The Government of the United States of America and the Government of the Islamic Republic of Iran should not take any action and should ensure that no action is taken which may aggravate the tension between the two countries or render the existing dispute more difficult of solution.

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For the purposes of its Order, the Court was composed as follows: President Sir Humphrey Waldock, Vice-President Elias, Judges Forster, Gros, Lachs, Morozov, Nagendra Singh, Ruda, Mosler, Tarazi, Oda, Ago, El-Erian, Sette-Camara and Baxter.

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65. CASE CONCERNING UNITED STATES DIPLOMATIC AND CONSULAR STAFF IN TEHRAN

Judgment of 24 May 1980

In its Judgment in the case concerning United States Diplomatic and Consular Staff in Tehran, the Court decided (1) that Iran has violated and is still violating obligations owed by it to the United States; (2) that these violations engage Iran's responsibility; (3) that the Government of Iran must immediately release the United States nationals held as hostages and place the premises of the Embassy in the hands of the protecting power; (4) 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) that Iran is under an obligation to make reparation for the injury caused to the United States; and (6) that the form and amount of such reparation, failing agreement between the parties, shall be settled by the Court. (The full text of the operative paragraph is reproduced below.)

These decisions were adopted by large majorities: (1) and (2)—13 votes to 2; (3) and (4)—unanimously; (5)—12 votes to 3; (6)—14 votes to 1 (the votes are recorded by name below).

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A separate opinion was appended to the Judgment by Judge Lachs, who voted against operative paragraph 5. Dissenting opinions were appended by Judge Morozov, who voted against paragraphs 1, 2, 5 and 6, and by Judge Tarazi, who voted against paragraphs 1, 2 and 5.

Procedure before the Court
(paras. 1–10)

In its Judgment, the Court recalls that on 29 November 1979 the United States of America had instituted proceedings against Iran in a case arising out of the situation at its Embassy in Tehran and Consulates at Tabriz and Shiraz, and the seizure and detention as hostages of its diplomatic and consular staff in Tehran and two more citizens of the United States. The United States having at the same time requested the indication of provisional measures, the Court, by a unanimous Order of 15 December 1979, indicated, pending final judgment, that the Embassy should immediately be given back and the hostages released (see Press Communiqué No. 80/1).

The procedure then continued in accordance with the Statute and Rules of Court. The United States filed a Memorial, and on 18, 19 and 20 March 1980 the Court held a public hearing at the close of which the United States, in its final submissions, requested it to adjudge and declare, *inter alia*, that the Iranian Government had violated its international legal obligations to the United States and must: ensure the immediate release of the hostages; afford the United States diplomatic and consular personnel the protection and immunities to which they were entitled (including immunity from

criminal jurisdiction) and provide them with facilities to leave Iran; submit the persons responsible for the crimes committed to the competent Iranian authorities for prosecution, or extradite them to the United States; and pay the United States reparation, in a sum to be subsequently determined by the Court.

Iran took no part in the proceedings. It neither filed pleadings nor was represented at the hearing, and no submissions were therefore presented on its behalf. Its position was however defined in two letters addressed to the Court by its Minister for Foreign Affairs on 9 December 1979 and 16 March 1980 respectively. In these the Minister maintained *inter alia* that the Court could not and should not take cognizance of the case.

The Facts
(paras. 11–32)

The Court expresses regret that Iran did not appear before it to put forward its arguments. The absence of Iran from the proceedings brought into operation Article 53 of the Statute, under which the Court is required, before finding in the Applicant's favour, to satisfy itself that the allegations of fact on which the claim is based are well founded.

In that respect the Court observes that it has had available to it, in the documents presented by the United States, a massive body of information from various sources, including numerous official statements of both Iranian and United States authorities. This information, the Court notes, is wholly concordant as to the main facts and has all been communicated to Iran without evoking any denial. The Court is accordingly satisfied that the allegations of fact on which the United States based its claim were well founded.

Admissibility
(paras. 33–44)

Under the settled jurisprudence of the Court, it is bound, in applying Article 53 of its Statute, to investigate, on its own initiative, any preliminary question of admissibility or jurisdiction that may arise.

On the subject of admissibility, the Court, after examining the considerations put forward in the two letters from Iran, finds that they do not disclose any ground for concluding that it could not or should not deal with the case. Neither does it find any incompatibility with the continuance of judicial proceedings before the Court in the establishment by the Secretary-General of the United Nations, with the agreement of both States, of a Commission given a mandate to undertake a fact-finding mission to Iran, hear Iran's grievances and facilitate the solution of the crisis between the two countries.

Jurisdiction
(paras. 45–55)

Four instruments having been cited by the United States as bases for the Court's jurisdiction to deal with its claims, the Court finds that three, namely the Optional Protocols to the two Vienna Conventions of 1961 and 1963 on, respectively, Diplomatic and Consular Relations, and the 1955 Treaty of Amity, Economic Relations, and Consular Rights between the United States and Iran, do in fact provide such foundations.

The Court, however, does not find it necessary in the present Judgment to enter into the question whether Article 13 of the fourth instrument so cited, namely the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents, provides a basis for the exercise of its jurisdiction with respect to the United States' claims thereunder.

MERITS: *Attributability to the Iranian State of the acts complained of, and violation by Iran of certain obligations*
(paras. 56–94)

The Court has also, under Article 53 of its Statute, to satisfy itself that the claims of the Applicant are well founded in law. To this end, it considers the acts complained of in order to determine how far, legally, they may be attributed to the Iranian State (as distinct from the occupiers of the Embassy) and whether they are compatible or incompatible with Iran's obligations under treaties in force or other applicable rules of international law.

(a) *The events of 4 November 1979*
(paras. 56–68)

The first phase of the events underlying the Applicant's claims covers the armed attack on the United States Embassy carried out on 4 November 1979 by Muslim Student Followers of the Imam's Policy (further referred to as "the militants" in the Judgment), 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 these occurrences.

The Court points out that the conduct of the militants on that occasion could be directly attributed to the Iranian State only if it were established that they were in fact acting on its behalf. The information before the Court did not suffice to establish this with due certainty. However, the Iranian State—which, as the State to which the mission was accredited, was under obligation to take appropriate steps to protect the United States Embassy—did nothing to prevent the attack, stop it before it reached its completion or oblige the militants to withdraw from the premises and release the hostages. This inaction was in contrast with the conduct of the Iranian authorities on several similar occasions at the same period, when they had taken appropriate steps. It constituted, the Court finds, a clear and serious violation of Iran's obligations to the United States under Articles 22 (2), 24, 25, 26, 27 and 29 of the 1961 Vienna Convention on Diplomatic Relations, of Articles 5 and 36 of the 1963 Vienna Convention on Consular Relations, and of Article II (4) of the 1955 Treaty. Further breaches of the 1963 Convention had been involved in failure to protect the Consulates at Tabriz and Shiraz.

The Court is therefore led to conclude that on 4 November 1979 the Iranian authorities were fully aware of their obligations under the conventions in force, and also of the urgent need for action on their part, that they had the means at their disposal to perform their obligations, but that they completely failed to do so.

(b) *Events since 4 November 1979*
(paras. 69–79)

The second phase of the events underlying the United States' claims comprises the whole series of facts which occurred following the occupation of the Embassy by the militants. Though it was the duty of the Iranian Government to take every appropriate step to end the infringement of the inviolability of the Embassy premises and staff, and to offer reparation for the damage, it did nothing of the kind. Instead, expressions of approval were immediately heard from numerous Iranian authorities. Ayatollah Khomeini himself proclaimed the Iranian State's endorsement of both the seizure of the premises and the detention of the hostages. He described the Embassy as a "centre of espionage", declared that the hostages would (with some exceptions) remain

"under arrest" until the United States had returned the former Shah and his property to Iran, and forbade all negotiation with the United States on the subject. Once organs of the Iranian State had thus given approval to the acts complained of and decided to perpetuate them as a means of pressure on the United States, those acts were transformed into acts of the Iranian State: the militants became agents of that State, which itself became internationally responsible for their acts. During the six months which ensued, the situation underwent no material change: the Court's Order of 15 December 1979 was publicly rejected by Iran, while the Ayatollah declared that the detention of the hostages would continue until the new Iranian parliament had taken a decision as to their fate.

The Iranian authorities' decision to continue the subjection of the Embassy to occupation, and of its staff to detention as hostages, gave rise to repeated and multiple breaches of Iran's treaty obligations, additional to those already committed at the time of the seizure of the Embassy (1961 Convention: Arts. 22, 24, 25, 26, 27 and 29; 1963 Convention: *inter alia*, Art. 33; 1955 Treaty, Art. II (4)).

With regard to the Chargé d'affaires and the two other members of the United States mission who have been in the Iranian Ministry of Foreign Affairs since 4 November 1979, the Court finds that the Iranian authorities have withheld from them the protection and facilities necessary to allow them to leave the Ministry in safety. Accordingly, it appears to the Court that in their respect there have been breaches of Articles 26 and 29 of the 1961 Vienna Convention.

Taking note, furthermore, that various Iranian authorities have threatened to have some of the hostages submitted to trial before a court, or to compel them to bear witness, the Court considers that, if put into effect, that intention would constitute a breach of Article 31 of the same Convention.

(c) *Possible existence of special circumstances* (paras. 80–89)

The Court considers that it should examine the question whether the conduct of the Iranian Government might be justified by the existence of special circumstances, for the Iranian Minister for Foreign Affairs had alleged in his two letters to the Court that the United States had carried out criminal activities in Iran. The Court considers that, even if these alleged activities could be considered as proven, they would not constitute a defence to the United States' claims, since diplomatic law provides the possibility of breaking off diplomatic relations, or of declaring *persona non grata* members of diplomatic or consular missions who may be carrying on illicit activities. The Court concludes that the Government of Iran had recourse to coercion against the United States Embassy and its staff instead of making use of the normal means at its disposal.

(d) *International responsibility* (paras. 90–92)

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, the 1955 Treaty, and the applicable rules of general international law, has incurred responsibility towards the United States. As a consequence, there is an obligation on the part of the Iranian State to make reparation for the injury caused to the United States. Since, however, the breaches are still continuing, the form and amount of such reparation cannot yet be determined.

At the same time the Court considers it essential to reiterate the observations it made in its Order of 15 December 1979 on the importance of the principles of international law governing diplomatic and consular relations. After stressing the particular gravity of the case, arising out of the fact that it is not any private individuals or groups that have set at naught the inviolability of an embassy, but the very government of the State to which the mission is accredited, the Court draws the attention of the entire international community to the irreparable harm that may be caused by events of the kind before the Court. Such events cannot fail to undermine a carefully constructed edifice of law, the maintenance of which is vital for the security and well-being of the international community.

(e) *United States operation in Iran on 24–25 April 1980* (paras. 93 and 94)

With regard to the operation undertaken in Iran by United States military units on 24–25 April 1980, the Court says that it cannot fail to express its concern. It 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. Nevertheless, the question of the legality of that operation can have no bearing on the evaluation of Iran's conduct on 4 November 1979. The findings reached by the Court are therefore not affected by that operation.

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For these reasons, the Court gives the decision reproduced in full below:

OPERATIVE PART OF JUDGMENT

THE COURT,*

1. By thirteen votes[1] to two,[2]

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;

2. By thirteen votes[1] to two,[2]

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;

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;

*Composed as follows: *President* Sir Humphrey Waldock; *Vice-President* Elias; *Judges* Forster, Gros, Lachs, Morozov, Nagendra Singh, Ruda, Mosler, Tarazi, Oda, Ago, El-Erian, Sette-Camara and Baxter.

[1] *President* Sir Humphrey Waldock; *Vice-President* Elias; *Judges* Forster, Gros, Lachs, Nagendra Singh, Ruda, Mosler, Oda, Ago, El-Erian, Sette-Camara and Baxter.

[2] *Judges* Morozov and Tarazi.

(*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[3] to three,[4]

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;

6. By fourteen votes[5] to one,[6]

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.

SUMMARY OF OPINIONS APPENDED TO THE JUDGMENT

Judge Lachs indicated that he voted against the first part of operative paragraph 5, as he found it redundant. The responsibility having been established, the whole question of reparations should have been left to the subsequent procedure, including the question of form and amount as provided by the Judgment.

The opinion stresses the importance of the Judgment for diplomatic law, and the major part of it is devoted to the question of the practical solution by diplomatic means of the dispute between the Parties. Once the legal issues have been clarified by the Judgment, the parties should take speedy action and make maximum efforts to dispel tension and mistrust, and in this a third-party initiative may be important. Judge Lachs visualizes a particular role for the Secretary-General of the United Nations in this respect and the work of a special commission or mediating body. In view of the gravity of the situation, the need for a resolution is urgent.

* * *

In his dissenting opinion, *Judge Morozov* indicates that operative paragraph 1 of the Judgment is drafted in such a way that it is not limited to the question of the violation of the Vienna Conventions of 1961 and 1963, but also covers, if read with some paragraphs of the reasoning, the question of alleged violations of the 1955 Treaty of Amity, Economic Relations and Consular Rights between Iran and the United States; this treaty, he believes, does not provide the parties with an unconditional right to invoke the compulsory jurisdiction of the Court, and in the circumstances the Court has in fact no competence to consider the alleged violations.

Furthermore, Judge Morozov observes, the United States committed during the period of the judicial deliberations many unlawful actions, culminating in the military invasion of the territory of the Islamic Republic of Iran, and has therefore lost the legal right to refer to the Treaty in its relations with Iran.

Judge Morozov voted against operative paragraphs 2, 5 and 6 because he had noted that a series of actions was undertaken by the United States of America against Iran in the course of the judicial deliberations, in particular the freezing by the United States of very considerable Iranian assets, combined with the intention, clearly expressed in a statement made by the President of the United States on 7 April 1980, to make use of these assets, if need be, in accordance with decisions that would be taken in the domestic framework of the United States; that meant that the United States was acting as a "judge" in its own cause. In Judge Morozov's view, the situation, created by actions of the United States, in which the Court carried on its judicial deliberations in the case had no precedent in the whole history of the administration of international justice either before the Court or before any other international judicial institution. The United States, having caused severe damage to Iran, had lost the legal as well as the moral right to reparations from Iran, as mentioned in operative paragraphs 2, 5 and 6.

Judge Morozov also finds that some paragraphs of the reasoning part of the Judgment describe the circumstances of the case in an incorrect or one-sided way.

He considers that, without any prejudice to the exclusive competence of the Security Council, the Court, from a purely legal point of view, could have drawn attention to the undeniable fact that Article 51 of the United Nations Charter, establishing the right of self-defence to which the United States of America referred in connection with the events of 24–25 April, may be invoked only "if an armed attack occurs against a member of the United Nations", and that there is no evidence of any armed attack having occurred against the United States.

Judge Morozov also stresses that some indication should have been included in the Judgment to the effect that the Court considered that settlement of the dispute between the United States and the Islamic Republic of Iran should be reached exclusively by peaceful means.

* * *

Judge Tarazi voted in favour of operative paragraphs 3 and 4 of the Judgment, because he considered that the seizure of the embassy, and the detention as hostages of those present in it, constituted an act in breach of the provisions of the 1961 and 1963 Vienna Conventions on Diplomatic and Consular Relations.

On the other hand, Judge Tarazi felt impelled to vote against operative paragraph 1, because he considered that only the 1961 and 1963 Vienna Conventions conferred jurisdiction on the Court in the present case.

He also voted against paragraphs 2 and 5, because, in his view, the Court, at the present stage of the proceedings and considering the concomitant circumstances, could not make any ruling as to the responsibility of the Government of the Islamic Republic of Iran.

On the other hand, Judge Tarazi voted in favour of paragraph 6, because he considered that, in the event of any reparations being owed, they should be determined and assessed by the International Court of Justice; it was not admissible for them to be the subject of proceedings in courts of domestic jurisdiction.

[3] *President* Sir Humphrey Waldock; *Vice-President* Elias; *Judges* Forster, Gros, Nagendra Singh, Ruda, Mosler, Oda, Ago, El-Erian, Sette-Camara and Baxter.

[4] *Judges* Lachs, Morozov and Tarazi.

[5] *President* Sir Humphrey Waldock; *Vice-President* Elias; *Judges* Forster, Gros, Lachs, Nagendra Singh, Ruda, Mosler, Tarazi, Oda, Ago, El-Erian, Sette-Camara and Baxter.

[6] *Judge* Morozov.

66. INTERPRETATION OF THE AGREEMENT OF 25 MARCH 1951 BETWEEN THE WHO AND EGYPT

Advisory Opinion of 20 December 1980

In its Advisory Opinion on the question concerning the Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt submitted to it by a request from the World Health Assembly, the Court set forth the legal principles and rules concerning consultation, negotiation and notice that would apply as between the WHO and Egypt if the Regional Office of the WHO for the Eastern Mediterranean, in Alexandria, were transferred from Egyptian territory.

1. By 12 votes to 1, the Court decided to comply with the Request for an advisory opinion.

2. With regard to *Question 1*, which read as follows:

> "Are the negotiation and notice provisions of Section 37 of the Agreement of 25 March 1951 between the World Health Organization and Egypt applicable in the event that either party to the Agreement wishes to have the Regional Office transferred from the territory of Egypt?",

the Court, by 12 votes to 1, expressed the opinion that in the event of a transfer of the Regional Office of the WHO from Egypt, the WHO and Egypt would, in particular, have (*a*) a mutual obligation to consult together in good faith as to the question under what conditions and in accordance with what modalities the transfer might be effected; (*b*) a mutual obligation to consult together and to negotiate regarding the arrangements needed to effect such transfer in an orderly manner and with a minimum of prejudice to the work of the WHO and the interests of Egypt; and (*c*) an obligation on the part of the party which wishes to effect the transfer to give a reasonable period of notice to the other party.

3. With regard to *Question 2*, which read:

> "If so, what would be the legal responsibilities of both the World Health Organization and Egypt, with regard to the Regional Office in Alexandria, during the 2-year period between notice and termination of the Agreement?",

the Court, by 11 votes to 2, expressed the opinion that, in the event of a decision to transfer, the legal responsibilities of the WHO and Egypt between the notification of the proposed transfer and the accomplishment thereof would be to fulfil in good faith the mutual obligations stated in the reply to Question 1.

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The Court was composed as follows: *President* Sir Humphrey Waldock; *Vice-President* Elias; *Judges* Forster, Gros, Lachs, Morozov, Nagendra Singh, Ruda, Mosler, Oda, Ago, El-Erian and Sette-Camara.

Judges Gros, Lachs, Ruda, Mosler, Oda, Ago, El-Erian and Sette-Camara have appended separate opinions to the Advisory Opinion.

Judge Morozov has appended a dissenting opinion.

In these opinions the judges concerned make clear and explain their reasons for the positions which they take in regard to the various matters dealt with in the Court's opinion.

Factual and legal background to the submission of the Request
(paras. 1–32 of the Advisory Opinion)

After detailing the various stages of the proceedings (paras. 1–9), the Court recounts the antecedents of the WHO Regional Office at Alexandria, from the creation in that city of a general Board of Health in 1831 for the purpose of preventing epidemics up to the integration of the Alexandria Sanitary Bureau with the WHO in 1949 as a regional organ. The Eastern Mediterranean Regional Office commenced operations on 1 July 1949, while negotiations were in progress between the WHO and Egypt for the conclusion of an agreement on the privileges, immunities and facilities to be granted to the Organization. This agreement was eventually signed on 25 March 1951 and entered into force on 8 August 1951. (Paras. 10–27.)

The Court next examines the events which led to the submission of the request for an Advisory Opinion. It recapitulates proceedings within the WHO, from the recommendation by a Sub-Committee of the Regional Committee for the Eastern Mediterranean on 11 May 1979 that the Office be transferred to another State in the region, up to the recommendation by the same Sub-Committee on 9 May 1980 that the Regional Office be transferred as soon as possible to Amman (Jordan) and the adoption by the World Health Assembly on 20 May 1980 of resolution WHA33.16 by which, on account of differing views as to the applicability of Section 37 of the Agreement of 25 March 1951 to the transfer of the Regional Office, it sought the Court's advisory opinion on two questions prior to taking any decision. (Paras. 28–32.)

Competence to deliver an Opinion
(para. 33 of the Advisory Opinion)

Before going any further, the Court considers whether it ought to decline to reply to the request for an Advisory Opinion by reason of its allegedly political character. It concludes that to do so would run counter to its settled jurisprudence. If a question submitted in a request is one that otherwise falls within the normal exercise of its judicial powers, the Court has not to deal with the motives which may have inspired the request.

Significance and scope of the questions put to the Court
(paras. 34 f. of the Advisory Opinion)

The Court next considers the meaning and implications of the hypothetical questions on which it is asked to advise. Section 37 of the Agreement of 25 March 1951, to which the first question refers, reads:

> "The present Agreement may be revised at the request of either party. In this event the two parties shall consult each other concerning the modifications to be made in its provisions. If the negotiations do not result in an understanding within one year, the present Agreement may be denounced by either party giving two years' notice."

The Court points out that, if it is to remain faithful to the requirements of its judicial character in the exercise of its advisory jurisdiction, it must ascertain what are the legal

questions really in issue in questions formulated in a request. This it has had occasion to do in the past, as had also the Permanent Court of International Justice. The Court also notes that a reply to questions of the kind posed in the request submitted to it may, if incomplete, be not only ineffectual but actually misleading as to the legal rules applicable to the matter under consideration by the WHO.

Having regard to the differing views expressed in the World Health Assembly on a number of points, it appears that the true legal question under consideration in the World Health Assembly, which must also be considered to be the legal question submitted to the Court in the WHO's request, is:

What are the legal principles and rules applicable to the question under what conditions and in accordance with what modalities a transfer of the Regional Office from Egypt may be effected?

The differing views advanced
(paras. 37–42)

In answering the question thus formulated, the Court first notes that the right of an international organization to choose the location of its headquarters or regional office is not contested. It then turns to the differing views expressed in the World Health Assembly and, before the Court, in the written and oral statements, regarding the relevance of the Agreement of 25 March 1951 and the applicability of Section 37 to a transfer of the Regional Office from Egypt.

With respect to the *relevance of the 1951 Agreement*, one of the views advanced was that that agreement was a separate transaction, subsequent to the establishment of the Regional Office, and that, although it might contain references to the seat of the Regional Office in Alexandria, it did not provide for the Office's location there. It would follow that it had no bearing on the Organization's right to remove the Regional Office from Egypt. The Agreement, it was claimed, concerned the immunities and privileges granted to the Office within the larger context of the immunities and privileges granted by Egypt to the WHO.

According to the opposing view, the establishment of the Regional Office and its integration with the WHO were not completed in 1949; they were accomplished by a series of acts in a composite process, the final and definitive step in which was the conclusion of the 1951 host agreement. It was contended, *inter alia*, that the absence of a specific provision regarding the establishment of the WHO Office in Alexandria was due to the fact that the Agreement was dealing with a pre-existing Sanitary Bureau already established there. Moreover, it was stated, the Agreement was constantly referred to as a host agreement in the records of the WHO and in official acts of the Egyptian State. (Paras. 37–39.)

So far as the applicability of Section 37 to the transfer of the Office from Egypt was concerned, the differences of view resulted essentially from the meaning attributed to the word "revise" in the first sentence. According to one view, a transfer of the seat would not constitute a revision and would thus not be covered by Section 37, which would not apply to the denunciation of the Agreement which a transfer of the Office from Egypt would involve. Upholders of this view concluded therefrom that since there was no provision in the Agreement for denunciation, the general rules of international law which provided for the possibility of denunciation and the need for a period of notice in respect of such agreements applied in the present case. According to the opposite view, the word "revise" might also signify a general revision of an agreement, including its termination, and was so used in the 1951 Agreement. According to the proponents of this view, even if that interpretation was rejected, Egypt would still be entitled to receive notice under the general rules of international law.

Whatever view may be taken of the arguments advanced concerning the relevance and applicability of the 1951 Agreement, the Court finds that certain legal principles and rules are applicable in the case of such a transfer. (Paras. 40–42.)

Mutual obligations of co-operation and good faith
(paras. 43–47)

Whether the mutual understandings reached between Egypt and the WHO from 1949 to 1951 are regarded as distinct agreements or as separate parts of a single transaction, a contractual legal régime was created between Egypt and the Organization which remains the basis of their legal relations today. These relations remain those of a host State and an international organization, the very essence of which is a body of mutual obligations of co-operation and good faith. Having regard to the practical problems which a transfer would cause, the WHO and Egypt must co-operate closely to avoid any risk of serious disruption to the work of the Regional Office. In particular, a reasonable period of time should be allowed for the process. (Paras. 43 f.)

In the Court's view, certain pointers to the implications of these mutual obligations to co-operate in good faith in a situation like the one with which it is concerned may be found in numerous host agreements, as well as in Article 56, paragraph 2, of the Vienna Convention on the Law of Treaties and the corresponding provision in the International Law Commission's draft articles on treaties between States and international organizations or between international organizations. (Paras. 45–47.)

Applicable legal principles and rules
(paras. 48 f.)

The Court thus finds the applicable legal principles and rules, and the consequent obligations, to consist in:

—consultation in good faith as to the question under what conditions and in accordance with what modalities a transfer of the Regional Office from Egypt may be effected;

—if a transfer is decided upon, consultation and negotiation regarding the arrangements needed to effect the transfer in an orderly manner and with a minimum of prejudice to the work of the organization and the interests of Egypt;

—the giving of reasonable notice by the party desiring the transfer.

Precisely what periods of time may be involved in the observance of the duties to consult and negotiate, and what period of notice should be given, are matters which necessarily vary according to the requirements of the particular case. In principle, therefore, it is for the parties in each case to determine them. Some indications as to the possible periods involved can be seen in provisions of host agreements, including Section 37 of the Agreement of 25 March 1951, as well as in Article 56 of the Vienna Convention on the Law of Treaties and in the corresponding article of the International Law Commission's draft articles on treaties between States and international organizations or between international organizations. The paramount consideration for both the WHO and the host State in every case must be their obligation to co-operate in good faith to promote the objectives and purposes of the WHO.

Second question submitted to the Court
(para. 50)

It follows from the foregoing that the Court's reply to the second question is that the legal responsibilities of the Organization and Egypt during the transitional period between notification of the proposed transfer and the accomplishment thereof would be to fulfil in good faith the mutual obligations set out above.

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For these reasons, the Court has delivered the Advisory Opinion whose complete operative provisions are reproduced below:

OPERATIVE PROVISION OF THE ADVISORY OPINION

THE COURT,*

1. By twelve votes[1] to one,[2]

Decides to comply with the Request for an advisory opinion;

2. With regard to Question 1,

by twelve votes[1] to one,[2]

Is of the opinion that in the event specified in the Request, the legal principles and rules, and the mutual obligations which they imply, regarding consultation, negotiation and notice, applicable as between the World Health Organization and Egypt, are those which have been set out in paragraph 49 of this Advisory Opinion and in particular that:

(*a*) Their mutual obligations under those legal principles and rules place a duty both upon the Organization and upon Egypt to consult together in good faith as to the question under what conditions and in accordance with what modalities a transfer of the Regional Office from Egypt may be effected;

(*b*) In the event of its being finally decided that the Regional Office shall be transferred from Egypt, their mutual obligations of co-operation place a duty upon the Organization and Egypt to consult together and to negotiate regarding the various arrangements needed to effect the transfer from the existing to the new site in an orderly manner and with a minimum of prejudice to the work of the Organization and the interests of Egypt;

(*c*) Their mutual obligations under those legal principles and rules place a duty upon the party which wishes to effect the transfer to give a reasonable period of notice to the other party for the termination of the existing situation regarding the Regional Office at Alexandria, taking due account of all the practical arrangements needed to effect an orderly and equitable transfer of the Office to its new site.

3. With regard to Question 2,

By eleven votes[3] to two,[4]

Is of the opinion that, in the event of a decision that the Regional Office shall be transferred from Egypt, the legal responsibilities of the World Health Organization and Egypt during the transitional period between the notification of the proposed transfer of the Office and the accomplishment thereof are to fulfil in good faith the mutual obligations which the Court has set out in answering Question 1.

SUMMARY OF JUDGE MOROZOV'S DISSENTING OPINION

Judge Morozov voted against the Advisory Opinion because in substance it is an attempt to involve the Court in the handling of one of the consequences of a serious political conflict existing in the Middle East. This conflict is directly related to the cause of the increasingly tense situation in the Eastern Mediterranean Region, which results from the Agreement signed at Camp David in the USA on 27 September 1978 which, as was said particularly in the Written Statement presented to the Court by the Syrian Arab Republic, "prevented the region from achieving the comprehensive and true peace called by the Arab States".

According to the dissenting opinion, the Court, which, by virtue of Article 65 of its Statute, has *a discretionary right to give* or *not to give* an Advisory Opinion, should in this case decline to deliver an Opinion in order to avoid an embarrassing situation where it would be involved in handling a dispute between States with a definite political character.

Judge Morozov also expressed the view that the Court, even from the point of view of those who consider that the Request of the WHO is a purely legal one, acted wrongly when in substance it changed the two questions submitted by the WHO into questions of its own. Thus Question 1 on the applicability of Section 37 of the 1951 Agreement was replaced by the question "under what conditions and in accordance with what modalities a transfer of the Regional Office from Egypt may be effected?" The same attempt to redraft was also made in relation to Question 2.

The references made to the previous practice of the Court do not in his view justify such kind of redrafting which, as a matter of principle, is incompatible with the judicial functions of the Court as defined in Chapter IV of its Statute. Moreover, the Court tacitly recognizes that Section 37 of the 1951 Agreement is not applicable to the question of the transfer of the office because it does not give the answer to Question 1 submitted by the WHO.

Judge Morozov considered that certain recommendations which were made by the Court to the WHO are in substance not an answer to its request. They constitute attempts to interfere with the activity of the WHO, which, in accordance with its Constitution, has an exclusive right to take the *decision* relating to the establishment of its Regional Offices, and consequently to the transfer thereof, including all steps for the implementation of the decision concerned.

*Composed as follows: *President* Sir Humphrey Waldock; *Vice-President* Elias; *Judges* Forster, Gros, Lachs, Morozov, Nagendra Singh, Ruda, Mosler, Oda, Ago, El-Erian, Sette-Camara.

[1] *President* Sir Humphrey Waldock; *Vice-President* Elias; *Judges* Forster, Gros, Lachs, Nagendra Singh, Ruda, Mosler, Oda, Ago, El-Erian, Sette-Camara.

[2] *Judge* Morozov.

[3] *President* Sir Humphrey Waldock; *Vice-President* Elias; *Judges* Forster, Gros, Nagendra Singh, Ruda, Mosler, Oda, Ago, El-Erian, Sette-Camara.

[4] *Judges* Lachs and Morozov.

67. CASE CONCERNING THE CONTINENTAL SHELF (TUNISIA/LIBYAN ARAB JAMAHIRIYA) (APPLICATION FOR PERMISSION TO INTERVENE)

Judgment of 14 April 1981

In its Judgment in respect of Malta's application for permission to intervene under Article 62 of the Statute in the case concerning the Continental Shelf between Tunisia and Libya, the Court found unanimously that Malta's request for permission to intervene could not be granted.

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The Court was composed as follows:

President Sir Humphrey Waldock; *Vice-President* Elias; *Judges* Gros, Lachs, Morozov, Nagendra Singh, Ruda, Mosler, Oda, Ago, El-Erian, Sette-Camara, El-Khani, Schwebel; *Judges* ad hoc Evensen, Jiménez de Aréchaga.

Judges Morozov, Oda and Schwebel appended to the Judgment separate opinions making clear their positions with regard to certain matters raised in the Court's reasoning.

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Proceedings before the Court
(paras. 1–10)

In its Judgment, the Court recalled that on 1 December 1978 and 19 February 1979, respectively, Tunisia and the Libyan Arab Jamahiriya notified to the Court a Special Agreement which they had concluded on 10 June 1977 for the submission of the question of the continental shelf between the two countries to the International Court of Justice.

In accordance with the Statute and the Rules of Court, the proceedings then took their course having regard to the terms of that Agreement. The Memorials of the Parties were filed and exchanged on 30 May 1960; the Counter-Memorial of Tunisia and that of the Libyan Arab Jamahiriya were filed respectively on 1 December 1980 and 2 February 1981, and were exchanged on the latter date.

Since the Court did not include upon the bench a judge of Tunisian or of Libyan nationality, each of the Parties exercised the right conferred by Article 31 of the Statute to choose a judge *ad hoc* to sit in the case. The Libyan Arab Jamahiriya designated Mr. E. Jiménez de Aréchaga and Tunisia Mr. J. Evensen.

On 30 January 1981 Malta filed an Application requesting permission to intervene in the case under Article 62 of the Statute. Tunisia and the Libyan Arab Jamahiriya submitted written observations on this Application on 26 February 1981, the date fixed as the time-limit for that purpose. Objection having been raised to Malta's request, the Court, in accordance with Article 84 of its Rules, sat in public on 19–21 and 23 March 1981 for the purpose of hearing the three States before deciding whether it should be granted or not.

Provisions of the Statute and Rules of Court concerning intervention
(para. 11)

The Article of the Statute invoked by Malta provides as follows:

"*Article 62*

"1. Should a State consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene.

"2. It shall be for the Court to decide upon this request."

Under Article 81, paragraph 2, of the Rules of Court, an application for permission to intervene under Article 62 of the Statute shall specify the case to which it relates, and shall set out:

"(*a*) the interest of a legal nature which the State applying to intervene considers may be affected by the decision in that case;

"(*b*) the precise object of the intervention;

"(*c*) any basis of jurisdiction which is claimed to exist as between the State applying to intervene and the parties to the case."

The contentions of Malta and of the Parties
(paras. 12–16)

The Court summarized the contentions put forward by Malta in its Application and oral arguments, and by the two Parties in their respective written observations and oral arguments.

Legal problems raised by Malta's request
(paras. 17–27)

The Court noted that objections in relation to all three matters specified in Article 81, paragraph 2, of the Rules had been raised by the Parties, which had alleged that Malta had not succeeded in showing possession of an interest of a legal nature which might be affected by the decision in the case, that the object of its request fell altogether outside the scope of the form of intervention for which Article 62 provided, and that it had not established any jurisdictional link with them. If any one of those objections should be found justified, it would, said the Court, clearly not be open to it to give any further consideration to the request.

Before considering the objections the Court retraced the history of the provisions of its Statute and Rules concerning intervention and noted how, from the beginning, it had been agreed not to try to resolve in the Rules of Court the various substantive questions which had been raised but to leave them to be decided on the basis of the Statute and in the light of the particular circumstances of each case.

Interest of a legal nature and object of the intervention
(paras. 28–35)

The Court then considered whether the interest of a legal nature relied upon by Malta and the stated object of its intervention were such as to justify the grant of permission to intervene.

The interest of a legal nature which Malta had invoked consisted essentially in its possible concern with any findings of the Court that identified and assessed the geographical or geomorphological factors relevant to the delimitation of the

Libya/Tunisia continental shelf and with any pronouncements made by the Court regarding, for example, the significance of special circumstances or the application of equitable principles in that delimitation. Any such findings or pronouncements, in Malta's view, were likely to have repercussions upon Malta's own rights and legal interests in any future settlement of its continental shelf boundaries with Libya and Tunisia. Malta had underlined that only such elements were the object of its request and that it was not concerned with the choice of the particular line to delimit the boundary between those two countries or with the laying-down of general principles by the Court as between them.

The fact that Malta's request related to specific elements in the case between Tunisia and Libya implied, the Court found, that the legal interest which it relied on would concern matters which were, or might be, directly in issue between the Parties and, as Malta had presented them, were part of the very subject-matter of that case. Yet Malta had at the same time made it plain that it did not mean by its intervention to submit its own interest in those matters for decision as between itself and Libya or Tunisia, since its object was not to obtain any decision from the Court concerning its continental shelf boundaries with either or both of those countries.

While Malta, as it had asserted, clearly possessed a certain interest in the Court's treatment of the physical factors and legal considerations relevant to the delimitation of the continental shelf boundaries of States within the central Mediterranean region that was somewhat more specific and direct than that of States outside that region, that interest was nevertheless of the same kind as those of other States within the region. But what Malta had to show in order to obtain permission to intervene under Article 62 of the Statute was an interest of a legal nature which might be affected by the Court's decision in the case.

Under the Special Agreement the Court was called upon to decide the principles and rules of international law to be applied in the delimitation of the respective areas of continental shelf appertaining to Tunisia and Libya. Those two States had therefore put in issue their claims with respect to the matters covered by that instrument and, having regard to the terms of Article 59 of the Statute, the Court's decision in the case would accordingly be binding in respect of those matters. Malta, however, had attached to its request an express reservation that its intervention was not to have the effect of putting in issue its own claims vis-à-vis Tunisia and Libya. That being so, the very character of the intervention for which Malta sought permission showed that the interest of a legal nature which it had invoked could not be considered as one which, within the meaning of Article 62 of the Statute, might be affected by the decision in the case.

The Court found that what the request in effect sought to secure was the opportunity of arguing in favour of a decision in which the Court would refrain from adopting and applying particular criteria that it might otherwise consider appropriate for the delimitation of the continental shelf of Tunisia and Libya. To allow such a form of intervention would leave the Parties quite uncertain as to whether and how far they should consider their own separate interests vis-à-vis Malta as in effect constituting part of the subject-matter of the case. In the view of the Court, a State seeking to intervene under Article 62 of the Statute was clearly not entitled to place the parties to the case in such a position.

The Court understood Malta's preoccupations regarding possible implications for its own interests of the Court's findings and pronouncements on particular elements in the case between Tunisia and Libya. Even so, for the reasons set out in the Judgment, the request was not one to which, under Article 62 of the Statute, the Court might accede.

Jurisdictional link
(para. 36)

Having reached the conclusion that Malta's request for permission to intervene was not one to which it could accede, the Court found it unnecessary to decide in the case under consideration the question whether the existence of a valid link of jurisdiction with the parties to the case was an essential condition for the granting of permission to intervene under Article 62 of the Statute.

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For those reasons, the Court (para. 37) found that Malta's request for permission to intervene in the proceedings under Article 62 of the Statute could not be granted.

SUMMARY OF OPINIONS APPENDED TO THE JUDGMENT

Judge Morozov voted for the operative part of the decision, but for the following reason: he considered that no application for permission to intervene could be entertained by the Court unless it had competence, in one form or another, under Chapter II of its Statute. The principle enshrined in that Chapter was that the Court had no power to consider any dispute without the consent of all the States parties to that dispute. The cornerstone provisions of Chapter II had equally to be taken into account before any intervention under Article 62 could be authorized. Hence the requirement of consent applied to Malta's request, as it would also apply to that of any State requesting intervention on the basis of Article 62.

Malta had recognized that no such consent existed between it and the Parties, Libya and Tunisia, who for their part had objected that the Court was not competent. Therein lay, as a matter of principle, the decisive question which the Court should have considered first.

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Judge Oda stated in his opinion that he had voted in favour of the Judgment in deference to the Court's competence to exercise authority in granting or refusing permission to intervene under Article 62 of the Statute. That provision had, however, been too narrowly interpreted in the Judgment, for it was far from clear that an intervening State must in all circumstances place its interests in issue like a party to the case. The Court had also, in Judge Oda's opinion, imposed too severe a test of whether Malta had a legal interest which might be affected by the decision in the case. On the question whether a jurisdictional link was required between the intervener and the original litigants before intervention could be authorized, Judge Oda expressed the view that that would depend *inter alia* on whether the third State claimed a right directly involved in the subject-matter of the case.

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Judge Schwebel appended a separate opinion which concurred in the Court's Judgment that the object of Malta's

intervention was not intervention within the meaning of Article 62 of the Statute of the Court. In his view, the Court could reasonably decide to debar Malta's request to intervene as that of a "non-party". However, he did not agree that Malta had failed to show that it had an interest of a legal nature which merely "may" be no more than "affected" by the decision in the case. Judge Schwebel submitted that, in view of the geographical situation of Malta, Libya and Tunisia—which Malta construes as that of sharing a single continental shelf—the critical point is not the object of the case but the subjects of the case as the Court is likely to treat them. Those subjects, as dealt with in passages of the Court's Judgment in the main case, could well affect the legal interests of Malta. Judge Schwebel added that, while the Court had rightly refrained from passing upon whether a State seeking to intervene must demonstrate a jurisdictional link with the Parties to the principal case, he was of the view that Article 62 of itself provides the requisite jurisdiction.

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68. CASE CONCERNING DELIMITATION OF THE MARITIME BOUNDARY IN THE GULF OF MAINE AREA (CONSTITUTION OF CHAMBER)

Order of 20 January 1982

The Court, by an Order, constituted a Chamber to which Canada and the United States submitted a longstanding dispute over the boundary separating the fishery zones and continental shelf areas of the two countries off the Atlantic coast in the Gulf of Maine.

This was the first time in the history of the Court that the parties to a dispute made use of the possibilities, embodied in the Statute and Rules of the Court, of sending their case to a chamber instead of the full Court.

Details of the process by which the chamber was created are given below.

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On 25 November 1981 the Government of Canada and the Government of the United States had notified to the Registry a Special Agreement, concluded by them on 29 March 1979, and having entered into force on 20 November 1981, by which they submitted to a chamber of the Court a question as to the course of the maritime boundary dividing the continental shelf and fisheries zones of the two Parties in the Gulf of Maine area.

The Special Agreement provided for the submission of the dispute to a five-member chamber to be constituted after consultation with the Parties, pursuant to Article 26, paragraph 2, and Article 31 of the Statute of the Court. These are respectively the Articles providing for the establishment of a chamber to deal with a particular case and the right of a Party, when there is no judge of its nationality upon the bench, to choose a judge *ad hoc* to sit in the case.

The Parties were duly consulted, and the Court had already been notified in a letter from the Parties accompanying the submission of the case that, since the Court did not include upon the bench a judge of Canadian nationality, the Government of Canada intended to choose a judge *ad hoc*.

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Following a decision in principle to accede to the Parties' request to form the special chamber, and an election held on 15 January 1982, the Court

—composed as follows: *Acting President* Elias; *Judges* Forster, Gros, Lachs, Morozov, Nagendra Singh, Ruda, Mosler, Oda, Ago, Sette-Camara, El-Khani and Schwebel—

adopted, on 20 January 1982, by 11 votes to 2, an Order whereby it duly constituted a special chamber to deal with the delimitation of the maritime boundary between Canada and the United States in the Gulf of Maine area, with the composition having resulted from the above-mentioned election: Judges Gros, Ruda, Mosler, Ago and Schwebel. The Order notes that, in application of Article 31, paragraph 4, of the Statute of the Court, the Acting President had requested Judge Ruda to give place in due course to the judge *ad hoc* to be chosen by Canada, and that Judge Ruda had indicated his readiness to do so.

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Judge Oda appended a declaration to the Order of 20 January 1982.

Judges Morozov and El-Khani voted against the Order as a whole and appended dissenting opinions giving their reasons.

SUMMARY OF THE DECLARATION APPENDED TO THE ORDER

Judge Oda indicated that, while he voted in favour of the Order, it should have been made known that the Court, for reasons best known to itself, had approved the composition of the Chamber entirely in accordance with the latest wishes of the Parties.

SUMMARY OF DISSENTING OPINIONS APPENDED TO THE ORDER

In his dissenting opinion, *Judge Morozov* stressed that in substance the Special Agreement between the United States of America and Canada clearly took as point of departure the erroneous presumption that, contrary to Article 26, paragraph 2, of the Statute, the Parties who presented a request to create a Chamber for consideration of a particular case might not merely choose what should be the number of the members of the Chamber, but also formally decide and propose the names of judges who should be selected by secret ballot, and even present those proposals to the Court in the form of some kind of "ultimatum".

In that situation, the sovereign right of the Court to carry out the election independently of the wishes of the Parties, by

secret ballot in accordance with the provisions of the Statute and Rules of Court, became in substance meaningless.

From his point of view, the matter could have been successfully settled by the Court in February 1982 in its new composition.

Judge El-Khani voted against the Order and stated in his dissenting opinion that in his opinion the imposition of an unduly close time-limit for the Chamber's formation and of a particular composition rendered the Court no longer master of its own acts, deprived it of its freedom of choice and was an obstacle to the proper administration of justice. Furthermore it diminished the prestige of the Court and was harmful to its dignity as the principal judicial organ of the United Nations. It resulted in its regionalization, by depriving it of its basic and essential characteristic of universality, and produced the indirect result of two judges of the same nationality acting in the name of the Court, one in the Chamber and the other in the Court, which did not correspond to the Statute. On those grounds he found that it ought not to constitute a precedent, as it would be a dangerous course to follow in the future.

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69. CASE CONCERNING THE CONTINENTAL SHELF (TUNISIA/LIBYAN ARAB JAMAHIRIYA)

Judgment of 24 February 1982

In its judgment in the Continental Shelf case between Tunisia and Libya, the Court declared the principles and rules of international law which are applicable to the delimitation of the areas of continental shelf appertaining respectively to Tunisia and Libya in the region concerned in the dispute.

It enumerated the relevant circumstances to be taken into account for the purpose of arriving at an equitable delimitation and specified the practical method to be used for the delimitation itself.

The delimitation line indicated by the Court is made up of two segments: the *first segment* of the line starts from the outer limit of the Parties' territorial sea, at the intersection of that limit with a straight line constructed from the frontier point of Ras Ajdir at a bearing approximately 26° east of north; it continues at the same bearing until it meets the latitude of the most westerly point of the Gulf of Gabes, approximately 34° 10′ 30″ N. There begins the *second segment*, which is inclined farther to the east at a bearing of 52°.

The Court's Judgment was adopted by 10 votes to 4.

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The Court was composed as follows: Acting President Elias; Judges Forster, Gros, Lachs, Morozov, Nagendra Singh, Mosler, Oda, Ago, Sette-Camara, El-Khani and Schwebel; Judges *ad hoc* Evensen and Jiménez de Aréchaga.

Judges Ago, Schwebel and Jiménez de Aréchaga appended separate opinions to the Judgment.

Judges Gros, Oda and Evensen appended dissenting opinions to the Judgment.

In these opinions the Judges concerned stated and explained the positions they adopted in regard to certain points dealt with in the Judgment.

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The Court began its Judgment by recapitulating the various stages of the proceedings (paras. 1–15), defining the geographical setting of the dispute, namely the region known as the Pelagian Block or Basin (paras. 17–20 and 32–36), and noting that petroleum prospection and exploitation had been carried out on the continental shelf (para. 21).

Turning to the Special Agreement between Tunisia and Libya by which the proceedings had been instituted (paras. 22–31), the Court recalled that under Article 1, paragraph 1, it had been requested to state "the principles and rules of international law" which might "be applied for the delimitation of the areas of the continental shelf" respectively appertaining to each of the two States, and had further been specifically called upon, in rendering its decision, to take account of the following three factors: (*a*) equitable principles; (*b*) the relevant circumstances which characterize the area; and (*c*) the new accepted trends in the Third United Nations Conference on the Law of the Sea.

Article 1, second paragraph, of the Special Agreement required the Court to "clarify the practical method for the application of these principles and rules . . . so as to enable the experts of the two countries to delimit these areas without difficulties". The Court was therefore not called upon itself to draw the actual delimitation line. The Parties were in disagreement as to the scope of the task entrusted to the Court by that text, but a careful analysis of the pleadings and arguments on the point led the Court to conclude that there was only a difference of emphasis as to the respective roles of the Court and of the experts. Articles 2 and 3 of the Special Agreement made it clear that the Parties recognized the obligation to comply with the Judgment of the Court, which would have the effect and binding force attributed to it under Article 94 of the Charter, Articles 59 and 60 of the Statute and Article 94, paragraph 2, of the Rules of Court. The Parties were to meet as quickly as possible after the Judgment was given with a view to the conclusion of a treaty. The Court's view was that at that stage there would be no need for negotiation between the experts of the Parties regarding the factors to be taken into account in their calculations, since the Court would have determined that matter.

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The Court then dealt with the question of the principles and rules of international law applicable to the delimitation (paras. 36–107), which it examined in the light of the Parties' arguments. After first setting forth some general considerations (paras. 36–44), it examined the role of the new accepted trends at the United Nations Third Conference on the Law of the Sea (paras. 45–50). Next it turned to the question whether the natural prolongation of each of the two

States could be determined on the basis of physical criteria (paras. 51–68); having found that there was just one continental shelf common to both States, it concluded that the extent of the continental shelf area appertaining to each could not be ascertained from criteria of natural prolongation. The Court went on to consider the implications of equitable principles (paras. 69–71) and to review the various circumstances characterizing the area which were likely to be relevant for the purposes of the delimitation (paras. 72–107).

Finally the Court examined the various methods of delimitation (paras. 108–132) contended for by the Parties, explained why it could not accept them, and indicated what method would in its judgment enable an equitable solution to be reached in the present case.

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The conclusions reached by the Court are indicated in the operative paragraph of the Judgment, which is worded as follows:

The Court, by ten votes to four, finds that

A. The principles and rules of international law applicable for the delimitation, to be effected by agreement in implementation of the present Judgment, of the areas of continental shelf appertaining to the Republic of Tunisia and the Socialist People's Libyan Arab Jamahiriya respectively, in the area of the Pelagian Block in dispute between them as defined in paragraph B, subparagraph (1) below, are as follows:

(1) the delimitation is to be effected in accordance with equitable principles, and taking account of all relevant circumstances;

(2) the area relevant for the delimitation constitutes a single continental shelf as the natural prolongation of the land territory of both Parties, so that in the present case, no criterion for delimitation of shelf areas can be derived from the principle of natural prolongation as such;

(3) in the particular geographical circumstances of the present case, the physical structure of the continental shelf areas is not such as to determine an equitable line of delimitation.

B. The relevant circumstances referred to in paragraph A, subparagraph (1) above, to be taken into account in achieving an equitable delimitation include the following:

(1) the fact that the area relevant to the delimitation in the present case is bounded by the Tunisian coast from Ras Ajdir to Ras Kaboudia and the Libyan coast from Ras Ajdir to Ras Tajoura and by the parallel of latitude passing through Ras Kaboudia and the meridian passing through Ras Tajoura, the rights of third States being reserved;

(2) the general configuration of the coasts of the Parties, and in particular the marked change in direction of the Tunisian coastline between Ras Ajdir and Ras Kaboudia;

(3) the existence and position of the Kerkennah Islands;

(4) the land frontier between the Parties, and their conduct prior to 1974 in the grant of petroleum concessions, resulting in the employment of a line seawards from Ras Ajdir at an angle of approximately 26° east of the meridian, which line corresponds to the line perpendicular to the coast at the frontier point which had in the past been observed as a *de facto* maritime limit;

(5) the element of a reasonable degree of proportionality, which a delimitation carried out in accordance with equitable principles ought to bring about between the extent of the continental shelf areas appertaining to the coastal State and the length of the relevant part of its coast, measured in the general direction of the coastlines, account being taken for this purpose of the effects, actual or prospective, of any other continental shelf delimitation between States in the same region.

C. The practical method for the application of the aforesaid principles and rules of international law in the particular situation of the present case is the following:

(1) the taking into account of the relevant circumstances which characterize the area defined in paragraph B, subparagraph (1) above, including its extent, calls for it to be treated, for the purpose of its delimitation between the Parties to the present case, as made up of two sectors, each requiring the application of a specific method of delimitation in order to achieve an overall equitable solution;

(2) in the first sector, namely in the sector closer to the coast of the Parties, the starting point for the line of delimitation is the point where the outer limit of the territorial sea of the Parties is intersected by a straight line drawn from the land frontier point of Ras Ajdir through the point 33°55'N, 12°E, which line runs at a bearing of approximately 26° east of north, corresponding to the angle followed by the north-western boundary of Libyan petroleum concessions numbers NC 76, 137, NC 41 and NC 53, which was aligned on the south-eastern boundary of Tunisian petroleum concession "Permis complémentaire offshore du Golfe de Gabès" (21 October 1966); from the intersection point so determined, the line of delimitation between the two continental shelves is to run north-east through the point 33°55'N, 12°E, thus on that same bearing, to the point of intersection with the parallel passing through the most westerly point of the Tunisian coastline between Ras Kaboudia and Ras Ajdir, that is to say, the most westerly point on the shoreline (low-water mark) of the Gulf of Gabès;

(3) in the second sector, namely in the area which extends seawards beyond the parallel of the most westerly point of the Gulf of Gabès, the line of delimitation of the two continental shelves is to veer to the east in such a way as to take account of the Kerkennah Islands; that is to say, the delimitation line is to run parallel to a line drawn from the most westerly point of the Gulf of Gabès bisecting the angle formed by a line from that point to Ras Kaboudia and a line drawn from that same point along the seaward coast of the Kerkennah Islands, the bearing of the delimitation line parallel to such bisector being 52° to the meridian; the extension of this line northeastwards is a matter falling outside the jurisdiction of the Court in the present case, as it will depend on the delimitation to be agreed with third States.

IN FAVOUR: *Acting President* Elias; *Judges* Lachs, Morozov, Nagendra Singh, Mosler, Ago, Sette-Camara, El-Khani, Schwebel and *Judge* ad hoc Jiménez de Aréchaga;

AGAINST: *Judges* Forster, Gros, Oda and *Judge* ad hoc Evensen.

SUMMARY OF DISSENTING OPINIONS APPENDED TO THE JUDGMENT

In *Judge Oda*'s view, the Court fails to suggest any positive principles or rules of international law, and the line suggested is not grounded on any persuasive considerations. Indeed, the judgment appears as one appropriate to a case to be decided *ex aequo et bono* under Article 38, paragraph 2, of the Statute. Considering that the distance criterion has become dominant in the new concept of the limits of the continental shelf, as also the limits of the exclusive economic zone which inevitably has a significant impact on the exploi-

tation of submarine mineral resources, an equidistance method is appropriate in principle for the delimitation of the continental shelf between Tunisia and Libya, but only on condition that the line is adjusted in the light of any coastal features which might otherwise result in some distortion from the general viewpoint of proportionality between the lengths of coastline and the areas to be apportioned. He suggests, for what is quite a normal case of delimitation of a continental shelf between two adjacent States, a line equidistant from the coasts of both countries, disregarding the Kerkennah Islands and surrounding low-tide elevations, as shown on attached maps.

Judge ad hoc *Evensen* held that, although equity is part of international law, it cannot operate in a legal void. In the case at hand, the coasts of the two States were adjacent but at the same time almost opposite each other. The Court has not paid sufficient attention to this geographic fact. It has also disregarded such relevant characteristics of the coasts concerned as the Island of Jerba, the promontories of Zarzis and the Kerkennah Archipelago with the surrounding low-tide elevations. Nor had the Court given sufficient considerations to such new trends in the United Nations Law of the Sea Conference as the 200-mile exclusive economic zone and the trend towards distance criteria for certain aspects of the continental shelf. He felt that, in this case, the equidistance criterion might have been a more appropriate starting-point for delimitation purposes, adjusted by considerations of equity, than the method proposed by the Court. He felt that the distinction between a decision based on principles and rules of international law in accordance with Article 38, paragraph 1, of the Statute and an *ex aequo et bono* decision under Article 38, paragraph 2, had become blurred.

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70. APPLICATION FOR REVIEW OF JUDGEMENT NO. 273 OF THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL

Advisory Opinion of 20 July 1982

In its Advisory Opinion concerning an Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, the Court decided that in Judgement No. 273 the United Nations Administrative Tribunal did not err on a question of law relating to the provisions of the Charter of the United Nations, and did not commit any excess of jurisdiction or competence.

The question submitted to the Court by the Committee on Applications for Review of Administrative Tribunal Judgements was as follows:

> "Is the judgement of the United Nations Administrative Tribunal in Judgement No. 273, *Mortished* v. *the Secretary-General,* warranted in determining that General Assembly resolution 34/165 of 17 December 1979 could not be given immediate effect in requiring, for the payment of repatriation grants, evidence of relocation to a country other than the country of the staff member's last duty station?"

Having interpreted the question as requiring it to determine whether, with respect to the matters mentioned in it, the Administrative Tribunal had "erred on a question of law relating to the provisions of the Charter" or "exceeded its jurisdiction or competence", the Court decided as follows:

1. By nine votes to six, the Court decided to comply with the request for an advisory opinion.

2(A) By ten votes to five, the Court was of the opinion that the Administrative Tribunal of the United Nations in Judgement No. 273 did not err on a question of law relating to the provisions of the Charter of the United Nations.

2(B) By twelve votes to three, the Court was of the opinion that the Administrative Tribunal of the United Nations in Judgement No. 273 did not commit any excess of the jurisdiction or competence vested in it.

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The Court was composed as follows: *President* Elias; *Vice-President* Sette-Camara; *Judges* Lachs, Morozov, Nagendra Singh, Ruda, Mosler, Oda, Ago, El-Khani, Schwebel, Sir Robert Jennings, de Lacharrière, Mbaye and Bedjaoui.

Judges Nagendra Singh, Ruda, Mosler and Oda appended separate opinions to the Advisory Opinion.

Judges Lachs, Morozov, El-Khani and Schwebel appended dissenting opinions to the Advisory Opinion.

In their opinions the judges concerned state and explain the positions they adopted in regard to certain points dealt with in the Advisory Opinion

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Summary of facts
(paras. 1–15 of the Opinion)

After outlining the successive stages of the proceedings before it (paras. 1–9), the Court gave a summary of the facts of the case (paras. 10–15); the principal facts were as follows:

Mr. Mortished, an Irish national, entered the service of the International Civil Aviation Organization (ICAO) in 1949. In 1958 he was transferred to the United Nations in New York, and in 1967 to the United Nations Office at Geneva. On attaining the age of 60 he retired on 30 April 1980.

A benefit known as the "repatriation grant" was payable in certain circumstances to staff members at the time of their separation from service, under United Nations Staff Regulation 9.4 and Annex IV; the conditions for payment of this grant were determined by the Secretary-General in Staff Rule 109.5.

At the time of Mr. Mortished's retirement, the General Assembly had recently adopted two successive resolutions relating to (*inter alia*) the repatriation grant. By resolution 33/119 of 19 December 1978, the General Assembly had decided

> "that payment of the repatriation grant to entitled staff members shall be made conditional upon the presentation

by the staff member of evidence of actual relocation, subject to the terms to be established by the [International Civil Service] Commission;".

To give effect, from 1 July 1979, to the terms established by the Commission for the payment of the repatriation grant, for which there had previously been no requirement of presentation of evidence, the Secretary-General had amended Staff Rule 109.5 to make payment of the repatriation grant subject to provision of evidence that "the former staff member has established residence in a country other than that of the last duty station" (para. (*d*)). However, paragraph (*f*) of the Rule was worded to read:

"(*f*) Notwithstanding paragraph (*d*) above, staff members already in service before 1 July 1979 shall retain the entitlement to repatriation grant proportionate to the years and months of service qualifying for the grant which they already had accrued at that date without the necessity of production of evidence of relocation with respect to such qualifying service."

Since Mr. Mortished had accumulated the maximum qualifying service (12 years) well before 1 July 1979, paragraph (*f*) would have totally exempted him from the requirement to present evidence of relocation.

On 17 December 1979 the General Assembly adopted resolution 34/165 by which it decided, *inter alia,* that

"effective 1 January 1980 no staff member shall be entitled to any part of the relocation grant unless evidence of relocation away from the country of the last duty station is provided".

The Secretary-General accordingly issued an administrative instruction abolishing Rule 109.5 (*f*) with effect from 1 January 1980, followed by a revision of the Staff Rules deleting paragraph (*f*).

On Mr. Mortished's retirement, the Secretariat refused to pay him the repatriation grant without evidence of relocation, and on 10 October 1980 Mr. Mortished seised the Administrative Tribunal of an appeal.

The Administrative Tribunal, in its Judgement No. 273 of 15 May 1981, found *inter alia* that the Secretary-General had

"failed to recognize the Applicant's acquired right, which he held by virtue of the transitional system in force from 1 July to 31 December 1979 and set forth in Staff Rule 109.5 (*f*)".

It concluded that Mr. Mortished

"was entitled to receive that grant on the terms defined in Staff Rule 109.5 (*f*), despite the fact that that rule was no longer in force on the date of that Applicant's separation from the United Nations",

and was therefore entitled to compensation for the injury sustained "as the result of a disregard of Staff Regulation 12.1 and Staff Rule 112.2 (*a*)", which read:

"REGULATION 12.1: These regulations may be supplemented or amended by the General Assembly, without prejudice to the acquired rights of staff members."

"Rule 112.2

"(*a*) These rules may be amended by the Secretary-General in a manner consistent with the Staff Regulations."

The compensation was assessed by the Tribunal at the amount of the repatriation grant of which payment was refused.

The United States of America did not accept the Tribunal's Judgement and therefore applied to the Committee on Applications for Review of Administrative Tribunal Judgements (hereinafter called "the Committee"), asking the Committee to request an advisory opinion of the Court. This application was made pursuant to Article 11, paragraph 1, of the Tribunal's Statute, which empowered member States, the Secretary-General or the person in respect of whom the judgement had been rendered to object to the judgement. If the Committee decides that there is a substantial basis for the application, it requests an advisory opinion of the Court. In the case in question, after examining the application at two meetings, the Committee decided that there was a substantial basis for it, on the grounds both that the Administrative Tribunal had erred on a question of law relating to the provisions of the Charter, and that the Tribunal had exceeded its jurisdiction or competence.

Competence to give an advisory opinion
(paras. 16–21)

The Court began by considering whether it had competence to comply with the request for advisory opinion submitted by the Committee. It recalled that the request was the second made to it under Article 11, paragraphs 1 and 2, of the Statute of the Administrative Tribunal (the first concerning an *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal*); it was however the first to arise from the Committee's consideration of an application by a member State, the previous case having resulted from the application of a staff member. When in 1973 the Court had agreed to give an advisory opinion in the case mentioned, it had recognized that it would be incumbent upon it to examine the features characteristic of any request for advisory opinion submitted on the application of a member State, and had indicated that the Court should then bear in mind not only the considerations applying to the review procedure in general, but also the additional considerations proper to the specific situation created by the interposition of a member State in the review process. The Court found that the special features of the proceedings leading up to the present request did not afford any grounds for the Court to depart from its previous position.

Discretion of the Court and propriety of giving an Opinion
(paras. 22–45)

The Court then considered whether, although it had found that it had competence, certain aspects of the procedure should not lead it to decline to give an advisory opinion, having regard to the requirements of its judicial character, and the principles of the due administration of justice, to which it must remain faithful in the exercise of its functions, as much in advisory as in contentious proceedings.

The Court first disposed of a number of objections, concerning the following points:

—whether an application for review made by a member State constituted an intervention by an entity not a party to the original proceedings;

—whether the conclusive effect of the Advisory Opinion to be given by the Court would found an objection to the exercise by the Court of its advisory jurisdiction;

—whether a refusal by the Court to give the Opinion would put in question the status of Judgement No. 273 of the Administrative Tribunal;

—whether an application for review by a member State was in contradiction with certain articles of the Charter or impinged upon the authority of the Secretary-General under other articles.

With reference to the proceedings before the Court, great

importance was attached by the Court to the question whether real equality was ensured between the parties, notwithstanding any seeming or nominal absence of equality resulting from Article 66 of the Court's Statute, which confined to States and international organizations the power to submit written or oral statements. In that respect, it noted that the views of the staff member concerned had been transmitted to it through the Secretary-General, without any control over the contents being exercised by the latter, and that the Court had decided to dispense with oral proceedings in order to ensure actual equality. With regard to the stage of the proceedings involving the Committee, the Court noted that it was no more than an organ of the party which had been unsuccessful before the Tribunal, that is to say the United Nations. Thus that party was able to decide the fate of the application for review made by the other party, the staff member, through the will of a political organ. That fundamental inequality entailed for the Court a careful examination of what the Committee had actually done when seised of the application of the United States.

The Court referred to the question of the composition of the Administrative Tribunal in the case before it, and posed the question why, when the three regular members of the Tribunal had been available to sit and had sat, it had been thought appropriate to allow an alternate member to sit, who in fact appended a dissenting opinion to the Judgement. His participation seemed to require an explanation, but the Court noted that it had not been asked to consider whether the Tribunal might have committed a fundamental error in procedure having occasioned a failure of justice. Accordingly, further consideration of the point did not seem to be called for.

With regard to the discussions in the Committee, the Court pointed out that they involved a number of notable irregularities showing the lack of rigour with which the Committee had conducted its proceedings. Those irregularities related to:

—its composition at its twentieth session;

—the application submitted to it by the United States;

—the conduct of its meetings.

Despite those irregularities, and the failure of the Committee to show the concern for equality appropriate to a body discharging quasi-judicial functions, the Court considered that it should comply with the request for advisory opinion. The irregularities which featured throughout the proceedings could of course be regarded as "compelling reasons" for refusal by the Court to entertain the request; but the stability and efficiency of the international organizations were of such paramount importance to world order that the Court should not fail to assist a subsidiary body of the United Nations General Assembly in putting its operation upon a firm and secure foundation. Furthermore, such a refusal would leave in suspense a very serious allegation against the Administrative Tribunal: that it had in effect challenged the authority of the General Assembly.

Scope of the question submitted to the Court
(paras. 46–56)

The Court then turned to the actual question on which its opinion had been requested (see p. 1 above), and considered first whether, in the form in which it had been submitted, it was one which the Court could properly answer. Finding that it had been badly drafted and did not appear to correspond to the intentions of the Committee, the Court, in the light of the discussions in the Committee, interpreted the question as requiring it to determine whether, with respect to the matters mentioned in the question, the Administrative Tribunal had "erred on a question of law relating to the provisions of the Charter" or "exceeded its jurisdiction or competence".

The Court recalled the nature of the claim submitted to the Administrative Tribunal, what in fact it had decided, and the reasons it had given for its decision. The Court found that, so far from saying that resolution 34/165 (see p. 4 above) could not be given immediate effect, the Tribunal had held that the Applicant had sustained injury precisely by reason of the resolution's having been given immediate effect by the Secretary-General in the new version of the Staff Rules which omitted Rule 109.5 (*f*), the injury, for which compensation was due, being assessed at the amount of the grant of which payment had been refused. The Tribunal had in no way sought to call in question the validity of resolution 34/165 or the Staff Rules referred to, but had drawn what in the Tribunal's view had been the necessary consequences of the fact that the adoption and application of those measures had infringed what it considered to have been an acquired right, which was protected by Staff Regulation 12.1 (see p. 4 above). While the question submitted by the Committee produced that answer, it appeared that it left another question as it were secreted between the lines of the question as laid before the Court, namely: whether the Tribunal denied the full effect of decisions of the General Assembly, and so erred on a question of law relating to the provisions of the Charter or exceeded its jurisdiction or competence? This seemed in the Court's view to be the question which was the gravamen of the objection to the Tribunal's Judgement, and the one which the Committee had intended to raise.

Did the United Nations Administrative Tribunal err on a question of law relating to the provisions of the Charter?
(paras. 57–76)

In order to reply, the Court first examined what was its proper role when asked for an advisory opinion in respect of the ground of objection based on an alleged error "on a question of law relating to the provisions of the Charter". That its proper role was not to retry the case already dealt with by the Tribunal, and attempt to substitute its own opinion on the merits for that of the Tribunal, was apparent from the fact that the question on which the Court had been asked its opinion was different from that which the Tribunal had had to decide. There were however other reasons. One was the difficulty of using the advisory jurisdiction of the Court for the task of trying a contentious case, since it was not certain that the requirements of the equality of the parties would be met if the Court were called upon to function as an appeal court and not by way of advisory proceedings. Likewise, the interposition of the Committee, an essentially political body, between the proceedings before the Tribunal and those before the Court would be unacceptable if the advisory opinion were to be assimilated to a decision on appeal. That difficulty was especially cogent if, as in the present case, the Committee had excluded from its proceedings a party to the case before the Tribunal, while the applicant State had been able to advance its own arguments. Furthermore, the fact that by Article 11 of the Tribunal's Statute the review procedure could be set in train by member States—that is to say, third parties—was only explicable on the assumption that the advisory opinion was to deal with a different question from that dealt with by the Tribunal.

Since the Court could not be asked to review the merits in the case of *Mortished* v. *the Secretary-General of the United Nations*, the first question for the Court was the scope of the enquiry to be conducted in order that it might decide whether the Tribunal had erred on a question of law relating to the pro-

visions of the Charter. Clearly the Court could not decide whether a judgement about the interpretation of Staff Regulations or Rules had so erred without looking at that Judgement. To that extent, the Court had to examine the decision of the Tribunal on the merits. But it did not have to get involved in the question of the proper interpretation of the Staff Regulations and Rules further than was strictly necessary in order to judge whether the interpretation adopted by the Tribunal was in contradiction with the requirements of the provisions of the Charter. It would be mistaken to suppose that an objection to any interpretation by the Tribunal of Staff Rules or Regulations was a matter for an advisory opinion of the Court.

The Court then examined the applicable texts concerning the repatriation grant. The relations of the United Nations with its staff were governed primarily by the Staff Regulations established by the General Assembly according to Article 101, paragraph 1, of the Charter. Those Regulations were themselves elaborated and applied in the Staff Rules, drawn up by the Secretary-General, who necessarily had a measure of discretion in the matter. There was no doubt that the General Assembly itself had the power to make detailed regulations, as for example in Annex IV to the Staff Regulations which set out the rates of repatriation grant; but in resolutions 33/119 and 34/165 (see pp. 3 and 4 above) it had not done so; instead, it had laid down a principle to which it had left the Secretary-General to give effect. There could be no doubt that in doing so the Secretary-General spoke for and committed the United Nations in its relations with staff members.

The Tribunal, faced with Mr. Mortished's claim, had had to take account of the whole body of regulations and rules applicable to Mr. Mortished's claim (see pp. 3 and 4 above). The Tribunal had also relied on Staff Regulation 12.1, in which the General Assembly had affirmed the "fundamental principle of respect for acquired rights", and Staff Rule 112.2 (*a*), which provided for amendment of the Staff Rules only in a manner consistent with the Staff Regulations (see p. 4 above). It had therefore decided that Mr. Mortished had indeed an acquired right, in the sense of Regulation 12.1, and that he had accordingly suffered injury by being deprived of his entitlement as a result of resolution 34/165 and of the texts which put it into effect. The Tribunal's Judgement had not anywhere suggested that there could be a contradiction between Staff Regulation 12.1 and the relevant provision of resolution 34/165.

There might be room for more than one view on the question as to what amounted to an acquired right, and the United States had contested in its written statement that Mr. Mortished had any right under paragraph (*f*) of Rule 109.5. But to enter upon that question would, in the Court's view, be precisely to retry the case, which was not the business of the Court. The Tribunal had found that Mr. Mortished had an acquired right. It had had to interpret and apply two sets of rules, both of which had been applicable to Mr. Mortished's situation. As the Tribunal had attempted only to apply to his case what it had found to be the relevant Staff Regulations and Staff Rules made under the authority of the General Assembly, it clearly had not erred on a question of law relating to the provisions of the Charter.

Did the United Nations Administrative Tribunal exceed its jurisdiction or competence?
(paras. 77 and 78)

With regard to the second ground of objection, that the Tribunal had allegedly exceeded its jurisdiction or competence, it appeared that that had not been put forward as a ground entirely independent of that concerning error on a question of law relating to the provisions of the Charter, but rather as another way of expressing the allegation that the Tribunal had attempted to exercise a competence of judicial review over a General Assembly resolution, a matter already dealt with. However, it was clear that the Tribunal's jurisdiction, under Article 2 of its Statute, included not only the terms of Mr. Mortished's contract of employment and terms of appointment, but also the meaning and effect of Staff Regulations and Rules in force at the material time. It was impossible to say that the Tribunal—which had sought to apply the terms of Mr. Mortished's instruments of appointment and the relevant Staff Regulations and Rules made in pursuance of General Assembly resolutions—had anywhere strayed into an area lying beyond the limits of its jurisdiction as defined in Article 2 of its Statute. Whether or not it was right in its decision was not pertinent to the issue of jurisdiction.

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The complete text of the operative paragraph of the Advisory Opinion is reproduced below.

OPERATIVE PART OF THE ADVISORY OPINION

THE COURT,*

1. By nine votes to six,

Decides to comply with the request for an advisory opinion:

IN FAVOUR: *President* Elias; *Vice-President* Sette-Camara; *Judges* Nagendra Singh, Mosler, Ago, Schwebel, Sir Robert Jennings, de Lacharrière and Mbaye;

AGAINST: *Judges* Lachs, Morozov, Ruda, Oda, El-Khani and Bedjaoui.

2. With respect to the question as formulated in paragraph 48 above, *is of the opinion:*

A. By ten votes to five,

That the Administrative Tribunal of the United Nations in Judgement No. 273 did not err on a question of law relating to the provisions of the Charter of the United Nations;

IN FAVOUR: *President* Elias; *Vice-President* Sette-Camara; *Judges* Nagendra Singh, Ruda, Mosler, Oda, Ago, Sir Robert Jennings, de Lacharrière and Mbaye;

AGAINST: *Judges* Lachs, Morozov, El-Khani, Schwebel and Bedjaoui.

B. By twelve votes to three,

That the Administrative Tribunal of the United Nations in Judgement No. 273 did not commit any excess of the jurisdiction or competence vested in it.

IN FAVOUR: *President* Elias; *Vice-President* Sette-Camara; *Judges* Lachs, Nagendra Singh, Ruda, Mosler, Oda, Ago, Sir Robert Jennings, de Lacharrière, Mbaye and Bedjaoui;

AGAINST: *Judges* Morozov, El-Khani and Schwebel.

SUMMARY OF OPINIONS APPENDED TO THE ADVISORY OPINION

Separate opinions

While agreeing mostly with the dispositive of the Court in

*Composed as follows: *President* Elias; *Vice-President* Sette-Camara; *Judges* Lachs, Morozov, Nagendra Singh, Ruda, Mosler, Oda, Ago, El-Khani, Schwebel, Sir Robert Jennings, de Lacharrière, Mbaye, Bedjaoui.

this case, *Judge Nagendra Singh* has observed that the Court should have applied principles of interpretation and application of Statutes and rules in relation to General Assembly resolution 34/165 to come to the conclusion that the latter could not be retroactively applied to Mr. Mortished's case since the entire repatriation grant had been earned by him and completed well before 1 January 1980, from which date alone was the resolution of the General Assembly to become operative. The Court could therefore have come to this conclusion without going into the question of acquired rights of Mr. Mortished because the said resolution has a clear and unambiguous prospective thrust only and cannot be stretched to apply to past completed and finished cases like that of Mr. Mortished. However, the resolution 34/165 would certainly apply to govern all cases where the repatriation grant continues to accrue after 1 January 1980 with the result that evidence of relocation would be necessary to obtain the grant in such cases for any period of entitlement, whether before or after 1 January 1980.

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Judge Ruda voted in favour of paragraphs 2 (A) and 2 (B) of the operative clause of the Advisory Opinion, which contained the decisions of the Court on the merits; but, since he voted against paragraph 1, on the preliminary point as to whether or not the Court should comply with the request, he felt obliged to explain, in an individual opinion, the reasons for his vote.

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Judge Mosler, while sharing the view of the Court as expressed in the operative part of the Advisory Opinion, and agreeing to a large extent with the reasons, nevertheless felt bound to raise some points which seemed to him to require either additional explanation or a different kind of argument.

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In the view of *Judge Oda*, who voted against the first point of the operative clause, the Court ought not to have responded to the Request for an advisory opinion because of fundamental irregularities, including the fact that the deliberations of the Committee on Applications for Review of Administrative Tribunal Judgements did not convincingly indicate any reasonable grounds on which the judgement of the Administrative Tribunal could have been objected to: in addition, it would seem that the Request had been drafted on the basis of an entirely erroneous premise. Judge Oda further suggests that if in 1979 the Staff Rules had been revised in a more cautious and proper manner so as to meet the wishes of the member States of the United Nations, confusion could well have been avoided: the situation of the repatriation grant scheme might now have been totally different and the Administrative Tribunal might have delivered a different judgement on the subject.

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Dissenting opinions

Judge Lachs, in his dissenting opinion, writes that, while he had found no compelling reason for refusing an advisory opinion, the procedural irregularities at the stage of the Committee on Applications had caused him (not without hesitation) to vote against point 1 of the operative paragraph. The Court's having decided to give an opinion had, however, given him a welcome opportunity to consider the merits. In his view, the Court should have gone more deeply into the nature of the repatriation grant and the wishes of the General Assembly. Instead, it had considered that its powers of review did not enable it to question the Tribunal's finding that Mr. Mortished had possessed an acquired right which had been disregarded in the imposition of the rule resulting from General Assembly resolution 34/165. However, an injury allegedly traceable to a decision of the General Assembly and failure to give due attention to the effect of Assembly resolutions in the sphere of staff regulations had raised the essential question of acquired rights and entitled the Court to examine it. Judge Lachs questioned the Tribunal's view that the cancelled Rule 109.5 (*f*), which had stemmed from the International Civil Service Commission's interpretation of its mandate and been incompatible with the very nature of repatriation grant, could have founded any acquired right. On point 2 (B) of the Opinion he held, however, that the Tribunal had acted within the bounds of its jurisdiction.

Judge Lachs concludes by enlarging upon the observations he made in 1973 regarding the improvement of the review procedure and the establishment of a single international administrative tribunal.

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Judge Morozov considered that, instead of being guided by the resolutions of the General Assembly, and by its own Statute as adopted by the General Assembly, and by the provisions of the Charter, which ultimately is the only source of law for the Tribunal, Judgement No. 273 of the Tribunal clearly was not warranted in determining that resolution 34/165 of 17 December 1979 could not be given immediate effect. In reality the Judgement was directed not against the Respondent—the Secretary-General—but against General Assembly resolution 34/165, against its letter and spirit.

He believed that, acting contrary to the provision of its Statute, the Tribunal exceeded its competence, and in fact rejected resolution 34/165 of the General Assembly. The Tribunal under the pretext of interpretation of the 1978 and 1979 resolutions of the General Assembly erred on a question of law relating to the provisions of the Charter of the United Nations, as well as exceeding its jurisdiction or competence.

The Advisory Opinion of the Court which recognized that the Tribunal did not err on a question of law relating to the provisions of the Charter of the United Nations could not be supported by him and Judge Morozov could not therefore consider the Advisory Opinion as a document which coincided with his understanding of an implementation of international justice.

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Judge El-Khani voted against point 1 in the operative paragraph of the Advisory Opinion because he considered:

(*a*) that the Court, whose primary role is to deal with cases between States, should not be led into giving up opinions which finally result in diverting it from its principal jurisdiction and reducing it to being a court of appeal from judgements of the United Nations Administrative Tribunal in cases between officials and the Secretary-General; and

(*b*) that the grave errors vitiating the request constituted "compelling reasons" that should induce the Court to consider the request for advisory opinion as inadmissible.

He voted against point 2, paragraphs (A) and (B), in order to be consistent and because he considered that the Court should have gone no farther after point 1.

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Judge Schwebel dissented from the Court's Opinion, essentially on two grounds. Taking a broader view than did the Court of its competence to review the merits of a judgment of the United Nations Administrative Tribunal, he particularly maintained that, when an objection to a judgment is lodged on the ground of error of law relating to provisions of the United Nations Charter, the Court is to act in an appellate capacity, passing upon the judgment's merits insofar as answering the question put to the Court requires it to do so. On the merits of the Tribunal's judgment in this case, Judge Schwebel concluded that the Tribunal had erred on questions of law relating to provisions of the Charter and had exceeded its jurisdiction, primarily because its judgment derogated from an unequivocal exercise of the General Assembly's authority under Article 101(1) of the Charter to regulate the conditions of service of the United Nations Secretariat.

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71. CASE CONCERNING THE CONTINENTAL SHELF (LIBYAN ARAB JAMAHIRIYA/MALTA) (APPLICATION FOR PERMISSION TO INTERVENE)

Judgment of 21 March 1984

In its Judgment in respect of Italy's application for permission to intervene under Article 62 of the Statute in the case concerning the Continental Shelf between Libya and Malta, the Court, by 11 votes to 5, found that Italy's request for permission to intervene could not be granted.

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The Court was composed as follows: *President* Elias; *Vice-President* Sette-Camara; *Judges* Lachs, Morozov, Nagendra Singh, Ruda, Oda, Ago, El-Khani, Schwebel, Sir Robert Jennings, de Lacharrière, Mbaye, Bedjaoui; *Judges* ad hoc Jiménez de Aréchaga, Castañeda.

Judges Morozov, Nagendra Singh, Mbaye and Jiménez de Aréchaga appended separate opinions to the Judgment.

Vice-President Sette-Camara, Judges Oda, Ago, Schwebel and Sir Robert Jennings appended dissenting opinions to the Judgment.

Proceedings before the Court
(paras. 1 to 9)

In its Judgment, the Court recalled that on 26 July 1982, the Governments of Libya and Malta jointly notified to it a Special Agreement concluded between them on 23 May 1976 for the submission to the Court of a dispute concerning the delimitation of the continental shelf between those two countries.

In accordance with the Statute and the Rules of Court, the proceedings took their course having regard to the terms of the Agreement between the two countries. The Memorials of both Parties were filed on 26 April 1983 and the Counter-Memorials on 26 October 1983.

Since the Court did not include upon the bench a judge of Libyan or Maltese nationality, each of the Parties exercised the right conferred by Article 31 of the Statute to choose a judge *ad hoc* to sit in the case. The Libyan Arab Jamahiriya designated Judge Jiménez de Aréchaga and Malta Judge Castañeda.

On 24 October 1983, the Registry received from the Italian Government an Application for permission to intervene under Article 62 of the Statute. The Governments of the Libyan Arab Jamahiriya and Malta submitted written observations on this Application on 5 December 1983, within the time-limit fixed for that purpose. Objection having been raised to Italy's application to intervene, the Court, in accordance with Article 84 of its Rules, held sittings between 25 and 30 January 1984 to hear the Parties and the State seeking to intervene on the question whether the Italian Application for permission to intervene should or should not be granted.

Provisions of the Statute and Rules of Court concerning intervention
(para. 10)

Article 62 of the Statute, invoked by Italy, provides as follows:

"1. Should a State consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene.

"2. It shall be for the Court to decide upon this request."

Under Article 81, paragraph 2, of the Rules of Court, an application for permission to intervene under Article 62 of the Statute shall specify the case to which it relates, and shall set out:

"(*a*) the interest of a legal nature which the State applying to intervene considers may be affected by the decision in that case;

"(*b*) the precise object of the intervention;

"(*c*) any basis of jurisdiction which is claimed to exist as between the State applying to intervene and the Parties to the case."

Formal admissibility of the Italian Application for permission to intervene
(paras. 10–12)

Noting that the Italian Application complied formally with the three conditions set out in Article 81, paragraph 2, of the

Rules and that it was not filed out of time, the Court concluded that it had no formal defect which would render it inadmissible.

Statement of the contentions of Italy and of the two Parties (paras. 13–27)

The Court summarized the contentions advanced by Italy in its Application and oral argument (paras. 13–17). It noted in particular that the legal interest invoked by Italy was constituted by the protection of the sovereign rights which it claimed over certain areas of continental shelf *en cause* in the case between the Libyan Arab Jamahiriya and Malta. It also noted that the object of the intervention was to permit Italy to defend those rights, so that the Court should be as fully informed of them as possible, and so that it might be in a position to take due account of them in its decision and provide the Parties with every needful indication to ensure that they do not, when they conclude their delimitation agreement pursuant to the Court's Judgment, include any areas over which Italy has rights. Finally, the Court noted that, according to Italy, Article 62 of the Statute afforded a sufficient basis of jurisdiction in this case, which did not need to be complemented by a special jurisdictional link between itself and the Parties to the case.

The Court then summarized the arguments put forward by the Libyan Arab Jamahiriya (paras. 18–24) and by Malta (paras. 25–27), both in their written observations on the Italian Application and in their Counsel's oral argument.

Interest of a legal nature and object of the intervention (paras. 28–38)

In order to determine whether the Italian request is justified, the Court had to consider the interest of a legal nature which, it was claimed, might be affected, and to do this it had to assess the object of the Application and the way in which that object corresponds to what is contemplated by the Statute, namely to ensure the protection of an "interest of a legal nature", by preventing it from being "affected" by the decision.

The Court recalled that in the case of an intervention, it is normally by reference to the definition of its interest of a legal nature and the object indicated by the State seeking to intervene that the Court should judge whether or not the intervention is admissible. It had nonetheless to ascertain the true object of the claim. In this case, taking into account all the circumstances as well as the nature of the subject matter of the proceedings instituted by Libya and Malta, it appeared to the Court that, while formally Italy was requesting the Court to safeguard its rights, the unavoidable practical effect of its request was that the Court would be called upon to recognize those rights, and hence, for the purpose of being able to do so, to make a finding, at least in part, on disputes between Italy and one or both of the Parties. Italy was in fact requesting the Court to pronounce only on what genuinely appertains to Malta and Libya. But for the Court to be able to carry out such an operation, it would first have to determine the areas over which Italy has rights and those over which it has none. It would therefore have to make findings as to the existence of Italian rights over certain areas, and as to the absence of such Italian rights in other areas. The Court would thus be called upon, in order to give effect to the intervention, to determine a dispute, or some part of a dispute, between Italy and one or both of the principal Parties, which would involve it in adjudicating on the legal relations between Italy and Libya without the consent of Libya, or on those between Italy and Malta without the consent of Malta. Its decision could not be interpreted merely as not "affecting" those rights, but would be one either recognizing or rejecting them, in whole or in part.

The consequences of the Court's finding, that to permit the intervention would involve the introduction of a fresh dispute, could be defined by reference to either of two approaches to the interpretation of Article 62 of the Statute.

According to the first approach, since Italy was requesting the Court to decide on the rights which it had claimed, the Court would have to decide whether it was competent to give, by way of intervention procedure, the decision requested by Italy. As already noted, the Italian Government maintained that the operation of Article 62 of the Statute was itself sufficient to create the basis of jurisdiction of the Court in this case. It appeared to the Court that, if it were to admit the Italian contention, it would thereby be admitting that the procedure of intervention under Article 62 would constitute an exception to the fundamental principles underlying its jurisdiction: primarily the principle of consent, but also the principles of reciprocity and equality of States. The Court considered that an exception of this kind could not be admitted unless it were very clearly expressed, which was not the case. It therefore considered that appeal to Article 62 should, if it were to justify an intervention in a case such as that of the Italian Application, be backed by a basis of jurisdiction.

According to the second approach, in a case in which the State requesting the intervention asked the Court to give a judgment on the rights which it was claiming, this would not be a genuine intervention within the meaning of Article 62. That Article would not derogate from the consensualism which underlies the jurisdiction of the Court, since the only cases of intervention afforded by that Article would be those in which the intervener was only seeking the preservation of its rights, without attempting to have them recognized. There was nothing to suggest that Article 62 was intended as an alternative means of bringing an additional dispute as a case before the Court, or as a method of asserting the individual rights of a State not a party to the case. Such a dispute may not be brought before the Court by way of intervention.

The Court found that the intervention requested by Italy fell into a category which, on Italy's own showing, is one which cannot be accepted. That conclusion followed from either of the two approaches outlined above, and the Court accordingly did not have to decide between them.

Since the Court considered that it should not go beyond the considerations which were in its view necessary to its decision, the various other questions raised before the Court in the proceedings as to the conditions for, and operation of, intervention under Article 62 of the Statute did not have to be dealt with by the Judgment. In particular the Court, in order to arrive at its decision on the Application of Italy to intervene in the present case, did not have to rule on the question whether, in general, any intervention based on Article 62 must, as a condition for its admission, show the existence of a valid jurisdictional link.

Protection of Italy's interests (paras. 39 to 43)

Italy had also urged the impossibility, or at least the greatly increased difficulty, of the Court's performing the task entrusted to it by the Special Agreement in the absence of participation in the proceedings by Italy as intervener. Whilst recognizing that if the Court were fully enlightened as to the claims and contentions of Italy it might be in a better position to give the Parties such indications as would enable them to delimit their areas of continental shelf without difficulty

(even though sufficient information for the purpose of safeguarding Italy's rights had been supplied during the present proceedings), the Court noted that the question was not whether the participation of Italy might be useful or even necessary to the Court; it was whether, assuming Italy's non-participation, a legal interest of Italy would be *en cause*, or was likely to be affected by the decision.

The Court considered that it was possible to take into account the legal interest of Italy—as well as of other States of the Mediterranean region—while replying to the questions raised in the Special Agreement. The rights claimed by Italy would be safeguarded by Article 59 of the Statute, which provides that "The decision of the Court has no binding force except between the parties and in respect of that particular case". It was clear from this that the principles and rules of international law found by the Court to be applicable to the delimitation between Libya and Malta, and the indications given by the Court as to their application in practice, could be relied on by the parties against any other State. Furthermore, there could be no doubt that the Court would, in its future judgment in the case, take account, as a fact, of the existence of other States having claims in the region. The judgment would not merely be limited in its effects by Article 59 of the Statute; it would be expressed, upon its face, to be without prejudice to the rights and titles of third States.

Interpretation of Article 62
(paras. 44–46)

Reverting to the question as to whether or not an intervener has to establish a jurisdictional link as between it and the principal Parties to the case, the Court recalled that it had already made a summary of the origin and evolution of Article 62 of the Statute of the Court in its Judgment of 14 April 1981 on the Application of Malta for permission to intervene in the *Tunisia/Libya* case. The Court had found it possible to reach a decision on the present Application without generally resolving the vexed question of the "valid link of jurisdiction" (see above), and no more needed to be said than that the Court was convinced of the wisdom of the conclusion reached by its predecessor in 1922 that it should not attempt to resolve in the Rules of Court the various questions which have been raised, but leave them to be decided as and when they occurred in practice and in the light of the circumstances of each particular case.

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Operative clause
(para. 47)

For these reasons, the Court found that the Application of the Italian Republic for permission to intervene under Article 62 of the Statute of the Court could not be granted.

IN FAVOUR: *President* Elias, *Judges* Lachs, Morozov, Nagendra Singh, Ruda, El-Khani, de Lacharrière, Mbaye, Bedjaoui; *Judges* ad hoc Jiménez de Aréchaga and Castañeda.

AGAINST: *Vice-President* Sette-Camara, *Judges* Oda, Ago, Schwebel and Sir Robert Jennings.

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

Order of 10 May 1984

By an Order issued in the case concerning Military and Paramilitary Activities in and against Nicaragua, the Court:

A. Rejected the request made by the United States of America that the case be removed from the list and

B. Indicated the following provisional measures, pending the final decision;

B.1. The United States of America should immediately cease and refrain from any action restricting access to or from Nicaraguan ports, and, in particular, the laying of mines;

B.2. The right to sovereignty and to political independence possessed by the Republic of Nicaragua, like any other State of the region or of the world, should be fully respected and should not in any way be jeopardized by any military and paramilitary activities which are prohibited by the principles of international law, in particular the principle that States should refrain in their international relations from the threat or use of force against the territorial integrity or the political independence of any State, and the principle concerning the duty not to intervene in matters within the domestic jurisdiction of a State, principles embodied in the United Nations Charter and the Charter of the Organization of American States;

B.3. The United States of America and Nicaragua should ensure that no action is taken which might aggravate or extend the dispute submitted to the Court;

B.4. The United States of America and Nicaragua should ensure that no action is taken which might prejudice the rights of the other Party in respect of the carrying out of whatever decision the Court may render.

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These decisions were unanimously adopted, except in respect of paragraph B.2 which was adopted by fourteen votes to one.

The Court was composed as follows:

President T. O. Elias, *Vice-President* J. Sette-Camara, *Judges* M. Lachs, P. Morozov, Nagendra Singh, J. M. Ruda, H. Mosler, S. Oda, R. Ago, A. El-Khani, S. M. Schwebel, Sir Robert Jennings, G. de Lacharrière, K. Mbaye, M. Bedjaoui.

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Judges Mosler and Sir Robert Jennings appended a joint separate opinion to the Order of the Court. Judge Schwebel,

who voted against paragraph B.2 of the Order, appended a dissenting opinion. (A brief summary of these opinions may be found annexed hereto.)

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* *

Proceedings before the Court
(paras. 1–9)

In its Order, the Court recalled that on 9 April 1984 Nicaragua instituted proceedings against the United States of America, in respect of a dispute concerning responsibility for military and paramilitary activities in and against Nicaragua. On the basis of the facts alleged in its Application, Nicaragua requested the Court to adjudge and declare (*inter alia*):

—that the United States of America had violated and was violating its obligations to Nicaragua, under several international instruments and under general and customary international law;

—that the United States of America was under a duty to cease and desist immediately from all use of force against Nicaragua, all violations of the sovereignty, territorial integrity or political independence of Nicaragua, all support of any kind to anyone engaged in military or paramilitary actions in or against Nicaragua, and all efforts to restrict access to or from Nicaraguan ports;

—that the United States of America has an obligation to pay Nicaragua reparation for damages incurred by reason of these violations.

On the same day, Nicaragua urgently requested the Court to indicate provisional measures:

> "—That the United States should immediately cease and desist from providing, directly or indirectly, any support—including training, arms, ammunition, supplies, assistance, finances, direction or any other form of support—to any nation, group, organization, movement or individual engaged or planning to engage in military or paramilitary activities in or against Nicaragua;
>
> "—That the United States should immediately cease and desist from any military or paramilitary activity by its own officials, agents or forces in or against Nicaragua and from any other use or threat of force in its relations with Nicaragua."

Shortly after the institution of these proceedings, the United States of America notified the Registry that it had appointed an Agent for the purposes of this case and, being convinced that the Court was without jurisdiction in the case, requested the Court to preclude any further proceedings and to remove the case from the list (letters of 13 and 23 April 1984). On 24 April, taking into account a letter of the same date from Nicaragua, the Court decided that it had then no sufficient basis for acceding to the request of the United States.

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Jurisdiction
(paras. 10–26)

Declaration of Nicaragua and request for removal from the List made by the United States
(paras. 10–21)

Nicaragua claims to found the jurisdiction of the Court to entertain this case on the declarations of the Parties accepting the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Statute of the Court, namely the Declaration made by the United States of America dated 26 August 1946 and the Declaration made by Nicaragua dated 24 September 1929. Under the system of international judicial settlement of disputes in which the consent of the States constitutes the basis of the Court's jurisdiction, a State having accepted the jurisdiction of the Court by a declaration may rely on the declaration by which another State has also accepted the jurisdiction of the Court, in order to bring a case before the Court.

Nicaragua claims to have recognized the compulsory jurisdiction of the Permanent Court of International Justice by its declaration of 24 September 1929, which, it claims, continues in force and is deemed by virtue of Article 36, paragraph 5, of the Statute of the present Court to be an acceptance of the compulsory jurisdiction of that Court.[1]

The United States contends that Nicaragua never ratified the Protocol of Signature of the Statute of the Permanent Court of International Justice, that Nicaragua never became a party to the Statute of the Permanent Court, and that consequently the declaration by Nicaragua of 1929 never came into force and that Nicaragua cannot be deemed to have accepted the compulsory jurisdiction of the present Court by virtue of Article 36 of its Statute. The United States therefore requests the Court to preclude any further proceedings and to remove the case from the list.

For its part, Nicaragua asserts that it duly ratified the Protocol of Signature of the Statute of the Permanent Court, and sets forth a number of points in support of the legal validity of its declaration of 1929. The two Parties explained their arguments at length during the oral proceedings.

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The Court finds that in this case, the question is whether Nicaragua, having deposited a declaration of acceptance of the jurisdiction of the Permanent Court, can claim to be a "State accepting the same obligation" within the meaning of Article 36, paragraph 2, of the Statute, so as to invoke the declaration of the United States. As the contentions of the Parties disclose a "dispute as to whether the Court has jurisdiction", the matter has to be settled by the decision of the Court, after having heard the Parties. The Court is therefore unable to accede to the United States' request summarily to remove the case from the list.

Declaration of the United States
(paras. 22 and 23)

The United States also disputes the jurisdiction of the Court in this case by relying on a declaration which it deposited on 6 April 1984, referring to its 1946 Declaration, and providing that that Declaration "shall not apply to disputes with any Central American State or arising out of or related to events in Central America" and that it "shall take effect immediately and shall remain in force for a period of two years". Since the dispute with Nicaragua, in its opinion, clearly falls within the terms of the exclusion in the declaration of 6 April 1984, it considers that the 1946 Declaration cannot confer jurisdiction on the Court to entertain the case. For its part, Nicaragua considers that the declaration of

[1] Under Article 36, paragraph 5, of the Statute of the Court, a declaration made pursuant to the Statute of the Permanent Court which is "still in force" is to be deemed, as between the Parties to the Statute, to be an acceptance of the jurisdiction of the International Court of Justice for the period which it still has to run.

6 April 1984 could not have modified the 1946 Declaration which, not having been validly terminated, remains in force.

Conclusion
(paras. 24–26)

The Court observes that it ought not to indicate provisional measures unless the provisions invoked by the Applicant appear, prima facie, to afford a basis on which its jurisdiction might be founded. It does not now have to determine the validity or invalidity of the declaration of Nicaragua of 24 September 1929 and, the question whether or not Nicaragua could thus rely on the United States Declaration of 16 August 1946, or the question whether, as a result of the declaration of 6 April 1984, the Application is excluded as from this date from the scope of the United States acceptance of the compulsory jurisdiction of the Court. It finds that the declarations deposited by the two Parties respectively in 1929 and in 1946 nevertheless appear to afford a basis on which the jurisdiction of the Court might be founded.

Provisional Measures
(paras. 27–40)

The Order sets out the circumstances alleged by Nicaragua as requiring the indication of provisional measures, and the material it has provided to support its allegations. The Government of the United States has stated that the United States does not intend to engage in a debate concerning the facts alleged by Nicaragua, given the absence of jurisdiction, but it has admitted no factual allegations by Nicaragua whatever. The Court had available to it considerable information concerning the facts of the present case, including official statements of United States authorities, and has to consider whether the circumstances drawn to its attention require the indication of provisional measures, but it makes it clear that the right of the respondent to dispute the facts alleged must remain unaffected by its decision.

After setting out the rights which, according to Nicaragua, should be urgently protected by the indication of provisional measures, the Court considers three objections raised by the United States (in addition to the objection relating to jurisdiction) against the indication of such measures.

First, the indication of provisional measures would interfere with the negotiations being conducted in the context of the work of the Contadora Group, and would directly involve the rights and interests of States not Parties to this case; secondly, these negotiations constituted a regional process within which Nicaragua is under a good faith obligation to negotiate; thirdly, the Application by Nicaragua raises issues which should more properly be committed to resolution by the political organs of the United Nations and of the Organization of American States.

Nicaragua disputes the relevance to this case of the Contadora process—in which it is actively participating—denies that its claim could prejudice the rights of other States, and recalls previous decisions of the Court, by virtue of which, in its opinion, the Court is not required to decline to undertake an essentially judicial task merely because the question before it is intertwined with political questions.

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The Court finds that the circumstances require that it should indicate provisional measures, as provided by Article 41 of the Statute, in order to preserve the rights claimed. It emphasizes that its decision in no way prejudges the question of its jurisdiction to deal with the merits of the case and leaves unaffected the right of the Government of the United States and of the Government of Nicaragua to submit arguments in respect of such jurisdiction or such merits.

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For these reasons, the Court gives the decision of which the complete text is reproduced below:

OPERATIVE PART OF THE ORDER

THE COURT,*

A. Unanimously,

Rejects the request made by the United States of America that the proceedings on the Application filed by the Republic of Nicaragua on 9 April 1984, and on the request filed the same day by the Republic of Nicaragua for the indication of provisional measures, be terminated by the removal of the case from the list;

B. *Indicates*, pending its final decision in the proceedings instituted on 9 April 1984 by the Republic of Nicaragua against the United States of America, the following provisional measures:

1. Unanimously,

The United States of America should immediately cease and refrain from any action restricting, blocking or endangering access to or from Nicaraguan ports, and, in particular, the laying of mines;

2. By fourteen votes to one,

The right to sovereignty and to political independence possessed by the Republic of Nicaragua, like any other State of the region or of the world, should be fully respected and should not in any way be jeopardized by any military and paramilitary activities which are prohibited by the principles of international law, in particular the principle that States should refrain in their international relations from the threat or use of force against the territorial integrity or the political independence of any State, and the principle concerning the duty not to intervene in matters within the domestic jurisdiction of a State, principles embodied in the United Nations Charter and the Charter of the Organization of American States.

FOR: *President* Elias; *Vice-President* Sette-Camara; *Judges* Lachs, Morozov, Nagendra Singh, Ruda, Mosler, Oda, Ago, El-Khani, Sir Robert Jennings, de Lacharrière, Mbaye, Bedjaoui.

AGAINST: *Judge* Schwebel.

3. Unanimously,

The Governments of the United States of America and the Republic of Nicaragua should each of them ensure that no action of any kind is taken which might aggravate or extend the dispute submitted to the Court.

4. Unanimously,

The Governments of the United States of America and the Republic of Nicaragua should each of them ensure that no

*Composed as follows: *President* Elias; *Vice-President* Sette-Camara; *Judges* Lachs, Morozov, Nagendra Singh, Ruda, Mosler, Oda, Ago, El-Khani, Schwebel, Sir Robert Jennings, de Lacharrière, Mbaye, Bedjaoui.

action is taken which might prejudice the rights of the other Party in respect of the carrying out of whatever decision the Court may render in the case.

C. Unanimously,

Decides further that, until the Court delivers its final judgment in the present case, it will keep the matters covered by this Order continuously under review.

D. Unanimously,

Decides that the written proceedings shall first be addressed to the questions of the jurisdiction of the Court to entertain the dispute and of the admissibility of the Application;

And reserves the fixing of the time-limits for the said written proceedings, and the subsequent procedure, for further decision.

SUMMARY OF OPINIONS APPENDED TO THE ORDER OF THE COURT

Separate opinion of Judges Mosler and Sir Robert Jennings

Judges Mosler and Jennings, in a separate opinion, emphasised that the duties to refrain from illegal use of force or threat of force, and from intervention in the affairs of another State, are duties which apply to Nicaragua as well as to the United States; and that both States are under an obligation to pursue negotiations in good faith in the context of regional arrangements.

Dissenting opinion of Judge Schwebel

Judge Schwebel voted in favour of the Court's rejection of the United States request to dismiss Nicaragua's case on jurisdictional grounds, and voted as well for the Court's indication that the United States should not restrict access to and from Nicaraguan ports, particularly by mine-laying. He "emphatically" dissented from the provision of the Court's Order holding that the right to sovereignty and to political independence possessed by Nicaragua "should be fully respected and should not in any way be jeopardized by any military or paramilitary activities which are prohibited by the principles of international law". Judge Schwebel characterized that provision's "emphasis upon the rights of Nicaragua—in a case in which Nicaragua itself is charged with violating the territorial integrity and political independence of its neighbours"—as "unwarranted" and "incompatible with the principles of equality of States and of collective security".

Judge Schwebel observed that the charges advanced by the United States against Nicaragua were "of a gravity no less profound" than the charges of Nicaragua against the United States, and that like charges had been made against Nicaragua by El Salvador, Honduras and Costa Rica. Those three Central American States were not parties to this case. Nevertheless, claims that Nicaragua is violating their security may properly be made by the United States and acted upon by the Court, for the rights at issue in the case "do not depend", Judge Schwebel held, "upon narrow considerations of privity to a dispute before the Court. They depend upon the broad considerations of collective security". Every State has "a legal interest" in the observance of the principles of collective security. The United States accordingly was justified in invoking before the Court what it saw as wrongful acts of Nicaragua against other Central American States "not because it can speak for Costa Rica, Honduras and El Salvador but because the alleged violation by Nicaragua of their security is a violation of the security of the United States".

Judge Schwebel declared that he felt able to vote for the provision of the Court's Order concerning mine-laying—which is addressed only to the United States—because the United States had not alleged before the Court that Nicaragua is mining the ports and waters of foreign States.

Judge Schwebel supported the Court's rejection of the United States challenge to jurisdiction because, at the stage of indication of provisional measures, all Nicaragua had to do was to make out, prima facie, a basis on which the Court's jurisdiction might be founded.

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

Order of 4 October 1984

In its Order the Court decided, by nine votes against six, not to hold a hearing on the declaration of intervention submitted by El Salvador in the case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua *v.* United States of America).

In the same Order, the Court also decided, by 14 votes to one, to defer further consideration of the question of the admissibility of the intervention by El Salvador until a later stage of the proceedings.

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On the first point, Judges Ruda, Mosler, Ago, Schwebel, Sir Robert Jennings, de Lacharrière voted against.

On the second point, Judge Schwebel voted against.

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The operative provisions of the Order are as follows:

"The Court,

"(i) By nine votes to six,

"Decides not to hold a hearing on the Declaration of Intervention of the Republic of El Salvador,

"IN FAVOUR: *President* Elias; *Vice-President* Sette-Camara; *Judges* Lachs, Morozov, Nagendra Singh, Oda, El-Khani, Mbaye, Bedjaoui.

"AGAINST: *Judges* Ruda, Mosler, Ago, Schwebel, Sir Robert Jennings, de Lacharrière.

"(ii) By fourteen votes to one,

"Decides that the Declaration of Intervention of the Republic of El Salvador is inadmissible insofar as it relates to the present phase of the proceedings instituted by Nicaragua against the United States of America.

"IN FAVOUR: *President* Elias; *Vice-President* Sette-Camara; *Judges* Lachs, Morozov, Nagendra Singh, Ruda, Mosler, Oda, Ago, El-Khani, Sir Robert Jennings, de Lacharrière, Mbaye, Bedjaoui.

"AGAINST: *Judge* Schwebel."

Judges Nagendra Singh, Oda and Bedjaoui appended separate opinions to the Order; Judges Ruda, Mosler, Ago, Sir Robert Jennings and de Lacharrière appended a joint separate opinion and Judge Schwebel appended a dissenting opinion.

SUMMARY OF OPINIONS APPENDED TO THE ORDER OF THE COURT

Separate opinion by Judge Nagendra Singh

In his separate opinion Judge Nagendra Singh pointed out that since El Salvador's Declaration to Intervene at this stage of the proceedings really pointed to merits of the case and if a hearing was granted now there would inevitably be arguments on merits of the case which would lead to two hearings on merits—the first now and the second if and when the Court deals with the merits of the case. This would be confusing and undesirable as well as untenable. The Court, therefore, has put things in their proper order and sequence and noted the intention of El Salvador to intervene at the next phase of the case if and when the Court considers the merits of the dispute. El Salvador has therefore *not* had a raw deal, as it were, because the Court has kept alive the right of intervention which could be examined at the subsequent phase of the case. There was no point in giving a hearing at the present phase when the Court had by 14:1 come to the conclusion that the intervention of El Salvador was inadmissible. In the circumstances El Salvador will be heard at the proper time, taking into consideration the reasoning and arguments that had been submitted to the Court by El Salvador in support of their intervention.

Joint separate opinion by Judges Ruda, Mosler, Ago, Sir Robert Jennings and de Lacharrière

Judges Ruda, Mosler, Ago, Sir Robert Jennings and de Lacharrière appended a joint separate opinion to the effect that, although agreeing with the Court that El Salvador's Declaration of Intervention is inadmissible at the present stage of the proceedings, they are of the opinion that it would have been more in accordance with judicial propriety if the Court had granted a hearing to the State seeking to intervene.

Separate Opinion by Judge Oda

Judge Oda considered that El Salvador's Declaration of Intervention of 15 August 1984 was vague and did not appear to satisfy the requirements of Article 82 (*b*) and (*c*) of the Rules of Court for an intervention at the present stage, but it was later supplemented by its communications of 10 and 17 September which might meet the terms of Article 82. To his regret, the Court, which only had before it the views of Nicaragua and the United States on the first submission of El Salvador, did not ascertain their views on the two subsequent communications from El Salvador, in particular on the admissibility of El Salvador's intervention at the jurisdictional stage.

If Nicaragua's observations had been interpreted, as Judge Oda believed they should, as objecting to El Salvador's intervention at that stage, Article 84, paragraph 2, would have clearly applied. He voted against a hearing only because his interpretation of the Court's view was that Nicaragua had not objected.

Judge Oda also regretted that 8 October had already been fixed for the commencement of the oral hearings between Nicaragua and the United States, even before the Court met to deal with El Salvador's Declaration on 4 October. In fact, El Salvador's request for an oral hearing and the admissibility of its intervention at the present jurisdictional stage were both dealt with on 4 October, after only one day's deliberations.

Had it not been for the above, El Salvador's Declaration might well have been the first case of intervention under Article 63 of the Statute to be considered by the Court at a jurisdictional phase of a case.

Separate opinion by Judge Bedjaoui

Judge Bedjaoui indicated that in his opinion one could not be in favour of dismissing the request for intervention and at the same time in favour of holding a hearing in order to examine such a request. Since the Court had reached the conclusion that El Salvador's request for intervention was inadmissible, the holding of a hearing no longer logically had an object.

Dissenting opinion by Judge Schwebel

Judge Schwebel dissented from the Court's Order on two grounds. He maintained that the decision of the Court not to hold a hearing on the declaration of El Salvador was a departure from the due process of law which the Court has traditionally observed. He concluded that, while the matter was not altogether clear, El Salvador was entitled to intervene, and that, once the Court had declined to hear El Salvador, any doubts should have been resolved in favour of the admissibility of its declaration of intervention.

Judge Schwebel interpreted El Salvador's declaration as a request to intervene on the construction of articles of the Statute of the Court, the United Nations Charter and three inter-American treaties, as well as of declarations submitted to the Court under its Statute accepting its compulsory jurisdiction. In his view, Nicaragua, while purporting not to object to El Salvador's intervention, had raised objections which required a hearing under the mandatory provision of Article 84 (2) of the Court's Rules, which provides that, if an objection is filed to the admissibility of a declaration of intervention, "the Court shall hear the State seeking to intervene and the parties before deciding". He maintained that El Salvador's declaration was admissible, first, because intervention under Article 63 of the Court's Statute may take place at a jurisdictional stage, and, second, because it may relate to the construction of conventions which include the United Nations Charter and the Court's Statute as well as the inter-American treaties which El Salvador had cited. If declarations adhering to the Court's compulsory jurisdiction were not to be treated as conventions, then the Court should have barred only that aspect of El Salvador's intervention.

74. CASE CONCERNING DELIMITATION OF THE MARITIME BOUNDARY IN THE GULF OF MAINE AREA

Judgment of 12 October 1984

In its judgment, the Chamber of the Court constituted in the case concerning delimitation of the maritime boundary in the Gulf of Maine Area (Canada/United States of America) decided by four votes to one:

"That the course of the single maritime boundary that divides the continental shelf and the exclusive fisheries zones of Canada and the United States of America in the Area referred to in the Special Agreement concluded by those two States on 29 March 1979 shall be defined by geodetic lines connecting the points with the following co-ordinates:

	Latitude North	*Longitude West*
A.	44° 11′ 12″	67° 16′ 46″
B.	42° 53′ 14″	67° 44′ 35″
C.	42° 31′ 08″	67° 28′ 05″
D.	40° 27′ 05″	65° 41′ 59″."

(For the location of these points see Map No. 4.)

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The votes were cast as follows:

IN FAVOUR: *President* Ago; *Judges* Mosler and Schwebel, *Judge* ad hoc Cohen;

AGAINST: *Judge* Gros.

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The Chamber was composed as follows: *President* Ago, *Judges* Gros, Mosler, Schwebel, *Judge* ad hoc Cohen.

* * *

Judge Schwebel appended a separate opinion and Judge Gros a dissenting opinion to the Judgment.

In these opinions the Judges concerned stated and explained the positions they adopted in regard to certain points dealt with in the Judgment.

* * *

I. *The Special Agreement and the Chamber's Jurisdiction* (paras. 1–27)

After recapitulating the various stages in the proceedings and setting out the formal submission of the Parties (paras. 1–13), the Chamber takes note of the provisions of the Special Agreement by which the case was brought before it. Under Article II, paragraph 1, of that Special Agreement, it was:

"requested to decide, in accordance with the principles and rules of international law applicable in the matter as between the Parties, the following question:

What is the course of the single maritime boundary that divides the continental shelf and fisheries zones of Canada and the United States of America from a point in latitude 44° 11′ 12″ N, longitude 67° 16′ 46″ W to a point to be determined by the Chamber within an area bounded by straight lines connecting the following sets of geographic coordinates: latitude 40° N, longitude 67° W; latitude 40° N, longitude 65° W; latitude 42° N, longitude 65° W?"

(For the location of the starting-point and terminal area of the delimitation, see Map No. 1.)

The Chamber notes that the Special Agreement imposes no limitation on its jurisdiction other than that resulting from the terms of this question, and that the rights of third States in the marine and submarine areas to which the case related could not in any way be affected by the delimitation. It also notes that, the case having been submitted by special agreement, no preliminary question of jurisdiction arose. The only initial problem that might theoretically arise is whether and to what extent the Chamber is obliged to adhere to the terms of the Special Agreement as regards the starting-point of the line to be drawn—called point A—and the triangular area within which that line is to terminate. Noting the reasons for the Parties' choice of the point and area in question, the Chamber sees a decisive consideration for not adopting any other starting-point or terminal area in the fact that, under international law, mutual agreement between States concerned is the preferred procedure for establishing a maritime delimitation; since Canada and the United States of America had by mutual agreement taken a step towards the solution of their dispute which must not be disregarded, the Chamber must, in performing the task conferred upon it, conform to the terms by which the Parties have defined it.

The Chamber notes that there are profound differences between the case before it and other delimitation cases previously brought before the Court in that (*a*) the Chamber is requested to draw the line of delimitation itself and not merely to undertake a task preliminary to the determination of a line, and (*b*) the delimitation requested does not relate exclusively to the continental shelf but to both the shelf and the exclusive fishing zone, the delimitation to be by a single boundary. With regard to (*b*), the Chamber is of the view that there is certainly no rule of international law, or any material impossibility, to prevent it from determining such a line.

II. *The delimitation area* (paras. 28–59)

The Chamber finds it indispensable to define with greater precision the geographical area—"the Gulf of Maine area"—within which the delimitation has to be carried out. It notes that the Gulf of Maine properly so called is a broad indentation in the eastern coast of the North-American continent, having roughly the shape of an elongated rectangle whose short sides are made up mainly by the coasts of Massachusetts in the west and Nova Scotia in the east, whose long landward side is made up by the coast of Maine from Cape Elizabeth to the terminus of the international boundary between the United States and Canada, and whose fourth,

Atlantic side would be an imaginary line, between Nantucket and Cape Sable, agreed by the Parties to be the "closing line" of the Gulf of Maine.

The Chamber emphasizes the quasi-parallel direction of the opposite coasts of Massachusetts and Nova Scotia. It points out that the reference to "long" and "short" sides is not to be interpreted as an espousal of the idea of distinguishing "primary" and "secondary" coastal fronts. The latter distinction is merely the expression of a human value judgment, which is necessarily subjective and may vary on the basis of the same facts, depending on the ends in view. It points out, with reference to certain arguments put forward by the Parties, that geographical facts are the result of natural phenomena and can only be taken as they are.

The delimitation, the Chamber observes, is not limited to the Gulf of Maine but comprises, beyond the Gulf closing line, another maritime expanse including the whole of the Georges Bank, the main focus of the dispute. The Chamber rejects however the arguments of the Parties tending to involve coasts other than those directly surrounding the Gulf so as to extend the delimitation area to expanses which have in fact nothing to do with it.

After noting that it has up to this point based itself on aspects inherent in physical geography, the Chamber goes on to consider the geological and geomorphological characteristics of the area. It notes that the Parties are in agreement that geological factors are not significant and finds that, given the unity and uniformity of the sea-bed, there are no geomorphological reasons for distinguishing between the respective natural prolongations of the United States and Canadian coasts in the continental shelf of the delimitation area: even the Northeast Channel, which is the most prominent feature, does not have the characteristics of a real trough dividing two geomorphologically distinct units.

As regards another component element of the delimitation area, the "water column", the Chamber notes that while Canada emphasized its character of overall unity, the United States invoked the existence of three distinct ecological régimes separated by natural boundaries the most important of which consisted of the Northeast Channel; the Chamber, however, is not convinced of the possibility of discerning, in so fluctuating an environment as the waters of the ocean, any natural boundaries capable of serving as a basis for carrying out a delimitation of the kind requested.

III. *Origins and development of the dispute*
(paras. 60–78)

Beginning with a reference to the Truman Proclamations of 1945, the Chamber summarizes the origins and development of the dispute, which first materialized in the 1960s in relation to the continental shelf, as soon as petroleum exploration had begun on either side, more particularly in certain locations on Georges Bank. In 1976–1977 certain events occurred which added to the continental shelf dimension that of the waters and their living resources, for both States proceeded to institute an exclusive 200-mile fishery zone off their coasts and adopted regulations specifying the limits of the zone and continental shelf they claimed. In its account of the negotiations which eventually led to the reference of the dispute to the Court, the Chamber notes that in 1976 the United States adopted a line limiting both the continental shelf and the fishing zones and the adoption by Canada of a first line in 1976 (Map No. 2).

The Chamber takes note of the respective delimitation lines now proposed by each Party (Map No. 3). The Canadian line, described like that of 1976 as an equidistance line, is one constructed almost entirely from the nearest points of the baselines from which the breadth of the territorial sea is measured. Those points happen to be exclusively islands, rocks or low-tide elevations, yet the basepoints on the Massachusetts coast which had initially been chosen for the 1976 line have been shifted westward so that the new line no longer takes account of the protrusion formed by Cape Cod and Nantucket Island and is accordingly displaced west. The line proposed by the United States is a perpendicular to the general direction of the coast from the starting-point agreed upon by the Parties, adjusted to avoid the splitting of fishing banks. It differs from the "Northeast Channel line" adopted in 1976 which, according to its authors, had been based upon the "equidistance/special circumstances" rule of Article 6 of the 1958 Geneva Convention. The Chamber notes that the two successive lines put forward by Canada were both drawn primarily with the continental shelf in mind, whereas the United States lines were both drawn up initially on the basis of different considerations though both treated the fishery régime as essential.

IV. *The applicable principles and rules of international law*
(paras. 79–112)

After observing that the terms "principles and rules" really convey one and the same idea, the Chamber stresses that a distinction has to be made between such principles or rules and what, rather, are equitable criteria or practical methods for ensuring that a particular situation is dealt with in accordance with those principles and rules. Of its nature, customary international law can only provide a few basic legal principles serving as guidelines and cannot be expected also to specify the equitable criteria to be applied or the practical methods to be followed. The same may however not be true of international treaty law.

To determine the principles and rules of international law governing maritime delimitation, the Chamber begins by examining the Geneva Convention of 29 April 1958 on the Continental Shelf, which has been ratified by both the Parties to the case, who both also recognize that it is in force between them. In particular the Chamber examines Article 6, paragraphs 1 and 2, from which a principle of international law may be deduced to the effect that any delimitation of a continental shelf effected unilaterally by one State regardless of the views of the other State or States concerned is not opposable to those States. To this principle may conceivably be added a latent rule that any agreement or other equivalent solution should involve the application of equitable criteria. The Chamber goes on to consider the bearing on the problem of various judicial decisions and to comment upon the work of the Third United Nations Conference on the Law of the Sea, noting that certain provisions concerning the continental shelf and the exclusive economic zone were, in the Convention of 1982, adopted without any objections and may be regarded as consonant at present with general international law on the question.

As regards the respective positions of the Parties in the light of those findings, the Chamber notes their agreement as to the existence of a fundamental norm of international law calling for a single maritime boundary to be determined in accordance with the applicable law, in conformity with equitable principles, having regard to all relevant circumstances, in order to achieve an equitable result. However, there is no longer agreement between the Parties when each separately seeks to ascertain whether international law might also contain other mandatory rules in the same field. The Chamber

rejects the Canadian argument from geographical adjacency to the effect that a rule exists whereby a State any part of whose coasts is less distant from the zones to be attributed than those of the other State concerned would be entitled to have the zones recognized as its own. The Chamber also finds unacceptable the distinction made by the United States between "primary" and "secondary" coasts and the consequent preferential relationship said to exist between the "principal" coasts and the maritime and submarine areas situated frontally before them.

In concluding this part of its considerations, the Chamber sets out a more precise reformulation of the fundamental norm acknowledged by the Parties:

> "No maritime delimitation between States with opposite or adjacent coasts may be effected unilaterally by one of those States. Such delimitation must be sought and effected by means of an agreement, following negotiations conducted in good faith and with the genuine intention of achieving a positive result. Where, however, such agreement cannot be achieved, delimitation should be effected by recourse to a third party possessing the necessary competence.
>
> "In either case, delimitation is to be effected by the application of equitable criteria and by the use of practical methods capable of ensuring, with regard to the geographic configuration of the area and other relevant circumstances, an equitable result." (Para. 112)

V. *The equitable criteria and practical methods applicable to the delimitation*
(paras. 113–163)

Turning to the question of the criteria and methods which are capable of ensuring an equitable result and whose application is prescribed by the above norm, the Chamber is of the view that they must be looked for not in customary international law but in positive international law, and in that connection it examines those provided for by the 1958 Convention on the Continental Shelf, in Article 6 (median line in the case of opposite coasts, lateral equidistance line in the case of adjacent coasts). The Chamber points out that a treaty obligation concerning the delimitation of the continental shelf cannot be extended so as to apply to the superjacent waters and, after rejecting the Canadian argument that the combined equidistance/special-circumstances rule has become a rule of general international law, finds that Article 6, while in force between the Parties, does not entail either for them or for the Chamber any legal obligation to apply its provisions to the present delimitation.

The Chamber next turns to the question whether any obligation of that kind can have resulted from the conduct of the Parties and whether the conduct of one of them might not have constituted an acquiescence in the application of a specific method or resulted in a *modus vivendi* with regard to a line corresponding to such an application. Dealing first with a Canadian argument that the conduct of the United States had evinced a form of consent to the application of the equidistance method, especially in the Georges Bank sector, the Chamber finds that reliance on acquiescence or estoppel is not warranted in the circumstances and that the conduct of the Parties does not prove the existence of any such *modus vivendi*. As for the argument of the United States based on Canada's failure to react to the Truman Proclamation, that amounted to claiming that delimitation must be effected in accordance with equitable principles; consequently, the United States position on that point merely referred back to the "fundamental norm" acknowledged by both Parties. On the basis of that analysis, the Chamber concludes that the Parties, in the current state of the law governing relations between them, are not bound, under a rule of treaty law or other rule, to apply certain criteria or certain methods for the establishment of the single maritime boundary, and that the Chamber is not so bound either.

Regarding possible criteria, the Chamber does not consider that it would be useful to undertake a more or less complete enumeration in the abstract of those that might be theoretically conceivable, or an evaluation of their greater or lesser degree of equity. It also notes, in regard to the practical methods, that none would intrinsically bring greater justice or be of greater practical usefulness than others, and that there must be willingness to adopt a combination of different methods whenever circumstances so require.

VI. *The criteria and methods proposed by the Parties and the lines resulting from their application to the delimitation*
(paras. 164–189)

Once the dispute had taken on its present dual dimension (first the continental shelf and subsequently fisheries) both Parties took care to specify and publish their respective claims, proposing the application of very different criteria and the use of very different practical methods. Each had successively proposed two delimitation lines (Maps Nos. 2 and 3).

The United States had first proposed, in 1976, a criterion attaching determinative value to the natural, especially ecological, factors of the area. Its line corresponded approximately to the line of the greatest depths, leaving German Bank to Canada and Georges Bank to the United States. The Chamber considers that this line, inspired as it was by the objective of distributing fishery resources in accordance with a "natural" criterion, was too biased towards one aspect (fisheries) to be considered as equitable in relation to the overall problem. In 1982 the United States proposed a second line with the general direction of the coast as its central idea, the criterion applied being that of the frontal projection of the primary coastal front. This application resulted in a perpendicular to the general direction of the coastline, adjusted however to take account of various relevant circumstances, in particular such ecological circumstances as the existence of fishing banks. The Chamber considers it almost an essential condition for the use of such a method that the boundary to be drawn should concern two countries whose territories lie successively along a more or less rectilinear coast, for a certain distance at least. But it would be difficult to imagine a case less conducive to the application of that method than the Gulf of Maine case. The circumstances would moreover entail so many adjustments that the character of the method would be completely distorted.

As for the Canadian proposals, the Chamber considers together the two lines proposed respectively in 1976 and 1977, as they are essentially based on the same criterion, that of the equal division of disputed areas—and the same method—equidistance. Canada described the first line as a strict equidistance line, and the second as an equidistance line corrected on account of the special circumstance formed by the protrusion of Nantucket Island and the Cape Cod peninsula, alleged to be geographical anomalies that Canada is entitled to discount, so that its delimitation line is displaced towards the west. The Chamber notes that in the case before it the difference in the lengths of the two States' coastlines within the delimitation area is particularly marked and would constitute a valid ground for making a correction even if this

factor in itself furnished neither a criterion nor a method of delimitation. Furthermore, the Canadian line appears to neglect the difference between two situations clearly distinguished by the 1958 Convention, namely that of adjacent coasts and that of opposite coasts, and fails to take account of the fact that the relationship of lateral adjacency between, on the one hand, part of the coast of Nova Scotia and its prolongation across the opening of the Bay of Fundy and, on the other hand, the coast of Maine, gives way to a relationship of frontal opposition between the other relevant part of the coast of Nova Scotia and the coast of Massachusetts. The Canadian line fails to allow for this new relationship, which is nevertheless the most characteristic feature of the objective situation in the context of which the delimitation is to be effected.

VII. *The criteria and methods held by the Chamber to be applicable. Line resulting from their application to the delimitation*
(paras. 190–229)

The Chamber considers that, having regard to all those considerations, it must put forward its own solution independently of the Parties. It must exclude criteria which, however equitable they may appear in themselves, are not suited to the delimitation of both of the two objects in respect of which the delimitation is requested—the continental shelf and the fishery zones. Inevitably, criteria will be preferred which, by their more neutral character, are best suited for use in a multipurpose delimitation. The Chamber feels bound to turn in the present case to criteria more especially derived from geography, and it is inevitable that its basic choice should favour the criterion whereby one should aim at an equal division of areas where the maritime projections of the coasts of the States between which delimitation is to be effected converge and overlap. However, some corrections must be made to certain effects of applying that criterion that might be unreasonable, so that the concurrent use of auxiliary criteria may appear indispensable. As regards the practical methods to be used for giving effect to the criteria indicated, the Chamber considers that, like the criteria themselves, they must be basically founded upon geography and be as suitable for the delimitation of the sea-bed and subsoil as to that of the superjacent waters and their living resources. In the outcome, therefore, only geometrical methods will serve.

Turning to the concrete choice of the methods it considers appropriate for implementing the equitable criteria it has decided to apply, the Chamber notes that the coastal configuration of the Gulf of Maine excludes any possibility of the boundary's being formed by a basically unidirectional line, given the change of situation noted in the geography of the Gulf. It is only in the northeastern sector of the Gulf that the prevailing relationship of the coasts of the United States and Canada is one of lateral adjacency. In the sector closest to the closing line, it is one of oppositeness. In the Chamber's view it is therefore obvious that, between point A and the line from Nantucket to Cape Sable, i.e. within the limits of the Gulf of Maine proper, the delimitation line must comprise two segments.

In the case of the *first segment*, the one closest to the international boundary terminus, there is no special circumstance to militate against the division into, as far as possible, equal parts of the overlapping created by the lateral superimposition of the maritime projections of the two States' coasts. Rejecting the employment of a lateral equidistance line on account of the disadvantages it is found to entail, the Chamber follows the method of drawing, from point A, two perpendiculars to the two basic coastal lines, namely the line from Cape Elizabeth to the international boundary terminus and the line running thence to Cape Sable. At point A, those two perpendiculars form an acute angle of 278°. It is the bisector of this angle which is prescribed for the first sector of the delimitation line (Map No. 4).

In turning to the *second segment*, the Chamber proceeds by two stages. First, it decides the method to be employed in view of the quasi-parallelism between the coasts of Nova Scotia and Massachusetts. As these are opposite coasts, the application of a geometrical method can only result in the drawing of a median delimitation line approximately parallel to them. The Chamber finds, however, that, while a median line would be perfectly legitimate if the international boundary ended in the very middle of the coast at the back of the Gulf, in the actual circumstances where it is situated at the northeastern corner of the rectangle which geometrically represents the shape of the Gulf the use of a median line would result in an unreasonable effect, in that it would give Canada the same overall maritime projection in the delimitation area as if the entire eastern part of the coast of Maine belonged to Canada instead of the United States. That being so, the Chamber finds a second stage necessary, in which it corrects the median line to take account of the undeniably important circumstance of the difference in length between the two States' coastlines abutting on the delimitation area. As the total length of the United States coastlines on the Gulf is approximately 284 nautical miles, and that of the Canadian coasts (including part of the coast of the Bay of Fundy) is approximately 206 nautical miles, the ratio of the coastlines is 1.38 to 1. However, a further correction is necessitated by the presence of Seal Island off Nova Scotia. The Chamber considers that it would be excessive to consider the coastline of Nova Scotia as displaced in a southwesterly direction by the entire distance between Seal Island and that coast, and therefore considers it appropriate to attribute half effect to the island. Taking that into account, the ratio to be applied to determine the position of the corrected median line on a line across the Gulf between the points where the coasts of Nova Scotia and Massachusetts are closest (i.e. a line from the tip of Cape Cod to Chebogue Point) becomes 1.32 to 1. The second segment of the delimitation will therefore correspond to the median line as thus corrected, from its intersection with the bisector drawn from point A (first segment) to the point where it reaches the closing line of the Gulf (Map No. 4).

As for the *third segment* of the delimitation, relating to that part of the delimitation area lying outside the Gulf of Maine, this portion of the line is situated throughout its length in the open ocean. It appears obvious that the most appropriate geometrical method for this segment is the drawing of a perpendicular to the closing line of the Gulf. One advantage of this method is to give the final segment of the line practically the same orientation as that given by both Parties to the final portion of the respective lines they envisaged. As for the exact point on the closing line from which the perpendicular should be drawn seawards, it will coincide with the intersection of that line with the corrected median line. Starting from that point, the third segment crosses Georges Bank between points on the 100-fathom depth line with the following coordinates:

42° 11′.8 N, 67° 11′.0 W
41° 10′.1 N, 66° 17′.9 W

The terminus of this final segment will be situated within the triangle defined by the Special Agreement and coincide with

the last point it reaches within the overlapping of the respective 200-mile zones claimed by the two States.

VIII. *Verification of the equitable character of the result* (paras. 230–241)

Having drawn the delimitation line requested by the Parties, the final task of the Chamber is to verify whether the result obtained can be considered as intrinsically equitable in the light of all the circumstances. While such verification is not absolutely necessary where the first two segments of the line are concerned, since the Chamber's guiding parameters were provided by geography, the situation is different as regards the third segment, which is the one of greatest concern to the Parties on account of the presence in the area it traverses of Georges Bank, the principal stake in the proceedings on account of the potential resources of its subsoil and the economic importance of its fisheries.

In the eyes of the United States, the decisive factor lies in the fishing carried on by the United States and its nationals ever since the country's independence and even before, activities which they are held to have been alone in pursuing over the greater part of that period, and which were accompanied by other maritime activities concerning navigational assistance, rescue, research, defence, etc. Canada laid greater emphasis on the socio-economic aspects, concentrating on the recent past, especially the last 15 years, and presenting as an equitable principle the idea that a single maritime boundary should ensure the maintenance of the existing structures of fishing which, according to it, were of vital importance to the coastal communities of the area.

The Chamber explains why it cannot subscribe to these contentions and finds that it is clearly out of the question to consider the respective scale of activities in the domain of fishing or petroleum exploitation as an equitable criterion to be applied in determining the delimitation line. What the Chamber would regard as a legitimate scruple lies rather in concern lest, unexpectedly, the overall result should appear radically inequitable as entailing disastrous repercussions on the subsistence and economic development of the populations concerned. It considers that there is no reason to fear any such danger in the present case on account of the Chamber's choice of delimitation line or, more especially, the course of its third segment, and concludes that the overall result of the delimitation is equitable. Noting the long tradition of friendly and fruitful co-operation in maritime matters between Canada and the United States, the Chamber considers that the Parties will be able to surmount any difficulties and take the right steps to ensure the positive development of their activities in the important domains concerned.

For these reasons, the Chamber renders the decision couched in the following terms:

OPERATIVE PROVISIONS OF THE CHAMBER'S JUDGMENT

THE CHAMBER,

by four votes to one,

Decides

That the course of the single maritime boundary that divides the continental shelf and the exclusive fisheries zones of Canada and the United States of America in the Area referred to in the Special Agreement concluded by those two States on 29 March 1979 shall be defined by geodetic lines connecting the points with the following co-ordinates:

	Latitude North	*Longitude West*
A.	44° 11′ 12″	67° 16′ 46″
B.	42° 53′ 14″	67° 44′ 35″
C.	42° 31′ 08″	67° 28′ 05″
D.	40° 27′ 05″	65° 41′ 59″

IN FAVOUR: *President* Ago; *Judges* Mosler and Schwebel, *Judge* ad hoc Cohen;

AGAINST: *Judge* Gros."

(For the location of the co-ordinates given above, see Map No. 4.)

*
* *

SUMMARY OF OPINIONS APPENDED TO THE JUDGMENT OF THE CHAMBER

Separate Opinion by Judge Schwebel

Judge Schwebel voted for the Chamber's Judgment because he agreed with the essentials of its analysis and reasoning and found the resultant line of delimitation to be "not inequitable". In his view, the Chamber was right to exclude both the claims of Canada and of the United States, not with a view towards "splitting the difference" between them but because those claims were insufficiently grounded in law and equity. It was right—contrary to the United States position—to divide Georges Bank between the United States and Canada. However, Judge Schwebel maintained that the line of delimitation drawn by the Chamber was open to challenge.

The line was correctly based on dividing the areas of overlapping United States and Canadian jurisdiction equally, subject, however, to a critical adjustment designed to take account of the fact that the bulk of the Gulf of Maine is bordered by territory of the United States. In Judge Schwebel's view, the adjustment applied by the Chamber was inadequate, because it treated the lengths of the coasts of the Bay of Fundy up to the limit of Canadian territorial waters as part of the Gulf of Maine. In his opinion, only that portion of the Bay of Fundy which faces the Gulf of Maine should have been included in that calculation of proportionality. Had that been done, the delimitation line would have been shifted towards Nova Scotia so as to accord the United States a significantly larger zone. Nevertheless, Judge Schwebel acknowledged that the equitable considerations which led the Chamber and him to differing conclusions on this key issue were open to more than one interpretation.

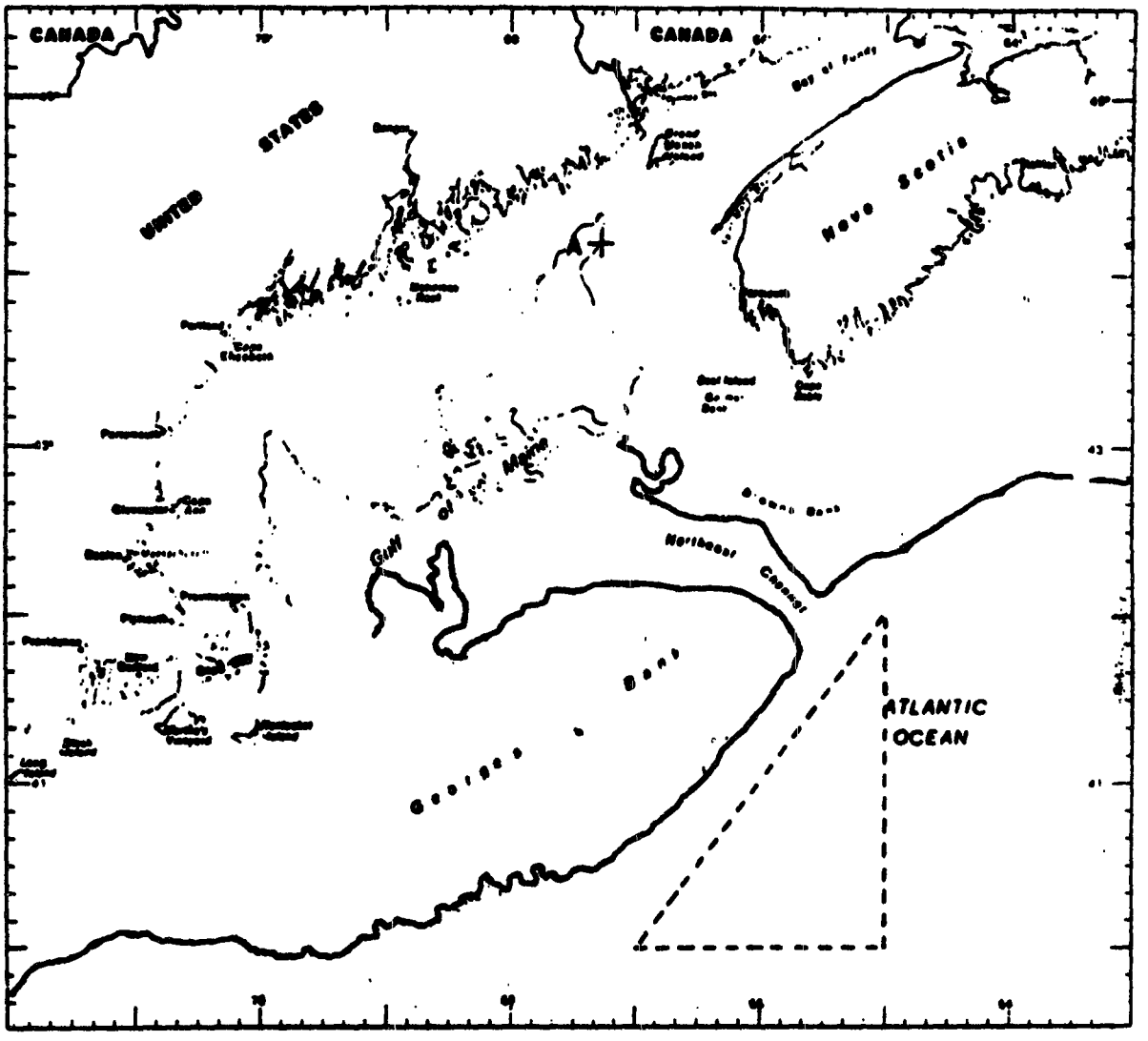
Dissenting Opinion by Judge Gros

Judge Gros points out that the case-law took a new turning when the International Court of Justice gave its Judgment on 24 February 1982 in the case concerning the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*. That Judgment brought to an end the situation resulting from the 1958 Convention on the Continental Shelf as it had been previously interpreted by the Court, in its 1969 Judgment on the *North Sea Continental Shelf*, and by the Anglo-French Court of Arbitration in its Decision of 1977.

This new turning, confirmed by the Chamber's Judgment, amounted to exclusive reliance on the work of the Third Conference of the United Nations on the Law of the Sea, but this Conference produced agreement plus equity as its prescription for maritime delimitation, a solution which Judge Gros considers very feeble.

In the eyes of Judge Gros, moreover, a vague conception of equity which departs from the firmly controlled equity of 1969 and 1977 has also resulted in a departure from the way international legal disputes used to be adjudicated—he has in mind the way courts of equity emerged in England. The Chamber's reasoning logically implies, he considers, that there is no longer any legal rule governing maritime delimitation because the principles relied on by the Chamber, the methods employed to put them into practice, and the corrections made to the whole process transform the entire operation, according to Judge Gros, into an exercise wherein it will henceforth be open to each judge to decide at his discretion what is equitable.

Without going so far as to maintain that the line drawn by the Chamber is inequitable, Judge Gros asks whether it has really been demonstrated to be more equitable than any of the other lines considered in the course of the proceedings.

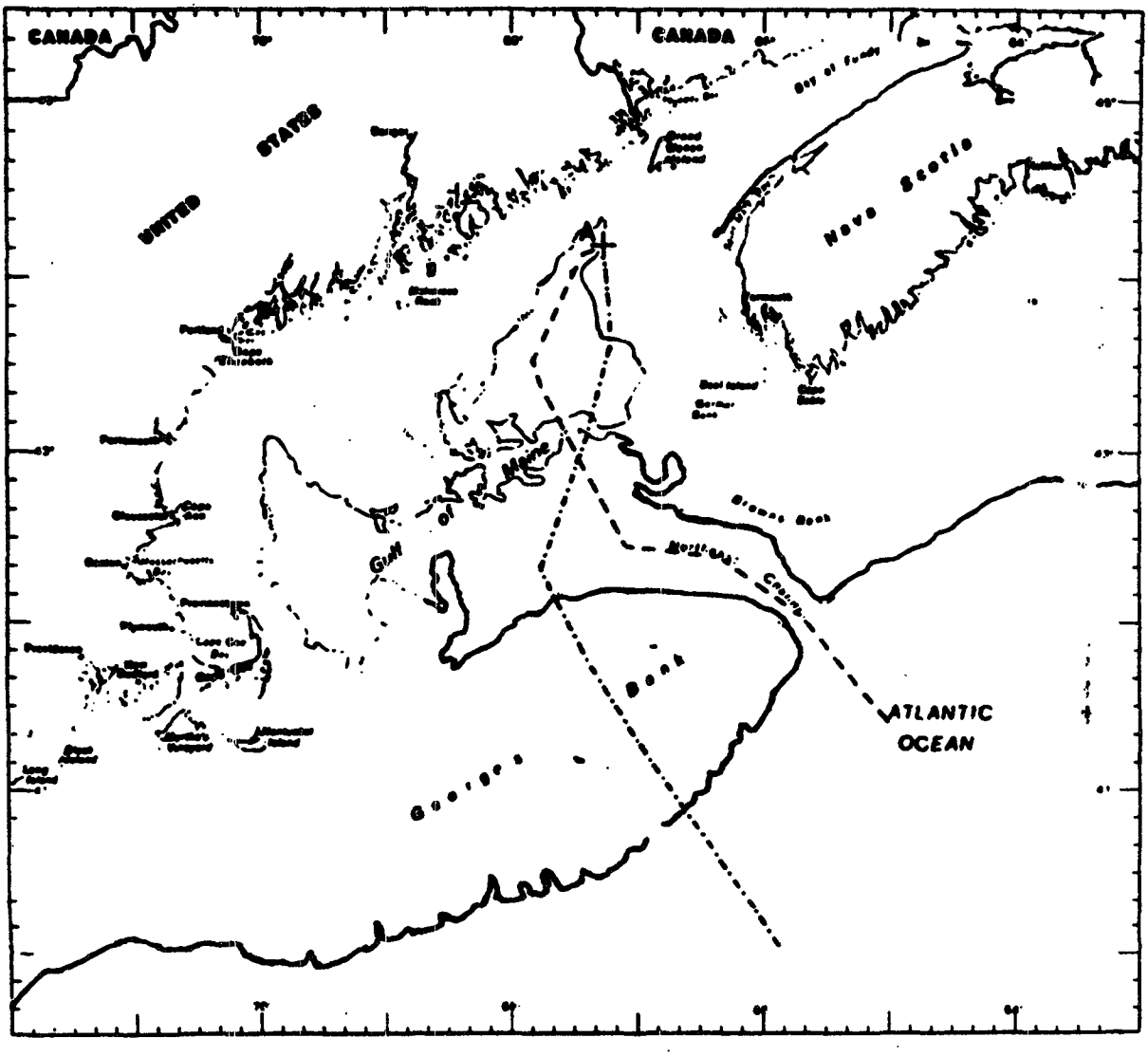


Map No. 1

General map of the region, showing the starting-point for the delimitation line and the area for its termination

* * *

The maps incorporated in the present Judgment were prepared on the basis of documents submitted to the Court by the Parties, and their sole purpose is to provide a visual illustration of the relevant paragraphs of the Judgment.

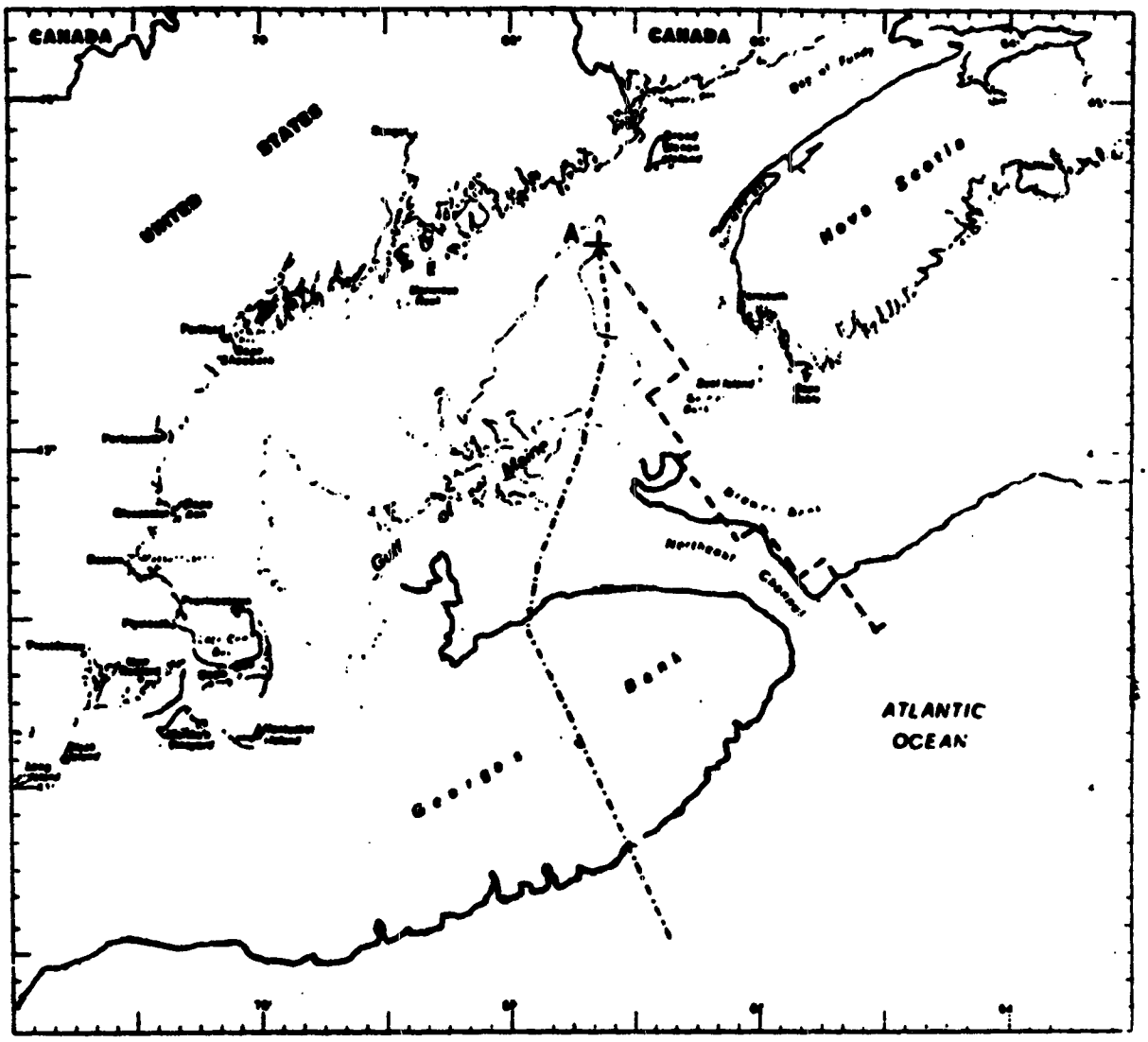


United States line _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _
Canadian line _ . _ . _ . _ . _ . _ . _ . _ . _ . _

Map No. 2

Limits of fishery zones and continental shelf claimed by the Parties, at 1 March 1977

(see paras. 68–70)

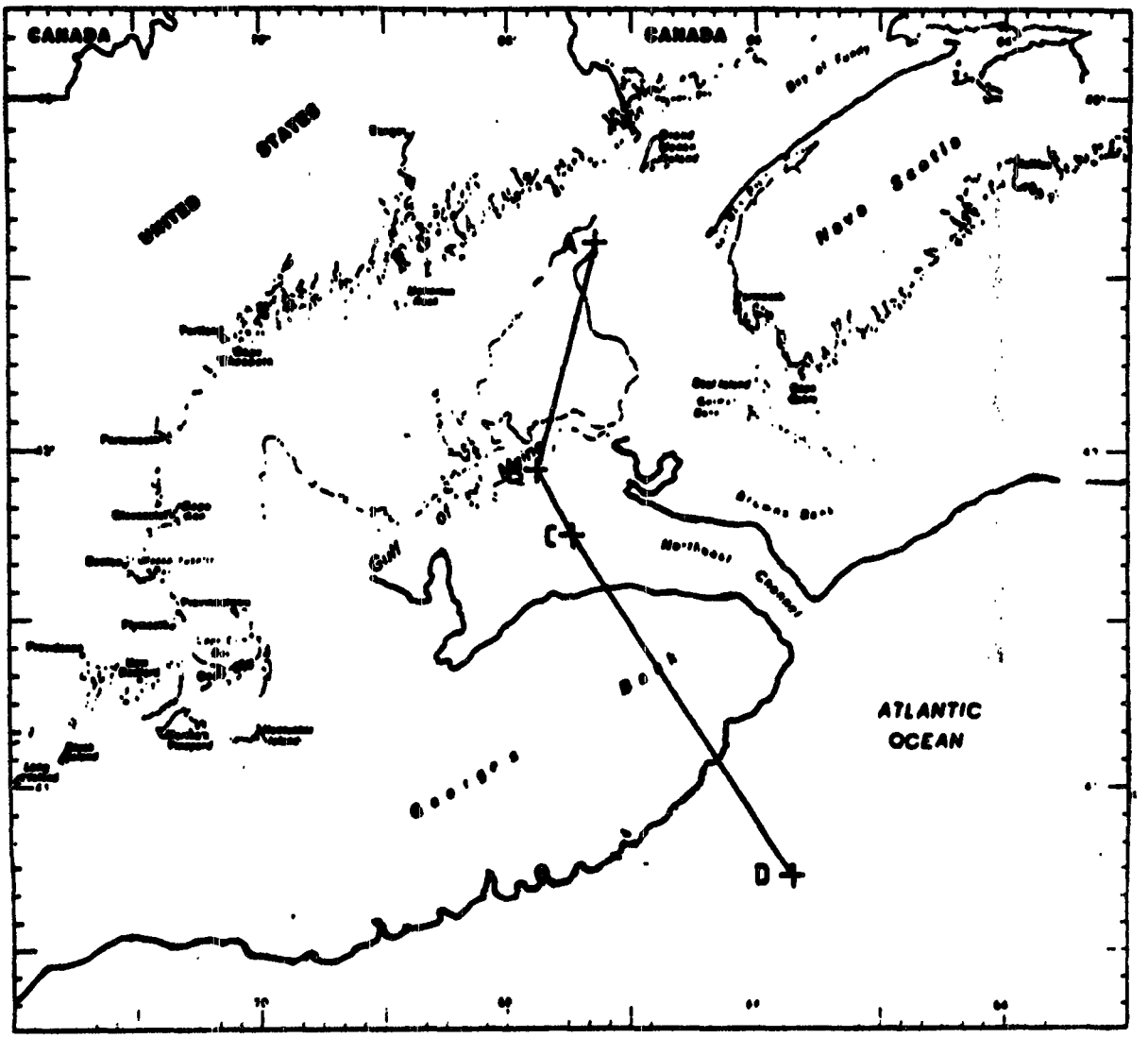


United States line _ _ _ _ _ _ _ _ _ _ _ _
Canadian line — • — • — • — • — • — • — • —

Map No. 3

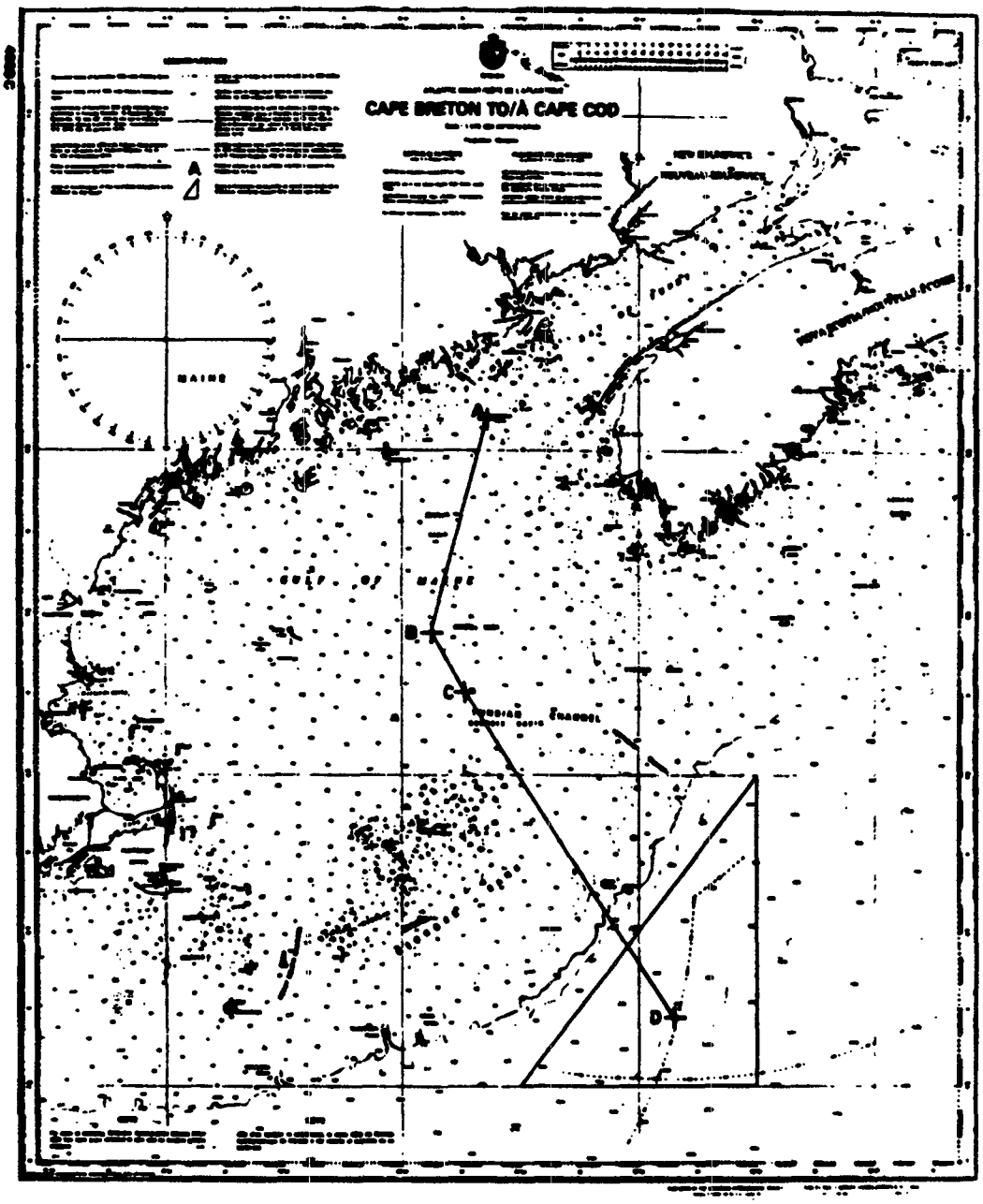
Delimitation lines proposed by the Parties before the Chamber

(see paras. 71, 77–78)



Map No. 4

Delimitation line drawn by the Chamber



Delimitation line drawn by the Chamber

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

Judgment of 26 November 1984

In this judgment, delivered in the case concerning military and paramilitary activities in and against Nicaragua (Nicaragua *v.* United States of America), the Court found, by fifteen votes to one, that it had jurisdiction to entertain the case and, unanimously, that the Application filed by Nicaragua against the United States of America was admissible.

*
* *

The complete text of the operative part of the Judgment, with the voting figures, is as follows:

"THE COURT,

"(1) (*a*) *finds*, by eleven votes to five, that it has jurisdiction to entertain the Application filed by the Republic of Nicaragua on 9 April 1984, on the basis of Article 36, paragraphs 2 and 5, of the Statute of the Court;

"IN FAVOUR: *President* Elias; *Vice-President* Sette-Camara; *Judges* Lachs, Morozov, Nagendra Singh, Ruda, El-Khani, de Lacharrière, Mbaye, Bedjaoui; *Judge* ad hoc Colliard;

"AGAINST: *Judges* Mosler, Oda, Ago, Schwebel and Sir Robert Jennings;

"(*b*) *finds*, by fourteen votes to two, that it has jurisdiction to entertain the Application filed by the Republic of Nicaragua on 9 April 1984, insofar as that Application relates to a dispute concerning the interpretation or application of the Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of Nicaragua signed at Managua on 21 January 1956, on the basis of Article XXIV of that Treaty;

"IN FAVOUR: *President* Elias; *Vice-President* Sette-Camara; *Judges* Lachs, Morozov, Nagendra Singh, Mosler, Oda, Ago, El-Khani, Sir Robert Jennings, de Lacharrière, Mbaye, Bedjaoui; *Judge* ad hoc Colliard;

"AGAINST: *Judges* Ruda and Schwebel;

"(*c*) *finds*, by fifteen votes to one, that it has jurisdiction to entertain the case;

"IN FAVOUR: *President* Elias; *Vice-President* Sette-Camara; *Judges* Lachs, Morozov, Nagendra Singh, Ruda, Mosler, Oda, Ago, El-Khani, Sir Robert Jennings, de Lacharrière, Mbaye, Bedjaoui; *Judge* ad hoc Colliard;

"AGAINST: *Judge* Schwebel;

"(2) *finds*, unanimously, that the said Application is admissible."

*
* *

The Court was composed as follows: *President* Elias; *Vice-President* Sette-Camara; *Judges* Lachs, Morozov, Nagendra Singh, Ruda, Mosler, Oda, Ago, El-Khani, Schwebel, Sir Robert Jennings, de Lacharrière, Mbaye, Bedjaoui; *Judge* ad hoc Colliard.

Judges Nagendra Singh, Ruda, Mosler, Oda, Ago and Sir Robert Jennings appended separate opinions to the Judgment.

Judge Schwebel appended a dissenting opinion to the Judgment.

In these opinions the Judges concerned stated and explained the positions they adopted in regard to certain points dealt with in the Judgment.

*
* *

Proceedings and Submissions of the Parties
(paras. 1–11)

After recapitulating the various stages in the proceedings and setting out the submissions of the Parties (paras. 1–10), the Court recalls that the case concerns a dispute between the Government of the Republic of Nicaragua and the Government of the United States of America arising out of military and paramilitary activities in Nicaragua and in the waters off its coasts, responsibility for which is attributed by Nicaragua to the United States. In the present phase, the case concerns the Court's jurisdiction to entertain and pronounce upon this dispute, as well as the admissibility of Nicaragua's Application referring it to the Court (para. 11).

I. *The question of the jurisdiction of the Court to entertain the dispute*
(paras. 12–83)

A. *The declaration of Nicaragua and Article 36, paragraph 5, of the Statute of the Court*
(paras. 12–51)

To found the jurisdiction of the Court, Nicaragua relied on Article 36 of the Statute of the Court and the declarations accepting the compulsory jurisdiction of the Court made by the United States and itself.

The relevant texts and the historical background to Nicaragua's declaration
(paras. 12–16)

Article 36, paragraph 2, of the Statute of the International Court of Justice provides that:

"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 14 August 1946, under this provision, the United

States made a declaration containing reservations which will be described further below. In this declaration, it stated that:

"this declaration shall remain in force for a period of five years and thereafter until the expiration of six months after notice may be given to terminate this declaration."

On 6 April 1984 the Government of the United States deposited with the Secretary-General of the United Nations a notification signed by the Secretary of State, Mr. George Shultz (hereinafter referred to as "the 1984 notification"), referring to the declaration of 1946, and stating that:

"the aforesaid declaration shall not apply to disputes with any Central American State or arising out of or related to events in Central America, any of which disputes shall be settled in such manner as the parties to them may agree.

"Notwithstanding the terms of the aforesaid declaration, this proviso shall take effect immediately and shall remain in force for two years, so as to foster the continuing regional dispute settlement process which seeks a negotiated solution to the interrelated political, economic and security problems of Central America."

In order to be able to rely upon the United States declaration of 1946 to found jurisdiction in the present case, Nicaragua has to show that it is a "State accepting the same obligation" as the United States within the meaning of Article 36, paragraph 2, of the Statute.

For this purpose, it relies on a declaration made by it on 24 September 1929 pursuant to Article 36, paragraph 2, of the Statute of the Permanent Court of International Justice, the predecessor of the present Court, which provided that:

"The Members of the League of Nations and the States mentioned in the Annex to the Covenant may, either when signing or ratifying the Protocol to which the present Statute is adjoined, or at a later moment, declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other Member or State accepting the same obligation, the jurisdiction of the Court . . . "

in any of the same categories of dispute as listed in Article 36, paragraph 2, of the Statute of the present Court.

Nicaragua relies further on Article 36, paragraph 5, of the Statute of the present Court, which provides that:

"Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms."

The Judgment recalls the circumstances in which Nicaragua made its declaration: on 14 September 1929, as a member of the League of Nations, it signed the Protocol of Signature of the Statute of the Permanent Court of International Justice:[1] this Protocol provided that it was subject to ratification and that instruments of ratification were to be sent to the Secretary-General of the League of Nations. On 24 September 1929 Nicaragua deposited with the Secretary-General of the League a declaration under Article 36, paragraph 2, of the Statute of the Permanent Court which reads:

[*Translation from the French*]

"On behalf of the Republic of Nicaragua I recognize as compulsory unconditionally the jurisdiction of the Permanent Court of International Justice.

Geneva, 24 September 1929

(*Signed*) T. F. MEDINA"

The national authorities in Nicaragua authorized its ratification, and, on 29 November 1939, the Ministry of Foreign Affairs of Nicaragua sent a telegram to the Secretary-General of the League of Nations advising it of the despatch of the instrument of ratification. The files of the League, however, contain no record of an instrument of ratification ever having been received and no evidence has been adduced to show that such an instrument of ratification was ever despatched to Geneva. After the Second World War, Nicaragua became an original Member of the United Nations, having ratified the Charter on 6 September 1945; on 24 October 1945 the Statute of the International Court of Justice, which is an integral part of the Charter, came into force.

The arguments of the Parties
(paras. 17–23)
and the reasoning of the Court
(paras. 24–42)

This being the case, the United States contends that Nicaragua never became a party to the Statute of the Permanent Court and that its 1929 declaration was therefore not "still in force" within the meaning of the English text of Article 36, paragraph 5, of the Statute of the present Court.

In the light of the arguments of the United States and the opposing arguments of Nicaragua, the Court sought to determine whether Article 36, paragraph 5, could have applied to Nicaragua's declaration of 1929.

The Court notes that the Nicaraguan declaration was valid at the time when the question of the applicability of the new Statute, that of the International Court of Justice, arose, since under the system of the Permanent Court of International Justice a declaration was valid only on condition that it had been made by a State which had signed the Protocol of Signature of the Statute. It had not become binding under that Statute, since Nicaragua had not deposited its instrument of ratification of the Protocol of Signature and it was therefore not a party to the Statute. However, it is not disputed that the 1929 declaration could have acquired binding force. All that Nicaragua need have done was to deposit its instrument of ratification, and it could have done that at any time until the day on which the new Court came into existence. It follows that the declaration had a certain potential effect which could be maintained for many years. Having been made "unconditionally" and being valid for an unlimited period, it had retained its potential effect at the moment when Nicaragua became a party to the Statute of the new Court.

In order to reach a conclusion on the question whether the effect of a declaration which did not have binding force at the time of the Permanent Court could be transposed to the International Court of Justice through the operation of Article 36, paragraph 5, of the Statute of that body, the Court took several considerations into account.

As regards the French phrase "*pour une durée qui n'est pas encore expirée*" applying to declarations made under the former system, the Court does not consider it to imply that "*la durée non expirée*" (the unexpired period) is that of a commitment of a binding character. The deliberate choice of the expression seems to denote an intention to widen the scope of Article 36, paragraph 5, so as to cover declarations

[1] While a State admitted to membership of the United Nations automatically becomes a party to the Statute of the International Court of Justice, a State member of the League of Nations only became a party to that of the Permanent Court of International Justice if it so desired, and, in that case, it was required to accede to the Protocol of Signature of the Statute of the Court.

which have not acquired binding force. The English phrase "still in force" does not expressly exclude a valid declaration of unexpired duration, made by a State not party to the Protocol of Signature of the Statute of the Permanent Court, and therefore not of binding character.

With regard to the considerations governing the transfer of the powers of the former Court to the new one, the Court takes the view that the primary concern of those who drafted its Statute was to maintain the greatest possible continuity between it and the Permanent Court and that their aim was to ensure that the replacement of one Court by another should not result in a step backwards in relation to the progress accomplished towards adopting a system of compulsory jurisdiction. The logic of a general system of devolution from the old Court to the new resulted in the ratification of the new Statute having exactly the same effects as those of the ratification of the Protocol of Signature of the old Statute, i.e., in the case of Nicaragua, a transformation of a potential commitment into an effective one. Nicaragua may therefore be deemed to have given its consent to the transfer of its declaration to the International Court of Justice when it signed and ratified the Charter, thus accepting the Statute and its Article 36, paragraph 5.

Concerning the publications of the Court referred to by the Parties for opposite reasons, the Court notes that they have regularly placed Nicaragua on the list of those States that have recognized the compulsory jurisdiction of the Court by virtue of Article 36, paragraph 5, of the Statute. The attestations furnished by these publications have been entirely official and public, extremely numerous and have extended over a period of nearly 40 years. The Court draws from this testimony the conclusion that the conduct of States parties to the Statute has confirmed the interpretation of Article 36, paragraph 5, of the Statute, whereby the provisions of this Article cover the case of Nicaragua.

The conduct of the Parties
(paras. 43–51)

Nicaragua also contends that the validity of Nicaragua's recognition of the compulsory jurisdiction of the Court finds an independent basis in the conduct of the Parties. It argues that its conduct over 38 years unequivocally constitutes consent to be bound by the compulsory jurisdiction of the Court and that the conduct of the United States over the same period unequivocally constitutes its recognition of the validity of the declaration of Nicaragua of 1929 as an acceptance of the compulsory jurisdiction of the Court. The United States, however, objects that the contention of Nicaragua is inconsistent with the Statute, and in particular that compulsory jurisdiction must be based on the clearest manifestation of the State's intent to accept it. After considering Nicaragua's particular circumstances and noting that Nicaragua's situation has been wholly unique, the Court considers that, having regard to the source and generality of statements to the effect that Nicaragua was bound by its 1929 declaration, it is right to conclude that the constant acquiescence of that State in those affirmations constitutes a valid mode of manifestation of its intent to recognize the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Statute. It further considers that the estoppel on which the United States has relied, and which would have barred Nicaragua from instituting proceedings against it in the Court, cannot be said to apply to it.

Finding: the Court therefore finds that the Nicaraguan declaration of 1929 is valid and that Nicaragua accordingly was, for the purposes of Article 36, paragraph 2, of the Statute of the Court, a "State accepting the same obligation" as the United States at the date of filing of the Application and could therefore rely on the United States declaration of 1946.

B. *The declaration of the United States*
(paras. 52–76)

The notification of 1984
(paras. 52–66)

The acceptance of the jurisdiction of the Court by the United States on which Nicaragua relies is the result of the United States declaration of 14 August 1946. However, the United States argues that effect should be given to the letter sent to the Secretary-General of the United Nations on 6 April 1984 (see p. 4 above). It is clear that if this notification were valid as against Nicaragua at the date of filing of the Application, the Court would not have jurisdiction under Article 36 of the Statute. After outlining the arguments of the Parties in this connection, the Court points out that the most important question relating to the effect of the 1984 notification is whether the United States was free to disregard the six months' notice clause which, freely and by its own choice, it has appended to its declaration, in spite of the obligation it has entered into *vis-à-vis* other States which have made such a declaration. The Court notes that the United States has argued that the Nicaraguan declaration, being of undefined duration, is liable to immediate termination, and that Nicaragua has not accepted "the same obligation" as itself and may not rely on the time-limit proviso against it. The Court does not consider that this argument entitles the United States validly to derogate from the time-limit proviso included in its 1946 declaration. In the Court's opinion, the notion of reciprocity is concerned with the scope and substance of the commitments entered into, including reservations, and not with the formal conditions of their creation, duration or extinction. Reciprocity cannot be invoked in order to excuse departure from the terms of a State's own declaration. The United States cannot rely on reciprocity since the Nicaraguan declaration contains no express restriction at all. On the contrary, Nicaragua can invoke the six months' notice against it, not on the basis of reciprocity, but because it is an undertaking which is an integral part of the instrument that contains it. The 1984 notification cannot therefore override the obligation of the United States to submit to the jurisdiction of the Court *vis-à-vis* Nicaragua.

The United States multilateral treaty reservation
(paras. 67–76)

The question remains to be resolved whether the United States declaration of 1946 constitutes the necessary consent of the United States to the jurisdiction of the Court in the present case, taking into account the reservations which were attached to the declaration. Specifically, the United States had invoked proviso (*c*) to that declaration, which provides that the United States acceptance of the Court's compulsory jurisdiction shall not extend to

> "disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States of America specially agrees to jurisdiction".

This reservation will be referred to as the "multilateral treaty reservation".

The United States argues that Nicaragua relies in its Application on four multilateral treaties, and that the Court, in view of the above reservation, may exercise jurisdiction only

if all treaty parties affected by a prospective decision of the Court are also parties to the case.

The Court notes that the States which, according to the United States, might be affected by the future decision of the Court, have made declarations of acceptance of the compulsory jurisdiction of the Court, and are free, any time, to come before the Court with an application instituting proceedings, or to resort to the incidental procedure of intervention. These States are therefore not defenceless against any consequences that may arise out of adjudication by the Court and they do not need the protection of the multilateral treaty reservation (insofar as they are not already protected by Article 59 of the Statute). The Court considers that obviously the question of what States may be affected is not a jurisdictional problem and that it has no choice but to declare that the objection based on the multilateral treaty reservation does not possess, in the circumstances of the case, an exclusively preliminary character.

Finding: the Court finds that, despite the United States notification of 1984, Nicaragua's Application is not excluded from the scope of the acceptance by the United States of the compulsory jurisdiction of the Court. The two declarations afford a basis for its jurisdiction.

C. *The Treaty of Friendship, Commerce and Navigation of 21 January 1956 as a basis of jurisdiction*
(paras. 77–83)

In its Memorial, Nicaragua also relies, as a "subsidiary basis" for the Court's jurisdiction in this case, on the Treaty of Friendship, Commerce and Navigation which it concluded at Managua with the United States on 21 January 1956 and which entered into force on 24 May 1958. Article XXIV, paragraph 2, reads as follows:

> "Any dispute between the 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 Parties agree to settlement by some other pacific means."

Nicaragua submits that this treaty has been and is being violated by the military and paramilitary activities of the United States as described in the Application. The United States contends that, since the Application presents no claims of any violation of the treaty, there are no claims properly before the Court for adjudication, and that, since no attempt to adjust the dispute by diplomacy has been made, the compromissory clause cannot operate. The Court finds it necessary to satisfy itself as to jurisdiction under the treaty inasmuch as it has found that the objection based upon the multilateral treaty reservation in the United States declaration does not debar it from entertaining the Application. In the view of the Court, the fact that a State has not expressly referred, in negotiations with another States, to a particular treaty as having been violated by the conduct of that other State, does not debar that State from invoking a compromissory clause in that treaty. Accordingly, the Court finds that it has jurisdiction under the 1956 Treaty to entertain the claims made by Nicaragua in its Application.

II. *The question of the admissibility of Nicaragua's Application*
(paras. 84–108)

The Court now turns to the question of the admissibility of Nicaragua's Application. The United States contended that it is inadmissible on five separate grounds, each of which, it is said, is sufficient to establish such inadmissibility, whether considered as a legal bar to adjudication or as "a matter requiring the exercise of prudential discretion in the interest of the integrity of the judicial function".

The *first ground of inadmissibility* (paras. 85–88) put forward by the United States is that Nicaragua has failed to bring before the Court parties whose presence and participation is necessary for the rights of those parties to be protected and for the adjudication of the issues raised in the Application. In this connection, the Court recalls that it delivers judgments with binding force as between the Parties in accordance with Article 59 of the Statute, and that States which consider they may be affected by the decision are free to institute separate proceedings or to employ the procedure of intervention. There is no trace, either in the Statute or in the practice of international tribunals, of an "indispensable parties" rule which would only be conceivable in parallel to a power, which the Court does not possess, to direct that a third State be made a party to proceedings. None of the States referred to can be regarded as being in a position such that its presence would be truly indispensable to the pursuance of the proceedings.

The *second ground of inadmissibility* (paras. 89–90) relied on by the United States is that Nicaragua is, in effect, requesting that the Court in this case determines the existence of a threat to peace, a matter falling essentially within the competence of the Security Council because it is connected with Nicaragua's complaint involving the use of force. The Court examines this ground of inadmissibility at the same time as the *third ground* (paras. 91–98) based on the position of the Court within the United Nations system, including the impact of proceedings before the Court on the exercise of the inherent right of individual or collective self-defence under Article 51 of the Charter. The Court is of the opinion that the fact that a matter is before the Security Council should not prevent it from being dealt with by the Court and that both proceedings could be pursued *pari passu*. The Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs can therefore perform their separate but complementary functions with respect to the same events. In the present case, the complaint of Nicaragua is not about an ongoing war of armed conflict between it and the United States, but about a situation demanding the peaceful settlement of disputes, a matter which is covered by Chapter VI of the Charter. Hence, it is properly brought before the principal judicial organ of the United Nations for peaceful settlement. This is not a case which can only be dealt with by the Security Council in accordance with the provisions of Chapter VII of the Charter.

With reference to Article 51 of the Charter, the Court notes that the fact that the inherent right of self-defence is referred to in the Charter as a "right" is indicative of a legal dimension, and finds that if, in the present proceedings, it became necessary for the Court to judge in this respect between the Parties, it cannot be debarred from doing so by the existence of a procedure requiring that the matter be reported to the Security Council.

A *fourth ground of inadmissibility* (paras. 99–101) put forward by the United States is the inability of the judicial function to deal with situations involving ongoing armed conflict, since the resort to force during an ongoing armed conflict lacks the attributes necessary for the application of the judicial process, namely a pattern of legally relevant facts discernible by the means available to the adjudicating tribunal. The Court observes that any judgment on the merits is limited to upholding such submissions of the Parties as has been supported by sufficient proof of relevant facts and that ultimately it is the litigant who bears the burden of proof.

The *fifth ground of inadmissibility* (paras. 102–108) put forward by the United States is based on the non-exhaustion of the established processes for the resolution of the conflicts occurring in Central America. It contends that the Nicaraguan Application is incompatible with the Contadora process to which Nicaragua is a party.

The Court recalls its earlier decisions that there is nothing to compel it to decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects (*United States Diplomatic and Consular Staff in Tehran* case, *I.C.J. Reports 1980*, p. 19, para. 36), and the fact that negotiations are being actively pursued during the proceedings is not, legally, any obstacle to the exercise by the Court of its judicial function (*Aegean Sea Continental Shelf* case, *I.C.J. Reports 1978*, p. 12, para. 29). The Court is unable to accept either that there is any requirement of prior exhaustion of regional negotiating processes as a precondition to seising the Court; or that the existence of the Contadora process constitutes in this case an obstacle to the examination by the Court of Nicaragua's Application.

The Court is therefore unable to declare the Application inadmissible on any of the grounds the United States has advanced.

Findings (paras. 109–111)

Status of the provisional measures (para. 112)

The Court states that its Order of 10 May 1984 and the provisional measures indicated therein remain operative until the delivery of the final judgment in the case.

OPERATIVE PROVISIONS OF THE COURT'S JUDGMENT

THE COURT,

(1) (*a*) *finds*, by eleven votes to five, that it has jurisdiction to entertain the Application filed by the Republic of Nicaragua on 9 April 1984, on the basis of Article 36, paragraphs 2 and 5, of the Statute of the Court;

IN FAVOUR: *President* Elias; *Vice-President* Sette-Camara; *Judges* Lachs, Morozov, Nagendra Singh, Ruda, El-Khani, de Lacharrière, Mbaye, Bedjaoui; *Judge* ad hoc Colliard;

AGAINST: *Judges* Mosler, Oda, Ago, Schwebel and Sir Robert Jennings;

(*b*) *finds*, by fourteen votes to two, that it has jurisdiction to entertain the Application filed by the Republic of Nicaragua on 9 April 1984, insofar as that Application relates to a dispute concerning the interpretation or application of the Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of Nicaragua signed at Managua on 21 January 1956, on the basis of Article XXIV of that Treaty;

IN FAVOUR: *President* Elias; *Vice-President* Sette-Camara; *Judges* Lachs, Morozov, Nagendra Singh, Mosler, Oda, Ago, El-Khani, Sir Robert Jennings, de Lacharrière, Mbaye, Bedjaoui; *Judge* ad hoc Colliard;

AGAINST: *Judges* Ruda and Schwebel;

(*c*) *finds*, by fifteen votes to one, that it has jurisdiction to entertain the case;

IN FAVOUR: *President* Elias; *Vice-President* Sette-Camara; *Judges* Lachs, Morozov, Nagendra Singh, Ruda, Mosler, Oda, Ago, El-Khani, Sir Robert Jennings, de Lacharrière, Mbaye, Bedjaoui; *Judge* ad hoc Colliard;

AGAINST: *Judge* Schwebel;

(2) *finds*, unanimously, that the said Application is admissible."

SUMMARY OF OPINIONS APPENDED TO THE JUDGMENT OF THE COURT

Separate Opinion by Judge Nagendra Singh

While Judge Nagendra Singh has voted for the jurisdiction of the Court on both counts, namely under the Optional Clause of Article 36, paragraphs 2 and 5, of the Statute of the Court, as well as under Article 36, paragraph 1, of the Statute on the basis of Article XXIV, paragraph 2, of the Treaty of Friendship, Commerce and Navigation of 21 January 1956, he has felt all along in those proceedings that the jurisdiction of the Court resting upon the latter, namely the Treaty, provides a clearer and a firmer ground than the Jurisdiction based on the Optional Clause of Article 36 (2) and (5) of the Statute. The difficulties which confront the Court in relation to the imperfect acceptance of the jurisdiction by Nicaragua and the unwilling response from the United States, as revealed by its declaration of 6 April 1984 intended to bar the Court's jurisdiction in relation to any dispute with the Central American States for a period of two years. In addition there is also the question of reciprocity in relation to six months' notice of termination stipulated in the United States declaration of 14 August 1946. On the other hand, the Treaty of 1956 does provide a clear jurisdictional base, although the field of the jurisdiction is restricted to disputes concerning the interpretation and application of that Treaty. However, the said jurisdiction is not subject to the multilateral treaty reservation of the United States, which is applicable to the Court's jurisdiction under the Optional Clause of Article 36(2) of the Statute. Another helpful feature of the jurisdiction based on the Treaty of 1956 is that it would help to specify and legally channelise the issues of the dispute. The Parties will have to come to the Court under the Treaty, invoking legal principles and adopting legal procedures which would helpfully place legal limits to the presentation of this sprawling dispute, which could otherwise take a non-legal character, thus raising the problem of sorting out what is justiciable as opposed to non-justiciable matters being brought before the Court. He concludes, therefore, that the jurisdiction of the Court as based on the Treaty is clear, convincing and reliable. Nicaragua will now have to spell out clearly and specifically the violations of the Treaty involving its interpretation and application when the Court proceeds to consider the merits of the case.

Separate Opinion by Judge Ruda

The separate opinion of Judge Ruda, who concurred in the Court's finding that it had jurisdiction to entertain the Application, on the basis of Article 36, paragraphs 2 and 5, of the Statute of the Court, concerns three points: the Treaty of Friendship, Commerce and Navigation of 1956 as a basis of the Court's jurisdiction, the reservation contained in proviso (*c*) of the United States declaration of 1946, and the conduct of States as a basis for the Court's jurisdiction.

In regard to the first point, Judge Ruda maintains that the Parties have not fulfilled the conditions set forth in Article XXIV of the Treaty, which therefore cannot serve as a basis for the jurisdiction of the Court.

In regard to the second point, he considers that the reservation contained in proviso (*c*) of the declaration is not applicable in the present instance because there is not only a dispute between the United States and Nicaragua but also a separate dispute between, on the one hand, Honduras, El Salvador and Costa Rica and, on the other hand, Nicaragua.

In regard to the third point, Judge Ruda is of the opinion that the conduct of States does not constitute an independent

basis for the Court's jurisdiction if there has been no deposit of a declaration accepting the optional clause with the Secretary-General of the United Nations.

Judge Ruda concurs in the Court's interpretation of Article 36, paragraph 5, of the Statute.

Separate Opinion by Judge Mosler

Judge Mosler does not agree with the opinion of the Court that it has jurisdiction on the basis of the Nicaraguan declaration of 1929 relating to the jurisdiction of the Permanent Court of International Justice. In his view the Court possesses jurisdiction only on the basis of the 1956 Treaty of Friendship, Commerce and Navigation between the Parties.

Separate Opinion by Judge Oda

Judge Oda concurs in the conclusion of the Court solely because the case can be sustained under the 1956 Treaty between Nicaragua and the United States. Thus in his view the scope of the case should be strictly limited to any violation of specific provisions of that Treaty.

However, Judge Oda holds the firm view that this case cannot be entertained under the Optional Clause of the Statute, for the following two reasons. First, there is no ground for concluding that Nicaragua can be held to have legal standing in the present proceedings on the basis of the acceptance of the Optional Clause. Secondly, assuming that Nicaragua has legal standing in the present proceedings, the United States by its Shultz letter of 6 April 1984 effectively excluded, before the seisin of the case, the type of dispute at issue from its obligation under the Optional Clause in its relation to Nicaragua: when it is sought to bring a case before the Court under that clause, a provision fixing a certain duration, such as in the United States declaration, cannot, because of the rule of reciprocity, be invoked by another party whose declaration is terminable or amendable at any time.

Separate Opinion by Judge Ago

Judge Ago concurred in the Court's finding that it had jurisdiction to entertain the merits of the case because of his conviction that a valid link of jurisdiction between the Parties was present in Article XXIV (2) of the Treaty of Friendship, Commerce and Navigation concluded between the United States of America and Nicaragua on 21 January 1956. That link, in his view, conferred jurisdiction upon the Court to consider Nicaragua's claims implying breaches of that Treaty by the United States.

Judge Ago did not reach the same conclusion as regards the broader jurisdictional link presented by the Judgment as deducible from the facts concerning the acceptance by both Nicaragua and the United States of the Court's compulsory jurisdiction by unilateral declaration, since he remained unconvinced of the existence of that link either in fact or in law.

Separate Opinion by Judge Sir Robert Jennings

The Court does not have jurisdiction under Article 36, paragraph 5, of its Statute because Nicaragua never became a party to the Statute of the Permanent Court; accordingly, its declaration made under Article 36 of that Court's Statute cannot be one "still in force" in the sense of Article 36, paragraph 5, of the present Court's Statute, because it never was in force. To attempt to support a different view on entries in reference books such as the *Yearbooks* of the Court is wrong in principle and unsupported by the facts relied on.

In any event the letter of 6 April 1984 from the United States Secretary of State bars jurisdiction because the recent practice shows that States have the right to withdraw or alter their optional clause declarations with immediate effect, at any time before an application to the Court based on the declaration.

Sir Robert concurs with the Court's decision in respect of the United States multilateral treaties reservation; and the 1956 Treaty of Friendship, Commerce and Navigation.

Dissenting Opinion by Judge Schwebel

Judge Schwebel dissented from the judgment of the Court, which he found to be "in error on the principal questions of jurisdiction" involved. However, if the Court were correct in finding that it has jurisdiction, then the case would be admissible.

On the question of whether Nicaragua is party to the Court's compulsory jurisdiction under its Optional Clause, and thus has standing to maintain suit against the United States, Judge Schwebel concluded that it is not a party and hence lacks standing. Nicaragua has never adhered to this Court's compulsory jurisdiction under the Optional Clause. It claimed that it nevertheless was party by reason of its 1929 declaration accepting the compulsory jurisdiction of the Permanent Court of International Justice. If the 1929 declaration had come into force, Nicaragua would be deemed party to this Court's compulsory jurisdiction by operation of Article 36, paragraph 5, of this Court's Statute. But Nicaragua's 1929 declaration had never come into force. Under the terms of Article 36, paragraph 5, accordingly it has no period in which it still runs, since it never began to run at all. It has no period which has not yet expired since its declaration never was "inspired".

That this is the correct interpretation of Article 36, paragraph 5, is demonstrated not only by the plain meaning of its text, but by the drafting history of the article at the San Francisco Conference and by four cases of this Court. All, clearly and uniformly, construe Article 36, paragraph 5, as referring exclusively to declarations made under the Statute of the Permanent Court by which States were "bound", i.e., which were in force.

The fact that, for almost 40 years, Nicaragua has been listed in the Yearbook of this Court and elsewhere as bound under the Optional Clause is not sufficient to overturn this conclusion or independently to establish Nicaragua's standing. The Yearbooks have always contained or referred to a footnote warning the reader that Nicaragua's adherence to the Optional Clause was in doubt. Moreover, Nicaragua's conduct has been equivocal. Not only has it failed to manifest its intent to be bound by this Court's compulsory jurisdiction by depositing a declaration. It also evaded obvious occasion for declaring that it recognized itself to be bound under Article 36, paragraph 5, as in the *King of Spain* case.

Even if, however, Nicaragua had standing to maintain suit under the Optional Clause, it may not do so against the United States. Assuming Nicaragua's declaration to be binding, Nicaragua could terminate it at any time with immediate effect. By operation of the rule of reciprocity, the United States likewise could terminate its adherence to the Court's compulsory jurisdiction, *vis-à-vis* Nicaragua, with immediate effect. Thus, while generally the United States could not terminate or modify its adherence to the Court's compulsory jurisdiction—as its notification of April, 1984 purports to do—on less than six months' notice, it could validly do so in relationship to Nicaragua.

In any event, even if the United States could not terminate

its declaration *vis-à-vis* Nicaragua, by the terms of its multilateral treaty reservation to its declaration, the United States is entitled to exclude Nicaragua's reliance in its Application on four multilateral treaties, including the United Nations and OAS Charters, unless all other parties to the treaties affected by the decision are parties to the case. Those parties—as is demonstrated by the pleadings of Nicaragua in the case—are Honduras, Costa Rica and El Salvador. Since those States are not parties, Nicaraguan reliance on those four treaties should have been barred by the Court. However, the Court—erroneously in Judge Schwebel's view—has held that those other States cannot now be identified and appears to have put off the question of application of the reservation to the stage of the merits.

Finally, in Judge Schwebel's view, the Court does not have jurisdiction over the claims made against the United States by Nicaragua in its Application by reason of their being party to a bilateral Treaty of Friendship, Commerce and Navigation. Nicaragua had failed to pursue the procedural prerequisites for invoking that treaty as the basis of the Court's jurisdiction. More than that, this purely commercial treaty has no plausible relationship to the charges of aggression and intervention made in Nicaragua's Application.

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76. CASE CONCERNING THE CONTINENTAL SHELF (LIBYAN ARAB JAMAHIRIYA/MALTA)

Judgment of 3 June 1985

In its judgment in the case concerning the Continental Shelf between the Libyan Arab Jamahiriya and Malta, the Court, by 14 votes to 3, stated what principles and rules of international law are applicable to the delimitation of the continental shelf between the two States, and the circumstances and factors to be taken into consideration in order to achieve an equitable delimitation. It stated that an equitable result could be obtained first by drawing between the 13° 50′ and the 15° 10′ meridians a median line, of which every point is equidistant from the low-water mark of the relevant coasts of Malta, on the one hand, and of Libya, on the other, and by then transposing this line northwards by 18′ so as to intersect the 15° 10′ E meridian at a latitude of approximately 34° 30′ N.

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The voting was as follows:

IN FAVOUR: *President* Elias; *Vice-President* Sette-Camara; *Judges* Lachs, Morozov, Nagendra Singh, Ruda, Ago, El-Khani, Sir Robert Jennings, de Lacharrière, Mbaye, Bedjaoui; *Judges* ad hoc Valticos, Jiménéz de Aréchaga.

AGAINST: *Judges* Mosler, Oda and Schwebel.

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The Court was composed for this case as follows: *President* Elias; *Vice-President* Sette-Camara; *Judges* Lachs, Morozov, Nagendra Singh, Ruda, Mosler, Oda, Ago, El-Khani, Schwebel, Sir Robert Jennings, de Lacharrière, Mbaye, Bedjaoui; *Judges* ad hoc Valticos and Jiménéz de Aréchaga.

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Judge El-Khani appended a declaration to the Judgment.

Vice-President Sette-Camara appended a separate opinion to the Judgment; Judges Ruda and Bedjaoui, and Judge *ad hoc* Jiménéz de Aréchaga appended a joint opinion. Judge Mbaye and Judge *ad hoc* Valticos each appended separate opinions.

Judges Mosler, Oda and Schwebel appended dissenting opinions to the Judgment.

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In these opinions the Judges concerned state and explain the positions they adopted in regard to certain points dealt with in the Judgment.

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Proceedings and Submissions of the Parties
(paras. 1–13)

The Court begins by recapitulating the various stages in the proceedings and setting out the provisions of the Special Agreement concluded between the Libyan Arab Jamahiriya and Malta for the purpose of submitting to the Court the dispute between them concerning the delimitation of their respective continental shelves.

By Article 1 of the Special Agreement, the Court is requested to decide the following question:

> "What principles and rules of international law are applicable to the delimitation of the area of continental shelf which appertains to the Republic of Malta and the area of continental shelf which appertains to the Libyan Arab Republic, and how in practice such principles and rules can be applied by the two Parties in this particular case in order that they may without difficulty delimit such area by an agreement as provided in Article III."

According to Article III:

> "Following the final decision of the International Court of Justice the Government of the Republic of Malta and the Government of the Libyan Arab Republic shall enter into negotiations for determining the area of their respective continental shelves and for concluding an agreement for that purpose in accordance with the decision of the Court."

Having described the *geographical context* (paras. 14–17) in which the delimitation of the continental shelf, the subject of the proceedings, is to be carried out, the Court explains its approach to the *task* which it has to discharge (paras. 18–23).

The Parties agree on the task of the Court as regards the definition of the principles and rules of international law applicable in the case, but disagree as to the way in which the Court is to indicate the practical application of these principles and rules. Malta takes the view that the applicable principles and rules are to be implemented in practice by the drawing of a specific line (in this case, a median line) whereas Libya maintains that the Court's task does not extend to the actual drawing of the delimitation line. Having examined the intentions of the Parties to the Special Agreement, from which its jurisdiction derives, the Court considers that it is not debarred by the terms of the Special Agreement from indicating a delimitation line.

Turning to the scope of the Judgment, the Court emphasizes that the delimitation contemplated by the Special Agreement relates only to areas of continental shelf "which appertain" to the Parties, to the exclusion of areas which might "appertain" to a third State. Although the Parties have in effect invited the Court not to limit its Judgment to the area in which theirs are the sole competing claims, the Court does not regard itself as free to do so, in view of the interest shown in the proceedings by Italy, which in 1984 submitted an application for permission to intervene under Article 62 of the Statute, an application which the Court found itself unable to grant. As the Court had previously indicated in its Judgment of 21 March 1984, the geographical scope of the present decision must be limited, and must be confined to the area in which, according to information supplied by Italy, that State has no claims to continental shelf rights. Thus the Court ensures to Italy the protection which it sought to obtain by intervening. In view of the geographical location of these claims the Court limits the area within which it will give its decision, on the east by the 15° 10′ E meridian, including also that part of the meridian which is south of the 34° 30′ N parallel, and on the west by excluding a pentagonal area bounded on the east by the 13° 50′ E meridian. The Parties have no grounds for complaint since, as the Court says, by expressing a negative opinion on the Italian Application to intervene, they had shown their preference for a restriction in the geographical scope of the Judgment which the Court would be required to deliver.

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The Court observes that no decisive role is played in the present case by considerations derived from the *history of the dispute*, or from legislative and exploratory activities in relation to the continental shelf (paras. 24 and 25). In these the Court finds neither acquiescence by either Party to claims by the other, nor any helpful indication of any view of either Party as to what would be equitable differing in any way from the view advanced by that Party before the Court. Its decision must accordingly be based upon the application to the submissions made before it of principles and rules of international law.

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The applicable principles and rules of international law (paras. 26–35)

The two Parties agree that the dispute is to be governed by customary international law. Malta is a party to the 1958 Geneva Convention on the Continental Shelf, while Libya is not; both Parties have signed the 1982 United Nations Convention on the Law of the Sea, but that Convention has not yet entered into force. However, the Parties are in accord in considering that some of its provisions constitute the expression of customary law, while holding different views as to which provisions have this status. In view of the major importance of this Convention—which has been adopted by an overwhelming majority of States—it is clearly the duty of the Court to consider how far any of its provisions may be binding upon the Parties as a rule of customary law.

In this context the Parties have laid some emphasis on a distinction between the law applicable to the *basis of entitlement* to areas of continental shelf and the law applicable to the *delimitation* of areas of shelf between neighbouring States. On the second point, which is governed by Article 83 of the 1982 Convention, the Court notes that the Convention sets a goal to be pursued, namely "to achieve an equitable solution", but is silent as to the method to be followed to achieve it, leaving it to States themselves, or to the courts, to endow this standard with specific content. It also points out that both Parties agree that, whatever the status of Article 83 of the 1982 Convention, the delimitation is to be effected in accordance with equitable principles and taking account of all relevant circumstances.

However, on the legal basis of title to continental shelf rights the views of the Parties are irreconcilable. For Libya, the natural prolongation of the land territory of a State into the sea remains the fundamental basis of legal title to continental shelf areas. For Malta, continental shelf rights are no longer defined in the light of physical criteria; they are controlled by the concept of distance from the coast.

In the view of the Court, the principles and rules underlying the régime of the exclusive economic zone cannot be left out of consideration in the present case, which relates to the delimitation of the continental shelf. The two institutions are linked together in modern law, and one of the relevant circumstances to be taken into account for the delimitation of the continental shelf of a State is the legally permissible extent of the exclusive economic zone appertaining to that same State. The institution of the exclusive economic zone, with its rule on entitlement by reason of distance, is shown by the practice of States to have become a part of customary law; and although the institutions of the continental shelf and the exclusive economic zone are different and distinct, the rights which the exclusive economic zone entails over the sea-bed of the zone are defined by reference to the régime laid down for the continental shelf. Although there can be a continental shelf where there is no exclusive economic zone, there cannot be an exclusive economic zone without a corresponding continental shelf. It follows that, for juridical and practical reasons, the distance criterion must now apply to the continental shelf as well as to the exclusive economic zone; and this quite apart from the provision as to distance in Article 76 of the 1982 Convention. Within 200 miles of the coast, natural prolongation is in part defined by distance from the shore. The concepts of natural prolongation and distance are not opposed but complementary; and both remain essential elements in the juridical concept of the continental shelf. The Court is thus unable to accept the Libyan contention that distance from the coast is not a relevant element for the decision of the present case.

The Libyan "rift zone" argument
(paras. 36–41)

The Court goes on to consider Libya's argument based on the existence of a "rift zone" in the region of the delimitation. From Libya's contention that the natural prolongation, in the physical sense, of the land territory into the sea is still a primary basis of title to continental shelf, it would follow that, if there exists a fundamental discontinuity between the shelf area adjacent to one Party and the shelf area adjacent to the other, the boundary should lie along the general line of that fundamental discontinuity. According to Libya, in the present case there are two distinct continental shelves divided by what it calls the "rift zone", and it is "within, and following the general direction of, the Rift Zone" that the delimitation should be carried out.

The Court takes the view that, since the development of the law enables a State to claim continental shelf up to as far as 200 miles from its coast, whatever the geological characteristics of the corresponding sea-bed and subsoil, there is no reason to ascribe any role to geological or geophysical factors within that distance. Since in the present instance the distance between the coasts of the Parties is less than 400 miles, so that no geophysical feature can lie more than 200 miles from each coast, the "rift zone" cannot constitute a fundamental discontinuity terminating the southward extension of the Maltese shelf and the northward extension of the Libyan as if it were some natural boundary. Moreover, the need to interpret the evidence advanced for and against the Libyan argument would compel the Court first to make a determination upon a disagreement between scientists of distinction as to the more plausibly correct interpretation of apparently incomplete scientific data, a position which it cannot accept. It therefore rejects the so-called "rift zone" argument of Libya.

Malta's argument respecting the primacy of equidistance
(paras. 42–44)

Neither, however, is the Court able to accept Malta's argument that the new importance of the idea of distance from the coast has conferred a primacy on the method of equidistance for the purposes of delimitation of the continental shelf, at any rate between opposite States, as is the case with the coasts of Malta and Libya. Malta considers that the distance principle requires that, as a starting point of the delimitation process, consideration must be given to an equidistance line, subject to verification of the equitableness of the result achieved by this initial delimitation. The Court is unable to accept that, even as a preliminary step towards the drawing of a delimitation line, the equidistance method is one which must necessarily be used. It is neither the only appropriate method of delimitation, nor the only permissible point of departure. Moreover, the Court considers that the practice of States in this field falls short of proving the existence of a rule prescribing the use of equidistance, or indeed of any method, as obligatory.

Equitable principles
(paras. 45–47)

The Parties agree that the delimitation of the continental shelf must be effected by the application of equitable principles in all the relevant circumstances in order to achieve an equitable result. The Court lists some of these principles: the principle that there is to be no question of refashioning geography; the principle of non-encroachment by one Party on areas appertaining to the other; the principle of the respect due to all relevant circumstances; the principle that "equity does not necessarily imply equality" and that there can be no question of distributive justice.

The relevant circumstances
(paras. 48–54)

The Court has still to assess the weight to be accorded to the relevant circumstances for the purposes of the delimitation. Although there is no closed list of considerations which a court may invoke, the Court emphasizes that the only ones which will qualify for inclusion are those which are pertinent to the institution of the continental shelf as it has developed within the law, and to the application of equitable principles to its delimitation.

Thus it finds to be unfounded in the practice of States, in the jurisprudence or in the work of the Third United Nations Conference on the Law of the Sea the argument of Libya that the landmass provides the legal justification of entitlement to continental shelf rights, such that a State with a greater landmass would have a more intense natural prolongation. Nor does the Court consider, contrary to the contentions advanced by Malta, that a delimitation should be influenced by the relative economic position of the two States in question. Regarding the security or defence interests of the two Parties, the Court notes that the delimitation which will result from the application of the present Judgment is not so near to the coast of either Party as to make these questions a particular consideration. As for the treatment of islands in continental shelf delimitation, Malta has drawn a distinction between island States and islands politically linked to a mainland State. In this connection the Court merely notes that, Malta being independent, the relationship of its coasts with the coasts of its neighbours is different from what it would be if it were part of the territory of one of them. This aspect of the matter also seems to the Court to be linked to the position of the Maltese islands in the wider geographical context, to which it will return.

The Court rejects another argument of Malta, derived from the sovereign equality of States, whereby the maritime extensions generated by the sovereignty of each State must be of equal juridical value, whatever the length of the coasts. The Court considers that if coastal States have an equal entitlement, *ipso jure* and *ab initio*, to their continental shelves, this does not imply an equality in the extent of these shelves, and thus reference to the length of coasts as a relevant consideration cannot be excluded *a priori*.

Proportionality
(paras. 55–59)

The Court then considers the role to be assigned in the present case to proportionality, Libya having attached considerable importance to this factor. It recalls that, according to the jurisprudence, proportionality is one possibly relevant factor among several others to be taken into account, without ever being mentioned among "the principles and rules of international law applicable to the delimitation" or as "a general principle providing an independent source of rights to areas of continental shelf". Libya's argument, however, goes further. Once the submission relating to the rift-zone has been dismissed, there is no other element in the Libyan submissions, apart from the reference to the lengths of coastline, which is able to afford an independent principle and method for drawing the boundary. The Court considers that to use the ratio of coastal lengths as self-determinative of the seaward reach and area of continental shelf proper to each, is

to go far beyond the use of proportionality as a test of equity, in the sense employed in the case concerning the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*. Such use finds no support in the practice of States or their public statements, or in the jurisprudence.

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The delimitation operation and the drawing of a provisional equidistance line
(paras. 60–64)

In order to apply the equitable principles which were elicited by taking account of the relevant circumstances, the Court proceeds by stages; it begins by making a provisional delimitation, which it then compares with the requirements derived from other criteria which may call for an adjustment of this initial result.

Stating that the law applicable to the present dispute is based on the criterion of distance in relation to the coast (the principle of adjacency measured by distance), and noting that the equitableness of the equidistance method is particularly marked in cases where the delimitation concerns States with opposite coasts, the Court considers that the tracing of a median line between the coasts of Malta and Libya, by way of a provisional step in a process to be continued by other operations, is the most judicious manner of proceeding with a view to the eventual achievement of an equitable result. The equidistance method is not the only possible method, and it must be demonstrated that it in fact leads to an equitable result—this can be ascertained by examining the result to which it leads in the context of applying other equitable principles to the relevant circumstances. At this stage, the Court explains that it finds it equitable not to take account of the uninhabited Maltese island of Filfla in the construction of the provisional median line between Malta and Libya, in order to eliminate the disproportionate effect which it might have on the course of this line.

Adjustment of the equidistance line, taking account especially of the lengths of the respective coasts of the Parties
(paras. 65–73)

The Court examines whether, in assessing the equitableness of the result, certain relevant circumstances may carry such weight as to justify their being taken into account, requiring an adjustment of the median line which has provisionally been drawn.

One point argued before the Court has been the considerable disparity in the lengths of the relevant coasts of the Parties. Here, the Court compares Malta's coasts with the coasts of Libya between Ras Ajdir (the boundary with Tunisia) and Ras Zarruq (15° 10′) and notes that there is a marked disparity between the lengths of these coasts, since the Maltese coast is 24 miles long and the Libyan coast 192 miles long. This is a relevant circumstance which warrants an adjustment of the median line, to attribute a greater area of shelf to Libya. However, it remains to determine the extent of this adjustment.

A further geographical feature must be taken into consideration as a relevant circumstance; this is the southern location of the coasts of the Maltese islands, within the general geographical context in which the delimitation is to be effected. The Court points to a further reason for not accepting the median line, without adjustment, as an equitable boundary: namely that this line is to all intents and purposes controlled on each side, in its entirety, by a handful of salient points on a short stretch of the coast (two points 11 miles apart for Malta; several points concentrated immediately east of Ras Tadjoura for Libya).

The Court therefore finds it necessary that the delimitation line be adjusted so as to lie closer to the coasts of Malta. The coasts of the Parties being opposite to each other, and the equidistance line lying broadly west to east, this adjustment can be satisfactorily and simply achieved by transposing it in an exactly northward direction.

The Court then establishes what should be the extreme limit of such a transposition. It reasons as follows: were it supposed that the Maltese islands were part of Italian territory, and that there was a question of the delimitation of the continental shelf between Libya and Italy, the boundary would be drawn in the light of the coasts of Libya to the south and of Sicily to the north. However, account would have to be taken of the islands of Malta, so that this delimitation would be located somewhat south of the median line between Sicily and Libya. Since Malta is not part of Italy, but is an independent State, it cannot be the case that, as regards continental shelf rights, it will be in a worse position because of its independence. It is therefore reasonable to assume that an equitable boundary between Libya and Malta must be to the south of a notional median line between Libya and Sicily. That line intersects the 15° 10′ E meridian at a latitude of approximately 34° 36′. The median line between Malta and Libya (drawn to exclude the islet of Filfla) intersects the 15° 10′ E meridian at a latitude of approximately 34° 12′ N. A transposition northwards of 24′ of latitude of the Malta-Libya median line would therefore be the extreme limit of such an adjustment.

Having weighed up the various circumstances in the case as previously indicated, the Court concludes that a shift of about two-thirds of the distance between the Malta-Libya median line and the line located 24′ further north gives an equitable result, and that the delimitation line is to be produced by transposing the median line northwards through 18′ of latitude. It will intersect the 15° 10′ E meridian at approximately 34° 30′ N. It will be for the Parties and their experts to determine the exact position.

The test of proportionality
(paras. 74–75)

While considering that there is no reason of principle why a test of proportionality, based on the ratio between the lengths of the relevant coasts and the areas of shelf attributed, should not be employed to verify the equity of the result, the Court states that there may be certain practical difficulties which render this test inappropriate. They are particularly evident in the present case, *inter alia* because the area to which the Judgment will apply is limited by reason of the existence of claims of third States, and to apply the proportionality test simply to the areas within these limits would be unrealistic. However, it seems to the Court that it can make a broad assessment of the equity of the result without attempting to express it in figures. It concludes that there is certainly no manifest disproportion between areas of shelf attributed to each of the Parties, such that it might be claimed that the requirements of the test of proportionality as an aspect of equity are not satisfied.

The Court presents a *summary of its conclusions* (paras. 76–78) and its decision, the full text of which follows (para. 79).

OPERATIVE PROVISIONS OF THE COURT'S JUDGMENT

THE COURT,

by fourteen votes to three,

finds that, with reference to the areas of continental shelf between the coasts of the Parties within the limits defined in the present Judgment, namely the meridian 13° 50′ E and the meridian 15° 10′ E:

A. The principles and rules of international law applicable for the delimitation, to be effected by agreement in implementation of the present Judgment, of the areas of continental shelf appertaining to the Socialist People's Libyan Arab Jamahiriya and to the Republic of Malta respectively are as follows:

(1) the delimitation is to be effected in accordance with equitable principles and taking account of all relevant circumstances, so as to arrive at an equitable result;

(2) the area of continental shelf to be found to appertain to either Party not extending more than 200 miles from the coast of the Party concerned, no criterion for delimitation of shelf areas can be derived from the principle of natural prolongation in the physical sense.

B. The circumstances and factors to be taken into account in achieving an equitable delimitation in the present case are the following:

(1) the general configuration of the coasts of the Parties, their oppositeness, and their relationship to each other within the general geographical context;

(2) the disparity in the lengths of the relevant coasts of the Parties and the distance between them;

(3) the need to avoid in the delimitation any excessive disproportion between the extent of the continental shelf areas appertaining to the coastal State and the length of the relevant part of its coast, measured in the general direction of the coastlines.

C. In consequence, an equitable result may be arrived at by drawing, as a first stage in the process, a median line every point of which is equidistant from the low-water mark of the relevant coast of Malta (excluding the islet of Filfla), and the low-water mark of the relevant coast of Libya, that initial line being then subject to adjustment in the light of the above-mentioned circumstances and factors.

D. The adjustment of the median line referred to in sub-paragraph C above is to be effected by transposing that line northwards through eighteen minutes of latitude (so that it intersects the meridian 15° 10′ E at approximately latitude 34° 30′ N) such transposed line then constituting the delimitation line between the areas of continental shelf appertaining to the Socialist People's Libyan Arab Jamahiriya and to the Republic of Malta respectively.

IN FAVOUR: *President* Elias; *Vice-President* Sette-Camara; *Judges* Lachs, Morozov, Nagendra Singh, Ruda, Ago, El-Khani, Sir Robert Jennings, de Lacharrière, Mbaye, Bedjaoui; *Judges* ad hoc Valticos, Jiménez de Aréchaga.

AGAINST: *Judges* Mosler, Oda and Schwebel.

SUMMARY OF THE DECLARATION AND OPINIONS APPENDED TO THE JUDGMENT OF THE COURT

Declaration by Judge El-Khani

Judge El-Khani voted in favour of the Judgment, but is of the view that a line located further to the north than the proposed line would have been more in accordance with proportionality while satisfying one requirement of equity.

Separate Opinion by Vice-President Sette-Camara

Vice-President Sette-Camara, while concurring in voting for the Judgment, filed a separate Opinion for the following reasons:

1. The natural prolongation doctrine as established in the 1969 *North Sea Continental Shelf* Judgment is still the main pillar of the concept of continental shelf. Although the original concept of the "species of platform" has been replaced by a gradually more juridical definition of the continental shelf, natural prolongation remains the basic element of the definition of continental shelf. Article 76, paragraph 1, of the 1982 Montego Bay Convention itself confirms the reliance on natural prolongation.

2. Vice-President Sette-Camara sees no need to resort to the "distance principle" as defined in the final part of paragraph 76 of the 1982 Montego Bay Convention as a legal foundation for the Judgment. The coasts of Malta and Libya are barely 180 miles apart and the specific geographical situation dealt with by that proviso does not exist in the present case. Even if we consider the said proviso as containing a rule of customary international law—discarding conventional law because the Convention is not in force—it has no relation with the circumstances of this case.

3. Since neither of the Parties has claimed an exclusive economic zone the opinion finds unnecessary and out of place the considerations of the Judgment on this specific subject.

4. Although concurring with the method of establishing a median line between the Maltese and Libyan coasts and then correcting its course by transposing it northwards by 18 minutes, the opinion fails to subscribe to the way the Judgment reached a line on the extreme northern parameter for that operation. The imaginary exercise of drawing a "notional" median line between the coasts of Sicily and Malta is rejected as an artificial refashioning of geography. Vice-President Sette-Camara believes that it would be much simpler to attribute partial effect to the coasts of Malta, to be balanced up with similar partial effect to be given to the flagrant disproportionality in the lengths of the relevant coasts, so as to reach an equitable result.

Separate Opinion of Judges Ruda, Bedjaoui and Judge ad hoc *Jiménez de Aréchaga*

The authors of the joint separate Opinion agree with many of the Court's findings and conclusions, but observe that the Judgment does not pronounce on Malta's trapezium claim, which they find excessive and contrary to the practice of States in enclosed or semi-enclosed seas.

They also believe that it would have been more equitable to correct the median line northwards by 28′, thus giving Malta a 3/4 effect, achieving a proportionality ratio of 1 to 3.54 and dividing equally the area in dispute.

Separate Opinion by Judge Mbaye

Judge Mbaye voted in favour of the Judgment since he endorses the conclusions which the Court has reached and accepts, on the whole, the reasons for them.

His Opinion deals with two points: what he has called the "two meanings of the concept of natural prolongation" and the circumstance of the "considerable distance between the coasts of the two States".

As far as the first point is concerned, although Judge Mbaye states that he does not disagree with the Court, espec-

ially as regards the finding that natural prolongation in the physical sense cannot, in the present case, have any effect on the delimitation of the areas of continental shelf appertaining respectively to each Party, he expresses regret that the Court, which he finds has made a highly perceptive analysis of the development of customary international law relating to the continental shelf by drawing a distinction between natural prolongation as a "legal principle" and natural prolongation in the "physical sense", has not taken the opportunity to bring out this fundamental idea, which marks a turning point in the development of this area of the law as it emerges from the United Nations Convention on the Law of the Sea of 10 December 1982.

As for the second point, Judge Mbaye questions whether the "considerable" distance between the coasts of the two States can be described as a "relevant circumstance", such as to justify in any way the transposition northwards of the median line initially drawn by the Court. According to Judge Mbaye, the decisive reason for such a transposition is the difference in the lengths of the coasts, and also the general configuration of these coasts and the geography of the region.

Separate Opinion by Judge ad hoc *Valticos*

While concurring with the Judgment as a whole, Judge *ad hoc* Valticos emphasizes that, by confining the area to which its decision applies to a limited zone, in order to leave unaffected the interests of Italy, the Court points out that Malta and Libya remain free to examine together with Italy the question of the delimitation, as between these three countries, of areas outside this limited zone. He states his full agreement as to the lack of relevance of the geological and geomorphological factors; nevertheless, he considers that the line of delimitation should have been the median line between Malta and Libya for various reasons, including the position of opposite countries, the new trends in international law, the practice of States and the task of the Court, which is to define the appropriate rule of international law. He takes the view that the factor of the difference in lengths between the coasts should not have been taken into consideration, and did not warrant any "correction" of the median line. He also considers that account should have been taken of the economic factors involved and of security needs, circumstances which constitute additional justification for the median line solution.

Dissenting Opinion by Judge Mosler

Judge Mosler is of the opinion that the median line between Malta and Libya constitutes an equitable solution in the circumstances of the case. He criticizes the global removal of the median line by 18 minutes northward and the method used by the Court in arriving at that result.

Dissenting Opinion by Judge Oda

In Judge Oda's view, the Court has not fully grappled with recent developments in the law of the sea and is in danger of identifying the principle of equity with its own subjective sense of what is equitable in a particular case. He finds that the area to which the Court has confined the operation of its Judgment is misconstructed through overconcentration on third-State interests which have not been judicially established. Furthermore, the Judgment's employment of a proportionality test to verify the equity of the suggested delimitation is paradoxical, in that the necessity of defining the relevant area and coastlines for that purpose is first propounded and then this exercise is abandoned on the ground of its impossibility. The adjustment or transposition of the Libya/Malta median line so as to shift it 18 minutes northwards on each meridian appears to Judge Oda to be groundless. Despite the Judgment's professing to have taken the Libya/Malta median line as an initial or provisional delimitation, the final line suggested as a consequence of the 18-minute shift is devoid of all the properties inherent in the concept of equidistance, so that this resultant line cannot properly be regarded as an adjusted median. In effect, the technique of the Judgment has involved viewing the entire territory of one Party as a special circumstance affecting a delimitation (Sicily/Libya) which the Court had no call to make and which excludes that Party. In that context, the partial effect that may sometimes be allowed to an island is interpreted in a manner completely different to that featured in the 1977 Anglo-French Arbitration. In Judge Oda's view, the "half-effect" of an island had also been misinterpreted by the Court's 1982 Judgment in the *Tunisia/Libya* case and the 1984 Judgment of a Chamber of the Court in the *Gulf of Maine* case. To clarify his criticisms, he analyses the relevant sections of those Judgments as well as the "proportionality" test as originally mentioned in the *North Sea Continental Shelf* cases.

Judge Oda remains of the view that the equidistance/special-circumstances rule indicated in the 1958 Continental Shelf Convention is still part of international law and, furthermore, that the role of special circumstances is not to justify any substitute for the equidistance line but to enable the bases of that line to be rectified with a view to the avoidance of any distorting effect. In the present case, Judge Oda suggests that the island of Filfla should be ignored in plotting an equidistance line between Libya and Malta. The resultant line would then in his view have constituted a correct delimitation. Drawing it would not, in the circumstances, have had any legal impact on the claim of any third State, but would have implied that neither Libya nor Malta was entitled to any claim against the other in any area beyond it.

Dissenting Opinion by Judge Schwebel

Judge Schwebel dissents from the Judgment in two respects. In his view, the line of delimitation which it lays down has been unduly truncated to defer to the claims of Italy; and the line is not a median line between the opposite coasts of Libya and Malta but a "corrected" median line which, as rendered, is incorrect.

Judge Schwebel maintains that, while a request by Italy to intervene in the case between Libya and Malta had been denied by the Court, today's Judgment grants to Italy all that it sought in its request to intervene. The Court justifies this implausible conclusion by holding that the Special Agreement between Libya and Malta gave the Court jurisdiction only to decide questions of the delimitation of the continental shelf "which appertains" to Malta or Libya, and not to any third State. But the Special Agreement did not speak of areas which exclusively appertain to a party. Moreover, in boundary cases, as previous judgments of the Court indicate, the Court need not decide in the absolute. Thus the Court could, as between Malta and Libya, pass upon areas to which Italy as well as Malta or Libya lay claim, while reserving any rights of Italy. That this interpretation of the Special Agreement is the better interpretation is shown by the fact that both Parties to it, Malta and Libya, maintained it. But the Court, contrary to the rules of treaty interpretation, has taken no account of the interpretation which the Parties placed upon their agreement. Judge Schwebel doubts the propriety of the Court's Judgment deferring so absolutely to Italy's claims for these reasons, and because it appears to place in the hands

of a third party the determination of the extent of the jurisdiction which two other Parties to a case conferred upon the Court.

As to the location of the line of delimitation, while Judge Schwebel agrees that, in a case of purely opposite States, a median line is the correct starting point, he does not agree with the Court's decision to transpose the line substantially to the north and thereby to accord Libya a much larger continental shelf than a median line would. The Court has relied essentially on the fact that Libya's coasts are much longer than Malta's and that, in the general geographical context, the Maltese islands are a small feature which lie south of a continental median line. But the Court has failed to show that these circumstances are probative or even relevant. They provide no reason for discounting the whole of the islands of Malta—which together constitute that independent State—as if they were the anomalous dependent islands of a mainland State. The general geographical context—which the Court in any event sharply narrowed to defer to Italy's claims—worked against Malta's position no more than Libya's. As for the fact that Libya's coasts are longer, since it has always been accepted that the base of a triangle is longer than the apex, it naturally follows that there is a larger area lying off the base (Libya) than the apex (Malta). But the Court goes beyond that fact to allot Libya a bonus because its coasts are longer. The Court denies that it does so for reasons of proportionality. But it supplies no alternative justification. It rather seems to base its Judgment on some intuitive instinct to give Libya a bonus because its coasts are so much longer than Malta's. Moreover, the Court offers no objective, verifiable link between the circumstances it regards as relevant and the determination of the precise line it regards as equitable. It fails to show that those circumstances dictate the adjustment to the extent of that adjustment.

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77. APPLICATION FOR REVISION AND INTERPRETATION OF THE JUDGMENT OF 24 FEBRUARY 1982 IN THE CASE CONCERNING THE CONTINENTAL SHELF (TUNISIA/LIBYAN ARAB JAMAHIRIYA)

Judgment of 10 December 1985

In its judgment on the question concerning the application for revision and interpretation submitted by Tunisia against the Libyan Arab Jamahiriya in connection with the judgment delivered on 24 February 1982 in the case of the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), the Court, unanimously,

—found inadmissible the request for revision of the Judgment of 24 February 1982;

—found admissible the request for interpretation of the Judgment of 24 February 1982 as far as it related to the first sector of the delimitation contemplated by that Judgment, stated the interpretation which should be made in that respect, and stated that the submission of Tunisia relating to that sector cannot be upheld;

—found that the request made by Tunisia for the correction of an error was without object, and that it was not therefore called upon to give a decision thereon;

—found admissible the request for interpretation of the Judgment of 24 February 1982 as far as it related to the most westerly point of the Gulf of Gabes in the second sector of the delimitation contemplated by that Judgment, stated the interpretation which should be made in that respect, and stated that it cannot uphold the submission made by Tunisia relating to that sector;

—found that there was at that time no cause for the Court to order an expert survey for the purpose of ascertaining the precise co-ordinates of the most westerly point of the Gulf of Gabes.

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* *

The International Court of Justice was composed as follows: *President* Nagendra Singh; *Vice-President* de Lacharrière; *Judges* Lachs, Ruda, Elias, Oda, Ago, Sette-Camara, Schwebel, Mbaye, Bedjaoui, Ni; *Judges* ad hoc Mrs. Bastid and Jiménez de Aréchaga.

Judges Ruda, Oda and Schwebel, and Judge *ad hoc* Mrs. Bastid appended separate opinions to the Judgment.

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In these opinions the Judges concerned stated and explained the positions they adopted in regard to certain points dealt with in the Judgment.

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RELEVANT EXTRACTS OF THE OPERATIVE PART OF THE JUDGMENT OF 24 FEBRUARY 1982

It will be helpful to recall the operative part of the Judgment of 24 February 1982, to which the Court makes frequent reference.

The Court states therein the principles and rules of international law applicable to the delimitation of the areas of continental shelf appertaining respectively to Tunisia and to the Libyan Arab Jamahiriya in the disputed region. It lists the relevant circumstances which should be taken into account in achieving an equitable delimitation, and specifies the practical method to be employed in the delimitation.

The delimitation derived from the method stated by the Court is divided into two sectors:

"in the first sector, namely in the sector closer to the coast of the Parties, the starting point for the line of delimitation is the point where the outer limit of the territorial sea of the Parties is intersected by a straight line drawn from the land frontier point of Ras Ajdir through the point 33° 55′ N 12° E, which line runs at a bearing of approximately 26° east of north, corresponding to the angle followed by the north-western boundary of Libyan petroleum concessions numbers NC 76, 137, NC 41 and NC 53, which was aligned on

the south-eastern boundary of Tunisian petroleum concession "Permis complémentaire offshore du Golfe de Gabès" (21 October 1966); from the intersection point so determined, the line of delimitation between the two continental shelves is to run north-east through the point 33° 55′ N, 12° E, thus on that same bearing, to the point of intersection with the parallel passing through the most westerly point of the Tunisian coastline between Ras Kaboudia and Ras Ajdir, that is to say, the most westerly point on the shoreline (low-water mark) of the Gulf of Gabes;

"in the second sector, namely in the area which extends seawards beyond the parallel of the most westerly point of the Gulf of Gabes, the line of delimitation of the two continental shelves is to veer to the east in such a way as to take account of the Kerkennah Islands; that is to say, the delimitation line is to run parallel to a line drawn from the most westerly point of the Gulf of Gabes bisecting the angle formed by a line from that point to Ras Kaboudia and a line drawn from that same point along the seaward coast of the Kerkennah Islands, the bearing of the delimitation line parallel to such bisector being 52° to the meridian; the extension of this line northeastwards is a matter falling outside the jurisdiction of the Court in the present case, as it will depend on the delimitation to be agreed with third States."

At the end of this summary there is a reproduction of Map No. 3, which was annexed to the 1982 Judgment, and which was produced for illustrative purposes only.

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In the Application instituting proceedings which it filed on 27 July 1984, Tunisia submitted to the Court several separate requests: a request for revision of the Judgment delivered by the Court on 24 February 1982 (hereinafter "the 1982 Judgment") submitted on the basis of Article 61 of the Statute of the Court; a request for interpretation of that Judgment submitted under Article 60 of the Statute; and a request for correction of an error. To these was later added a request for the Court to order an expert survey. The Court will deal with these requests in a single Judgment.

Question of the admissibility of the application for revision (paras 11–40)

Under Article 61 of the Statute, proceedings for revision are opened by a judgment of the Court declaring the application admissible on the grounds contemplated by the Statute. Proceedings on the merits are only undertaken if the Court has found the application admissible. Accordingly, the Court must deal first with the admissibility of the application for revision of the 1982 Judgment submitted by Tunisia. The conditions of admissibility are set out in Article 61, paragraphs 1, 4 and 5 of which read as follows:

"1. An application for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence.

". . .

"4. The application for revision must be made at latest within six months of the discovery of the new fact.

"5. No application for revision may be made after the lapse of ten years from the date of the judgment."

The fact which, according to Tunisia, was unknown either to the Court or to itself before the delivery of the 1982 Judgment, was the text of the Resolution of the Libyan Council of Ministers of 28 March 1968, which determined the "real course" of the north-western boundary of a petroleum concession, granted by Libya, known as Concession No. 137, to which reference is made in the Judgment, especially in the operative part (see above, page 3).

Tunisia affirms that the real course of that boundary is very different from that resulting from the various descriptions given by Libya to the Court during the proceedings leading up to the 1982 Judgment. It also observes that the delimitation line passing through point 33° 55′ N 12° E would allocate to Libya areas of continental shelf lying within the Tunisian permit of 1966, contrary to what has been clearly decided by the Court, whose entire decision, according to Tunisia, is based on the idea of alignment between the permits and concessions granted by the two Parties and on the resultant absence of any overlapping of claims up to 1974.

Without disputing the geographic facts as to the positions of the boundaries of the relevant concessions, as stated by Tunisia, Libya emphasizes that it did not present a misleading picture of its concessions. It refrained from making any statement as to the precise connection between Libyan Concession No. 137 and the Tunisian permit of 1966, and confined itself to indicating the existence of a boundary common to both these concessions, following a direction of approximately 26° from Ras Ajdir.

However, Libya disputes the admissibility of the Application for revision, for reasons of fact and law. According to Libya, the Application fails to comply with any of the conditions stated in Article 61 of the Statute, with the exception of the condition as to the ten-year limit laid down in paragraph 5. It contends

—that the fact now relied on was known to Tunisia at the time when the 1982 Judgment was delivered, or at all events earlier than six months before the filing of the Application,

—that if the fact was unknown to Tunisia, that ignorance was due to negligence on its part, and

—that Tunisia has failed to show that the fact discovered was "of such a nature as to be a decisive factor".

The Court recalls that everything known to the Court must be taken to be known also to the party seeking revision, and a party cannot claim to have been unaware of a fact regularly brought before it.

The Court examines the question raised by Tunisia, on the basis of the idea that the fact supposedly unknown in 1982 related solely to the co-ordinates defining the boundary of Concession No. 137, since the existence of an overlap between the north-western edge of Libyan Concession No. 137 and the south-eastern edge of the Tunisian permit could hardly have escaped Tunisia. It notes that, according to Libya, the information supplied to the Court was accurate as far as it went, but the exact co-ordinates of Concession No. 137 were not supplied to the Court by either Party, so that Tunisia would not have been able to ascertain the exact location of the Libyan Concession from the pleadings and other material then before the Court. The Court must, however, consider whether the circumstances were such that means were available to Tunisia to ascertain the exact co-ordinates of the Concession from other sources; and indeed whether it was in Tunisia's own interests to do so. If such be the case, it does not appear to the Court that it is open to Tunisia to rely on those co-ordinates as a fact unknown to it within the meaning of Article 61, paragraph 1, of the Statute. Having considered the opportunities available to Tunisia to obtain

this information, and arguing from these that the exact concession boundary co-ordinates were obtainable by Tunisia and that it was in its interests to obtain them, the Court concludes that one of the essential conditions of admissibility of a request for revision, laid down in Article 61, paragraph 1, of the Statute—ignorance of a new fact not due to negligence—is lacking.

The Court finds it useful to consider also whether the fact relating to the Concession co-ordinates was "of such a nature as to be a decisive factor", as required by Article 61, paragraph 1. It points out that, according to Tunisia, the coincidence of the boundaries of the Libyan concessions and of the Tunisian Permit of 1966 is "an essential element [of] the delimitation . . . and, in truth the *ratio decidendi* of the Judgment." The view of Tunisia as to the decisive character of that coincidence derives from its interpretation of the operative part of the 1982 Judgment (see above, page 3). That operative clause, however, according to the Court, falls into two distinct parts. In the first part, the Court establishes the starting-point of the delimitation line, that point being at the intersection of the limit of the territorial sea of the Parties and a line which it calls the "determining line", drawn from the frontier point of Ras Ajdir through the point 33° 55′ N 12° E. In the second part, the Court adds that the line runs at a specified approximate bearing, and that that bearing corresponds to the angle formed by the boundary of the concessions mentioned. It then defines the actual delimitation line as running from that intersection point north-east on that same bearing (approximately 26°) through the point 33° 55′ N 12° E.

The Court finds that in the operative clause of the Judgment there is a single precise criterion for the drawing of the delimitation line, namely that it is to be drawn through two specifically defined points. The other considerations are not mentioned as part of the description of the delimitation line itself; they appear in the operative clause only as an explanation, not a definition, of the "determining line".

The Court then considers whether it would have arrived at another decision if it had known the precise co-ordinates of Concession No. 137. Here it makes three observations. First, the line resulting from the grant of petroleum concessions was by no means the sole consideration taken into account by the Court, and the method indicated by the Court for achieving an equitable delimitation derived in fact from a balance struck between a number of considerations.

Secondly, the argument of Tunisia that the fact that the Libyan concessions did not match the Tunisian boundary on the west would have induced the Court, had it been aware of it, to adopt a different approach, proceeds from a narrow interpretation of the term "aligned" employed in the operative clause of the 1982 Judgment. It is evident that by using that word, the Court did not mean that the boundaries of the relevant concessions formed a perfect match in the sense that there was neither any overlap nor any sea-bed area left open between the boundaries. Moreover, from what had been said during the proceedings, it knew that the Libyan boundary was a straight line (at a bearing of 26°) and the Tunisian boundary a stepped line, creating either open areas or areas of overlap. The Tunisian boundary followed a general direction of 26° from Ras Ajdir, and according to the Court, the boundary of the Libyan concession was aligned with that general direction.

Thirdly, what was significant for the Court in the "alignment" of the concession boundaries was not merely the fact that Libya had apparently limited its 1968 concession so as not to encroach on Tunisia's 1966 permit. It was the fact that both parties had chosen to use as boundary of the permits or concessions granted by them a line corresponding roughly to a line drawn from Ras Ajdir at 26° to the meridian. Their choice was an indication that, at the time, a 26° line was considered equitable by both States.

From the foregoing it follows that the Court's reasoning in 1982 is wholly unaffected by the evidence now produced as to the boundaries of Concession No. 137. This does not mean that if the co-ordinates of Concession No. 137 had been clearly indicated to the Court, the 1982 Judgment would have been identically worded. Some additional details might have been given. But in order for an application for revision to be found admissible, it is not sufficient that the new fact relied on might, had it been known, have made it possible for the Court to be more specific in its decision; it must also have been a fact "of such a nature as to be a decisive factor". Yet far from constituting such a fact, the details of the correct co-ordinates of Concession No. 137 would have not have changed the decision of the Court as to the first sector of the delimitation. Accordingly, the Court must conclude that the application by Tunisia for a revision of the 1982 Judgment is not admissible according to the terms of Article 61 of the Statute.

Request for interpretation in the first sector of the delimitation
(paras. 41–50)

In the event that the Court does not find admissible its Application for revision, Tunisia has submitted a subsidiary request for interpretation as regards the first sector of the delimitation line, based on Article 60 of the Statute. The Court first deals in this respect with a jurisdictional objection raised by Libya. The latter claims that, if explanations or clarifications are necessary, the Parties must go back together to the Court in accordance with Article 3 of the Special Agreement on the basis of which the Court was originally seised.[1] The question therefore arises of the link between the procedure contemplated in Article 3 of the Special Agreement, and the possibility of either of the Parties requesting interpretation unilaterally of a judgment under Article 60 of the Statute. Having examined the contentions of the Parties, the Court concludes that the existence of Article 3 of the Special Agreement does not pose an obstacle to the request for interpretation submitted by Tunisia on the basis of Article 60 of the Statute.

The Court goes on to consider whether the Tunisian request fulfils the conditions for admissibility such that it can be met. It considers that a dispute indeed exists between the Parties as to the meaning and scope of the 1982 Judgment, since they do not agree as to whether the indication in the 1982 Judgment that the line should pass through the point 33 ° 55′ N 12° E does or does not constitute a matter decided with binding force; Libya argues that it does; Tunisia that it does not. It therefore concludes that the Tunisian request for interpretation in relation to the first sector is admissible.

The Court goes on to specify the significance of the principle of *res judicata* in the present case. In particular, it observes that even though the Parties did not entrust it with the task of drawing the delimitation line itself, they undertook to apply the principles and rules indicated by the Court

[1] Article 3 of the Special Agreement is worded as follows:
"In case the agreement mentioned in Article 2 is not reached within a period of three months, renewable by mutual agreement from the date of delivery of the Court's judgement, the two Parties shall together go back to the Court and request any explanations or clarifications which would facilitate the task of the two delegations to arrive at the line separating the two areas of the continental shelf, and the two Parties shall comply with the judgement of the Court and with its explanations and clarifications."

in its Judgment. As for the figures given by the Court, each element must be read in its context, to establish whether the Court intended it as a precise statement, or merely as an indication subject to variation.

Tunisia states that, in the first sector, the object of its request for interpretation is "to obtain some clarifications, notably as regards the hierarchy to be established between the criteria adopted by the Court, having regard to the impossibility of simultaneously applying these criteria to determine the starting point of the delimitation line . . . ". It argues that the boundary to be taken into consideration for the establishment of a delimitation line can only be the south-eastern boundary of the Tunisian Permit of 1966. The Court has already explained, in connection with the request for revision, that the 1982 Judgment lays down for the purposes of the delimitation a single precise criterion for the drawing of the line, namely that it is to be a straight line drawn through two specifically defined points. The Tunisian request for interpretation is therefore founded upon a misreading of the purport of the relevant passage of the operative clause of the 1982 Judgment. The Court therefore finds that it cannot uphold Tunisia's submission concerning the interpretation of the Judgment in this respect, and that there is nothing to be added to what it has already said, in its reasoning on the admissibility of the request for revision, as to the meaning and scope of the 1982 Judgment (see paragraphs 32–39 of the Judgment).

Request for the correction of an error in the first sector of the delimitation
(paras. 51 and 52)

As regards the Tunisian request for the correction of an error, submitted as a subsidiary request to replace the co-ordinates 33° 55′ N 12° E with other co-ordinates, the Court considers that it is based upon the view expressed by Tunisia that the choice of this point by the Court resulted from the application of a criterion whereby the delimitation line was not to encroach upon the Tunisian Permit of 1966. However, this is not the case; the point in question was chosen as a convenient concrete means of defining the 26° line from Ras Ajdir. Accordingly, Tunisia's request in this regard appears to be based on a misreading, and has thus become without object. Thus no decision thereon is called for.

Request for interpretation in the second sector of the delimitation
(paras. 53–63)

The Court now turns to the request made by Tunisia for an interpretation of the 1982 Judgment as it concerns the second sector of the delimitation. According to that Judgment, the delimitation line in the first sector was to be drawn "to the point of intersection with the parallel passing through the most westerly point of the Tunisian coastline between Ras Kaboudia and Ras Ajdir, that is to say, the most westerly point on the shoreline (low-water mark) of the Gulf of Gabes". Beyond that parallel, the delimitation line was to reflect the radical change in direction of the Tunisian coastline marked by the Gulf of Gabes. No co-ordinates, even approximate, were indicated in the operative part of the Judgment to identify what in the Court's view was the most westerly point of the Gulf of Gabes. According to the Judgment, "the precise co-ordinates of this point will be for the experts to determine, but it appears to the Court that it will be approximately 34° 10′ 30″ north".

Tunisia maintains that the co-ordinate 34° 10′ 30″ N given in the Judgment is not binding on the Parties, since it is not repeated in the operative part. Libya, on the other hand, argues that since the Court had already made its own calculations, the exact plotting of the point by the experts involved a margin "perhaps of seconds" at most. That being so, the Court takes the view, for the purposes of the conditions of admissibility which it has initially to examine, that there is certainly a dispute between the Parties as to what in the 1982 Judgment has been decided with binding force. It also seems to it that the real purpose of Tunisia's request is to obtain a clarification by the Court of "the meaning and scope of what the Court has decided" on that question in the 1982 Judgment. It therefore finds admissible the Tunisian request for interpretation in respect of the second sector.

Tunisia attaches great importance to the fact that the parallel 34° 10′ 30″ indicated by the Court meets the coastline in the mouth of a wadi. While recognizing that there is a point in the region of this parallel where tidal waters extend as far as a more westerly longitude than any of the other points considered, Tunisia disregards this, and fixes the most westerly point on the shoreline of the Gulf of Gabes at 34° 05′ 20″ N (Carthage). Explaining its grounds for rejecting this, the Court says that by "the most westerly point on the shoreline (low-water mark) of the Gulf of Gabes", it simply meant the point on the shoreline which is further to the west than any other point on the same shoreline, and has the advantage of being open to objective definition. As for the presence of a wadi at approximately the latitude referred to by the Court, the Court referred merely to the familiar concept of the "low-water mark". It did not intend to refer to the most westerly point on the baselines from which the breadth of the territorial sea was, or might be, measured; and the idea that it might have referred to such baselines to exclude from its definition of the "most westerly point" a point located in the mouth of a wadi must be regarded as untenable.

As to the significance to be attached to the Court's reference in the 1982 Judgment to the latitude 34° 10′ 30″ N, the Court explains that it took that latitude as a practical definition of the point in relation to which the bearing of the delimitation line was to change. The definition was not binding upon the Parties, and it is significant in that respect that the word "approximately" was used to describe the latitude, also that the operative part of the Judgment made no mention of it. Moreover, the task of determining the precise co-ordinates of the "most westerly point" was left to the experts. It follows that the Court cannot uphold Tunisia's submission that the most westerly point is situated at 34° 05′ 20″ N (Carthage). It expressly decided in 1982 that the precise co-ordinates were to be determined by the experts, and it would not be consistent with that decision for the Court to state that a specific co-ordinate constituted the most westerly point of the Gulf of Gabes.

That being so, the Court gives some indications for the experts, saying that they are to identify the most westerly point on the low-water mark by using the available maps, disregarding any straight baselines, and proceeding if necessary to a survey *in loco*, whether or not this point is situated in a channel or in the mouth of a wadi, and whether or not it can be considered as marking a change in direction of the coastline.

Request for an expert survey
(paras. 64–68)

During the oral proceedings, Tunisia made a subsidiary submission for the ordering of an expert survey for the purpose of ascertaining the exact co-ordinates of the most westerly point of the Gulf of Gabes. The Court comments in this

respect that it could only accede to the request of Tunisia if the determination of the co-ordinates of this point were required to enable it to give judgment on the matters submitted to it. However, the Court is seised of a request for interpretation of a previous judgment, and in 1982 it stipulated that it did not purport to determine these co-ordinates with accuracy, this task being left for the experts of the Parties. At that time, it refrained from appointing an expert itself, what was at issue being a necessary element in its decision as to the practical methods to be used. Its decision in this respect is covered by the force of *res judicata*. However, this does not prevent the Parties from returning to the Court to present a joint request that it should order an expert survey, but they would have to do so by means of an agreement. The Court concludes that there is no cause at present for it to order an expert survey for the purpose of ascertaining the exact co-ordinates of the most westerly point of the Gulf of Gabes.

For the future, the Court recalls that the Parties are obliged to conclude a treaty for the purpose of the delimitation. They must ensure that the 1982 Judgment is implemented so that the dispute is finally disposed of, and must consequently act in such a way that their experts engage in a sincere exercise to determine the co-ordinates of the most westerly point, in the light of the indications furnished in the Judgment.

OPERATIVE PROVISIONS OF THE COURT'S JUDGMENT

THE COURT,

A. Unanimously,

Finds inadmissible the request submitted by the Republic of Tunisia for revision, under Article 61 of the Statute of the Court, of the Judgment given by the Court on 24 February 1982;

B. Unanimously,

(1) *Finds admissible* the request submitted by the Republic of Tunisia for interpretation, under Article 60 of the Statute of the Court, of the Judgment of 24 February 1982 as far as it relates to the first sector of the delimitation contemplated by that Judgment;

(2) *Declares*, by way of interpretation of the Judgment of 24 February 1982, that the meaning and scope of that part of the Judgment which relates to the first sector of the delimitation are to be understood according to paragraphs 32 to 39 of the present Judgment;

(3) *Finds* that the submission of the Republic of Tunisia of 14 June 1985 relating to the first sector of the delimitation, cannot be upheld;

C. Unanimously,

Finds that the request of the Republic of Tunisia for the correction of an error is without object and that the Court is therefore not called upon to give a decision thereon;

D. Unanimously,

(1) *Finds admissible* the request submitted by the Republic of Tunisia for interpretation, under Article 60 of the Statute of the Court, of the Judgment of 24 February 1982 as far as it relates to the "most westerly point of the Gulf of Gabes";

(2) *Declares*, by way of interpretation of the Judgment of 24 February 1982,

(*a*) that the reference in paragraph 124 of that Judgment to "approximately 34° 10′ 30″ north" is a general indication of the latitude of the point which appeared to the Court to be the most westerly point on the shoreline (low-water mark) of the Gulf of Gabes, it being left to the experts of the Parties to determine the precise co-ordinates of that point; that the latitude of 34° 10′ 30″ was therefore not intended to be itself binding on the Parties but was employed for the purpose of clarifying what was decided with binding force in paragraph 133 C (3) of that Judgment;

(*b*) that the reference in paragraph 133 C (2) of that Judgment to "the most westerly point of the Tunisian coastline between Ras Kaboudia and Ras Ajdir, that is to say, the most westerly point on the shoreline (low-water mark) of the Gulf of Gabes", and the similar reference in paragraph 133 C (3) are to be understood as meaning the point on that shoreline which is furthest to the west on the low-water mark; and

(*c*) that it will be for the experts of the Parties, making use of all available cartographic documents and, if necessary, carrying out an *ad hoc* survey *in loco*, to determine the precise co-ordinates of that point, whether or not it lies within a channel or the mouth of a wadi, and regardless of whether or not such point might be regarded by the experts as marking a change in direction of the coastline;

(3) *Finds* that the submission of the Republic of Tunisia, "that the most westerly point of the Gulf of Gabes lies on latitude 34° 05′ 20″ N (Carthage)", cannot be upheld;

E. Unanimously,

Finds that, with respect to the submission of the Republic of Tunisia of 14 June 1985, there is at the present time no cause for the Court to order an expert survey for the purpose of ascertaining the precise co-ordinates of the most westerly point of the Gulf of Gabes.

SUMMARY OF THE OPINIONS APPENDED TO THE JUDGMENT OF THE COURT

Separate Opinion of Judge Ruda

Judge Ruda's Separate Opinion refers to the relationship between Article 60 of the Statute of the Court, which deals with the interpretation of previous Judgments and Article 3 of the Special Agreement, empowering the Parties to ask from the Court "explanations or clarifications".

Judge Ruda thinks that, although Libya developed in the argument a jurisdictional objection, based on Article 3, she later waived such objection. Judge Ruda, unlike the Court, also considers that that article established a special procedure to be observed before coming to the Court; "The purpose of Article 3 is to oblige the Parties to make an effort to settle between themselves which are the points of difference, before coming to the Court; if such an effort fails, the Parties then could ask unilaterally for an interpretation under Article 60 of the Statute".

Separate Opinion of Judge Oda

Judge Oda, as a dissenting judge in the original case in 1982, stated that if the Court had been more cautious in 1982 in its reference to the former Tunisian and Libyan concessions as far as they were to constitute an important factor in the Court's determination of the delimitation line, the present case would probably not have been presented. This seems to him an essential point which the Court in the present Judgment should have more candidly recognized.

With regard to the Tunisian application for revision of the delimitation line in its first sector, Judge Oda is of the view that the Court's intention was for a straight line to be drawn linking Ras Ajdir and the mid-ocean point 33° 55′ N and 12° E, and that this was not of a nature to be so affected by any newly discovered facts as to cause the Court to reconsider it. However forcefully that 1982 Judgment may be criticized,

the cause and motive underlying that Judgment, which is final, are, in Judge Oda's view, not matters subject to revision under Article 61 of the Statute.

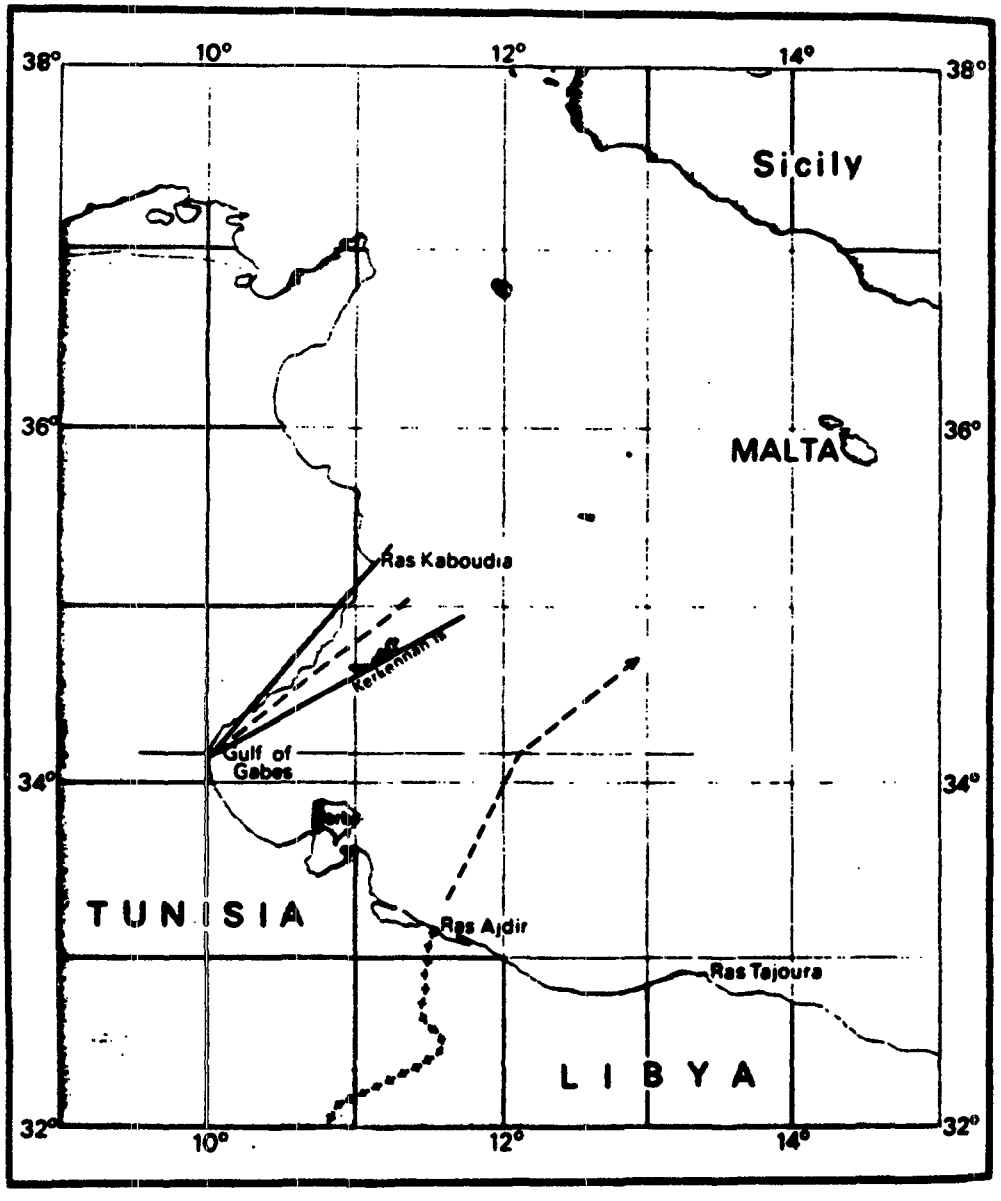
With regard to the Tunisian requests for interpretation concerning both the first and the second sectors of the delimitation line, Judge Oda is of the opinion that these requests should have been declared inadmissible, since they were simply disguised requests for revision. The first sector was, as indicated above, an unequivocal line connecting two clear points, and the veering-point of the delimitation line for its second sector was determined by the Court on the same latitude as a small nick on the Tunisian coast which the Court happened to pick as a turning-point on the coastline. However questionable these determinations by the Court might have been, they were so clear as to leave no room for interpretation.

Separate Opinion of Judge Schwebel

Judge Schwebel expresses reservations as to the treatment of the question whether Members of the Court in 1982 had appreciated that there was, in 1974, a measure of overlapping between the petroleum concessions of the Parties within 50 miles of the coast. In his view, the 1982 Judgment would have been worded differently had that fact been really understood. He is however satisfied that such knowledge would not have changed the Court's decision on the first sector of the delimitation line, and remains largely in accord with the present Judgment.

Separate Opinion of Mrs. Bastid, Judge ad hoc

In her Separate Opinion, Mrs. Suzanne Bastid, the Judge *ad hoc* chosen by Tunisia, dismisses the request for a revision on the ground that no new fact had emerged. She considers the requests for interpretation admissible. For the first sector, she criticizes the link established between the arguments on revision and those on interpretation. For the second sector, she considers it necessary to recall the meaning of the term "shoreline" (low-water mark) used in the operative part of the 1982 Judgment.



Map No. 3

For illustrative purposes only, and without prejudice to the role of the experts in determining the delimitation line with exactness

(Extract from I.C.J. Reports 1982, page 90)

78. CASE CONCERNING THE FRONTIER DISPUTE (BURKINA FASO/ REPUBLIC OF MALI) (PROVISIONAL MEASURES)

Order of 10 January 1986

An order issued by the Chamber of the Court constituted to deal with the frontier dispute between Burkina Faso and Mali unanimously indicated provisional measures.

Among other measures, the Chamber asked the Governments of Burkina Faso and Mali to withdraw their armed forces to such positions, or behind such lines as may, within twenty days of the delivery of the Order, be determined by agreement between the two Governments, it being understood that the terms of the troop withdrawal will be laid down by the agreement in question: failing such agreement, the Chamber would itself indicate these terms.

The Chamber also called on both Parties to continue to observe the ceasefire which has already taken place; not to modify the previous situation as regards the administration of the disputed areas; and to avoid any act likely to aggravate or extend the dispute of which the Chamber is seised.

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The Chamber constituted in the case of the *Frontier Dispute (Burkina Faso/Mali)* is composed as follows:

President Mohammed Bedjaoui; Judges Manfred Lachs, José-Maria Ruda; Judges *ad hoc* François Luchaire, Georges Abi-Saab.

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* *

ORDER INDICATING PROVISIONAL MEASURES

THE CHAMBER,

unanimously,

1. *Indicates,* pending its final decision in the proceedings instituted on 20 October 1983 by the notification of the Special Agreement between the Government of the Republic of Upper Volta (now Burkina Faso) and the Government of the Republic of Mali, signed on 16 September 1983 and relative to the frontier dispute between the two States, the following provisional measures:

A. The Government of Burkina Faso and the Government of the Republic of Mali should each of them ensure that no action of any kind is taken which might aggravate or extend the dispute submitted to the Chamber or prejudice the right of the other Party to compliance with whatever judgment the Chamber may render in the case;

B. Both Governments should refrain from any act likely to impede the gathering of evidence material to the present case;

C. Both Governments should continue to observe the ceasefire instituted by agreement between the two Heads of State on 31 December 1985;

D. Both Governments should withdraw their armed forces to such positions, or behind such lines, as may, within twenty days of the date of the present Order, be determined by an agreement between those Governments, it being understood that the terms of the troop withdrawal will be laid down by the agreement in question and that, failing such agreement, the Chamber will itself indicate them by means of an Order;

E. In regard to the administration of the disputed areas, the situation which prevailed before the armed actions that gave rise to the requests for provisional measures should not be modified;

2. *Calls upon* the Agents of the Parties to notify the Registrar without delay of any agreement concluded between their Governments within the scope of point 1 D above;

3. *Decides* that, pending its final judgment, and without prejudice to the application of Article 76 of the Rules, the Chamber will remain seised of the questions covered by the present Order.

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

Judgment of 27 June 1986

For its judgment on the merits in the case concerning Military and Paramilitary Activities in and against Nicaragua brought by Nicaragua against the United States of America, the Court was composed as follows:

President Nagendra Singh; Vice-President de Lacharrière; Judges Lachs, Ruda, Elias, Oda, Ago, Sette-Camara, Schwebel, Sir Robert Jennings, Mbaye, Bedjaoui, Ni, Evensen, Judge *ad hoc* Colliard.

*
* *

OPERATIVE PART OF THE COURT'S JUDGMENT

THE COURT

(1) By eleven votes to four,

Decides that in adjudicating the dispute brought before it by the Application filed by the Republic of Nicaragua on 9 April 1984, the Court is required to apply the "multilateral treaty reservation" contained in proviso (*c*) to the declaration of acceptance of jurisdiction made under Article 36, paragraph 2, of the Statute of the Court by the Government of the United States of America deposited on 26 August 1946;

IN FAVOUR: *President* Nagendra Singh; *Vice-President* de Lacharrière; *Judges* Lachs, Oda, Ago, Schwebel, Sir Robert Jennings, Mbaye, Bedjaoui and Evensen; *Judge* ad hoc Colliard;

AGAINST: *Judges* Ruda, Elias, Sette-Camara and Ni.

(2) By twelve votes to three,

Rejects the justification of collective self-defence maintained by the United States of America in connection with the military and paramilitary activities in and against Nicaragua the subject of this case;

IN FAVOUR: *President* Nagendra Singh; *Vice-President* de Lacharrière; *Judges* Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen; *Judge* ad hoc Colliard;

AGAINST: *Judges* Oda, Schwebel and Sir Robert Jennings.

(3) By twelve votes to three,

Decides that the United States of America, by training, arming, equipping, financing and supplying the *contra* forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to intervene in the affairs of another State;

IN FAVOUR: *President* Nagendra Singh; *Vice-President* de Lacharrière; *Judges* Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen; *Judge* ad hoc Colliard;

AGAINST: *Judges* Oda, Schwebel and Sir Robert Jennings.

(4) By twelve votes to three,

Decides that the United States of America, by certain attacks on Nicaraguan territory in 1983–1984, namely attacks on Puerto Sandino on 13 September and 14 October 1983; an attack on Corinto on 10 October 1983; an attack on Potosi Naval Base on 4/5 January 1984; an attack on San Juan del Sur on 7 March 1984; attacks on patrol boats at Puerto Sandino on 28 and 30 March 1984; and an attack on San Juan del Norte on 9 April 1984; and further by those acts of intervention referred to in subparagraph (3) hereof which involve the use of force, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to use force against another State;

IN FAVOUR: *President* Nagendra Singh; *Vice-President* de Lacharrière; *Judges* Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen; *Judge* ad hoc Colliard;

AGAINST: *Judges* Oda, Schwebel and Sir Robert Jennings.

(5) By twelve votes to three,

Decides that the United States of America, by directing or authorizing overflights of Nicaraguan territory, and by the acts imputable to the United States referred to in subparagraph (4) hereof, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to violate the sovereignty of another State;

IN FAVOUR: *President* Nagendra Singh; *Vice-President* de Lacharrière; *Judges* Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen; *Judge* ad hoc Colliard;

AGAINST: *Judges* Oda, Schwebel and Sir Robert Jennings.

(6) By twelve votes to three,

Decides that, by laying mines in the internal or territorial waters of the Republic of Nicaragua during the first months of 1984, the United States of America has acted, against the Republic of Nicaragua, in breach of its obligations under customary international law not to use force against another State, not to intervene in its affairs, not to violate its sovereignty and not to interrupt peaceful maritime commerce;

IN FAVOUR: *President* Nagendra Singh; *Vice-President* de Lacharrière; *Judges* Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen; *Judge* ad hoc Colliard;

AGAINST: *Judges* Oda, Schwebel and Sir Robert Jennings.

(7) By fourteen votes to one,

Decides that, by the acts referred to in subparagraph (6) hereof, the United States of America has acted, against the Republic of Nicaragua, in breach of its obligations under Article XIX of the Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of Nicaragua signed at Managua on 21 January 1956;

IN FAVOUR: *President* Nagendra Singh; *Vice-President* de Lacharrière; *Judges* Lachs, Ruda, Elias, Oda, Ago, Sette-Camara, Sir Robert Jennings, Mbaye, Bedjaoui, Ni and Evensen; *Judge* ad hoc Colliard;

AGAINST: *Judge* Schwebel.

(8) By fourteen votes to one,

Decides that the United States of America, by failing to make known the existence and location of the mines laid by it, referred to in subparagraph (6) hereof, has acted in breach of its obligations under customary international law in this respect;

IN FAVOUR: *President* Nagendra Singh; *Vice-President* de Lacharrière; *Judges* Lachs, Ruda, Elias, Ago, Sette-Camara, Schwebel, Sir Robert Jennings, Mbaye, Bedjaoui, Ni and Evensen; *Judge* ad hoc Colliard;

AGAINST: *Judge* Oda.

(9) By fourteen votes to one,

Finds that the United States of America, by producing in 1983 a manual entitled "Operaciones sicológicas en guerra de guerrillas", and disseminating it to *contra* forces, has encouraged the commission by them of acts contrary to general principles of humanitarian law; but does not find a a basis for concluding that any such acts which may have been committed are imputable to the United States of America as acts of the United States of America;

IN FAVOUR: *President* Nagendra Singh; *Vice-President* de Lacharrière; *Judges* Lachs, Ruda, Elias, Ago, Sette-Camara, Schwebel, Sir Robert Jennings, Mbaye, Bedjaoui, Ni and Evensen; *Judge* ad hoc Colliard;

AGAINST: *Judge* Oda.

(10) By twelve votes to three,

Decides that the United States of America, by the attacks on Nicaraguan territory referred to in subparagraph (4) hereof, and by declaring a general embargo on trade with Nicaragua on 1 May 1985, has committed acts calculated to deprive of its object and purpose the Treaty of Friendship, Commerce and Navigation between the Parties signed at Managua on 21 January 1956;

IN FAVOUR: *President* Nagendra Singh; *Vice-President* de Lacharrière; *Judges* Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen; *Judge* ad hoc Colliard;

AGAINST: *Judges* Oda, Schwebel and Sir Robert Jennings.

(11) By twelve votes to three,

Decides that the United States of America, by the attacks on Nicaraguan territory referred to in subparagraph (4) hereof, and by declaring a general embargo on trade with Nicaragua on 1 May 1985, has acted in breach of its obligations under Article XIX of the Treaty of Friendship, Com-

merce and Navigation between the Parties signed at Managua on 21 January 1956;

IN FAVOUR: *President* Nagendra Singh; *Vice-President* de Lacharrière; *Judges* Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen; *Judge* ad hoc Colliard;

AGAINST: *Judges* Oda, Schwebel and Sir Robert Jennings.

(12) By twelve votes to three,

Decides that the United States of America is under a duty immediately to cease and to refrain from all such acts as may constitute breaches of the foregoing legal obligations;

IN FAVOUR: *President* Nagendra Singh; *Vice-President* de Lacharrière; *Judges* Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen; *Judge* ad hoc Colliard;

AGAINST: *Judges* Oda, Schwebel and Sir Robert Jennings.

(13) By twelve votes to three,

Decides that the United States of America is under an obligation to make reparation to the Republic of Nicaragua for all injury caused to Nicaragua by the breaches of obligations under customary international law enumerated above;

IN FAVOUR: *President* Nagendra Singh; *Vice-President* de Lacharrière; *Judges* Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen; *Judge* ad hoc Colliard;

AGAINST: *Judges* Oda, Schwebel and Sir Robert Jennings.

(14) By fourteen votes to one,

Decides that the United States of America is under an obligation to make reparation to the Republic of Nicaragua for all injury caused to Nicaragua by the breaches of the Treaty of Friendship, Commerce and Navigation between the Parties signed at Managua on 21 January 1956;

IN FAVOUR: *President* Nagendra Singh; *Vice-President* de Lacharrière; *Judges* Lachs, Ruda, Elias, Oda, Ago, Sette-Camara, Sir Robert Jennings, Mbaye, Bedjaoui, Ni and Evensen; *Judge* ad hoc Colliard;

AGAINST: *Judge* Schwebel.

(15) By fourteen votes to one,

Decides that the form and amount of such reparation, failing agreement between the Parties, will be settled by the Court, and reserves for this purpose the subsequent procedure in the case;

IN FAVOUR: *President* Nagendra Singh; *Vice-President* de Lacharrière; *Judges* Lachs, Ruda, Elias, Oda, Ago, Sette-Camara, Sir Robert Jennings, Mbaye, Bedjaoui, Ni and Evensen; *Judge* ad hoc Colliard;

AGAINST: *Judge* Schwebel.

(16) Unanimously,

Recalls to both Parties their obligation to seek a solution to their disputes by peaceful means in accordance with international law.

SUMMARY OF THE JUDGMENT

I. *Qualités*
(paras. 1 to 17)

II. *Background to the dispute*
(paras. 18–25)

III. *The non-appearance of the Respondent and Article 53 of the Statute*
(paras. 26–31)

The Court recalls that subsequent to the delivery of its Judgment of 26 November 1984 on the jurisdiction of the Court and the admissibility of Nicaragua's Application, the United States decided not to take part in the present phase of the proceedings. This however does not prevent the Court from giving a decision in the case, but it has to do so while respecting the requirements of Article 53 of the Statute, which provides for the situation when one of the parties does not appear. The Court's jurisdiction being established, it has in accordance with Article 53 to satisfy itself that the claim of the party appearing is well founded in fact and law. In this respect the Court recalls certain guiding principles brought out in a number of previous cases, one of which excludes any possibility of a judgment automatically in favour of the party appearing. It also observes that it is valuable for the Court to know the views of the non-appearing party, even if those views are expressed in ways not provided for in the Rules of Court. The principle of the equality of the parties has to remain the basic principle, and the Court has to ensure that the party which declines to appear should not be permitted to profit from its absence.

IV. *Justiciability of the dispute*
(paras. 32–35)

The Court considers it appropriate to deal with a preliminary question. It has been suggested that the questions of the use of force and collective self-defence raised in the case fall outside the limits of the kind of questions the Court can deal with, in other words that they are not justiciable. However, in the first place the Parties have not argued that the present dispute is not a "legal dispute" within the meaning of Article 36, paragraph 2, of the Statute, and secondly, the Court considers that the case does not necessarily involve it in evaluation of political or military matters, which would be to overstep proper judicial bounds. Consequently, it is equipped to determine these problems.

V. *The significance of the multilateral treaty reservation*
(paras. 36–56)

The United States declaration of acceptance of the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Statute contained a reservation excluding from the operation of the declaration

> "disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States of America specially agrees to jurisdiction".

In its Judgment of 26 November 1984 the Court found, on the basis of Article 79, paragraph 7, of the Rules of Court, that the objection to jurisdiction based on the reservation raised "a question concerning matters of substance relating to the merits of the case" and that the objection did "not possess, in the circumstances of the case, an exclusively preliminary character". Since it contained both preliminary aspects and other aspects relating to the merits, it had to be dealt with at the stage of the merits.

In order to establish whether its jurisdiction was limited by the effect of the reservation in question, the Court has to ascertain whether any third States, parties to the four multilateral treaties invoked by Nicaragua, and not parties to the proceedings, would be "affected" by the Judgment. Of these treaties, the Court considers it sufficient to examine the position under the United Nations Charter and the Charter of the Organization of American States.

The Court examines the impact of the multilateral treaty reservation on Nicaragua's claim that the United States has

used force in breach of the two Charters. The Court examines in particular the case of El Salvador, for whose benefit primarily the United States claims to be exercising the right of collective self-defence which it regards as a justification of its own conduct towards Nicaragua, that right being endorsed by the United Nations Charter (Art. 51) and the OAS Charter (Art. 21). The dispute is to this extent a dispute "arising under" multilateral treaties to which the United States, Nicaragua and El Salvador are Parties. It appears clear to the Court that El Salvador would be "affected" by the Court's decision on the lawfulness of resort by the United States to collective self-defence.

As to Nicaragua's claim that the United States has intervened in its affairs contrary to the OAS Charter (Art. 18) the Court observes that it is impossible to say that a ruling on the alleged breach of the Charter by the United States would not "affect" El Salvador.

Having thus found that El Salvador would be "affected" by the decision that the Court would have to take on the claims of Nicaragua based on violation of the two Charters by the United States, the Court concludes that the jurisdiction conferred on it by the United States declaration does not permit it to entertain these claims. It makes it clear that the effect of the reservation is confined to barring the applicability of these two multilateral treaties as multilateral treaty law, and has no further impact on the sources of international law which Article 38 of the Statute requires the Court to apply, including customary international law.

VI. *Establishment of the facts: evidence and methods employed by the Court*
(paras. 57–74)

The Court has had to determine the facts relevant to the dispute. The difficulty of its task derived from the marked disagreement between the Parties, the non-appearance of the Respondent, the secrecy surrounding certain conduct, and the fact that the conflict is continuing. On this last point, the Court takes the view, in accordance with the general principles as to the judicial process, that the facts to be taken into account should be those occurring up to the close of the oral proceedings on the merits of the case (end of September 1985).

With regard to the production of evidence, the Court indicates how the requirements of its Statute—in particular Article 53—and the Rules of Court have to be met in the case, on the basis that the Court has freedom in estimating the value of the various elements of evidence. It has not seen fit to order an enquiry under Article 50 of the Statute. With regard to certain *documentary material* (press articles and various books), the Court has treated these with caution. It regards them not as evidence capable of proving facts, but as material which can nevertheless contribute to corroborating the existence of a fact and be taken into account to show whether certain facts are matters of public knowledge. With regard to *statements by representatives of States*, sometimes at the highest level, the Court takes the view that such statements are of particular probative value when they acknowledge facts or conduct unfavourable to the State represented by the person who made them. With regard to the *evidence of witnesses* presented by Nicaragua—five witnesses gave oral evidence and another a written affidavit—one consequence of the absence of the Respondent was that the evidence of the witnesses was not tested by cross-examination. The Court has not treated as evidence any part of the testimony which was a mere expression of opinion as to the probability or otherwise of the existence of a fact not directly known to the witness. With regard in particular to *affidavits* and sworn *statements* made by members of a Government, the Court considers that it can certainly retain such parts of this evidence as may be regarded as contrary to the interests or contentions of the State to which the witness has allegiance; for the rest such evidence has to be treated with great reserve.

The Court is also aware of a publication of the United States State Department entitled "Revolution Beyond Our Borders, Sandinista Intervention in Central America" which was not submitted to the Court in any form or manner contemplated by the Statute and Rules of Court. The Court considers that, in view of the special circumstances of this case, it may, within limits, make use of information in that publication.

VII. *The facts imputable to the United States*
(paras. 75 to 125)

1. The Court examines the allegations of Nicaragua that the *mining of Nicaraguan ports or waters* was carried out by United States military personnel or persons of the nationality of Latin American countries in the pay of the United States. After examining the facts, the Court finds it established that, on a date in late 1983 or early 1984, the President of the United States authorized a United States Government agency to lay mines in Nicaraguan ports; that in early 1984 mines were laid in or close to the ports of El Bluff, Corinto and Puerto Sandino, either in Nicaraguan internal waters or in its territorial sea or both, by persons in the pay and acting on the instructions of that agency, under the supervision and with the logistic support of United States agents; that neither before the laying of the mines, nor subsequently, did the United States Government issue any public and official warning to international shipping of the existence and location of the mines; and that personal and material injury was caused by the explosion of the mines, which also created risks causing a rise in marine insurance rates.

2. Nicaragua attributes to the direct action of United States personnel, or persons in its pay, operations against *oil installations, a naval base, etc.*, listed in paragraph 81 of the Judgment. The Court finds all these incidents, except three, to be established. Although it is not proved that any United States military personnel took a direct part in the operations, United States agents participated in the planning, direction and support. The imputability to the United States of these attacks appears therefore to the Court to be established.

3. Nicaragua complains of *infringement of its air space* by United States military aircraft. After indicating the evidence available, the Court finds that the only violations of Nicaraguan air space imputable to the United States on the basis of the evidence are high altitude reconnaissance flights and low altitude flights on 7 to 11 November 1984 causing "sonic booms".

With regard to joint military manoeuvres with Honduras carried out by the United States on Honduran territory near the Honduras/Nicaragua frontier, the Court considers that they may be treated as public knowledge and thus sufficiently established.

4. The Court then examines the genesis, development and *activities of the contra force*, and the *role of the United States* in relation to it. According to Nicaragua, the United States "conceived, created and organized a mercenary army, the *contra* force". On the basis of the available information, the Court is not able to satisfy itself that the Respondent State "created" the *contra* force in Nicaragua, but holds it established that it largely financed, trained, equipped, armed and organized the FDN, one element of the force.

It is claimed by Nicaragua that the United States Government devised the strategy and directed the tactics of the *contra* force, and provided direct combat support for its military operations. In the light of the evidence and material available to it, the Court is not satisfied that all the operations launched by the *contra* force, at every stage of the conflict, reflected strategy and tactics solely devised by the United States. It therefore cannot uphold the contention of Nicaragua on this point. The Court however finds it clear that a number of operations were decided and planned, if not actually by the United States advisers, then at least in close collaboration with them, and on the basis of the intelligence and logistic support which the United States was able to offer. It is also established in the Court's view that the support of the United States for the activities of the *contras* took various forms over the years, such as logistic support, the supply of information on the location and movements of the Sandinista troops, the use of sophisticated methods of communication, etc. The evidence does not however warrant a finding that the United States gave direct combat support, if that is taken to mean direct intervention by United States combat forces.

The Court has to determine whether the relationship of the *contras* to the United States Government was such that it would be right to equate the *contras*, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government. The Court considers that the evidence available to it is insufficient to demonstrate the total dependence of the *contras* on United States aid. A partial dependency, the exact extent of which the Court cannot establish, may be inferred from the fact that the leaders were selected by the United States, and from other factors such as the organization, training and equipping of the force, planning of operations, the choosing of targets and the operational support provided. There is no clear evidence that the United States actually exercised such a degree of control as to justify treating the *contras* as acting on its behalf.

5. Having reached the above conclusion, the Court takes the view that the *contras* remain responsible for their acts, in particular the alleged violations by them of *humanitarian law*. For the United States to be legally responsible, it would have to be proved that that State had effective control of the operations in the course of which the alleged violations were committed.

6. Nicaragua has complained of certain *measures of an economic nature* taken against it by the Government of the United States, which it regards as an indirect form of intervention in its internal affairs. Economic aid was suspended in January 1981, and terminated in April 1981; the United States acted to oppose or block loans to Nicaragua by international financial bodies; the sugar import quota from Nicaragua was reduced by 90 percent in September 1983; and a total trade embargo on Nicaragua was declared by an executive order of the President of the United States on 1 May 1985.

VIII. *The conduct of Nicaragua* (paras. 126–171)

The Court has to ascertain, so far as possible, whether the activities of the United States complained of, claimed to have been the exercise of collective self-defence, may be justified by certain facts attributable to Nicaragua.

1. The United States has contended that Nicaragua was *actively supporting armed groups operating in certain of the neighbouring countries*, particularly in El Salvador, and specifically in the form of the *supply of arms*, an accusation which Nicaragua has repudiated. The Court first examines the activity of Nicaragua with regard to El Salvador.

Having examined various evidence, and taking account of a number of concordant indications, many of which were provided by Nicaragua itself, from which the Court can reasonably infer the provision of a certain amount of aid from Nicaraguan territory, the Court concludes that support for the armed opposition in El Salvador from Nicaraguan territory was a fact up to the early months of 1981. Subsequently, evidence of military aid from or through Nicaragua remains very weak, despite the deployment by the United States in the region of extensive technical monitoring resources. The Court cannot however conclude that no transport of or traffic in arms existed. It merely takes note that the allegations of arms traffic are not solidly established, and has not been able to satisfy itself that any continuing flow on a significant scale took place after the early months of 1981.

Even supposing it were established that military aid was reaching the armed opposition in El Salvador from the territory of Nicaragua, it still remains to be proved that such aid is imputable to the authorities of Nicaragua, which has not sought to conceal the possibility of weapons crossing its territory, but denies that this is the result of any deliberate official policy on its part. Having regard to the circumstances characterizing this part of Central America, the Court considers that it is scarcely possible for Nicaragua's responsibility for arms traffic on its territory to be automatically assumed. The Court considers it more consistent with the probabilities to recognize that an activity of that nature, if on a limited scale, may very well be pursued unknown to the territorial government. In any event the evidence is insufficient to satisfy the Court that the Government of Nicaragua was responsible for any flow of arms at either period.

2. The United States has also accused Nicaragua of being responsible for *cross-border military attacks* on Honduras and Costa Rica. While not as fully informed on the question as it would wish to be, the Court considers as established the fact that certain trans-border military incursions are imputable to the Government of Nicaragua.

3. The Judgment recalls certain events which occurred at the time of the fall of President Somoza, since reliance has been placed on them by the United States to contend that the present Government of Nicaragua is in violation of certain alleged *assurances* given by its immediate predecessor. The Judgment refers in particular to the "Plan to secure peace" sent on 12 July 1979 by the "Junta of the Government of National Reconstruction" of Nicaragua to the Secretary-General of the OAS, mentioning, *inter alia*, its "firm intention to establish full observance of human rights in our country" and "to call the first free elections our country has known in this century". The United States considers that it has a special responsibility regarding the implementation of these commitments.

IX. *The applicable law: customary international law* (paras. 172–182)

The Court has reached the conclusion (section V, *in fine*) that it has to apply the multilateral treaty reservation in the United States declaration, the consequential exclusion of multilateral treaties being without prejudice either to other treaties or other sources of law enumerated in Article 38 of the Statute. In order to determine the law actually to be applied to the dispute, it has to ascertain the consequences of the exclusion of the applicability of the multilateral treaties for the definition of the content of the customary international law which remains applicable.

The Court, which has already commented briefly on this subject in the jurisdiction phase (*I.C.J. Reports 1984*, pp.

424 and 425, para. 73), develops its initial remarks. It does not consider that it can be claimed, as the United States does, that all the customary rules which may be invoked have a content exactly identical to that of the rules contained in the treaties which cannot be applied by virtue of the United States reservation. Even if a treaty norm and a customary norm relevant to the present dispute were to have exactly the same content, this would not be a reason for the Court to take the view that the operation of the treaty process must necessarily deprive the customary norm of its separate applicability. Consequently, the Court is in no way bound to uphold customary rules only in so far as they differ from the treaty rules which it is prevented by the United States reservation from applying.

In response to an argument of the United States, the Court considers that the divergence between the content of the customary norms and that of the treaty law norms is not such that a judgment confined to the field of customary international law would not be susceptible of compliance or execution by the parties.

X. *The content of the applicable law*
(paras. 183 to 225)

1. *Introduction: general observations*
(paras. 183–186)

The Court has next to consider what are the rules of customary law applicable to the present dispute. For this purpose it has to consider whether a customary rule exists in the *opinio juris* of States, and satisfy itself that it is confirmed by practice.

2. *The prohibition of the use of force, and the right of self-defence*
(paras. 187 to 201)

The Court finds that both Parties take the view that the principles as to the use of force incorporated in the United Nations Charter correspond, in essentials, to those found in customary international law. They therefore accept a treaty-law obligation to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations (Art. 2, para. 4, of the Charter). The Court has however to be satisfied that there exists in customary law an *opinio juris* as to the binding character of such abstention. It considers that this *opinio juris* may be deduced from, *inter alia*, the attitude of the Parties and of States towards certain General Assembly resolutions, and particularly resolution 2625 (XXV) entitled "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations". Consent to such resolutions is one of the forms of expression of an *opinio juris* with regard to the principle of non-use of force, regarded as a principle of customary international law, independently of the provisions, especially those of an institutional kind, to which it is subject on the treaty-law plane of the Charter.

The general rule prohibiting force established in customary law allows for certain exceptions. The exception of the right of individual or collective self-defence is also, in the view of States, established in customary law, as is apparent for example from the terms of Article 51 of the United Nations Charter, which refers to an "inherent right", and from the declaration in resolution 2625 (XXV). The Parties, who consider the existence of this right to be established as a matter of customary international law, agree in holding that whether the response to an attack is lawful depends on the observance of the criteria of the necessity and the proportionality of the measures taken in self-defence.

Whether self-defence be individual or collective, it can only be exercised in response to an "armed attack". In the view of the Court, this is to be understood as meaning not merely action by regular armed forces across an international border, but also the sending by a State of armed bands on to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack had it been carried out by regular armed forces. The Court quotes the definition of aggression annexed to General Assembly resolution 3314 (XXIX) as expressing customary law in this respect.

The Court does not believe that the concept of "armed attack" includes assistance to rebels in the form of the provision of weapons or logistical or other support. Furthermore, the Court finds that in customary international law, whether of a general kind or that particular to the inter-American legal system, there is no rule permitting the exercise of collective self-defence in the absence of a request by the State which is a victim of the alleged attack, this being additional to the requirement that the State in question should have declared itself to have been attacked.

3. *The principle of non-intervention*
(paras. 202 to 209)

The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference. Expressions of an *opinio juris* of States regarding the existence of this principle are numerous. The Court notes that this principle, stated in its own jurisprudence, has been reflected in numerous declarations and resolutions adopted by international organizations and conferences in which the United States and Nicaragua have participated. The text thereof testifies to the acceptance by the United States and Nicaragua of a customary principle which has universal application. As to the content of the principle in customary law, the Court defines the constitutive elements which appear relevant in this case: a prohibited intervention must be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely (for example the choice of a political, economic, social and cultural system, and formulation of foreign policy). Intervention is wrongful when it uses, in regard to such choices, methods of coercion, particularly force, either in the direct form of military action or in the indirect form of support for subversive activities in another State.

With regard to the practice of States, the Court notes that there have been in recent years a number of instances of foreign intervention in one State for the benefit of forces opposed to the government of that State. It concludes that the practice of States does not justify the view that any general right of intervention in support of an opposition within another State exists in contemporary international law; and this is in fact not asserted either by the United States or by Nicaragua.

4. *Collective counter-measures in response to conduct not amounting to armed attack*
(paras. 210 and 211)

The Court then considers the question whether, if one State acts towards another in breach of the principle of non-intervention, a third State may lawfully take action by way of counter-measures which would amount to an intervention in

the first State's internal affairs. This would be analogous to the right of self-defence in the case of armed attack, but the act giving rise to the reaction would be less grave, not amounting to armed attack. In the view of the Court, under international law in force today, States do not have a right of "collective" armed response to acts which do not constitute an "armed attack".

5. *State sovereignty*
(paras. 212 to 214)

Turning to the principle of respect for State sovereignty, the Court recalls that the concept of sovereignty, both in treaty-law and in customary international law, extends to the internal waters and territorial sea of every State and to the airspace above its territory. It notes that the laying of mines necessarily affects the sovereignty of the coastal State, and that if the right of access to ports is hindered by the laying of mines by another State, what is infringed is the freedom of communications and of maritime commerce.

6. *Humanitarian law*
(paras. 215 to 220)

The Court observes that the laying of mines in the waters of another State without any warning or notification is not only an unlawful act but also a breach of the principles of humanitarian law underlying the Hague Convention No. VIII of 1907. This consideration leads the Court on to examination of the international humanitarian law applicable to the dispute. Nicaragua has not expressly invoked the provisions of international humanitarian law as such, but has complained of acts committed on its territory which would appear to be breaches thereof. In its submissions it has accused the United States of having killed, wounded and kidnapped citizens of Nicaragua. Since the evidence available is insufficient for the purpose of attributing to the United States the acts committed by the *contras*, the Court rejects this submission.

The question however remains of the law applicable to the acts of the United States in relation to the activities of the *contras*. Although Nicaragua has refrained from referring to the four Geneva Conventions of 12 August 1949, to which Nicaragua and the United States are parties, the Court considers that the rules stated in Article 3, which is common to the four Conventions, applying to armed conflicts of a non-international character, should be applied. The United States is under an obligation to "respect" the Conventions and even to "ensure respect" for them, and thus not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3. This obligation derives from the general principles of humanitarian law to which the Conventions merely give specific expression.

7. *The 1956 treaty*
(paras. 221 to 225)

In its Judgment of 26 November 1984, the Court concluded that it had jurisdiction to entertain claims concerning the existence of a dispute between the United States and Nicaragua as to the interpretation or application of a number of articles of the treaty of Friendship, Commerce and Navigation signed at Managua on 21 January 1956. It has to determine the meaning of the various relevant provisions, and in particular of Article XXI, paragraphs 1 (*c*) and 1 (*d*), by which the parties reserved the power to derogate from the other provisions.

XI. *Application of the law to the facts*
(paras. 226 to 282)

Having set out the facts of the case and the rules of international law which appear to be in issue as a result of those facts, the Court has now to appraise the facts in relation to the legal rules applicable, and determine whether there are present any circumstances excluding the unlawfulness of particular acts.

1. *The prohibition of the use of force and the right of self-defence*
(paras. 227 to 238)

Appraising the facts first in the light of the principle of the non-use of force, the Court considers that the laying of mines in early 1984 and certain attacks on Nicaraguan ports, oil installations and naval bases, imputable to the United States, constitute infringements of this principle, unless justified by circumstances which exclude their unlawfulness. It also considers that the United States has committed a prima facie violation of the principle by arming and training the *contras*, unless this can be justified as an exercise of the right of self-defence.

On the other hand, it does not consider that military manoeuvres held by the United States near the Nicaraguan borders, or the supply of funds to the *contras*, amounts to a use of force.

The Court has to consider whether the acts which it regards as breaches of the principle may be justified by the exercise of the right of collective self-defence, and has therefore to establish whether the circumstances required are present. For this, it would first have to find that Nicaragua engaged in an armed attack against El Salvador, Honduras or Costa Rica, since only such an attack could justify reliance on the right of self-defence. As regards El Salvador, the Court considers that in customary international law the provision of arms to the opposition in another State does not constitute an armed attack on that State. As regards Honduras and Costa Rica, the Court states that, in the absence of sufficient information as to the transborder incursions into the territory of those two States from Nicaragua, it is difficult to decide whether they amount, singly or collectively, to an armed attack by Nicaragua. The Court finds that neither these incursions nor the alleged supply of arms may be relied on as justifying the exercise of the right of collective self-defence.

Secondly, in order to determine whether the United States was justified in exercising self-defence, the Court has to ascertain whether the circumstances required for the exercise of this right of collective self-defence were present, and therefore considers whether the States in question believed that they were the victims of an armed attack by Nicaragua, and requested the assistance of the United States in the exercise of collective self-defence. The Court has seen no evidence that the conduct of those States was consistent with such a situation.

Finally, appraising the United States activity in relation to the criteria of necessity and proportionality, the Court cannot find that the activities in question were undertaken in the light of necessity, and finds that some of them cannot be regarded as satisfying the criterion of proportionality.

Since the plea of collective self-defence advanced by the United States cannot be upheld, it follows that the United States has violated the principle prohibiting recourse to the threat or use of force by the acts referred to in the first paragraph of this section.

2. *The principle of non-intervention*
(paras. 239 to 245)

The Court finds it clearly established that the United States intended, by its support of the *contras*, to coerce Nicaragua in respect of matters in which each State is permitted to decide freely, and that the intention of the *contras* themselves was to overthrow the present Government of Nicaragua. It considers that if one State, with a view to the coercion of another State, supports and assists armed bands in that State whose purpose is to overthrow its government, that amounts to an intervention in its internal affairs, whatever the political objective of the State giving support. It therefore finds that the support given by the United States to the military and paramilitary activities of the *contras* in Nicaragua, by financial support, training, supply of weapons, intelligence and logistic support, constitutes a clear breach of the principle of non-intervention. Humanitarian aid on the other hand cannot be regarded as unlawful intervention. With effect from 1 October 1984, the United States Congress has restricted the use of funds to "humanitarian assistance" to the *contras*. The Court recalls that if the provision of "humanitarian assistance" is to escape condemnation as an intervention in the internal affairs of another State, it must be limited to the purposes hallowed in the practice of the Red Cross, and above all be given without discrimination.

With regard to the form of indirect intervention which Nicaragua sees in the taking of certain action of an economic nature against it by the United States, the Court is unable to regard such action in the present case as a breach of the customary law principle of non-intervention.

3. *Collective counter-measures in response to conduct not amounting to armed attack*
(paras. 246 to 249)

Having found that intervention in the internal affairs of another State does not produce an entitlement to take collective counter-measures involving the use of force, the Court finds that the acts of which Nicaragua is accused, even assuming them to have been established and imputable to that State, could not justify counter-measures taken by a third State, the United States, and particularly could not justify intervention involving the use of force.

4. *State sovereignty*
(paras. 250 to 253)

The Court finds that the assistance to the *contras*, the direct attacks on Nicaraguan ports, oil installations, etc., the mining operations in Nicaraguan ports, and the acts of intervention involving the use of force referred to in the Judgment, which are already a breach of the principle of non-use of force, are also an infringement of the principle of respect for territorial sovereignty. This principle is also directly infringed by the unauthorized overflight of Nicaraguan territory. These acts cannot be justified by the activities in El Salvador attributed to Nicaragua; assuming that such activities did in fact occur, they do not bring into effect any right belonging to the United States. The Court also concludes that, in the context of the present proceedings, the laying of mines in or near Nicaraguan ports constitutes an infringement, to Nicaragua's detriment, of the freedom of communications and of maritime commerce.

5. *Humanitarian law*
(paras. 254 to 256)

The Court has found the United States responsible for the failure to give notice of the mining of Nicaraguan ports.

It has also found that, under general principles of humanitarian law, the United States was bound to refrain from encouragement of persons or groups engaged in the conflict in Nicaragua to commit violations of common Article 3 of the four Geneva Conventions of 12 August 1949. The manual on "Psychological Operations in Guerrilla Warfare", for the publication and dissemination of which the United States is responsible, advises certain acts which cannot but be regarded as contrary to that article.

6. *Other grounds mentioned in justification of the acts of the United States*
(paras. 257 to 269)

The United States has linked its support to the *contras* with alleged breaches by the Government of Nicaragua of certain solemn commitments to the Nicaraguan people, the United States and the OAS. The Court considers whether there is anything in the conduct of Nicaragua which might legally warrant counter-measures by the United States in response to the alleged violations. With reference to the "Plan to secure peace" put forward by the Junta of the Government of National Reconstruction (12 July 1979), the Court is unable to find anything in the documents and communications transmitting the plan from which it can be inferred that any legal undertaking was intended to exist. The Court cannot contemplate the creation of a new rule opening up a right of intervention by one State against another on the ground that the latter has opted for some particular ideology or political system. Furthermore the Respondent has not advanced a legal argument based on an alleged new principle of "ideological intervention".

With regard more specifically to alleged violations of human rights relied on by the United States, the Court considers that the use of force by the United States could not be the appropriate method to monitor or ensure respect for such rights, normally provided for in the applicable conventions. With regard to the alleged militarization of Nicaragua, also referred to by the United States to justify its activities, the Court observes that in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited, and this principle is valid for all States without exception.

7. *The 1956 Treaty*
(paras. 270 to 282)

The Court turns to the claims of Nicaragua based on the Treaty of Friendship, Commerce and Navigation of 1956, and the claim that the United States has deprived the Treaty of its object and purpose and emptied it of real content. The Court cannot however entertain these claims unless the conduct complained of is not "measures . . . necessary to protect the essential security interests" of the United States, since Article XXI of the Treaty provides that the Treaty shall not preclude the application of such measures. With regard to the question what activities of the United States might have been such as to deprive the Treaty of its object and purpose, the Court makes a distinction. It is unable to regard all the acts complained of in that light, but considers that there are certain activities which undermine the whole spirit of the agreement. These are the mining of Nicaraguan ports, the direct attacks on ports, oil installations, etc., and the general trade embargo.

The Court also upholds the contention that the mining of the ports is in manifest contradiction with the freedom of navigation and commerce guaranteed by Article XIX of the

Treaty. It also concludes that the trade embargo proclaimed on 1 May 1985 is contrary to that article.

The Court therefore finds that the United States is prima facie in breach of an obligation not to deprive the 1956 Treaty of its object and purpose (*pacta sunt servanda*), and has committed acts in contradiction with the terms of the Treaty. The Court has however to consider whether the exception in Article XXI concerning "measures . . . necessary to protect the essential security interests" of a Party may be invoked to justify the acts complained of. After examining the available material, particularly the Executive Order of President Reagan of 1 May 1985, the Court finds that the mining of Nicaraguan ports, and the direct attacks on ports and oil installations, and the general trade embargo of 1 May 1985, cannot be justified as necessary to protect the essential security interests of the United States.

XII. *The claim for reparation*
(paras. 283 to 285)

The Court is requested to adjudge and declare that compensation is due to Nicaragua, the quantum thereof to be fixed subsequently, and to award to Nicaragua the sum of 370.2 million US dollars as an interim award. After satisfying itself that it has jurisdiction to order reparation, the Court considers appropriate the request of Nicaragua for the nature and amount of the reparation to be determined in a subsequent phase of the proceedings. It also considers that there is no provision in the Statute of the Court either specifically empowering it or debarring it from making an interim award of the kind requested. In a case in which one Party is not appearing, the Court should refrain from any unnecessary act which might prove an obstacle to a negotiated settlement. The Court therefore does not consider that it can accede *at this stage* to this request by Nicaragua.

XIII. *The provisional measures*
(paras. 286 to 289)

After recalling certain passages in its Order of 10 May 1984, the Court concludes that it is incumbent on each Party not to direct its conduct solely by reference to what it believes to be its rights. Particularly is this so in a situation of armed conflict where no reparation can efface the results of conduct which the Court may rule to have been contrary to international law.

XIV. *Peaceful settlement of disputes; the Contadora process*
(paras. 290 to 291)

In the present case the Court has already taken note of the Contadora process, and of the fact that it had been endorsed by the United Nations Security Council and General Assembly, as well as by Nicaragua and the United States. It recalls to both Parties to the present case the need to co-operate with the Contadora efforts in seeking a definitive and lasting peace in Central America, in accordance with the principle of customary international law that prescribes the peaceful settlement of international disputes, also endorsed by Article 33 of the United Nations Charter.

SUMMARY OF THE OPINIONS APPENDED TO THE JUDGMENT OF THE COURT

Separate Opinion of Judge Nagendra Singh, President

The operative part of paragraph 292 (16) of the Judgment adopted unanimously by the Court which enjoins parties to seek a peaceful solution of their disputes in accordance with international law really rests on the due observance of two basic principles: namely that of non-use of force in inter-State relations and that of non-intervention in the affairs of other States. This in the President's view is the main thrust of the Judgment of the Court rendered with utmost sincerity to serve the best interests of the community.

In fact, the cardinal principle of non-use of force in international relations has been the pivotal point of a time-honoured legal philosophy that has evolved particularly after the two world wars of the current century. The Charter provisions as well as the Latin American Treaty System have not only developed the concept but strengthened it to the extent that it would stand on its own, even if the Charter and the Treaty basis were held inapplicable in this case. The obvious explanation is that the original customary aspect which has evolved with the treaty law development has come now to stay and survive as the existing modern concept of international law, whether customary, because of its origins, or "a general principle of international law recognized by civilized nations". The contribution of the Court has been to emphasize the principle of non-use of force as one belonging to the realm of *jus cogens* and hence as the very cornerstone of the human effort to promote peace in a world torn by strife. Force begets force and aggravates conflicts, embitters relations and endangers peaceful resolution of the dispute.

There is also the key doctrine of non-intervention in the affairs of States which is equally vital for the peace and progress of humanity being essentially needed to promote the healthy existence of the community. The principle of non-intervention is to be treated as a sanctified absolute rule of law.

States must observe both these principles namely that of non-use of force and that of non-intervention in the best interests of peace and order in the community. The Court has rightly held them both as principles of customary international law although sanctified by treaty law, but applicable in this case in the former customary manifestation having been reinvigorated by being further strengthened by the express consent of States particularly the Parties in dispute here. This must indeed have all the weight that law could ever command in any case.

The decision of the Court is in the result of a collegiate exercise reached after prolonged deliberation and a full exchange of views of no less than fifteen Judges who, working according to the Statute and Rules of the Court, have examined the legal arguments and all the evidence before it. In this, as in all other cases, every care has been taken to strictly observe the procedures prescribed and the decision is upheld by a clear majority. What is more, the binding character of the Judgment under the Statute (Art. 59) is made sacrosanct by a provision of the UN Charter (Art. 94): all Members of the United Nations have undertaken an obligation to comply with the Court's decisions addressed to them and to always respect the validity of the Judgment.

Separate Opinion of Judge Lachs

Judge Lachs begins by drawing attention to the requirements of the Statute in respect of the personal qualities and diversity of origin that must characterize Members of the Court, and deprecates any aspersion upon their independence.

On the substance of the Judgment he would have preferred

more attention to be given to foreign assistance to the opposition forces in El Salvador, and different formulae to have been used in various places.

Judge Lachs returns to some aspects of jurisdiction, considering that insufficient weight had previously been given to the forty years that had elapsed before any public objection had been raised against the validity of Nicaragua's acceptance of the Court's jurisdiction. When that validity had been privately questioned in connection with a case in the mid-1950's, action should have been taken by the United Nations: Nicaragua should have been asked to complete any necessary formalities and, if it failed to do so, would have been removed from the list of States subject to the compulsory jurisdiction of the Court. The United Nations having taken no action, it was legitimate to view the imperfection as cured by acquiescence over a very long period. The jurisdiction of the Court based on the FCN Treaty of 1956 gave no cause for doubt.

Judge Lachs also deals with the question of the justiciability of the case: the close relationship between legal and political disputes, as between law and politics. International law today covers such wide areas of international relations that only very few domains—for instance, the problem of disarmament, or others, specifically excluded by States—are not justiciable. He specifically instances the case concerning *United States Diplomatic and Consular Staff in Tehran*.

Referring to the Court's refusal to grant a hearing to El Salvador at the jurisdictional stage, Judge Lachs states that he has come to view it as a judicial error which does not, however, justify any unrelated conclusions.

The broad confrontation between the Parties should, in Judge Lachs's view, be settled within the framework of the Contadora Plan, in co-operation with all States of the region. The area, torn by conflicts, suffering from under-development for a long time, requires a new approach based on equal consideration of the interests of all concerned in the spirit of good-neighbourly relations.

Separate Opinion of Judge Ruda

The separate Opinion of Judge Ruda deals with four subjects. In the first place, Judge Ruda does not accept the reservation expressed by the United States in the letter dated 18 January 1985 "in respect of any decision by the Court regarding Nicaragua's claims". In Judge Ruda's view, pursuant to Article 94, paragraph 1, of the Charter of the United Nations, the Member States of the United Nations have formally accepted the obligation to comply with the Court's decisions.

The second part of the Opinion refers to the Vandenberg Amendment. Judge Ruda voted against the application of the Amendment, for the reasons stated in the separate Opinion which he submitted in 1984.

In the third part, Judge Ruda deals with the question of self-defence. He explains that his conclusions are the same as those reached by the Court, but in his view it is not necessary to enter into all the factual details, because assistance to rebels is not *per se* a pretext for self-defence from the legal point of view.

The fourth part is devoted to the reasons why Judge Ruda, despite having voted in 1984 against the Treaty of Friendship, Commerce and Navigation as a basis of the Court's jurisdiction, believes he is bound to vote on the substantive issues submitted to the Court on this subject.

Separate Opinion of Judge Elias

Judge Elias considers that, following the Court's Judgment in the jurisdictional phase, the multilateral treaty reservation attached to the United States declaration accepting jurisdiction under the Optional Clause was left in abeyance and had no further relevance unless El Salvador, Honduras or Costa Rica intervened in the phase on merits and reparation. For the Court to have applied it was therefore incorrect and tantamount to invoking a power to revise its decision on jurisdiction and admissibility on behalf of non-parties to the case.

Separate Opinion of Judge Ago

While subscribing to the Judgment as a whole and approving in particular the position adopted by the Court concerning the United States' multilateral treaty reservation, Judge Ago remains hesitant about certain points. For example, he feels that the Court made a somewhat too hasty finding as to the quasi-identity of substance between customary international law and the law enshrined in certain major multilateral treaties of universal character, and was also somewhat too ready to see the endorsement of certain principles by UN and OAS resolutions as proof of the presence of those principles in the *opinio juris* of members of the international community. Judge Ago also feels obliged to draw attention to what he views as some partially contradictory aspects of the Court's assessment of the factual and legal situation. He further considers that some passages of the Judgment show a paucity of legal reasoning to support the Court's conclusions as to the imputability of certain acts to the Respondent *qua* acts giving rise to international responsibility, and would have preferred to see the Court include a more explicit confirmation of its case-law on this subject.

Separate Opinion of Judge Sette-Camara

Judge Sette-Camara fully concurs with the Judgment because he firmly believes that "the non-use of force as well as non-intervention—the latter as a corollary of equality of States and self-determination—are not only cardinal principles of customary international law but could in addition be recognized as peremptory rules of customary international law which impose obligations on all States". His separate opinion deals only with subparagraph (1) of the operative part, against which he has voted. He maintains that the multilateral treaty reservation, appended to the United States 1946 Declaration of Acceptance of the Jurisdiction of the Court according to Article 36, paragraph 2, of the Statute, cannot be applied to the present case, since none of the decisions taken in the operative part can in any way "affect" third States, and in particular El Salvador. The case is between Nicaragua and the United States and the binding force of the Court's decision is confined to these two Parties. Judge Sette-Camara recognizes the right of any State making Declarations of Acceptance to append to them whatever reservations it deems fit. However, he contends that the Court is free, and indeed bound, to interpret those reservations. He regrets that the application of the multilateral treaty reservation debarred the Court from resting the Judgment on the provisions of the Charter of the United Nations and the Charter of the Organization of American States, and forced it to resort only to principles of customary international law and the bilateral Treaty of Friendship, Commerce and Navigation of 1956. He submits that the law applied by the Judgment would be clearer and more precise if the Court had resorted to the specific provisions of the relevant multilateral conventions.

Separate Opinion of Judge Ni

Judge Ni's primary concern, as expressed in his separate opinion, is with respect to the "multilateral treaty reservation" invoked by the United States. In his view, any acceptance of its applicability entailed (1) the exclusion of the Court from exercising jurisdiction insofar as Nicaragua's claims were based on the multilateral treaties in question, and (2) the preclusion, if the case was on other grounds still in the Court for adjudication of the merits, of the application of such multilateral treaties. In the instant case, however, the United States, while invoking the multilateral treaty reservation to challenge the exercise of jurisdiction by the Court, had in the meantime persistently claimed that the multilateral treaties, which constitute the very basis of its reservation, should alone be applied to the case in dispute. That claim amounted in effect to a negation of its own reservation and, taking into account all the relevant circumstances, ought to have been considered as a waiver of the multilateral treaty reservation. Such being the case, Judge Ni differed from the majority of the Court in that he considered that the rules contained in multilateral treaties, as well as customary international law, should, where appropriate, have been applied to the case.

Dissenting Opinion of Judge Oda

Judge Oda agrees with the Court's recognition of the applicability of the multilateral treaty proviso attached to the United States' 1946 declaration but considers that, having thus decided that the dispute had arisen under a multilateral treaty, it should have ceased to entertain the application of Nicaragua on the basis of that declaration. The Court had been wrong to interpret the exclusion of the dispute by that proviso as merely placing restrictions upon the sources of law to which it was entitled to refer.

Judge Oda further believes that, to the extent that the Nicaraguan claims presupposed the Court's jurisdiction under declarations made pursuant to Article 36 (2) of the Statute, which refers to "legal disputes", they should have been declared non-justiciable, since the dispute was not "legal" within the meaning and intention of that clause or, even if it were, it was not one that the Court could properly entertain: as a political dispute, it was more suitable for resolution by other organs and procedures. Moreover, the facts the Court could elicit by examining the evidence in the absence of the Respondent fell far short of what was needed to show a complete picture.

Judge Oda thus considers that, in so far as the Court could properly entertain the case, it could do so on the basis of Article 36 (1) of the Statute, where the term "all matters specially provided for in . . . treaties . . . in force" gave no such grounds for questioning the "legal" nature of the dispute. The Court could therefore legitimately examine any breach of the concrete terms of the 1956 Treaty of Friendship, Commerce and Navigation. In Judge Oda's view, the mining of the Nicaraguan ports had constituted such a breach, for which the United States had incurred responsibility.

Judge Oda emphasizes that his negative votes on many counts of the Judgment must not be interpreted as implying that he is opposed to the rules of law concerning the use of force or intervention, of whose violation the United States has been accused, but are merely a logical consequence of his convictions on the subject of jurisdiction under Article 36 (2) of the Statute.

Finally, Judge Oda regrets that the Court has been needlessly precipitate in giving its views on collective self-defence in its first Judgment to broach that subject.

Dissenting Opinion of Judge Schwebel

Judge Schwebel dissented from the Court's Judgment on factual and legal grounds. He agreed with the Court in its holdings against the United States for its failure to make known the existence and location of mines laid by it and its causing the publication of a manual advocating acts in violation of the law of war. But Judge Schwebel concluded that the United States essentially acted lawfully in exerting armed pressures against Nicaragua, both directly and through its support of the *contras*, because Nicaragua's prior and sustained support of armed insurgency in El Salvador was tantamount to an armed attack upon El Salvador against which the United States could react in collective self-defence in El Salvador's support.

Judge Schwebel found that, since 1979, Nicaragua had assisted and persisted in providing large-scale, vital assistance to the insurgents in El Salvador. The delictual acts of Nicaragua had not been confined to providing the Salvadoran rebels with large quantities of arms, munitions and supplies, which of themselves arguably might be seen as not tantamount to armed attack. Nicaragua had also joined with the Salvadoran rebels in the organization, planning and training for their acts of insurgency, and had provided them with command-and-control facilities, bases, communications and sanctuary which enabled the leadership of the Salvadoran rebels to operate from Nicaraguan territory. That scale of assistance, in Judge Schwebel's view, was legally tantamount to an armed attack. Not only was El Salvador entitled to defend itself against that armed attack, it had called upon the United States to assist it in the exercise of collective self-defence. The United States was entitled to do so, through measures overt or covert. Those measures could be exerted not only in El Salvador but against Nicaragua on its own territory.

In Judge Schwebel's view, the Court's conclusion that the Nicaraguan Government was not "responsible for any flow of arms" to the Salvadoran insurgents was not sustained by "judicial or judicious" considerations. The Court had "excluded, discounted and excused the unanswerable evidence of Nicaragua's major and maintained intervention in the Salvadoran insurgency". Nicaragua's intervention in El Salvador in support of the Salvadoran insurgents was, Judge Schwebel held, admitted by the President of Nicaragua, affirmed by Nicaragua's leading witness in the case, and confirmed by a "cornucopia of corroboration".

Even if, contrary to his view, Nicaragua's actions in support of the Salvadoran insurgency were not viewed as tantamount to an armed attack, Judge Schwebel concluded that they undeniably constituted unlawful intervention. But the Court, "remarkably enough", while finding the United States responsible for intervention in Nicaragua, failed to recognize Nicaragua's prior and continuing intervention in El Salvador.

For United States measures in collective self-defence to be lawful, they must be necessary and proportionate. In Judge Schwebel's view, it was doubtful whether the question of necessity in this case was justiciable, because the facts were so indeterminate, depending as they did on whether measures not involving the use of force could succeed in terminating Nicaragua's intervention in El Salvador. But it could reasonably be held that the necessity of those measures was indicated by "persistent Nicaraguan failure to cease armed subversion of El Salvador".

Judge Schwebel held that "the actions of the United States are strikingly proportionate. The Salvadoran rebels, vitally supported by Nicaragua, conduct a rebellion in El Salvador;

in collective self-defence, the United States symmetrically supports rebels who conduct a rebellion in Nicaragua. The rebels in El Salvador pervasively attack economic targets of importance in El Salvador; the United States selectively attacks economic targets of military importance" in Nicaragua.

Judge Schwebel maintained that, in contemporary international law, the State which first intervenes with the use of force in another State—as by substantial involvement in the sending of irregulars onto its territory—is, *prima facie*, the aggressor. Nicaragua's status as *prima facie* aggressor can only be confirmed upon examination of the facts. "Moreover", Judge Schwebel concluded, "Nicaragua has compounded its delictual behaviour by pressing false testimony on the Court in a deliberate effort to conceal it. Accordingly, on both grounds, Nicaragua does not come before the Court with clean hands. Judgment in its favour is thus unwarranted, and would be unwarranted even if it should be concluded—as it should not be—that the responsive actions of the United States were unnecessary or disproportionate."

Dissenting Opinion of Judge Sir Robert Jennings

Judge Sir Robert Jennings agreed with the Court that the United States multilateral treaty reservation is valid and must be respected. He was unable to accept the Court's decision that it could, nevertheless, exercise jurisdiction over the case by applying customary law in lieu of the relevant multilateral treaties. Accordingly, whilst able to vote in favour of certain of the Court's findings, he felt compelled to vote against its decisions on the use of force, on intervention, and on the question of self-defence, because in his view the Court was lacking jurisdiction to decide those matters.

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80. CASE CONCERNING THE FRONTIER DISPUTE (BURKINA FASO/REPUBLIC OF MALI)
Judgment of 22 December 1986

In its judgment, the Chamber constituted by the Court in the case of the Frontier Dispute between Burkina Faso and the Republic of Mali, unanimously adopted the line of the frontier in the area in dispute between the two States.

(For this frontier line, see Map No. 2.)

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The Chamber was composed as follows:

President, Judge Mohammed Bedjaoui; Judges Manfred Lachs and José Maria Ruda, Judges *ad hoc* François Luchaire and Georges Abi-Saab.

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OPERATIVE PART OF THE CHAMBER'S JUDGMENT

THE CHAMBER,

Unanimously,

Decides

A. That the frontier line between Burkina Faso and the Republic of Mali in the disputed area, as defined in the Special Agreement concluded on 16 September 1983 between those two States, is as follows:

1. From a point with the geographical co-ordinates 1° 59′ 01″ W and 14° 24′ 40″ N (point A), the line runs in a northerly direction following the broken line of small crosses appearing on the map of West Africa on the scale 1:200,000 published by the French *Institut géographique national* (IGN) (hereinafter referred to as "the IGN line") as far as the point with the geographical co-ordinates 1° 58′ 49″ W and 14° 28′ 30″ N (point B).

2. At point B, the line turns eastwards and intersects the track connecting Dionouga and Diguel at approximately 7.5 kilometres from Dionouga at a point with the geographical co-ordinates 1° 54′ 24″ W and 14° 29′ 20″ N (point C).

3. From point C, the line runs approximately 2 kilometres to the south of the villages of Kounia and Oukoulourou, passing through the point with the geographical co-ordinates 1° 46′ 38″ W and 14° 28′ 54″ N (point D), and the point with the co-ordinates 1° 40′ 40″ W and 14° 30′ 03″ N (point E).

4. From point E, the line continues straight as far as a point with the geographical co-ordinates 1° 19′ 05″ W and 14° 43′ 45″ N (point F), situated approximately 2.6 kilometres to the south of the pool of Toussougou.

5. From point F, the line continues straight as far as the point with the geographical co-ordinates 1° 05′ 34″ W and 14° 47′ 04″ N (point G) situated on the west bank of the pool of Soum, which it crosses in a general west-east direction and divides equally between the two States; it then turns in a generally north/north-easterly direction to rejoin the IGN line at the point with the geographical co-ordinates 0° 43′ 29″ W and 15° 05′ 00″ N (point H).

6. From point H, the line follows the IGN line as far as the point with the geographical co-ordinates 0° 26′ 35″ W and 15° 05′ 00″ N (point I); from there it turns towards the south-east and continues straight as far as point J defined below.

7. Points J and K, the geographical co-ordinates of which will be determined by the Parties with the assistance of the experts nominated pursuant to Article IV of the Special Agreement, fulfil three conditions: they are situated on the same parallel of latitude; point J lies on the west bank of the pool of In Abao and point K on the east bank of the pool; the line drawn between them will result in dividing the area of the pool equally between the Parties.

8. At point K the line turns towards the north-east and continues straight as far as the point with the geographical co-ordinates 0° 14′ 44″ W and 15° 04′ 42″ N (point L), and, from that point, continues straight to a point with the geographical co-ordinates 0° 14′ 39″ E and 14° 54′ 48″ N (point M), situated approximately 3 kilometres to the north of the Kabia ford.

B. That the Chamber will at a later date, by Order, nominate three experts in accordance with Article IV, paragraph 3, of the Special Agreement of 16 September 1983.

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Judges *ad hoc* François Luchaire and Georges Abi-Saab appended separate Opinions to the Judgment.

In these Opinions the Judges concerned stated and explained the positions they adopted in regard to certain points dealt with in the Judgment.

I. *Procedure*
(paras. 1–15)

The Chamber recapitulates the successive phases of the procedure as from the notification to the Registrar of the Special Agreement concluded on 16 September 1983 between the Republic of Upper Volta (known as Burkina Faso since 4 August 1984) and the Republic of Mali, by which those two States agreed to submit to a chamber of the Court a dispute relating to the delimitation of a part of their common frontier.

II. *The task of the Chamber*
(paras. 16–18)

The Chamber's task is to indicate the line of the frontier between Burkina Faso and the Republic of Mali in the disputed area which is defined by Article I of the Special Agreement as consisting of "a band of territory extending from the sector Koro (Mali) Djibo (Upper Volta) up to and including the region of the Béli". Both States have indicated, in their submissions to the Chamber, the frontier line which each of them considers to be well-founded in law. These lines are shown on sketch-map No. 1 in the Judgment.

III. *Rules applicable to the case. Source of the rights claimed by the Parties*
(paras. 19–30)

1. *The principle of the intangibility of frontiers inherited from colonization*
(para. 19)

The Judgment considers the question of the rules applicable to the case, and seeks to ascertain the source of the rights claimed by the Parties. It begins by noting that the characteristic feature of the legal context of the frontier determination to be undertaken by the Chamber is that both States involved derive their existence from the process of decolonization which has been unfolding in Africa during the past 30 years: it can be said that Burkina Faso corresponds to the colony of Upper Volta and the Republic of Mali to the colony of Sudan (formerly French Sudan). In the preamble to their Special Agreement, the Parties stated that the settlement of the dispute should be "based in particular on respect for the principle of the intangibility of frontiers inherited from colonization", which recalls the principle expressly stated in resolution AGH/Res.16 (I) adopted in Cairo in July 1964 at the first summit conference following the creation of the Organization of African Unity, whereby all member States "solemnly . . . pledge themselves to respect the frontiers existing on their achievement of national independence".

2. *The principle of* uti possidetis juris
(paras. 20–26)

In these circumstances, the Chamber cannot disregard the principle of *uti possidetis juris*, the application of which gives rise to this respect for intangibility of frontiers. It emphasizes the general scope of the principle in matters of decolonization and its exceptional importance for the African continent, including the two Parties to this case. Although this principle was invoked for the first time in Spanish America, it is not a rule pertaining solely to one specific system of international law. It is a principle of general scope, logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power. The fact that the new African States have respected the territorial *status quo* which existed when they obtained independence must therefore be seen not as a mere practice but as the application in Africa of a rule of general scope which is firmly established in matters of decolonization; and the Chamber does not find it necessary to demonstrate this for the purposes of the case.

The principle of *uti possidetis juris* accords pre-eminence to legal title over effective possession as a basis of sovereignty. Its primary aim is to secure respect for the territorial boundaries which existed at the time when independence was achieved. When those boundaries were no more than delimitations between different administrative divisions or colonies all subject to the same sovereign, the application of this principle resulted in their being transformed into international frontiers, and this is what occurred with the States Parties to the present case, which both took shape within the territories of French West Africa. Where such boundaries already had the status of international frontiers at the time of decolonization, the obligation to respect pre-existing international frontiers derives from a general rule of international law relating to State succession. The many solemn affirmations of the intangibility of frontiers, made by African statesmen or by organs of the OAU, should therefore be taken as references to a principle already in existence, not as affirmations seeking to consecrate a new principle or to extend to Africa a rule previously applicable only in another continent.

This principle of *uti possidetis* appears to conflict outright with the right of peoples to self-determination. In fact, however, the maintenance of the territorial *status quo* in Africa is often seen as the wisest course. The essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields has induced African States to consent to the maintenance of colonial boundaries or frontiers, and to take account of this when interpreting the principle of self-determination of peoples. If the principle of *uti possidetis* has kept its place among the most important legal principles, this is by a deliberate choice on the part of African States.

3. *The role of equity*
(paras. 27–28)

The Chamber then considers whether it is possible, in this case, to invoke equity, concerning which the two Parties have advanced conflicting views. Obviously the Chamber cannot decide *ex aequo et bono*, since the Parties have not requested it to do so. It will, however, have regard to equity *infra legem*, that is, that form of equity which constitutes a method of interpretation of the law in force, and which is based on law. How the Chamber will, in practice, approach its consideration of this form of equity will become clear from its application of the principles and rules which it finds to be applicable.

4. *French colonial law ("droit d'outre-mer")*
(paras. 29–30)

The Parties agree that the delimitation of the frontier line also has to be appraised in the light of French *"droit d'outre-mer"*. The line to be determined by the Chamber as being that which existed in 1959–1960 was originally no more than

an administrative boundary dividing two former French overseas territories (*"territoires d'outre-mer"*) and, as such, was necessarily defined at that time not according to international law, but according to the French legislation applicable to such territories. Here the Chamber explains that international law—and therefore the principle of *uti possidetis*—applies to the new State as from its accession to independence, but has no retroactive effect. It freezes the territorial title. International law does not effect any *renvoi* to the law of the colonizing State. If the latter law has any part to play, it is as one factual element among others, or as evidence indicative of the "colonial heritage" at the critical date.

IV. *The development of administrative organization* (paras. 31–33)

The Judgment briefly reviews how territorial administration was organized in French West Africa—to which both Parties previously belonged—with its hierarchy of administrative units (colonies, *cercles*, subdivisions, *cantons*, villages), before recapitulating the history of both the colonies concerned since 1919, in order to determine what, for each of the two Parties, was the colonial heritage to which the *uti possidetis* was to apply. Mali gained its independence in 1960 under the name of the Federation of Mali, succeeding the Sudanese Republic which had emerged, in 1959, from an overseas territory called the French Sudan. The history of Upper Volta is more complicated. It came into being in 1919 but was then abolished in 1932, and again reconstituted by a law of 4 September 1947, which stated that the boundaries of "the re-established territory of Upper Volta" were to be "those of the former colony of Upper Volta on 5 September 1932". It was this reconstituted Upper Volta which subsequently obtained independence in 1960 and took the name of Burkina Faso in 1984. In the present case, therefore, the problem is to ascertain what frontier was inherited from the French administration; more precisely, to ascertain what, in the disputed area, was the frontier which existed in 1959–1960 between the *territoires d'outre-mer* of Sudan and Upper Volta. The Parties both agree that when they became independent there was a definite frontier, and they accept that no modification took place in the disputed area between January 1959 and August 1960, or has taken place since.

V. *The dispute between the Parties and the preliminary question of possible acquiescence by Mali* (paras. 34–43)

Burkina Faso argues that Mali accepted as binding the solution to the dispute outlined by the OAU Mediation Commission, which sat in 1975. If this argument from acquiescence were well-founded, it would make it unnecessary to endeavour to establish the frontier inherited from the colonial period.

The Chamber therefore considers whether Mali did acquiesce, as Burkina Faso claims, in the solution outlined by the Commission, although the latter never in fact completed its work. It begins by considering the element of acquiescence which, according to Burkina Faso, is found in the declaration made by the Head of State of Mali on 11 April 1975, whereby Mali allegedly declared itself bound in advance by the report to be drawn up by the Mediation Commission on the basis of the specific proposals emanating from its Legal Sub-Commission. That report was never issued, but it is known what the proposals of the Sub-Commission were. Upon consideration, and taking account of the jurisprudence of the Court, the Chamber finds that there are no grounds to interpret the declaration in question as a unilateral act with legal implications in regard to the dispute. The Judgment then goes on to consider the principles of delimitation approved by the Legal Sub-Commission which, according to Burkina Faso, Mali agreed should be taken into consideration in delimiting the frontier in the disputed area. Having weighed the arguments of the Parties, the Chamber concludes that, since it has to determine the frontier line on the basis of international law, it is of little significance whether Mali's approach may be construed to reflect a specific position towards, or indeed to signify acquiescence in, the principles held by the Legal Sub-Commission to be applicable to the resolution of the dispute. If those principles are applicable as elements of law, they remain so whatever Mali's attitude. The situation would only be otherwise if the two Parties had asked the Chamber to take account of them or had given them a special place in the Special Agreement as "rules expressly recognized by the contesting States" (Art. 38, para. 1 (*a*) of the Statute), neither of which was the case.

VI. *Preliminary question: the fixing of the tripoint* (paras. 44–50)

The Chamber disposes of a further preliminary question, concerning its powers in the matter of fixing the tripoint which forms the easternmost point of the frontier between the Parties. Their views on this question conflict. Mali claims that the determination of the tripoint Niger-Mali-Burkina Faso cannot be effected by the two Parties without Niger's agreement, and cannot be determined by the Chamber either; and Burkina Faso considers that the Chamber must, pursuant to the Special Agreement, reach a decision on the position of the tripoint. As for its jurisdiction in this matter, the Chamber finds it to be clear from the wording of the Special Agreement that the common intention of the Parties was that it should indicate the frontier line throughout the whole of the disputed area. In addition, it considers that its jurisdiction is not restricted simply because the end-point of the frontier lies on the frontier of a third State not a party to the proceedings. The rights of the neighbouring State, Niger, are in any event safeguarded by the operation of Article 59 of the Statute of the Court. Regarding the question whether considerations relating to the need to safeguard the interests of the third State concerned would require the Chamber to refrain from exercising its jurisdiction to determine the whole course of the line, this presupposes, according to the Chamber, that the legal interests of that State would not only be affected by its decision, but would form the very subject-matter of that decision. This is not so in this case, and the Chamber is accordingly required to determine how far the frontier inherited from the colonizing State extends. This is, for the Chamber, not a matter so much of defining a tripoint as of indicating where the easternmost point of the frontier lies, the point where the frontier ceases to divide the territories of Burkina Faso and the Republic of Mali.

VII. *Evidence relied on by the Parties* (paras. 51–65)

The Parties have relied upon different types of evidence to give support to their arguments.

1. They have referred to *legislative and regulative texts* or *administrative documents*, of which the basic document is the French law of 4 September 1947 "for the re-establishment of the territory of Upper Volta", providing that the boundaries of the re-established territory were to be "those of the former colony of Upper Volta on 5 September 1932". At the time of independence in 1960, those boundaries were the same as those which had existed on 5 Septem-

ber 1932. However, the texts and documents produced in evidence contain no complete description of the course of the boundary between French Sudan and Upper Volta during the two periods when these colonies co-existed (1919–1932 and 1947–1960). They are limited in scope, and their legal force or the correct interpretation of them are matters of dispute between the Parties.

2. The two States have also produced an abundant and varied *collection of cartographic materials*, and have discussed in considerable detail the question of the probative force of the maps and the respective legal force of the various kinds of evidence. The Chamber notes that, in frontier delimitations, maps merely constitute information, and never constitute territorial titles *in themselves alone*. They are merely extrinsic evidence which may be used, along with other evidence, to establish the real facts. Their value depends on their technical reliability and their neutrality in relation to the dispute and the Parties to that dispute; they cannot effect any reversal of the onus of proof.

When considering the maps produced in this case, the Chamber notes that not one of the maps available to it can provide a direct official illustration of the words contained in four essential texts (cf. Section VIII below) even though it was clear from their wording that two of those texts were intended to be accompanied by maps. Although the Chamber has been presented with a considerable body of maps, sketches and drawings for a region that is nevertheless described as partly unknown, no indisputable frontier line can be discerned from these documents. Particular vigilance is therefore required in examining the file of maps.

Two of the maps produced appear to be of special significance. These are the 1:500,000 scale map of the colonies of French West Africa, 1925 edition, known as the Blondel la Rougery map, and the 1:200,000 scale map of West Africa, issued by the French *Institut géographique national* (IGN) and originally published between 1958 and 1960. With regard to the first of these maps, the Chamber considers that the administrative boundaries shown on it do not in themselves possess any particular authority. With regard to the second map, the Chamber finds that, since it was drawn up by a body which was neutral towards the Parties, although it does not possess the status of a legal title, it is a visual portrayal both of the available texts and of information obtained on the ground. Where other evidence is lacking or is not sufficient to show an exact line, the probative force of the IGN map must be viewed as compelling.

3. Among the evidence to be taken into consideration, the Parties invoke the "colonial *effectivités*", in other words, the conduct of the administrative authorities as proof of the effective exercise of territorial jurisdiction in the region during the colonial period. The role played by such *effectivités* is complex, and the Chamber has to make a careful evaluation of their legal force in each particular instance.

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The Chamber emphasizes that the present case is a decidedly unusual one as concerns the facts to be proven or the evidence to be produced. Although the Parties have provided as complete a case file as possible, the Chamber cannot be certain of deciding the case on the basis of full knowledge of the facts. The case file shows inconsistencies and shortcomings. The systematic application of the rule concerning the burden of proof cannot always provide a solution, and the rejection of any particular argument for lack of proof is not sufficient to warrant upholding the contrary argument.

VIII. *Legislative and regulative titles and administrative documents invoked by the Parties: their applicability to the determination of the frontier line*
(paras. 66–105)
and the question of their implementation
(paras. 106–111)

The Chamber deals first with the legislative and regulative titles and the administrative documents invoked by the Parties, and considers what weight to attach to each of them, for the purpose of indicating the course of the line in the sector to which they relate. The Judgment presents these texts in chronological order:

—*Order of 31 December 1922* for the reorganization of the Timbuktu region. The Parties agree in recognizing the validity and pertinence of this text.

—*Order dated 31 August 1927*, issued by the Governor-General *ad interim* of French West Africa, relating to the boundaries of the colonies of Niger and Upper Volta; this Order was amended by an *erratum dated 5 October 1927*. The Parties both treat this text as relevant in so far as it refers to the tripoint discussed above (cf. Section VI). They disagree, however, regarding its validity; Mali claims that the Order and the erratum are invalidated by a factual error relating to the location of the heights of N'Gouma, so that Burkina Faso may not properly rely upon them. The Chamber emphasizes that, in the present proceedings, the Order and erratum have only evidentiary value in respect of the location of the end-point of the boundary between French Sudan and Upper Volta. The Chamber considers it unnecessary to endeavour to determine the legal validity of the text, its value as evidence—which is accepted by Mali—being a separate question.

—*Decree of 5 September 1932*, abolishing the colony of Upper Volta and annexing its component *cercles* either to French Sudan or to Niger (cf. sketch map No. 2 in the Judgment).

—*Exchange of letters which took place in 1935:* this correspondence consists of *letter 191 CM2 of 19 February 1935* addressed to the Lieutenant-Governors of Niger and French Sudan by the Governor-General of French West Africa, and the reply from the Lieutenant-Governor of the French Sudan dated *3 June 1935*. The Governor-General suggested a description of the boundary between Niger and the French Sudan, to which the Lieutenant-Governor of the Sudan replied by proposing only one amendment. This description appears to correspond to the line shown on the Blondel la Rougery map (see sketch map No. 3 in the Judgment). The draft description was not followed up, but its interpretation is a matter of dispute between the Parties, the issue being whether the proposed description did no more than describe an existing boundary (the "declaratory" theory of Burkina Faso) or whether the letter reflected an intention to define the legal boundary *de novo* (the "modifying" theory argued by Mali). The Chamber concludes that the definition of the boundary given in letter 191 CM2 corresponded, in the minds both of the Governor-General and of all the administrators who were consulted, to the *de facto* situation.

—*Order No. 2728 AP* issued on *27 November 1935* by the Governor-General *ad interim* of French West Africa for the delimitation of the *cercles* of Bafoulabé, Bamako and Mopti (French Sudan). The last-named *cercle* bordered on the *cercle* of Ouahigouya, which was then a part of French Sudan

and which reverted to Upper Volta as from 1947. This boundary was again to form the boundary between the territories of Upper Volta and Sudan until independence—hence its significance. The text describes the eastern boundary of the Sudanese *cercle* of Mopti as being "a line running markedly north-east, leaving to the *cercle* of Mopti the villages of Yoro, Dioulouna, Oukoulou, Agoulourou, Koubo . . . ". The Parties do not agree on the legal significance to be ascribed to this provision. They disagree as to whether the line indicated in the text, which "leaves" the villages in question to the *cercle* of Mopti, had the effect of attributing to that *cercle* villages which had previously been part of another *cercle* (Burkina Faso's contention) or whether this definition of the line rather implied that these villages already belonged to the *cercle* of Mopti (Mali's contention).

The Chamber considers whether the actual text of Order 2728 AP, and the administrative context in which it was issued, provide any indication of the scope which the Governor-General *ad interim* intended it to have. It concludes that there is at least a presumption that Order 2728 AP had neither the aim nor the result of modifying the boundaries which existed in 1935 between the Sudanese *cercles* of Mopti and Ouahigouya (no modification having been made between 1932 and 1935). The Chamber then enquires whether the content of Order 2728 AP operates to reverse or to confirm this presumption. It concludes from a detailed study of the documentary and cartographic evidence from which these villages can be located that this material does not overturn the presumption that Order 2728 AP was declaratory in nature.

In the course of its demonstration, the Chamber explains that the part of the frontier whose determination calls for the scope of Order 2728 AP to be ascertained has been called in the Judgment "the sector of the four villages". The words "four villages" refer to the villages of Dioulouna (which can be identified as the village which now goes under the name of Dionouga), Oukoulou, Agoulourou and Koubo (the village of Yoro, also mentioned in the Judgment, was definitely part of the *cercle* of Mopti, and is not in issue).

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The Chamber considers what relationship can be established among the pieces of information provided by the various texts of which it has to make use, and reaches a number of conclusions. It notes that on certain points the sources agree and bear one another out, but that in some respects, in view of the shortcomings of the maps at the time, they tend to conflict (see sketch map No. 4 in the Judgment).

IX. *Determination of the frontier in the disputed area* (paras. 112–174)

1. *The end-point in the west* (paras. 112–113)

The Chamber begins by fixing the end-point of the frontier already established between the Parties by agreement, in other words the western extremity of the disputed area. They have not clearly indicated this point, but the Chamber considers that it can justifiably conclude that both Parties accept the frontier line shown on the 1:200,000 scale map of West Africa published by the IGN to the south of the point with the geographical co-ordinates 1° 59′ 01″ W and 14° 24′ 40″ N (point A on the map annexed to the Judgment). It is from that point that the Parties are requesting it to indicate the line of their common frontier in an easterly direction.

2. *Villages and farming hamlets* (paras. 114–117)

The Chamber considers it necessary to examine the meaning to be ascribed to the word "village", since the regulative texts which fix the district boundaries generally refer merely to the villages comprising them, without further geographical clarification. It frequently happens that the inhabitants of a village cultivate land some distance away, taking up residence in "farming hamlets" forming dependencies of the village. The Chamber has to decide whether, for the purpose of the delimitation which it is asked to effect, the farming hamlets form part of the villages on which they depend. It is not persuaded that, when a village was a feature used to define the composition of a wider administrative entity, these farming hamlets were always taken into consideration in drawing the boundary of such an entity. It is only when it has examined all the available information relating to the extent of a particular village that it will be able to ascertain whether a particular piece of land is to be treated as part of that village despite its lack of a connection with it, or as a satellite hamlet which does not fall within the boundaries of the village.

3. *The sector of the four villages* (paras. 118–126)

Since Order 2728 AP defines the boundary between the *cercles* of Mopti and Ouahigouya in terms of the villages "left" to the *cercle* of Mopti, the Chamber identifies the villages in question and ascertains their territorial extent. It finds that Burkina Faso does not contest the Malian character of the village of Yoro, and that there is no disagreement regarding the first part of the frontier, which runs in a northerly direction from point A as far as the point with the co-ordinates 1° 58′ 49″ W and 14° 28′ 30″ N (point B).

As for Dionouga, the Parties agree in identifying it with the village of Dioulouna mentioned in the Order. The Chamber considers that it can conclude from the information available to it, especially in relation to the track-laying operations undertaken on the orders of the administrators concerned, these being a significant element of the "*effectivités*", that the administrative boundary at the relevant time during the colonial period intersected the track connecting this village to the nearby village of Diguel at a distance of approximately 7.5 kilometres to the south of Dionouga. The frontier line therefore does likewise, at the point with the co-ordinates 1° 54′ 24″ W and 14° 29′ 20″ N (point C).

As for the villages of Oukoulou and Agoulourou, mentioned in Order 2728 AP, the Chamber emphasizes that it is quite irrelevant whether these villages are now in existence or not. The fact that they may have disappeared has no impact on the boundary which was defined at the time. It may however be noted that the positions of the villages of Kounia and Oukoulourou correspond to those of the two villages referred to in the Order.

As regards Koubo, about which there is some confusion of nomenclature, the information available to the Chamber is not sufficient to establish with certainty whether it is the village of Kobou or the hamlet of Kobo which corresponds to the village of Koubo mentioned in the Order. But since the hamlet lies only 4 kilometres from the village, the Chamber considers it reasonable to treat them as a whole, drawing the frontier in such a way as to leave both of them to Mali.

The Chamber therefore considers that a line drawn at a dis-

tance of approximately 2 kilometres to the south of the present-day villages of Kounia and Okoulourou corresponds to the boundary described in Order 2728 AP. This line runs through the point with the co-ordinates 1° 46′ 38″ W and 14° 28′ 54″ N (point D) and through the point with the co-ordinates 1° 40′ 40″ W and 14° 30′ 03″ N (point E).

4. *The pool of Toussougou, the pool of Kétiouaire and the pool of Soum*
(paras. 127–150)

The line described in Order 2728 AP of 1935 extends in a "markedly north-east" direction, "passing to the south of the pool of Toussougou and culminating in a point located to the east of the pool of Kétiouaire". There is a problem as to the whereabouts of these pools, since none of the maps contemporary with the Order which the Parties have presented to the Chamber show any pools bearing these names. However, both Parties admit that there is at least one pool in the region of the village of Toussougou, while offering as evidence only maps which contradict one another. The question therefore arises whether the pool of Féto Maraboulé, which lies to the south-west of the village and has only recently been shown on the maps, is an integral part of this pool. The Chamber's opinion is that the two pools remain separate, even during the rainy season, and that the pool of Féto Maraboulé is not to be identified with the pool of Toussougou referred to in the Order, which is smaller and lies close to the village with the same name. Moreover, an identification of the two pools would have an impact on the course of the line. The Chamber, which has to interpret the reference to the pool of Toussougou in Order 2728 AP, considers that the interpretation to be made must be such as to minimize the margin of error involved in defining the tripoint at which, according to letter 191 CM2, the *cercles* of Mopti, Ouahigouya and Dori meet. Before defining the course of the line in relation to the pool of Toussougou, the Chamber attempts to locate the pool of Kétiouaire, near which the boundary described in Order 2728 AP also ran.

In Order 2728 AP, the pool of Kétiouaire constitutes an important element of the boundary therein defined. It therefore has to be ascertained whether, in 1935, there was a pool lying in a "markedly north-east" direction in relation to a point situated "to the south of the pool of Toussougou", close to the tripoint of the *cercles* of Mopti, Gourma-Rharous and Dori, and to the west of it. After due appraisal of all the information available to it, the Chamber is unable to locate the pool of Kétiouaire. Nor does it consider any identification possible between the pool of Kétiouaire and the pool of Soum, which is situated some kilometres to the east/north-east of the pool of Toussougou and close to the meeting-point, not of the three *cercles* mentioned above, but of the *cercles* of Mopti, Ouahigouya and Dori.

The Chamber remains persuaded by the case file that the pool of Soum is a frontier pool, but finds no indications dating from the colonial period from which the line could be said to run either to the north or to the south of the pool, or to divide it. This being so, the Chamber notes that although it has received no mandate from the Parties to make its own free choice of an appropriate frontier, it has nevertheless the task of drawing a precise line, and for that purpose can appeal to the equity *infra legem* which the Parties have themselves acknowledged to be applicable in the present case. In order to achieve an equitable solution along these lines, on the basis of the applicable law, the Chamber finds that account must be taken, in particular, of the circumstances in which the *commandants* of two adjacent *cercles*, one in Mali and the other in Upper Volta, recognized in a 1965 agreement, not endorsed by the competent authorities, that the pool should be shared. It concludes that the pool of Soum must be divided in two in an equitable manner. The line should therefore cross the pool in such a way as to divide its maximum area during the rainy season equally between the two States.

The Chamber notes that this line does not pass through the co-ordinates mentioned in letter 191 CM2, and concludes from an investigation of the topographical data that the tripoint must have lain to the south-east of the point indicated by these co-ordinates. Since this letter did not become a regulative text, it ranks only as evidence of the boundary which had "*de facto* value" at the time. It now transpires that the maps then available were not sufficiently accurate to warrant such a precise definition. Thus the fact that these co-ordinates are found to have been defined with less accuracy than had been thought does not contradict the Governor-General's intention or deprive the letter of probative force.

The boundary in this region takes the following course: from point E, the line continues straight as far as a point with the co-ordinates 1° 19′ 05″ W and 14° 43′ 45″ N, situated approximately 2.6 kilometres south of the pool of Toussougou (point F), and then reaches the pool of Soum at the point with the co-ordinates 1° 05′ 34″ W and 14° 47′ 04″ N (point G); it crosses the pool from west to east, dividing it equally.

5. *The sector from the pool of Soum to mount Tabakarech*
(paras. 151–156)

In order to determine the line of the frontier east of the pool of Soum, the Chamber has to refer to the wording of letter 191 CM2 of 1935, which it has found to possess probative value. According to Burkina Faso, the line follows the indications in this letter and on the Blondel la Rougery map of 1925, from the point with the co-ordinates 0° 50′ 47″ W and 15° 00′ 03″ N, as far as the pool of In Abao. There seems to be no doubt that the purpose of letter 191 CM2 was to define in textual form a boundary shown on that map, and here the Parties are in agreement. Mali has emphasized the inaccuracy and shortcomings of this map as regards the toponomy and orography. The Chamber considers that in the sector from the pool of Soum to Tabakarech no problem arises in the selection of a map. In the absence of other indications to the contrary, the letter must be interpreted as contemplating a straight line connecting mount Tabakarech to the tripoint where the boundaries of the *cercles* of Mopti, Ouahigouya and Dori converge.

The Chamber concludes that from point G the frontier runs in a north-northeasterly direction as far as the point mentioned by Burkina Faso, and from that point to Mount Tabakarech. This hill is to be identified with the elevation which appears on the IGN 1:200,000 map under the name of Tin Tabakat, with the geographical co-ordinates 0° 43′ 29″ W and 15° 05′ 00″ N (point H).

6. *The pool of In Abao*
(paras. 157–163)

In determining the next section of the line, the Chamber must refer to the Order made by the Governor-General of French West Africa on 31 December 1922. In that Order, from the pool of In Abao the western boundary of the *cercle* of Gao follows "the northern boundary of Upper Volta". The boundary to be established by the Chamber must include that pool; the pool must therefore be identified in order to determine the frontier line in relation to it. The information on the various maps concerning the location and size of the

pool is contradictory (see sketch map No. 5 in the Judgment). From the information available the Chamber considers it likely that the pool is the one located at the junction of two marigots, one being the Béli, running from west to east, and the other running from north to south. In the absence of more precise and reliable information than has been submitted to it concerning the relationship between the frontier line and the pool of In Abao, the Chamber must conclude that the boundary crosses the pool in such a way as to divide it equally between the two Parties.

The frontier must follow the IGN line from point H as far as the point with the co-ordinates 0° 26′ 35″ W and 15° 05′ 00″ N (point I) where it turns south-east to join the Béli. It continues straight as far as point J, which lies on the west bank of the pool of In Abao, and point K, which lies on the east bank of the same pool. From point K, the line once more runs in a north-easterly direction, and rejoins the IGN line at the point where that line, after leaving the Béli to head north-eastward, again turns south-east to form an orographic boundary (point L—0° 14′ 44″ W and 15° 04′ 42″ N). Points J and K will be determined with the assistance of experts appointed pursuant to Article IV of the Special Agreement.

7. *The region of the Béli*
(para. 164)

For the whole of this region Mali, rejecting letter 191 CM2 of 1935, argues in favour of a frontier running along the marigot. The two Parties have debated at length the choice which was open to the administering power, as between a hydrographic frontier along the Béli and an orographic frontier along the crestline of the elevations rising to the north of the marigot. In the Chamber's opinion, letter 191 CM2 proves that the orographic boundary was adopted. As for the boundary line described in that letter, the Chamber notes that the IGN map enjoys the approval of both Parties, at least in regard to its representation of the topography. It sees no reason to depart from the broken line of small crosses which is shown on that map and appears to be a faithful representation of the boundary described in letter 191 CM2, except with regard to the easternmost part of the line, where the problem arises of Mount N'Gouma.

8. *The heights of N'Gouma*
(paras. 165–174)

With regard to the final segment of the frontier line, the essential question for the Chamber is the location of the "heights of N'Gouma" mentioned in the erratum to the 1927 Order relating to the boundaries between Upper Volta and Niger (see sketch map No. 6 in the Judgment). That erratum defined the boundary as "a line starting at the heights of N'Gouma, passing through the Kabia ford . . . ". Mali has argued that this text was invalidated by a factual error, in that it referred to Mount N'Gouma as being to the north of the ford, whereas it was actually located south-west of it, as shown on the 1960 IGN map, which, according to Mali, is the only accurate picture of the situation. The Chamber has already stated that the text of the Order and of the erratum should not be set aside *in limine;* their probative value has to be appraised in order to determine the end-point of the frontier. It emphasizes that the maps of the period, such as the Blondel la Rougery map of 1925, locate Mount N'Gouma to the north of the Kabia ford, and that this location is also borne out by a 1:1,000,000 map, evidence which the Chamber considers cannot be overlooked, although the official body which approved it is unknown. Although the 1:200,000 IGN map of 1960 attaches the name N'Gouma to an elevation situated south-east of the ford, it also contains altimetric information from which it may be inferred that elevations ranged in a quarter-circle between a position north of the ford and another east-southeast of it together constitute an ensemble to which the name "N'Gouma" could be given. The existence of elevations to the north of the ford has, moreover, been confirmed by observations made on the ground in 1975.

Since the Chamber is not aware of any oral tradition going back at least to 1927 which might serve to contradict the indications given by the maps and documents of the period, it concludes that the Governor-General, in the 1927 Order and the erratum and in his letter 191 CM2 of 1935, described an existing boundary which passed through elevations rising to the north of the Kabia ford, and that the administrators considered, rightly or wrongly, that those elevations were known to the local people as the "heights of N'Gouma". The Chamber has therefore only to ascertain the location, within the area of high ground surrounding the ford, of the end-point of the boundary defined by the above-mentioned texts. It concludes that this point should be fixed three kilometres to the north of the ford, at the spot defined by the co-ordinates 0° 14′ 39″ E and 14° 54′ 48″ N (point M).

X. *The line of the frontier*
(para. 175)

The Chamber fixes the line of the frontier between the Parties in the disputed area. This line is reproduced, for illustrative purposes, on a map which is a compilation of five sheets of the 1:200,000 IGN map and is annexed to the Judgment.

XI. *Demarcation*
(para. 176)

The Chamber is ready to accept the task which the Parties have entrusted to it, and to nominate three experts to assist them in the demarcation operation, which is to take place within one year of the delivery of the Judgment. In its opinion, however, it is inappropriate to make in its Judgment the nomination requested by the Parties, which will be made later by means of an Order.

XII. *Provisional measures*
(paras. 177–178)

The Judgment states that the Order of 10 January 1986 ceases to be operative upon the delivery of the Judgment. The Chamber notes with satisfaction that the Heads of State of Burkina Faso and the Republic of Mali have agreed "to withdraw all their armed forces from either side of the disputed area and to effect their return to their respective territories".

XIII. *Binding force of the Judgment*
(para. 178)

The Chamber also notes that the Parties, already bound by Article 94, paragraph 1, of the Charter of the United Nations, expressly declared in Article IV, paragraph 1, of the Special Agreement that they "accept the Judgment of the Chamber . . . as final and binding upon them". The Chamber is happy to record the attachment of both Parties to the international judicial process and to the peaceful settlement of disputes.

XIV. *Operative clause*
(para. 179)

SUMMARY OF THE OPINIONS APPENDED TO THE JUDGMENT OF THE CHAMBER

Separate Opinion of Judge ad hoc *François Luchaire*

Judge Luchaire voted for the operative provisions of the Judgment because they were founded upon reasoning of which the logic is unquestionable, but he does not fully endorse some of its aspects or conclusions. He has therefore found it necessary to comment on the following points:

I. The principle of the right of peoples to self-determination; free choice of status and consequences for the French *territoires d'outre-mer* of the referendum held on 28 September 1958.

II. Acquiescence—*estoppel*—interpretation of the Conakry communiqué.

III. Reference to the 1932 boundaries drawn by the French administration on the maps of the period. Later documents irrelevant.

IV. Acquiescence arising from the participation of Dioulouna in the democratic process in Sudan.

V. Possibility of a line passing through Kobo—Fayando—Toussougou. Difficulties in relation to Dourumgara and In Abao—Tin Kacham.

Separate Opinion of Judge ad hoc *Georges Abi-Saab*

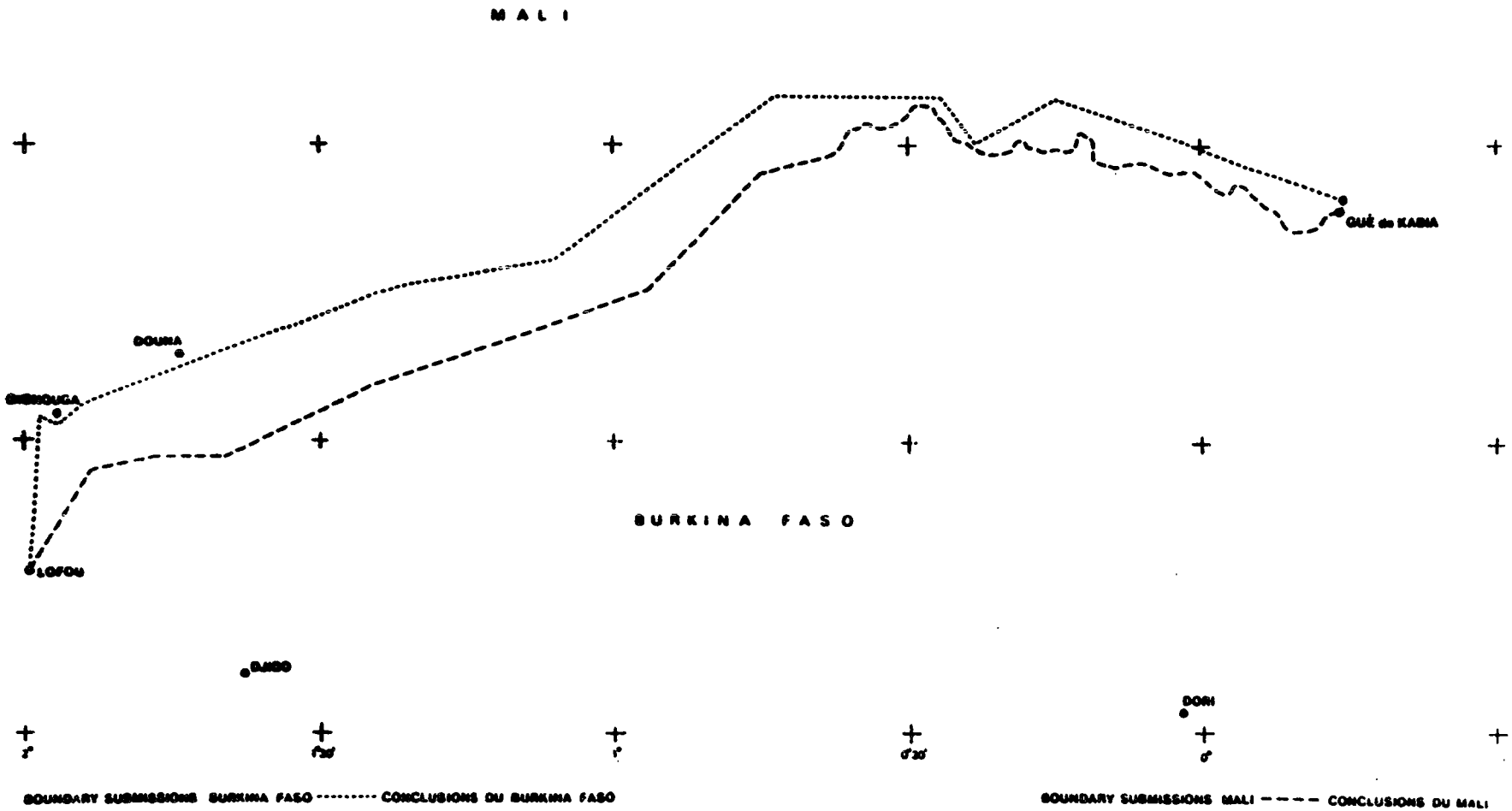
Although he voted for the operative provisions of the Judgment, Judge Abi-Saab cannot endorse certain aspects of either the Chamber's reasoning or its conclusions.

In particular, he dissociates himself from the Judgment's treatment of French colonial law, which, in his opinion, has been analysed in excessive detail. He also dissociates himself from the role attributed to letter 191 CM2 of 1935, the declaratory nature of which in respect of pre-existing territorial boundaries he regards as a mere possibility, not hardened to certainty by any evidence.

Judge Abi-Saab considers that the decision to base the line in the Béli region on that letter, which is simply a verbal reflection of the Blondel la Rougery map, amounts to giving this map the status of a legal title, although according to the Judgment itself maps in themselves are never sufficient to constitute such a title.

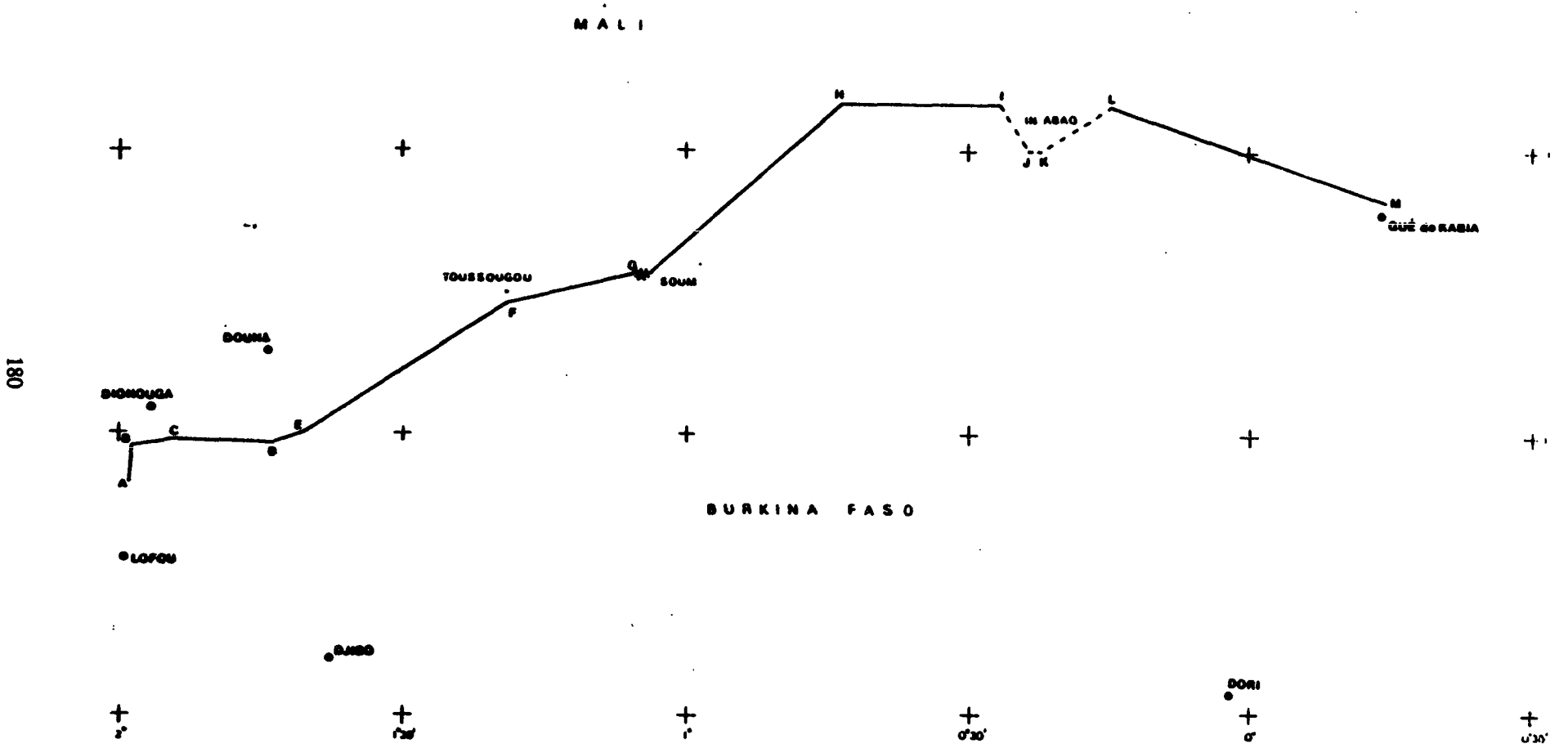
Having emphasized the difficulties which sometimes arise in applying the principle of *uti possidetis*, the author notes that the Chamber has adopted a possible legal solution within the bounds of the degrees of freedom which exist in the case. He considers this legally acceptable, but would have preferred another approach, relying to a greater extent upon considerations of equity *infra legem* in the interpretation and application of the law, the area concerned being a nomadic one afflicted by drought, so that access to water is vital.

Map No. 1


MALI
GUÉ de KABIA
DOUNA
BURKINA FASO
LOFOU
DJIDO
DORI
1°
1°30'
1°
0°30'
0°
BOUNDARY SUBMISSIONS BURKINA FASO ····· CONCLUSIONS DU BURKINA FASO
BOUNDARY SUBMISSIONS MALI – – – – CONCLUSIONS DU MALI

Map No. 2

Sketch-map illustrating the line adopted by the Chamber (para. 175 of the Judgment)



81. APPLICATION FOR REVIEW OF JUDGEMENT NO. 333 OF THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL

Advisory Opinion of 27 May 1987

In its Advisory Opinion on the question concerning the application for review of Judgement No. 333 of the United Nations Administrative Tribunal, the Court decided that in Judgement No. 333 the United Nations Administrative Tribunal did not fail to exercise jurisdiction vested in it and did not err on any question of law relating to provisions of the Charter.

The questions submitted to the Court by the Committee on Applications for Review of Administrative Tribunal Judgements were as follows:

"(1) In its Judgement No. 333 of 8 June 1984 (AT/DEC/333), did the United Nations Administrative Tribunal fail to exercise jurisdiction vested in it by not responding to the question whether a legal impediment existed to the further employment in the United Nations of the Applicant after the expiry of his contract on 26 December 1983?

"(2) Did the United Nations Administrative Tribunal, in the same Judgement No. 333, err on questions of law relating to provisions of the Charter of the United Nations?"

The Court decided as follows:

A. Unanimously, the Court decided to comply with the request for an advisory opinion.

B. Unanimously, the Court was of the opinion that the United Nations Administrative Tribunal, in its Judgement No. 333, did not fail to exercise jurisdiction vested in it by not responding to the question whether a legal impediment existed to the further employment in the United Nations of the Applicant after the expiry of his fixed-term contract on 26 December 1983.

C. By eleven votes to three, the Court was of the opinion that the United Nations Administrative Tribunal, in the same Judgement No. 333, did not err on any question of law relating to the provisions of the Charter of the United Nations.

IN FAVOUR: *President* Nagendra Singh; *Vice-President* Mbaye; *Judges* Lachs, Ruda, Elias, Oda, Ago, Sette-Camara, Bedjaoui, Ni Zhengyu, Tarassov.

AGAINST: *Judges* Schwebel, Sir Robert Jennings, Evensen.

The Court was composed as follows: *President* Nagendra Singh; *Vice-President* Mbaye; *Judges* Lachs, Ruda, Elias, Oda, Ago, Sette-Camara, Schwebel, Sir Robert Jennings, Bedjaoui, Ni Zhengyu, Evensen and Tarassov.

Judge Lachs appended a declaration to the Advisory Opinion.

Judges Elias, Oda and Ago appended separate opinions to the Advisory Opinion.

Judges Schwebel, Sir Robert Jennings and Evensen appended dissenting opinions to the Advisory Opinion.

*
* *

In their opinions the judges concerned stated and explained the positions they adopted in regard to certain points dealt with in the Advisory Opinion.

I. *Review of the proceedings and summary of facts* (paras. 1–22)

The Court outlines the successive stages of the proceedings before it (paras. 1–9) and summarizes the facts of the case as they emerge from the reasons adduced in the Judgement of 8 July 1984 in the case concerning *Yakimetz* v. *the Secretary-General of the United Nations*, and as set out in the documents submitted to the Tribunal (paras. 10–18). The facts essential for an understanding of the decision reached by the Court are as follows:

Mr. Vladimir Victorovich Yakimetz (referred to in the Opinion as " the Applicant") was given a five-year appointment (1977–1982) as Reviser in the Russian Translation Service of the United Nations. In 1981, he was transferred as Programme Officer to the Programme Planning and Co-ordination Office. At the end of 1982, his appointment was extended for one year, expiring on 26 December 1983, and his letter of appointment stated that he was "on secondment from the Government of the Union of Soviet Socialist Republics". (Para. 10.)

On 8 February 1983, the Assistant Secretary-General for Programme Planning and Co-ordination informed the Applicant that it was his intention to request an extension of his contract after the current contract expired on 26 December 1983. On 9 February 1983, the Applicant applied for asylum in the United States of America; on 10 February he informed the Permanent Representative of the USSR to the United Nations of his action, and stated that he was resigning from his positions in the Soviet Government. On the same day, he notified the Secretary-General of his intention to acquire permanent resident status in the United States of America. (Para. 11.)

On 25 October 1983 the Applicant addressed a memorandum to the Assistant Secretary-General for Programme Planning and Co-ordination, in which he expressed the hope that it would be found possible on the basis of his performance to recommend a further extension of his contract with the United Nations, "or even better a career appointment". On 23 November 1983, the Deputy Chief of Staff Services informed the Applicant by letter "upon instruction by the Office of the Secretary-General" that it was not the intention of the Organization to extend his fixed-term appointment beyond its expiration date, i.e., 26 December 1983. On 29 November, the Applicant protested against the decision and referred to his acquired rights under General Assembly resolution 37/126, IV, paragraph 5, which provides "that staff members on fixed-term appointments upon completion of five years of continuing good service shall be given every reasonable consideration for a career appointment." (Para. 13.)

On 13 December, the Applicant requested the Secretary-General to review the decision not to extend his appointment beyond its expiration date, and again invoked his rights under General Assembly resolution 37/126. In a letter dated 21 December 1983, the Assistant Secretary-General for Personnel Services replied to the Applicant's letter of 13 December and advised him that, for the reasons stated, the Secretary-General was maintaining the decision communicated in the letter of 23 November 1983. (Para. 14.)

On 6 January 1984, the Applicant filed the application to the United Nations Administrative Tribunal in respect of which Judgement No. 333 was given. (Para. 14.)

The Applicant then made a further application for United Nations employment. (Para. 15.)

The Court notes that, at a press conference on 4 January 1984, the spokesman for the Secretary-General said that "if Mr. Yakimetz chose to apply for a position . . . he would be given every consideration along with other applicants for any position". It also noted that the *New York Times* of the same day carried an article dealing with the non-renewal of the Applicant's contract, in which the Executive Assistant to the Secretary-General was quoted as having said that "to have the contract extended . . . Soviet consent was essential. But, he said, 'the Soviets refused'." Commenting on that report in a letter to the *New York Times* dated 24 January 1984, the Under-Secretary-General for Administration and Management pointed out that "a person who is on loan returns to his government unless that government agrees otherwise". (Para. 16.)

Following this summary of the facts, the Opinion presents the principal contentions of the Applicant and of the Respondent as summarized by the Tribunal, and lists the legal issues which the Tribunal stated were involved in the case (paras. 17 to 19). It then gives a brief analysis of Judgement No. 333, (paras. 20 and 21), to which it returns subsequently in more detail.

II. *The competence of the Court to give an advisory opinion, and the propriety of doing so*
(paras. 23–27)

The Court recalls that its competence to deliver an advisory opinion at the request of the Committee on Applications for review of Administrative Tribunal Judgements is derived from several provisions: Article 11, paragraphs 1 and 2, of the Statute of the Tribunal, Article 96 of the Charter and Article 65, paragraph 1, of the Statute of the Court. It has already had occasion to examine the question of its competence under these provisions, whether the request for opinion originated, as in the present case, from an application by a staff member (*Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Fasla* case, 1973) or from an application by a member State (*Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Mortished* case, 1982). In both cases, it concluded that it possessed competence. In the present case, its view is that the questions addressed to it are clearly legal questions arising within the context of the Committee's activities. (Paras. 23 and 24.)

As for the propriety of giving an opinion, it is clearly established, according to the Court, that the power conferred by Article 65 of the Statute is of a discretionary character, and also that the reply of the Court to a request for an advisory opinion reflects its participation in the activities of the United Nations and, in principle, should not be refused. In the present case, it considers in any event that there is clear legal justification for replying to the two questions put to it by the Committee. It recalls that, in its 1973 Opinion, it subjected the machinery established by Article 11 of the Statute of the Administrative Tribunal to critical examination. While renewing some of its reservations as to the procedure established by that Article, the Court, anxious to secure the judicial protection of officials, concludes that it should give an advisory opinion in the case. (Paras. 25 and 26.)

In its Advisory Opinions of 1973 and 1982, the Court established the principle that its role in review proceedings was not "to retry the case and to attempt to substitute its own opinion on the merits for that of the Tribunal". That principle must continue to guide it in the present case. In particular, it should not express a view on the correctness otherwise of any finding of the Tribunal, unless it is necessary to do so in order to reply to the questions put to it. (Para. 27.)

III. *First question*
(paras. 28–58)

The first question put to the Court is worded as follows:

"1. In its Judgement No. 333 of 8 June 1984 (AT/DEC/333), did the United Nations Administrative Tribunal fail to exercise jurisdiction vested in it by not responding to the question whether a legal impediment existed to the further[1] employment in the United Nations of the Applicant after the expiry of his contract on 26 December 1983?

In his application to the Administrative Tribunal, the Applicant contended that "there was no legal bar to his eligibility for a new fixed-term contract" or to a probationary appointment leading to a career appointment. He claimed to have a "legally and morally justifiable expectancy of continued U.N. employment, and a right to reasonable consideration for a career appointment". Before the Tribunal, the Secretary-General stated that there was no legal impediment to the grant of a career appointment, and asserted that the contested decision had been taken after consideration of all the circumstances in the case. This, he contended, constituted "reasonable consideration" within the meaning of the General Assembly resolution 37/126 (see above, p. 4), given that the Applicant had no "right" to "favourable consideration for a career appointment". (Paras. 29 and 30.)

Before the Tribunal, the Applicant made no reference to the recognition by the Secretary-General that there was no legal impediment, but took issue with the statement that "reasonable consideration" had been given. He argued that if the Secretary-General was under the impression, as the letter of 21 December 1983 and the statements made by certain senior officials indicated (see above, pp. 4 and 5), that any extension of the Applicant's appointment without the consent of the government which had seconded him was beyond the scope of his discretionary power, this would have prevented him from giving every reasonable consideration to a career appointment. The Applicant therefore requested the Tribunal to find that the view which actually was held at that time—that a secondment did give rise to a legal impediment to any further employment—was incorrect, so that no "consideration" on that basis could be "reasonable" within the meaning of resolution 37/126, and requested it to find that there was no legal impediment to his further employment after the expiry of his contract on 26 December 1983. The Applicant held that the Tribunal had not responded to his plea on that point, and the Court is now requested to state whether in that regard it failed to exercise jurisdiction. (Paras. 31 and 32.)

The Court considers that the Tribunal's handling of the question of the "legal impediment" is not entirely clear. The reason for this, according to the Court, is that it was obliged to deal first with other contentions set out by the Applicant. As a matter of logic, the Tribunal dealt first with the question whether the Applicant had a "justifiable expectancy of con-

[1] The Opinion notes a discrepancy between the English and French texts, pointing out that the words *"obstacle juridique au renouvellement de l'engagement"* appearing in the French version include both a case of prolongation of an existing contract, and that of an appointment distinct from the pre-existing contractual relationship (para. 28).

tinued United Nations employment"—in other words, whether there was a "legal expectancy" in that connection, since if such an expectancy existed the Secretary-General would have been obliged to provide continuing employment to the Applicant within the United Nations. The Tribunal found that there was no legal expectancy. On the one hand, the consent of the national government concerned would have been required for the renewal of the previous contract, which was a secondment contract, and on the other hand, according to Staff Rule 104.12 (*b*), fixed term appointments carry no expectancy of renewal or of conversion to any other type of appointment. The Tribunal also held that the Secretary-General had given reasonable consideration to the Applicant's case, pursuant to section IV, paragraph 5, of General Assembly resolution 37/126, but without saying so explicitly. (Paras. 33 to 37.)

An analysis of the judgement therefore shows that, for the Tribunal, there could be no legal expectancy, but neither was there any legal impediment to "reasonable consideration" being given to an application for a career appointment. According to the Tribunal there would have been no legal impediment to such an appointment if the Secretary-General, in the exercise of his discretion, had seen fit to offer one. (Paras. 38–41.)

The Court notes that the real complaint of the Applicant against the Tribunal was, rather than failing to respond to the question whether there was a legal impediment to his further employment, that it paid insufficient attention to the indications that the Secretary-General had thought that there was a legal impediment, so that the "reasonable consideration" either never took place or was vitiated by a basic assumption—that there was an impediment—which was later conceded to be incorrect. Here the Court recalls that in appropriate cases it is entitled to look behind the strict terms of the question as presented to it (*Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, 1980), provided its reformulation remains within the limits of the powers of the requesting body. In the present case, without going beyond the limits of the ground of objection contemplated by Article 11 of the Tribunal's Statute and upheld by the Committee (failure to exercise jurisdiction), it is open to the Court to redefine the point on which it is asserted that the Tribunal failed to exercise its jurisdiction, if this will enable it to give guidance on the legal question really in issue. It thus seems to the Court essential to examine not only whether the Tribunal failed to examine the question of the legal impediment to the Applicant's further employment—as it is requested to do—but also whether the Tribunal omitted to examine the Secretary-General's belief in that regard, and the possible impact of that belief on his ability to give "every reasonable consideration" to a career appointment. If it can be established in this case with sufficient certainty that the Tribunal addressed its mind to the matters on which the Applicant's contentions were based, there was no failure to exercise jurisdiction in that respect, whatever may be thought of the conclusion it reached in the light of the information available to it. (Paras. 42 to 47.)

The Court refers first to the actual text of the Tribunal's Judgement, which did not deal specifically with the question of the existence of a "legal impediment". It does not however conclude from this that it failed to address its mind to this question. What the Judgement states is that, in the Tribunal's view, the Secretary-General could take the decision to offer the Applicant a career appointment, but was not bound to do so. It follows from this that the Tribunal was clearly deciding, though by implication, that there was no absolute legal impediment which had supposedly inspired the decision not to give the Applicant a career appointment. In so doing the Tribunal therefore responded to the Applicant's plea that it should be adjudged that there was no legal impediment to the continuation of his service. (Para. 48.)

The Court then refers to a statement by the President of the Administrative Tribunal, Mr. Ustor, appended to the Judgement, and to the dissenting opinion of another member of the Tribunal, the Vice-President Mr. Kean. It seems to the Court impossible to conclude that the Tribunal did not address its mind to the issues which were specifically mentioned by Mr. Ustor and Mr. Kean as the grounds for their disagreement with part of the judgement relating to the "legal impediment" and to the "reasonable consideration". The Tribunal, as a body represented by the majority which voted in favour of the Judgement, must have drawn its own conclusions on these issues, even if these conclusions were not spelt out as clearly in the Judgement as they ought to have been. (Paras. 49 to 57.)

As to the question whether "every reasonable consideration" was in fact given, the Tribunal decided this in the affirmative. The Court, considering that it is not entitled to substitute its own opinion for that of the Tribunal on the merits of the case, does not find it possible to uphold the contention that the Secretary-General did not give "every reasonable consideration" to the Applicant's case, in implementation of resolution 37/126, because he believed that there was a "legal impediment".

The Court, after due analysis of the text of Judgement No. 333 of the Tribunal, considers that the Tribunal did not fail to exercise jurisdiction vested in it by not responding to the question whether a legal impediment existed to the further employment in the United Nations of the Applicant after the expiry of his contract on 26 December 1983. Accordingly, the answer to the first question put to it by the Committee must be in the negative. (Para. 58.)

IV. *Second question*
(paras. 59 to 96)

The question is worded as follows:

"2.) Did the United Nations Administrative Tribunal, in the same Judgement No. 333, err on questions of law relating to provisions of the Charter of the United Nations?"

Concerning the nature of its task, the Court recalls that the interpretation, in general, of Staff Regulations and Rules is not its business, but that it is the business of the Court to judge whether there is a contradiction between a particular interpretation or application of them by the Tribunal and any of the provisions of the Charter of the United Nations. It is also open to the Court to judge whether there is any contradiction between the Tribunal's interpretation of any other relevant texts such as, in this case, General Assembly resolution 37/126, and any of the provisions of the Charter. (Paras. 59 to 61.)

The first provision of the Charter in respect of which the Applicant contends that the Tribunal made an error of law is *Article 101, paragraph 1*, which provides that "The staff [of the Secretariat] shall be appointed by the Secretary-General under regulations established by the General Assembly". More specifically, the Applicant's complaint bears upon the role which ought to have been played by the Appointment and Promotion Board, but which was unable to play because no proposal ever reached it, with the result that it never had a chance to consider his case. The Applicant presented this as one element of the denial of "reasonable consideration" of his case. The Tribunal found that it was "left to the Respon-

dent to decide how every reasonable consideration for a career appointment should be given to a staff member" and that the Respondent had "the sole authority to decide what constituted 'reasonable consideration' ". On the basis of this passage the Applicant contends that this is a question of law relating to Article 101, paragraph 1, of the Charter. (Paras. 62 to 69.)

The Court interprets the above-quoted passage as meaning that it was for the Secretary-General to decide what process constituted "reasonable consideration", and not that the only test of reasonableness was what the Secretary-General thought to be reasonable. Indeed the Tribunal has nowhere stated that the Secretary-General possesses unfettered discretion. Nevertheless, the Tribunal did accept as sufficient a statement by the Secretary-General that the "reasonable consideration" required by resolution 37/126 had been given. It did not require the Secretary-General to furnish any details of when and how it was given, let alone calling for evidence to that effect. Because the texts do not specify which procedures are to be followed in such a case, the Court is unable to regard this interpretation as in contradiction with Article 101, paragraph 1, of the Charter. (Paras. 70 to 73.)

The Secretary-General has also asserted that the decision taken in this case was "legitimately motivated by the Secretary-General's perception of the interests of the Organization to which he properly gave precedence over competing interests". The Tribunal need not have accepted this; it might have regarded the statements quoted by the Applicant as evidence that the problem of secondment and the lack of government consent had been allowed to dominate more than the Secretary-General was ready to admit. That was not however the view it took. It found that the Secretary-General "exercised his discretion properly". Whether or not this was an error of judgment on the Tribunal's part, what is certain is that it was not an error on a question of law relating to Article 101, paragraph 1, of the Charter. The essential point is that the Tribunal did not abandon all claim to test the exercise by the Secretary-General of his discretionary power against the requirements of the Charter. On the contrary, it re-affirmed the need to check any "arbitrary or capricious exercise" of this power. (Paras. 74 and 75.)

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* *

The Applicant claims that the Tribunal committed an error of law relating to *Article 100, paragraph 1*, of the Charter, which provides:

> "In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organization."

The Applicant does not allege that in refusing him further employment the Secretary-General was merely carrying out the instructions of a government, but considers that the statements made by senior officials as mentioned above (pp. 4 and 5) indicated that the Secretary-General believed that further employment was impossible without the consent of the Applicant's government—which has been shown to be untrue—and that the Tribunal concluded that this was indeed the belief of the Secretary-General. The Court does not find it possible to uphold this contention, since it does not consider the Tribunal to have reached that conclusion. (Paras. 76 to 78.)

The Applicant alleges a failure to observe *Article 101, paragraph 3*, of the Charter, which provides:

> "The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible."

He asserts that the Tribunal's Judgement failed to weigh the mandate of that Article against other factors, and that it made merit subservient to other considerations. It is clear that the expression "the paramount consideration" is not synonymous with "the sole consideration", and it is for the Secretary-General to balance the various considerations. It was not for the Tribunal, nor is it for the Court, to substitute its own appreciation of the problem for his. The Secretary-General's decision cannot be said to have failed to respect the "paramount" character of the considerations mentioned in Article 101, paragraph 3, simply because he took into account all the circumstances of the case in order to give effect to the interests of the Organization. (Paras. 79 to 82.)

In taking his decision, the Secretary-General had taken account of "the events of 10 February 1983" (the date of the Applicant's communication informing the Soviet Government that he was resigning from its service) "and thereafter". The Tribunal examined this matter in the context of the new contractual relationship "which, according to the Applicant, had been created between himself and the United Nations on that date". For his part, the Secretary-General denied that "a continuing relationship with a national government is a contractual obligation of any fixed-term staff member—seconded or not" and that the Applicant's continued employment did not imply that a new contractual relationship had been created. The Tribunal comments on the significance of national ties, and expresses disapproval of the Secretary-General's above-quoted remarks. It does not apparently consider them consistent with the ideas found shortly beforehand in Judgement No. 326 (*Fischman*) which referred to a "widely-held belief" expressed in a report to the Fifth Committee of the General Assembly, to the effect that staff members who break their ties with their home countries can no longer claim to fulfil the conditions governing employment in the United Nations. The Tribunal adds that this position must continue to provide an essential guidance in this matter. The Court here observes that this "widely-held belief" amounts to the views expressed by some delegates to the Fifth Committee in 1953 at the Eighth Session of the General Assembly, and never materialized in an Assembly resolution. (Paras. 83–85.)

The Court also notes that the relevant passage in Judgement No. 333 is not essential to the reasoning of the decision, but that the Court has a duty to point out any error "on a question of law relating to the provisions of the Charter of the United Nations" whether or not such error affected the disposal of the case. However, having considered the relevant passage of the Judgement (para. XII), the Court is unable to find that the Tribunal there committed an error of law "relating to the provisions of the Charter". For the Secretary-General, the change of nationality was an act having no specific legal or administrative consequences. The Tribunal upheld the Secretary-General's main contention, but at the same time pointed out that according to one view, the change of nationality was not necessarily such an act, but one which in some circumstances may adversely affect the interests of the United Nations. This is very far from saying that a change or attempted change of nationality may be treated as a factor outweighing the "paramount consideration" defined by Arti-

cle 101, paragraph 3, of the Charter; this is what the Applicant accuses the Secretary-General of having done, but the Tribunal did not agree with him, since it established that "reasonable consideration" had taken place. (Paras. 86 to 92.)

The Applicant asserts that the Tribunal erred on a question of law relating to *Article 8* of the Charter, which is worded as follows:

> "The United Nations shall place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs."

The Applicant propounds a novel view of that Article, that it prohibits "any restriction on the eligibility of any person". The Court explains why it is not called upon to deal with this contention, so that Article 8, even in the wide interpretation contended for by the Applicant, has no relevance whatever. (Para. 93.)

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* *

The Applicant asserts that the Tribunal erred on a question of law relating to *Article 2, paragraph 1*, of the Charter, namely: "The Organization is based on the principle of the sovereign equality of all its Members", coupled with *Article 100, paragraph 2:*

> "2. Each Member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities."

The complaint here examined appears to be that a certain government brought pressure to bear on the Secretary-General contrary to Article 100, paragraph 2, of the Charter. In that event, even if there had been evidence (which there was not) that a member State had behaved in violation of that Article of the Charter, the Tribunal would not have been justified in making any finding in that respect, and could not therefore be criticised for not doing so. The Court can therefore see no possibility of an error of law by the Tribunal relating to Article 2 and Article 100, paragraph 2, of the Charter. (Paras. 94 to 96.)

In respect of the second question put to it in this case, the Court concludes that the Tribunal, in its Judgement No. 333, did not err on any question of law relating to the provisions of the Charter. The reply to that question also must therefore be in the negative. (Para. 96.)

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* *

The complete text of the *operative paragraph* (para. 97) will be found below:

THE COURT,

A. Unanimously,

Decides to comply with the request for an advisory opinion;

B. *Is of the opinion*

(1) with regard to Question I,

Unanimously

That the United Nations Administrative Tribunal, in its Judgement No. 333 of 8 June 1984 (AT/DEC/333), did not fail to exercise jurisdiction vested in it by not responding to the question whether a legal impediment existed to the further employment in the United Nations of the Applicant after the expiry of his fixed-term contract on 26 December 1983;

(2) with regard to Question II,

By eleven votes to three,

That the United Nations Administrative Tribunal, in the same Judgement No. 333, did not err on any question of law relating to the provisions of the Charter of the United Nations.

IN FAVOUR: *President* Nagendra Singh; *Vice-President* Mbaye, *Judges* Lachs, Ruda, Elias, Oda, Ago, Sette-Camara, Bedjaoui, Ni and Tarassov

AGAINST: *Judges* Schwebel, Sir Robert Jennings and Evensen.

SUMMARY OF DECLARATION, OPINIONS AND DISSENTING OPINIONS APPENDED TO ADVISORY OPINION

Declaration of Judge Lachs

Judge Lachs recalls that when in 1973 the Court first had occasion to give an Advisory Opinion concerning a judgement of the United Nations Administrative Tribunal, he appended as President of the Court a declaration expressing the hope that new procedures would be introduced so as to improve and harmonize the administrative protection offered staff members of international organizations. Note was taken of his remarks in the General Assembly and the International Civil Service Commission, so that steps were taken towards harmonizing the procedures of the Administrative Tribunals of the United Nations and the International Labour Organisation and the eventual establishment of a single tribunal to cover all staff in the United Nations family. After expressing gratification that the remarks of a Member of the Court should have begun to bear fruit in this way, Judge Lachs utters the hope that this year the General Assembly will cease postponing examination of the Secretary-General's latest report on the subject and will take some concrete steps towards the envisaged goal.

Separate opinion of Judge Elias

In his separate opinion, Judge Elias urges the General Assembly to reconsider the system of referring Administrative Tribunal cases to the Court for review. After examining the texts and the previous cases of this kind, he emphasizes the need for a flexible procedure to enable the Court to raise all legal issues considered relevant and necessary for the proper disposal of the problem before it. He outlines a possible system comprising a Tribunal of First Instance and the Administrative Tribunal sitting as a court of appeal, which would entail a recast of the present Statute of the Administrative Tribunal. Judge Elias also comments on the Court's power in advisory cases to determine the real meaning of the questions it has to answer, and on the problems raised in the case as to "reasonable consideration" under General Assembly resolution 37/126, secondment, and the discretion to be exercised by the Secretary-General in matters of this kind.

Separate opinion of Judge Oda

Judge Oda thinks that question 1 has been erroneously based in the light of the ambivalent provenance of the drafting of the question in the Committee on Applications. If the United Nations Administrative Tribunal did not respond to "the question whether a legal impediment existed to further

employment . . ." to Mr. Yakimetz's further employment in the United Nations, this did not appear to him to be relevant to the issue of whether the Tribunal failed to exercise jurisdiction.

With regard to question 2, Judge Oda thinks that on the issue of whether the Tribunal erred on a question of law relating to the provisions of the United Nations Charter, the present Court is expected, in the light of the process of amending the Tribunal's Statute in 1955, to function as an appellate court *vis-à-vis* the Tribunal and the Court should have examined the merits not only of the Judgement as such but also of the decision of the Secretary-General not to continue Mr. Yakimetz's contract. From this point of view Judge Oda holds that, in view of the Staff Rules and the relevant General Assembly resolutions, Mr. Yakimetz did not have a legal expectancy for further service with the United Nations towards the end of 1983 at the expiry of his contract, while the uncertainties of his status, caused by his application for asylum in the United States and his alleged resignation from any post in the Soviet Government in February 1983, could legitimately have been a factor considered by the Secretary-General in exercising his discretion regarding the employment of United Nations staff. Judge Oda states that the Tribunal did not err on any point of law relating to the provisions of the United Nations Charter in so far as the Tribunal did in fact uphold the decision of the Secretary-General which can be justified in the light of the latitude given to him in this respect.

Separate opinion of Judge Ago

Judge Ago explains in his separate opinion why, despite certain reservations, he did not dissociate himself from the negative answers given by the Court to both the first and the second questions. He states the reasons for the relative dissatisfaction he feels in this case, and on each occasion when the Court is called upon to give an advisory opinion in the context of proceedings for review of a decision of an Administrative Tribunal. While recognizing the necessity in principle, of a review procedure, he does not believe that the existing system is the most appropriate one for the particular ends in view. This system relies upon a committee of which the extremely broad composition, and the type of procedure followed, do not correspond very closely to those of a body entrusted with judicial, or at least quasi-judicial functions. Its competence is moreover confined to certain clearly-defined legal aspects, with the result that the judgements of the Administrative Tribunal are ultimately beyond the reach of any genuine judicial review, not only as regards their legal aspects but also as regards their factual aspects, which are often of great importance. It cannot therefore be claimed that the existing system fully safeguards both the overriding interests of the United Nations as an organization and the legitimate claims at law of its staff members.

Judge Ago takes the view that the only remedy for this situation would be the introduction of a second-tier administrative court with competence to review the decisions of the first-tier court in all their legal and factual aspects. This second-tier court could exercise jurisdiction with regard to all the existing administrative tribunals, and thus achieve the unified jurisdiction which has proved difficult to create at the lower level.

Dissenting opinion of Judge Schwebel

In dissenting from the Court's opinion, Judge Schwebel disclaimed the Court's position that its proper role in this class of case is not to substitute its own opinion on the merits for that of the Administrative Tribunal. On the contrary, the United Nations General Assembly, in investing the Court with the authority to review judgements of the Administrative Tribunal on the ground of error of law relating to provisions of the United Nations Charter, had intended that the Court should determine the merits of the case, and do so with binding force. The General Assembly had empowered the Court to act as the final authority on interpretation of the Charter and of staff regulations based thereon. One such regulation—enacted by General Assembly resolution 37/126, IV, paragraph 5—was precisely in issue in this case.

By the terms of that regulation, the Secretary-General was bound to have given Mr. Yakimetz "every reasonable consideration" for a career appointment. In fact, Mr. Yakimetz was given no such consideration. The terms of the Secretary-General's correspondence with Mr. Yakimetz demonstrate that the Secretary-General took the position at the operative time that Mr. Yakimetz's candidacy for a career appointment could not be considered because his contract "was concluded on the basis of a secondment from . . . national civil service," accordingly having "no expectancy . . . of conversion to any other type of appointment". Thus Mr. Yakimetz's name could not be forwarded " 'for reasonable consideration for career appointment' ". In Judge Schwebel's view, the inference which the Administrative Tribunal purports to find in this correspondence supporting its conclusion that the Secretary-General nevertheless did give Mr. Yakimetz's candidacy every reasonable consideration is fanciful.

Two surrounding circumstances emphasize how insupportable the Administrative Tribunal's conclusion is. First, shortly after Mr. Yakimetz resigned his positions with the Soviet Government, the Secretary-General barred him from entering United Nations premises. It is difficult to believe that, at one and the same time, during a period for all of which Mr. Yakimetz remained barred from his office and the United Nations corridors and cafeteria, he was being given every reasonable consideration for a career appointment at the end of the period which he was debarred from serving out on United Nations premises.

The second factor is that the Secretary-General failed to acknowledge, let alone act upon, the application for a permanent appointment which Mr. Yakimetz submitted on 9 January 1984, days after the expiration of his fixed-term appointment. That lack of reaction suggests that no consideration was given to his application. If there is another explanation of the Secretary-General's failure to respond, it has not been forthcoming.

The resultant errors of law are three:

1. The Secretary-General was bound to give Mr. Yakimetz's career appointment "every reasonable consideration" pursuant to a General Assembly regulation binding upon him, enacted in pursuance of the Assembly's authority providing that the staff shall be appointed "under regulations established by the General Assembly" (Art. 101, para. 1). He did not, but the Tribunal erred in finding—without factual basis—that he did. By not requiring the Secretary-General to act in accordance with a regulation, the Tribunal committed an error of law relating to a Charter provision.

2. The Administrative Tribunal indicated that "the question of his suitability as an international civil servant" was raised by Mr. Yakimetz's attempted change of nationality. It held that "essential guidance" is provided by the "widely held belief" expressed in a United Nations committee that international officials who elect "to break their ties with [their] country could no longer claim to fulfil the conditions governing employment in the United Nations". However,

Article 101, paragraph 3, of the Charter provides that the paramount consideration in the employment of staff shall be securing the highest standards of efficiency, competence and integrity. Nationality is not a Charter criterion. The Tribunal's holding that Mr. Yakimetz's attempted change of nationality put into question his suitability for continued United Nations service transgressed a Charter provision, since it invests nationality with an essentiality or paramountcy which conflicts with the terms of Article 101, paragraph 3. Beliefs expressed in United Nations committees are not sources of law; still less may they derogate from the terms of the Charter.

3. The Secretary-General acted in the apparent conviction that Mr. Yakimetz could not be considered for a career appointment in the absence of the consent of the Soviet Government, and thereby gave such consent a determinative weight. He accordingly failed to fulfil his obligation under Article 100, paragraph 1, of the Charter to "refrain from any action which might reflect" on his position as an international official "responsible only to the Organization" because, in effect, he ceded responsibility in this respect to a "government . . . or authority external to the organization". The failure of the Administrative Tribunal to assign this error constitutes an error of law relating to a Charter provision.

Dissenting opinion of Judge Sir Robert Jennings

Judge Sir Robert Jennings, in his dissenting opinion, was of the view that the question really in issue in the case was whether the Tribunal was right in holding that the Secretary-General had given every reasonable consideration to Mr. Yakimetz's application for a career appointment with the United Nations, as the Secretary-General agreed he was bound to do under General Assembly resolution 37/126, IV, paragraph 5.

As to the first question asked of the Court for its advisory opinion, Judge Jennings was content to agree, or at least not to disagree, with the majority opinion that the Tribunal had not failed to exercise its jurisdiction over whether there was any legal impediment to Mr. Yakimetz's appointment; this, however, for the reason that different views on so abstract and conceptual a problem might be held without necessary commital one way or the other to the answer to be given to the question the Court was really called upon to decide.

On the second question for the Court's opinion, which directly raised the central issue of the case, Sir Robert felt bound to dissent because, in his view, the Tribunal was wrong in finding that the Respondent had given every reasonable consideration to the question of a career appointment for Mr. Yakimetz; and this for two reasons. First, the Respondent had provided no evidence of the way in which his decision had been made, or of any reasons for it. Simply to accept his statement that proper consideration had been given, without objective evidence of its having been done, was subversive of a system of judicial control of administrative discretion. Second, such evidence as there was pointed the other way, because the Respondent's letter, of 21 December 1983, to Mr. Yakimetz simply did not allow of any supposed "plain inference" that "reasonable consideration" had been given; on the contrary it stated explicitly, though erroneously, that because Mr. Yakimetz had been on secondment by the USSR Government it was not possible to consider him for any further appointment without that Government's agreement.

In holding, therefore, that the Secretary-General had given reasonable consideration to such an appointment, the Tribunal had erred in relation to provisions of the United Nations Charter, because the General Assembly's resolution 37/126 was part of the corpus of law intended to implement the Charter provisions concerning the status and independence of the international civil service.

Dissenting opinion of Judge Evensen

In his dissenting opinion Judge Evensen agrees with the Advisory Opinion in regard to the first question addressed to the Court by the United Nations Committee on Applications. The United Nations Administrative Tribunal did not fail to exercise jurisdiction by not responding to the question whether a legal impediment existed for the further employment of Mr. Yakimetz.

In regard to the second question Judge Evensen holds the opinion that the Administrative Tribunal in its Judgement No. 333 erred on questions of law relating to the provisions of the United Nations Charter. Although the United Nations Secretary-General exercises discretionary powers in the appointment of the United Nations staff, certain criteria must be reasonably complied with. Among these conditions are those laid down in General Assembly resolution 37/126 to the effect that a staff member, upon completion of a fixed-term appointment of five years of continuing good service, shall be given "every reasonable consideration for a career appointment". Nor has sufficient attention been paid to the requirements contained in the Staff Rules and Staff Regulations to the effect that in filling vacancies the fullest regard shall be had to the qualifications and experience of the persons already in the service of the United Nations. Mr. Yakimetz had the unqualified recommendation of his superior for a career appointment.

In spite thereof Mr. Yakimetz was placed on involuntary and indefinite leave of absence. He was denied access to the premises of the United Nations including his office and the United Nations cafeteria while he was still holding a valid contract of employment.

In Judge Evensen's opinion the Administrative Tribunal erred in acquiescing in the Secretary-General's failure to apply the administrative rules and regulations binding upon him according to Article 101, paragraph 1, of the Charter. The Tribunal further erred in not finding that the administrative measures taken against Mr. Yakimetz were inconsistent with Article 100 of the Charter; and it erred under Article 101, paragraph 3, of the Charter in treating—at least where career appointments are concerned—government consent as a paramount consideration.

82. 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

The Court delivered a unanimous Advisory Opinion on the question concerning the Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947. It delivered this Advisory Opinion, after the application of an accelerated procedure, in response to a request submitted by the General Assembly of the United Nations under resolution 42/229 B, adopted on 2 March 1988.

In its decision, the Court gave its opinion that the United States of America is under an obligation, in accordance with section 21 of the United Nations Headquarters Agreement, to enter into arbitration for the settlement of a dispute between itself and the United Nations.

The Court was composed as follows: *President* Ruda; *Vice-President* Mbaye; *Judges* Lachs, Nagendra Singh, Elias, Oda, Ago, Schwebel, Sir Robert Jennings, Bedjaoui, Ni, Evensen, Tarassov, Guillaume and Shahabuddeen.

Judge Elias appended a declaration to the Advisory Opinion.

Judges Oda, Schwebel and Shahabuddeen appended separate opinions.

The General Assembly's request had arisen from the situation which had developed following the signing of the Anti-Terrorism Act adopted by the United States Congress in December 1987, a law which was specifically aimed at the Palestine Liberation Organization and *inter alia* declared illegal the establishment or maintenance of an office of the Organization within the jurisdiction of the United States. The law thus concerned in particular the office of the PLO Observer Mission to the United Nations, established in New York after the General Assembly had conferred observer status on the PLO in 1974. The maintenance of the office was held by the Secretary-General of the United Nations to fall within the ambit of the Headquarters Agreement concluded with the United States on 26 June 1947.

Alluding to reports submitted by the Secretary-General of contacts and conversations he had pursued with the United States Administration with a view to preventing the closure of the PLO office, the General Assembly put the following question to the Court:

> "In the light of facts reflected in the reports of the Secretary-General, 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, under an obligation to enter into arbitration in accordance with section 21 of the Agreement?"

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* *

Submission of the request and subsequent procedure
(paras. 1–6)

The question upon which the Court's advisory opinion had been sought was contained in resolution 42/229 B of the United Nations General Assembly, adopted on 2 March 1988. This resolution read in full as follows:

"*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?' "

In an Order dated 9 March 1988 the Court found that an early answer to the request would be desirable (Rules of Court, Art. 103), and that the United Nations and the United States of America could be considered likely to furnish information on the question (Statute, Art. 66, para. 2), and, accelerating its procedure, fixed 25 March 1988 as the time-limit for the submission of a written statement from them, or from any other State party to the Statute which desired to submit one. Written statements were received from the United Nations, the United States of America, the German Democratic Republic and the Syrian Arab Republic. At public sittings on 11 and 12 April 1988, held for the purpose of hearing the comments of any of those participants on the statements of the others, the Court heard the comments of the Legal Counsel of the United Nations and his replies to questions put by certain Members of the Court. None of the States having presented written statements expressed a desire to be heard.

The Court also had before it the documents provided by the Secretary-General in accordance with Article 65, paragraph 2, of the Statute.

Events material to the qualification of the situation (paras. 7–22)

In order to answer the question put to it, the Court had first to consider whether there existed between the United Nations and the United States a dispute as contemplated by section 21 of the Headquarters Agreement, the relevant part of which was worded as follows:

> "(*a*) 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."

For that purpose the Court set out the sequence of events which led first the Secretary-General and then the General Assembly to conclude that such a dispute existed.

The events in question centred round the Permanent Observer Mission of the Palestine Liberation Organization (PLO) to the United Nations in New York. The PLO had on 22 November 1974 been invited, by General Assembly resolution 3237 (XXIX), to "participate in the sessions and the work of the General Assembly in the capacity of observer". It had consequently established an observer mission in 1974 and maintained an office in New York City outside the United Nations Headquarters District.

In May 1987 a Bill had been introduced into the Senate of the United States, the purpose of which was "to make unlawful the establishment and maintenance within the United States of an office of the Palestine Liberation Organization"; section 3 of that Bill provided *inter alia* that it would be unlawful after its effective date:

> "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 . . ."

The text of that Bill became an amendment, presented in the Senate in the autumn of 1987, to the "Foreign Relations Authorization Act, Fiscal Years 1988 and 1989". From the terms of that amendment it appeared that the United States Government would, if the Bill became law, seek to close the office of the PLO Observer Mission. On 13 October 1987 the Secretary-General accordingly emphasized, in a letter to the United States Permanent Representative to the United Nations, that the legislation contemplated ran counter to obligations arising from the Headquarters Agreement, and the following day the PLO Observer brought the matter to the attention of the United Nations Committee on Relations with the Host Country. On 22 October a spokesman for the Secretary-General issued a statement to the effect that sections 11–13 of the Headquarters Agreement placed a treaty obligation on the United States to permit the personnel of the Mission to enter and remain in the United States in order to carry out their official functions.

The report of the Committee on Relations with the Host Country was placed before the Sixth Committee of the General Assembly on 24 November 1987. During consideration of that report 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 obligation 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".

The position taken by the 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 also cited by another representative and confirmed by the Representative of the United States.

The provisions of the amendment referred to above became incorporated into the United States "Foreign Relations Authorization Act, Fiscal Years 1988–1989" as Title X, the "Anti-Terrorism Act of 1987". At the beginning of December 1987 the amendment had not yet been adopted by Congress. On 7 December, in anticipation of such adoption, the Secretary-General reminded the Permanent Representative of the United States of his view that the United States was under a legal obligation to maintain the long-standing arrangements for the PLO Observer Mission and sought assurances that, in the event the proposed legislation became law, those arrangements would not be affected.

The House and Senate of the United States Congress adopted the Anti-Terrorism Act on 15–16 December 1987, and the following day the General Assembly adopted resolution 42/210 B whereby it called upon the host country to abide by its treaty obligations and to provide assurance that no action would be taken that would infringe on the arrangements for the official functions of the Mission.

On 22 December the Foreign Relations Authorization Act, Fiscal Years 1988–1989, was signed into law by the President of the United States. The Anti-Terrorism Act forming part thereof was, according to its own terms, to take effect 90 days later. In informing the Secretary-General of this development, the Acting Permanent Representative of the United States, on 5 January 1988, stated 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."

The Secretary-General responded, however, by observing that he had not received the assurance he had sought and did not consider that the statements of the United States enabled full respect for the Headquarters Agreement to be assumed. He went on:

> "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."

The Secretary-General then proposed that negotiations should begin in conformity with the procedure laid down in section 21.

While agreeing to informal discussions, the United States took the position that it was still evaluating the situation

which would arise from the application of the legislation and could not enter into the dispute settlement procedure of section 21. However, according to a letter written to the United States Permanent Representative by the Secretary-General on 2 February 1988:

> "The section 21 procedure is the only legal remedy available to the United Nations in this matter and . . . 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."

On 11 February 1988 the Legal Counsel of the United Nations informed the Legal Adviser of the Department of State of the United Nations' choice of its arbitrator, in the event of an arbitration under section 21, and, in view of the time constraints, urged him to inform the United Nations as soon as possible of the United States' choice. No communication in that regard was however received from the United States.

On 2 March 1988 the General Assembly adopted two resolutions on the subject. In the first, resolution 42/229 A, the Assembly, *inter alia*, reaffirmed that the PLO should be enabled to establish and maintain premises and adequate facilities for the purposes of the Observer Mission; and expressed the view that the application of the Anti-Terrorism Act in a manner inconsistent with that reaffirmation would be contrary to the international legal obligations of the United States under the Headquarters Agreement, and that the dispute-settlement procedure provided for in section 21 should be set in operation. The other resolution, 42/229 B, already cited, requested an advisory opinion of the Court. Although the United States did not participate in the vote on either resolution, its Acting Permanent Representative afterwards made a statement pointing out that his Government had made no final decision concerning the application or enforcement of the Anti-Terrorism Act with respect to the PLO Mission and that it remained its intention "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".

Material events subsequent to the submission of the request
(paras. 23–32)

The Court, while noting that the General Assembly had requested it to give its opinion "in the light of facts reflected in the reports" presented by the Secretary-General prior to 2 March 1988, did not consider in the circumstances that that form of words required it to close its eyes to relevant events subsequent to that date. It therefore took into account the following developments, which had occurred after the submission of the request.

On 11 March 1988, the United States Acting Permanent Representative informed the Secretary-General that the Attorney-General had determined that the Anti-Terrorism Act required him to close the office of the PLO Observer Mission, but that, if legal actions were needed to ensure compliance, no further actions to close it would be taken

> "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".

The Secretary-General took strong issue with that viewpoint in a letter of 15 March. Meanwhile the Attorney-General, in a letter of 11 March, had warned the Permanent Observer of the PLO that, as of 21 March, the maintenance of his Mission would be unlawful. Since the PLO Mission took no steps to comply with the requirements of the Anti-Terrorism Act, the Attorney-General sued for compliance in the District Court for the Southern District of New York. The United States' written statement informed the Court, however, that no action would be taken

> "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."

Limits of the Court's task
(para. 33)

The Court pointed out that its sole task, as defined by the question put to it, was to determine whether the United States was obliged to enter into arbitration under section 21 of the Headquarters Agreement. It had in particular not to decide whether the measures adopted by the United States in regard to the PLO Observer Mission ran counter to that Agreement.

Existence of a dispute
(paras. 34–44)

Given the terms of section 21 (*a*), quoted above, the Court was obliged to determine whether there existed a dispute between the United Nations and the United States and, if so, whether that dispute concerned the interpretation or application of the Headquarters Agreement and had not been settled by negotiation or other agreed mode of settlement.

To that end, the Court recalled that the existence of a dispute, that is to say, a disagreement on a point of law or a conflict of legal views or interests, is a matter for objective determination and cannot depend upon the mere assertions or denials of parties. In the present case, the Secretary-General was of the view, endorsed by the General Assembly, that a dispute within the meaning of section 21 existed from the moment the Anti-Terrorism Act was signed into law and in the absence of adequate assurances that the Act would not be applied to the PLO Observer Mission; he had moreover formally contested the consistency of the Act with the Headquarters Agreement. The United States had never expressly contradicted that view, but had taken measures against the Mission and indicated that they were being taken irrespective of any obligations it might have under that Agreement.

However, in the Court's view, the mere fact that a Party accused of the breach of a treaty did not advance any argument to justify its conduct under international law did not prevent the opposing attitudes of the parties from giving rise to a dispute concerning the treaty's interpretation or application. Nonetheless, the United States had during consultations in January 1988 stated that it "had not yet concluded that a dispute existed" between it and the United Nations, "because the legislation in question had not yet been implemented", and had subsequently, while referring to "the current dispute over the status of the PLO Observer Mission", expressed the view that arbitration would be premature. After litigation had been initiated in the domestic courts, its written statement had informed the Court of its belief that arbitration would not be "appropriate or timely".

The Court could not allow considerations as to what might be "appropriate" to prevail over the obligations which derived from section 21. Moreover, the purpose of the arbitration procedure thereunder was precisely the settlement of disputes between the United Nations and the host country without any prior recourse to municipal courts. Neither could the Court accept that the undertaking not to take any other action to close the Mission before the decision of the domestic court had prevented a dispute from arising.

The Court deemed that the chief, if not the sole, objective of the Anti-Terrorism Act was the closure of the office of the PLO Observer Mission and noted that the Attorney-General considered himself under an obligation to take steps for that closure. The Secretary-General had consistently challenged the decisions first contemplated and then taken by the United States Congress and Administration. That being so, the Court was obliged to find that the opposing attitudes of the United Nations and the United States showed the existence of a dispute, whatever the date on which it might be deemed to have arisen.

Qualification of the dispute
(paras. 46–50)

As to whether the dispute concerned the interpretation or application of the Headquarters Agreement, the United Nations had drawn attention to the fact that the PLO had been invited to participate in the sessions and work of the General Assembly as an observer; hence the PLO Mission was covered by the provisions of sections 11–13 and should be enabled to establish and maintain premises and adequate functional facilities. In the United Nations' view, the measures envisaged by Congress and eventually taken by the United States Administration would thus be incompatible with the Agreement if applied to the Mission, and their adoption had accordingly given rise to a dispute with regard to the interpretation and application of the Agreement.

Following the adoption of the Anti-Terrorism Act, the United States had first contemplated interpreting it in a manner compatible with its obligations under the Agreement, but on 11 March its Acting Permanent Representative had informed the Secretary-General of the Attorney-General's conclusion that the Act required him to close the Mission irrespective of any such obligations. The Secretary-General had disputed that view on the basis of the principle that international law prevailed over domestic law. Accordingly, although in a first stage the discussions had related to the interpretation of the Agreement and, in that context, the United States had not disputed that certain of its provisions applied to the PLO Observer Mission, in a second stage the United States had given precedence to the Act over the Agreement, and that had been challenged by the Secretary-General.

Furthermore, the United States had taken a number of measures against the PLO Observer Mission. Those had been regarded by the Secretary-General as contrary to the Agreement. Without disputing that point, the United States had stated that the measures in question had been taken "irrespective of any obligations the United States may have under the Agreement". Those two positions were irreconcilable; thus there existed a dispute between the United Nations and the United States concerning the application of the Headquarters Agreement.

The question might be raised as to whether in United States domestic law the Anti-Terrorism Act could only be regarded as having received effective application when or if, on completion of the proceedings before the domestic courts, the Mission was in fact closed. That was however not decisive in regard to section 21, which concerned the application of the Agreement itself, not of the measures taken within the municipal laws of the United States.

Condition of non-settlement by other agreed means
(paras. 51–56)

The Court then considered whether the dispute was one "not settled by negotiation or other agreed mode of settlement", in the terms of section 21 (*a*). The Secretary-General had not only invoked the dispute-settlement procedure but also noted that negotiations must first be tried, and had proposed that they begin on 20 January 1988. Indeed consultations had already started on 7 January and were to continue until 10 February. Moreover on 2 March the Acting Permanent Representative of the United States had stated in the General Assembly that his Government had been in regular and frequent contact with the United Nations Secretariat "concerning an appropriate resolution of this matter". The Secretary-General had recognized that the United States did not consider those contacts and consultations to lie formally within the framework of section 21 and had noted that the United States was taking the position that, pending evaluation of the situation which would arise from application of the Anti-Terrorism Act, it could not enter into the dispute settlement procedure outlined in section 21.

The Court found that, taking into account the United States' attitude, the Secretary-General had in the circumstances exhausted such possibilities of negotiation as were open to him, nor had any "other agreed mode of settlement" been contemplated by the United Nations and the United States. In particular, the current proceedings before the United States courts could not constitute an "agreed method of settlement" within the meaning of section 21, considering that their purpose was the enforcement of the Anti-Terrorism Act and not the settlement of the dispute concerning the application of the Agreement. Furthermore, the United Nations had never agreed to a settlement in the domestic courts.

Conclusion
(paras. 57–58)

The Court had therefore to conclude that the United States was bound to respect the obligation to enter into arbitration. That conclusion would remain intact even if it were necessary to interpret the statement that the measures against the Mission were taken "irrespective of any obligations" of the United States under the Headquarters Agreement as intended to refer not only to any substantive obligations under sections 11–13 but also to the obligation to arbitrate provided for in section 21. It was sufficient to recall the fundamental principle of international law that international law prevailed over domestic law, a principle long endorsed by judicial decisions.

For those reasons, the Court was unanimously 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".

*
* *

Judge Elias appended to the Advisory Opinion a declaration expressing the view that the dispute already came into being when the Congress of the United States passed the Anti-Terrorism Act, signed on 22 December 1987, and adding that the purpose of the Secretary-General could only be achieved if Congress adopted further legislation to amend the Act.

Judge Oda appended a separate opinion stressing that little difference of views subsisted between the United Nations and the United States as to the interpretation of the substantive provisions of the Headquarters Agreement affecting the PLO Observer Mission, and that, where application of the Agreement was concerned, both sides agreed that any forced closure of the Mission's office would conflict with the international obligations of the United States. The issue was rather as to what course of action within the domestic legal structure would be tantamount to such forced closure, and the consultations that had been undertaken had been concerned with the applicability not so much of the relevant substantive provisions of the Agreement (sections 11–13) as of the compromissory clause (section 21) itself. The crux of the matter was the question whether a domestic legislation had power to override treaties, an issue which the Court had not been called upon to address. That being so, the General Assembly had not presented the Court with the question which it would have been the most useful for it to answer if the Assembly's underlying concern was to be met.

Judge Schwebel maintained in a separate opinion that, while the Court's essential conclusion was tenable, the question posed admitted of more than one answer. He agreed that it was axiomatic that a State could not avoid its international legal obligations by the enactment of domestic legislation; that a party to an arbitration clause could not avoid its arbitral obligations by denying the existence of a dispute or by asserting that its arbitration would serve no useful purpose; and that international arbitral clauses do not require for their implementation the prior exhaustion of local remedies. However, as to the interpretation of the Headquarters Agreement, it was clear in the current case that there was no difference of interpretation between the United Nations and the United States; in the Secretary-General's term, their interpretation "coincided". The real issue was whether a dispute had already arisen over the application of the Agreement, or would only arise if and when the Anti-Terrorism Act were effectively applied to the PLO's Observer Mission. The Secretary-General had repeatedly taken the position that a dispute would arise only if the United States failed to give assurances that current arrangements for the PLO Mission would be "maintained" and application to it of the Act would be "deferred". The United States had given assurances that no action would be taken to close the Mission pending a decision in current litigation in U.S. courts. It was not clear why such assurances were not sufficient for the time being. Should the Act be effectively applied, a dispute would then arise triggering the U.S. obligation to arbitrate; should the Act be held by U.S. courts not to apply to the PLO's New York City office, there would be no dispute. However, it could be reasonably maintained, as the U.N. Legal Counsel had, that a U.S. court ruling against applying the Act to the PLO would not mean that a dispute had never existed but merely would put an end to the dispute, a consideration which had led Judge Schwebel to vote for the Court's Opinion.

Judge Shahabuddeen appended a separate opinion expressing the view that the central issue was whether a dispute existed at the date of the request for an advisory opinion and noting that the Court had not determined the stage at which a dispute had come into existence. In his view, the giving of assent to the Anti-Terrorism Act on 22 December 1987 had automatically brought the competing interests of the parties to the Headquarters Agreement into collision and precipitated a dispute. As to any suggestion that no dispute could exist before the Agreement had been breached by enforced closure of the PLO office, Judge Shahabuddeen denied for various reasons that such actual breach formed a precondition of that kind but, even if it did, the position of the United Nations could be construed as connoting a claim that the very enactment of the law in question, whether in itself or taken in conjunction with steps taken in pursuance of it, interfered with the United Nations' right under the Agreement to ensure that its permanent invitees were able to function out of established offices without needless interference; such a claim was not so unarguable as to be incapable of giving rise to a real dispute. The parties agreed that enforced closure of the PLO office would consitute a breach of the Agreement, but did not agree as to whether the Act was in itself creative of a current violation. Accordingly there in fact existed a dispute concerning the interpretation of the Agreement as well as its application.

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83. CASE CONCERNING BORDER AND TRANSBORDER ARMED ACTIONS (NICARAGUA V. HONDURAS) (JURISDICTION AND ADMISSIBILITY)

Judgment of 20 December 1988

In this judgment, delivered in the case concerning *Border and Transborder Armed Actions* (*Nicaragua v. Honduras*), the Court found, unanimously, that it had jurisdiction to entertain the Application filed by Nicaragua and, unanimously, that that Application was admissible.

* * *

The complete text of the *operative* clause of the Judgment is as follows:

"THE COURT,

"(1) Unanimously,

"*Finds* that it has jurisdiction under Article XXXI of the Pact of Bogotá to entertain the Application filed by the Government of the Republic of Nicaragua on 28 July 1986;

"(2) Unanimously,

"*Finds* that the Application of Nicaragua is admissible."

* * *

The Court was composed as follows: *President* Ruda; *Vice-President* Mbaye; *Judges* Lachs, Elias, Oda, Ago, Schwebel, Sir Robert Jennings, Bedjaoui, Ni, Evensen, Tarassov, Guillaume and Shahabuddeen.

Judge Nagendra Singh, who died unexpectedly on 11

December 1988 had participated fully in the case up to the date of his death.

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* *

Judge Lachs appended a declaration, and Judges Oda, Schwebel and Shahabuddeen appended separate opinions to the Judgment.

In these opinions the Judges concerned stated and explained the position they adopted in regard to certain points dealt with in the Judgment.

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* *

Proceedings and Submissions of the Parties
(paras. 1–15)

The Court begins by recapitulating the various stages in the proceedings, recalling that the present case concerns a dispute between Nicaragua and Honduras regarding the alleged activities of armed bands, said to be operating from Honduras, on the border between Honduras and Nicaragua and in Nicaraguan territory. At the suggestion of Honduras, agreed to by Nicaragua, the present phase of the proceedings is devoted, in accordance with an Order made by the Court on 22 October 1986, solely to the issues of the jurisdiction of the Court and the admissibility of the Application.

Burden of Proof
(para. 16)

I. *The Question of the Jurisdiction of the Court to Entertain the Dispute*
(paras. 17–48)

A. *The two titles of jurisdiction relied on*
(paras. 17–27)

Nicaragua refers, as the basis of the jurisdiction of the Court, to

> "the provisions of Article XXXI of the Pact of Bogotá and to the Declarations made by the Republic of Nicaragua and by the Republic of Honduras respectively, accepting the jurisdiction of the Court as provided for in Article 36, paragraphs 1 and 2, respectively of the Statute"

Article XXXI of the Pact of Bogotá provides as follows:

> "In conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice, the High Contracting Parties declare that they recognize, in relation to any other American State, the jurisdiction of the Court as compulsory *ipso facto*, without the necessity of any special agreement so long as the present Treaty is in force, in all disputes of a juridical nature that arise among them concerning:
>
> "(*a*) the interpretation of a treaty;
>
> "(*b*) any question of international law;
>
> "(*c*) the existence of any fact which, if established, would constitute the breach of an international obligation;
>
> "(*d*) the nature or extent of the reparation to be made for the breach of an international obligation."

The other basis of jurisdiction relied on by Nicaragua is constituted by the declarations of acceptance of compulsory jurisdiction made by the Parties under Article 36 of the Statute of the Court. Nicaragua claims to be entitled to found jurisdiction on a Honduran Declaration of 20 February 1960, while Honduras asserts that that Declaration has been modified by a subsequent Declaration, made on 22 May 1986 and deposited with the Secretary-General of the United Nations prior to the filing of the Application by Nicaragua.

Since in relations between the States parties to the Pact of Bogotá, that Pact is governing, the Court first examines the question whether it has jurisdiction under Article XXXI of the Pact.

B. *The Pact of Bogotá*
(paras. 28–47)

Honduras maintains in its Memorial that the Pact "does not provide any basis for the jurisdiction of the . . . Court" and puts forward two series of arguments in support of that statement.

(i) *Article XXXI of the Pact of Bogotá*
(paras. 29–41)

First, its interpretation of Article XXXI of the Pact is that, for a State party to the Pact which has made a declaration under Article 36, paragraph 2, of the Statute, the extent of the jurisdiction of the Court under Article XXXI of the Pact is determined by that declaration, and by any reservations appended to it. It also maintains that any modification or withdrawal of such a declaration which is valid under Article 36, paragraph 2, of the Statute is equally effective under Article XXXI of the Pact. Honduras has, however, given two successive interpretations of Article XXXI, claiming initially that to afford jurisdiction it must be supplemented by a declaration of acceptance of compulsory jurisdiction and subsequently that it can be so supplemented but need not be.

The Court considers that the first interpretation advanced by Honduras—that Article XXXI must be supplemented by a declaration—is incompatible with the actual terms of the Article. As regards the second Honduran interpretation, the Court notes the two readings of Article XXXI proposed by the Parties: as a treaty provision conferring jurisdiction in accordance with Article 36, paragraph 1, of the Statute or as a collective declaration of acceptance of compulsory jurisdiction under paragraph 2 of that Article. Even on the latter interpretation, however, the declaration, having been incorporated into the Pact of Bogotá, can only be modified in accordance with the rules provided for in the Pact itself. However, Article XXXI nowhere envisages that the undertaking entered into by the parties to the Pact might be amended by means of a unilateral declaration made subsequently under the Statute, and the reference to Article 36, paragraph 2, of the Statute is insufficient in itself to have that effect.

The fact that the Pact defines with precision the obligations of the parties lends particular significance to the absence of any indication of that kind. The commitment in Article XXXI applies *ratione materiae* to the disputes enumerated in that text; it relates *ratione personae* to the American States parties to the Pact; it remains valid *ratione temporis* for as long as that instrument itself remains in force between those States. Moreover, some provisions of the Treaty (Arts. V, VI and VII) restrict the scope of the parties' commitment. The commitment in Article XXXI can only be limited by means of reservations to the Pact itself, under Article LV thereof. It is an autonomous commitment, independent of any other which the parties may have undertaken or may undertake by depositing with the United Nations Secretary-General a dec-

laration of acceptance of compulsory jurisdiction under Article 36, paragraphs 2 and 4, of the Statute.

Further confirmation of the Court's reading of Article XXXI is to be found in the *travaux préparatoires* of the Bogotá Conference. The text which was to become Article XXXI was discussed at the meeting of the Committee III of the Conference held on 27 April 1948. It was there accepted that, in their relations with the other parties to the Pact, States which wished to maintain reservations included in a declaration of acceptance of compulsory jurisdiction would have to reformulate them as reservations to the Pact. That solution was not contested in the plenary session, and Article XXXI was adopted by the Conference without any amendments on the point. That interpretation, moreover, corresponds to the practice of the parties to the Pact since 1948. They have not, at any time, linked together Article XXXI and the declarations of acceptance of compulsory jurisdiction made under Article 36, paragraphs 2 and 4, of the Statute.

Under these circumstances, the Court has to conclude that the commitment in Article XXXI of the Pact is independent of such declarations of acceptance of compulsory jurisdiction as may have been made under Article 36, paragraph 2, of the Statute. The Honduran argument as to the effect of the reservation to its 1986 Declaration on its commitment under Article XXXI of the Pact therefore cannot be accepted.

(ii) *Article XXXII of the Pact of Bogotá*
(paras. 42–47)

The second objection of Honduras to jurisdiction is based on Article XXXII of the Pact of Bogotá, which reads as follows:

> "When the conciliation procedure previously established in the present Treaty or by agreement of the parties does not lead to a solution, and the said parties have not agreed upon an arbitral procedure, either of them shall be entitled to have recourse to the International Court of Justice in the manner prescribed in Article 40 of the Statute thereof. The Court shall have compulsory jurisdiction in accordance with Article 36, paragraph 1, of the said Statute."

It is the contention of Honduras that Article XXXI and XXXII must be read together. The first is said to define the extent of the Court's jurisdiction and the second to determine the conditions under which the Court may be seised. According to Honduras it follows that the Court could only be seised under Article XXXI if, in accordance with Article XXXII, there had been a prior recourse to conciliation and lack of agreement to arbitrate, which is not the situation in the present case. Nicaragua on the other hand contends that Article XXXI and Article XXXII are two autonomous provisions, each of which confers jurisdiction upon the Court in the cases for which it provides.

Honduras's interpretation of Article XXXII runs counter to the terms of that Article. Article XXXII makes no reference to Article XXXI; under that text the parties have, in general terms, an entitlement to have recourse to the Court in cases where there has been an unsuccessful conciliation. It is, moreover, quite clear from the Pact that the purpose of the American States in drafting it was to reinforce their mutual commitments with regard to judicial settlement. This is also confirmed by the *travaux préparatoires* of the Bogotá Conference: the Sub-Committee which had prepared the draft took the position "that the principal procedure for the peaceful settlement of conflicts between the American States had to be judicial procedure before the International Court of Justice". Honduras's interpretation would however imply that the commitment, at first sight firm and unconditional, set forth in Article XXXI would, in fact, be emptied of all content if, for any reason, the dispute were not subjected to prior conciliation. Such a solution would be clearly contrary to both the object and the purpose of the Pact. In short, Articles XXXI and XXXII provide for two distinct ways by which access may be had to the Court. The first relates to cases in which the Court can be seised directly and the second to those in which the parties initially resort to conciliation. In the present case, Nicaragua has relied upon Article XXXI, not Article XXXII.

C. *Finding*
(para. 48)

Article XXXI of the Pact of Bogotá thus confers jurisdiction upon the Court to entertain the dispute submitted to it. For that reason, the Court does not need to consider whether it might have jurisdiction by virtue of the declarations of acceptance of compulsory jurisdiction by Nicaragua and Honduras referred to above.

II. *The Question of the Admissibility of Nicaragua's Application*
(paras. 49–95)

Four objections have been raised by Honduras to the admissibility of the Nicaraguan Application, two of which are general in nature and the remaining two presented on the basis of the Pact of Bogotá.

The *first ground of inadmissibility* (paras. 51–54) put forward is that the Application "is a politically inspired, artificial request which the Court should not entertain consistently with its judicial character". As regards the alleged political inspiration of the proceedings the Court observes that it cannot concern itself with the political motivation which may lead a State at a particular time, or in particular circumstances, to choose judicial settlement. As to Honduras's view that the overall result of Nicaragua's action is "an artificial and arbitrary dividing up of the general conflict existing in Central America", the Court recalls that, while there is no doubt that the issues of which the Court has been seised may be regarded as part of a wider regional problem, "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", as the Court observed in the case concerning *United States Diplomatic and Consular Staff in Teheran* (*I.C.J. Reports 1980*, p. 19, para. 36).

The *second ground of inadmissibility* (paras. 55–56) put forward by Honduras is that "the Application is vague and the allegations contained in it are not properly particularized". The Court finds in this respect that the Nicaraguan Application in the present case meets the requirements of the Statute and Rules of Court, that an Application indicate "the subject of the dispute", specify "the precise nature of the claim", and in support thereof give no more than "a succinct statement of the facts and grounds on which the claim is based.

Accordingly none of these objections of a general nature to admissibility can be accepted.

The *third ground of inadmissibility* (paras. 59–76) put forward by Honduras is based upon Article II of the Pact of Bogotá which reads:

> "The High contracting Parties recognize the obligation to settle international controversies by regional pacific

procedures before referring them to the Security Council of the United Nations.

"Consequently, in the event that a controversy arises between two or more signatory States which, in the opinion of the parties [in the French text "de l'avis de l'une des parties"], cannot be settled by direct negotiations through the usual diplomatic channels, the parties bind themselves to use the procedures established in the present Treaty, in the manner and under the conditions provided for in the following articles, or, alternatively, such special procedures as, in their opinion, will permit them to arrive at a solution."

The submission of Honduras on the application of Article II is as follows:

"Nicaragua has failed to show that, in the opinion of the Parties, the dispute cannot be settled by direct negotiations, and thus Nicaragua fails to satisfy an essential precondition to the use of the procedure established by the Pact of Bogotá, which include reference of disputes to the International Court of Justice."

The contention of Honduras is that the precondition to recourse to the procedures established by the Pact is not merely that both parties should hold the opinion that the dispute could not be settled by negotiation, but that they should have "manifested" that opinion.

The Court notes a discrepancy between the four texts (English, French, Portuguese and Spanish) of Article II of the Pact, the reference in the French text being to the opinion of *one* of the parties. The Court proceeds on the hypothesis that the stricter interpretation should be used, i.e., that it would be necessary to consider whether the "opinion" of both Parties was that it was not possible to settle the dispute by negotiation. For this purpose the Court does not consider that it is bound by the mere assertion of the one Party or the other that its opinion is to a particular effect: it must, in the exercise of its judicial function, be free to make its own determination of that question on the basis of such evidence as is available to it.

The critical date for determining the admissibility of an application is the date on which it is filed (cf. *South West Africa, Preliminary Objections, I.C.J. Reports 1962*, p. 344), and in this case is thus 28 July 1986.

To ascertain the opinion of the Parties, the Court is bound to analyse the sequence of events in their diplomatic relations; it first finds that in 1981 and 1982 the Parties had engaged in bilateral exchanges at various levels including that of the Heads of States. Broadly speaking, Nicaragua sought a bilateral understanding while Honduras increasingly emphasized the regional dimension of the problem and held out for a multilateral approach, eventually producing a plan of internationalization which led to abortive Nicaraguan counter-proposals. The Court then examines the development of what has become known as the Contadora process; it notes that a draft of a "Contadora Act for Peace and Cooperation in Central America" was presented by the Contadora Group to the Central American States on 12–13 September 1985. None of the Central American States fully accepted the draft, but negotiations continued, to break down in June 1986.

The Court has to ascertain the nature of the procedure followed, and ascertain whether the negotiations in the context of the Contadora process could be regarded as direct negotiations through the usual diplomatic channels within the meaning of Article II of the Pact. While there were extensive consultations and negotiations between 1983 and 1986, in different forms, both among the Central American States themselves and between those States and those belonging to the Contadora Group, these were organized and carried on within the context of mediation to which they were subordinate. At this time, the Contadora process was primarily a mediation, in which third States, on their own initiative, endeavoured to bring together the viewpoints of the States concerned by making specific proposals to them. That process, therefore, which Honduras had accepted, was as a result of the presence and action of third States, markedly different from a "direct negotiation through the usual diplomatic channels". It thus did not fall within the relevant provisions of Article II of the Pact of Bogotá. Furthermore, no other negotiation which would meet the conditions laid down in that text was contemplated on 28 July 1986, the date of filing of the Nicaraguan Application. Consequently Honduras could not plausibly maintain at that date that the dispute between itself and Nicaragua, as defined in the Nicaraguan Application, was at that time capable of being settled by direct negotiation through the usual diplomatic channels.

The Court therefore considers that the provisions of Article II of the Pact of Bogotá relied on by Honduras do not constitute a bar to the admissibility of Nicaragua's Application.

The *fourth ground of inadmissibility* (paras. 77–94) put forward by Honduras is that:

"Having accepted the Contadora process as a 'special procedure' within the meaning of Article II of the Pact of Bogotá, Nicaragua is precluded both by Article IV of the Pact and by elementary considerations of good faith from commencing any other procedure for pacific settlement until such time as the Contadora process has been concluded; and that time has not arrived."

Article IV of the Pact of Bogotá, upon which Honduras relies, reads as follows:

"Once any pacific procedure has been initiated, whether by agreement between the parties or in fulfillment of the present Treaty or a previous pact, no other procedure may be commenced until that procedure is concluded."

It is common ground between the Parties that the present proceedings before the Court are a "pacific procedure" as contemplated by the Pact of Bogotá, and that therefore if any other "pacific procedure" under the Pact has been initiated and not concluded, the proceedings were instituted contrary to Article IV and must therefore be found inadmissible. The disagreement between the Parties is whether the Contadora process is or is not a procedure contemplated by Article IV.

It is clear that the question whether or not the Contadora process can be regarded as a "special procedure" or a "pacific procedure" within the meaning of Articles II and IV of the Pact would not have to be determined if such a procedure had to be regarded as "concluded" by 28 July 1988, the date of filing of the Nicaraguan Application.

For the purposes of Article IV of the Pact, no formal act is necessary before a pacific procedure can be said to be "concluded". The procedure in question does not have to have failed definitively before a new procedure can be commenced. It is sufficient if, at the date on which a new procedure is commenced, the initial procedure has come to a standstill in such circumstances that there appears to be no prospect of its being continued or resumed.

In order to decide this issue in the present case, the Court resumes its survey of the Contadora process. It considers that from this survey it is clear that the Contadora process was at a standstill at the date on which Nicaragua filed its Application. This situation continued until the presentation in February 1987 of the Arías Plan and the adoption by the five Central American States of the Esquipulas II Accord, which in

August 1987 set in train the procedure frequently referred to as Contadora-Esquipulas II.

The question therefore arises whether this latter procedure should be regarded as having ensured the continuation of the Contadora process without interruption, or whether on 28 July 1986 that process should be regarded as having "concluded" for the purposes of Article IV of the Pact of Bogotá, and a process of a different nature as having got under way thereafter. This question is of crucial importance, since on the latter hypothesis, whatever may have been the nature of the initial Contadora process with regard to Article IV, that Article would not have constituted a bar to the commencement of a procedure before the Court on that date.

After noting the views expressed by the Parties as to the continuity of the Contadora process, which however could not be seen as a concordance of views as to the interpretation of the term "concluded", the Court finds that the Contadora process, as it operated in the first phase, is different from the Contadora-Esquipulas II process initiated in the second phase. The two differ with regard both to their object and to their nature. The Contadora process initially constituted a mediation in which the Contadora Group and Support Group played a decisive part. In the Contadora-Esquipulas II process, on the other hand, the Contadora Group of States played a fundamentally different role. The five countries of Central America set up an independent mechanism of multilateral negotiation, in which the role of the Contadora Group was confined to the tasks laid down in the Esquipulas II Declaration, and has effectively shrunk still further subsequently. Moreover, it should not be overlooked that there was the gap of several months between the end of the initial Contadora process and the beginning of the Contadora-Esquipulas II process; and it was during this gap that Nicaragua filed its Application to the Court.

The Court concludes that the procedures employed in the Contadora process up to 28 July 1986, the date of filing of the Nicaraguan Application, had been "concluded", within the meaning of Article IV of the Pact of Bogotá, at that date. That being so, the submissions of Honduras based on Article IV of the Pact must be rejected, and it is unnecessary for the Court to determine whether the Contadora process was a "special procedure" or a "pacific procedure" for the purpose of Articles II and IV of the Pact and whether that procedure had the same object as that now in progress before the Court.

The Court has also to deal with the contention, made in the fourth submission of Honduras on the admissibility of the Application, that Nicaragua is precluded also "by elementary considerations of good faith" from commencing any other procedure for pacific settlement until such time as the Contadora process has been concluded. In this respect, the Court considers that the events of June/July 1986 constituted a "conclusion" of the initial procedure both for purposes of Article IV of the Pact and in relation to any other obligation to exhaust that procedure which might have existed independently of the Pact.

In conclusion the Court notes, by reference in particular to the terms of the Preamble to successive drafts of the Contadora Act, that the Contadora Group did not claim any exclusive role for the process it set in train.

SUMMARY OF THE DECLARATION AND OPINIONS APPENDED TO THE JUDGMENT OF THE COURT

Declaration of Judge Lachs

Judge Lachs in his declaration emphasizes the importance of procedural decisions, and points out that in the present case the Parties retain their freedom of action, and full possibilities of fiding solutions.

Separate Opinion of Judge Oda

Judge Oda has voted in favour of the Court's Judgment but with some reluctance. He suggests that, in view of the context of the Pact of Bogotá, an alternative interpretation, to the effect that Articles XXXI and XXXII are essentially interrelated and that the conciliation procedure provided for in Article XXXII is a prerequisite to judicial recourse, may also be tenable. The difficulty in confidently interpreting the Pact flows from the ambiguous terms in which it was drafted.

Judge Oda, in the light of the background to the 1948 Bogotá Conference and of the *travaux préparatoires*, shows that the American States which participated in the Bogotá Conference had no demonstrable intention of making the Pact into an instrument which would confer jurisdiction upon the Court in accordance with Article 36, paragraph 1, of the Statute, or would comprise a collective declaration of acceptance of compulsory jurisdiction under paragraph 2 of that Article.

In conclusion, Judge Oda emphasizes the paramount importance of the intention of the Parties to accept the Court's jurisdiction, which is invariably required for it to entertain a case, and expresses his doubt as to whether the Court has given this particular point all the weight due to it.

Separate Opinion of Judge Schwebel

Judge Schwebel states that his most substantial reservations about the Judgment flow from the Court's treatment of the problem of the "serial" nature of applications brought by Nicaragua in three inter-related cases, that against the United States in 1984 and those against Honduras and Costa Rica in 1986.

In 1984, Nicaragua maintained that it made "no claim of illegal conduct by any State other than the United States" and that it sought "no relief . . . from any other State". Nevertheless, in 1984, it made grave accusations not only against the United States, but against Honduras, Costa Rica and El Salvador. For its part, the United States, which claimed to be acting in collective self-defence of those three States, maintained that they were indispensable parties in whose absence the Court should not proceed.

The Court had rejected that contention, and also rejected, inconsistently with the Statute and Rules of Court, the request for intervention of El Salvador. Honduras and Costa Rica showed no disposition to intervene and could not have been encouraged to do so by the Court's treatment of El Salvador. Nevertheless, Nicaragua, which made such serious charges against them, could have required Honduras and Costa Rica to be defendants in Court since in 1984 they both adhered unreservedly to the Court's compulsory jurisdiction. It did not.

Promptly after Judgment came down against the United States on 27 June 1986, Nicaragua discovered after all, contrary to its 1984 pleadings, that it did have legal claims against Honduras and Costa Rica. If the current case should reach the stage of the merits, it is to be expected that Nicaragua will invoke against Honduras, as it already has, the factual and legal findings of the Court's Judgment of 27 June 1986.

In response, the Court, while rejecting the consequent objections of Honduras, rightly emphasized that,

"In any event, it is for the Parties to establish the facts in

the present case taking account of the usual rules of evidence, without it being possible to rely on considerations of *res judicata* in another case not involving the same Parties (see Art. 59 of the Statute)."

It follows that if, at the stage of the merits, a Party to the instant case should endeavour to rely on findings of fact of the Judgment of 27 June 1986, the Court will not accept such reliance. While this is no more than what Article 59 requires, it is important that the Court says it and still more important that it gives effect to what it says.

In Judge Schwebel's view, it is important for an extraordinary reason. To apply certain of the findings of fact of the Court's Judgment of 27 June 1986 to the current case would be the more prejudicial because certain of those findings do not correspond to the facts. And to apply certain of the Court's conclusions of law in that case to this case would be no less prejudicial because certain of those conclusions are in error.

Separate Opinion of Judge Shahabuddeen

Judge Shahabuddeen considers that the Judgment of the Court (with which he agrees) could be strengthened on three points relating to jurisdiction and on two relating to admissibility. He also thinks that these aspects admit of more specific treatment and of some account being taken of the regional literature cited by both sides.

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84. CASE CONCERNING ELETTRONICA SICULA S.P.A. (ELSI)

Judgment of 20 July 1989

In its judgment, the Chamber of the Court formed to deal with the case concerning Elettronica Sicula S.p.A. (ELSI) rejected an Italian objection to the admissibility of the Application and found that Italy had not committed any of the breaches, alleged by the United States, of the Treaty of Friendship, Commerce and Navigation between the Parties signed at Rome on 2 February 1989 or the Agreement Supplementing that Treaty. It accordingly rejected the claim to reparation made by the United States.

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The Chamber was composed as follows: *President* Ruda; *Judges* Oda, Ago, Schwebel and Sir Robert Jennings.

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The complete text of the *operative* clause of the Judgment is as follows:

"THE CHAMBER,

"(1) Unanimously,

"*Rejects* the objection presented by the Italian Republic to the admissibility of the Application filed in this case by the United States of America on 6 February 1987;

"(2) By four votes to one,

"*Finds* that the Italian Republic has not committed any of the breaches, alleged in the said Application, of the Treaty of Friendship, Commerce and Navigation between the Parties signed at Rome on 2 February 1948, or of the Agreement Supplementing that Treaty signed by the Parties at Washington on 26 September 1951.

"IN FAVOUR: *President* Ruda; *Judges* Oda, Ago and Sir Robert Jennings.

"AGAINST: *Judge* Schwebel.

"(3) By four votes to one,

"*Rejects*, accordingly, the claim for reparation made against the Republic of Italy by the United States of America.

"IN FAVOUR: *President* Ruda; *Judges* Oda, Ago and Sir Robert Jennings.

"AGAINST: *Judge* Schwebel."

*
* *

Judge Oda appended a separate opinion and Judge Schwebel a dissenting opinion to the Judgment.

In these opinions the Judges concerned stated and explained the positions they adopted in regard to certain points dealt with in the Judgment.

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Proceedings and Submissions of the Parties
(paras. 1–12)

The Chamber begins by recapitulating the various stages of the proceedings, recalling that the present case concerns a dispute in which the United States of America claims that Italy, by its actions with respect to an Italian company, *Elettronica Sicula S.p.A. (ELSI)*, which was wholly owned by two United States corporations, the Raytheon Company ("Raytheon") and the Machlett Laboratories Incorporated ("Machlett"), has violated certain provisions of the Treaty of Friendship, Commerce and Navigation between the two Parties, concluded in Rome on 2 February 1948 ("the FCN Treaty") and the Supplementary Agreement thereto concluded on 26 September 1951.

Origins and development of the dispute
(paras. 13–45)

In 1967, Raytheon held 99.16% of the shares in ELSI, the remaining 0.84% being held by Machlett, which was a wholly owned subsidiary of Raytheon. ELSI was established in Palermo, Sicily, where it had a plant for the production of electronic components; in 1967 it had a workforce of slightly under 900 employees. Its five major product lines were microwave tubes, cathode-ray tubes, semiconductor rectifiers, X-ray tubes and surge arresters.

From 1964 to 1966 ELSI made an operating profit, but this was insufficient to offset its debt expense or accumulated losses. In February 1967, according to the United States, Raytheon began taking steps to endeavour to make ELSI self-sufficient.

At the same time numerous meetings were held between February 1967 and March 1968 with Italian officials and companies, the purpose of which was stated to be to find for ELSI an Italian partner with economic power and influence and to explore the possibilities of other governmental support.

When it became apparent that these discussions were unlikely to lead to a mutually satisfactory arrangement, Raytheon and Machlett, as shareholders in ELSI, began seriously to plan to close and liquidate ELSI to minimize their losses. An asset analysis was prepared by the Chief Financial Officer of Raytheon showing the expected position on 31 March 1968. This showed the book value of ELSI's assets as 18,640 million lire; as explained in his affidavit filed in these proceedings, it also showed "the minimum prospects of recovery of values which we could be sure of, in order to ensure an orderly liquidation process", and the total realizable value of the assets on this basis (the "quick-sale value") was calculated to be 10,838.8 million lire. The total debt of the company at 30 September 1967 was 13,123.9 million lire. The "orderly liquidation" contemplated was an operation for the sale of ELSI's business or its assets, en bloc or separately, and the discharge of its debts, fully or otherwise, out of the proceeds, the whole operation being under the control of ELSI's own management. It was contemplated that all creditors would be paid in full, or, if only the "quick-sale value" was realized, the unsecured major creditors would receive about 50 per cent of their claims, and that this would be acceptable as more favourable than what could be expected in a bankruptcy.

On 28 March 1968, it was decided that the Company cease operations. Meetings with Italian officials however continued, at which the Italian authority rigorously pressed ELSI not to close the plant and not to dismiss the workforce. On 29 March 1968 letters of dismissal were mailed to the employees of ELSI.

On 1 April 1968 the Mayor of Palermo issued an order, effective immediately, requisitioning ELSI's plant and related assets for a period of six months.

The Parties disagree over whether, immediately prior to the requisition order, there had been any occupation of ELSI's plant by the employees, but it is common ground that the plant was so occupied during the period immediately following the requisition.

On 19 April 1968 ELSI brought an administrative appeal against the requisition to the Prefect of Palermo.

A bankruptcy petition was filed by ELSI on 26 April 1968, referring to the requisition as the reason why the company had lost control of the plant and could not avail itself of an immediate source of liquid funds, and mentioning payments which had become due and could not be met. A decree of bankruptcy was issued by the *Tribunale di Palermo* on 16 May 1968.

The administrative appeal filed by ELSI against the requisition order was determined by the Prefect of Palermo by a decision given on 22 August 1969, by which he annulled the requisition order. The Parties are at issue on the question whether this period of time was or was not normal for an appeal of this character.

In the meantime, on 16 June 1970 the trustee in bankruptcy had brought proceedings in the Court of Palermo against the Minister of the Interior of Italy and the Mayor of Palermo for damages resulting from the requisition. The Court of Appeal of Palermo awarded damages for loss of use of the plant during the period of the requisition.

The bankruptcy proceedings closed in November 1985. Of the amount realized, no surplus remained for distribution to the shareholders, Raytheon and Machlett.

I. *Jurisdiction of the Court and Admissibility of the Application; Rule of Exhaustion of Local Remedies* (paras 48–63)

An objection to the admissibility of the present case was entered by Italy in its Counter-Memorial, on the ground of an alleged failure of the two United States corporations, Raytheon and Machlett, on whose behalf the United States claim is brought, to exhaust the local remedies available to them in Italy. The Parties agreed that this objection be heard and determined in the framework of the merits.

The United States questioned whether the rule of the exhaustion of local remedies could apply at all, as Article XXVI (the jurisdictional clause) of the FCN Treaty is categorical in its terms, and unqualified by any reference to the local remedies rule. It also argued that in so far as its claim is for a declaratory judgment of a direct injury to the United States by infringement of its rights under the FCN Treaty, independent of the dispute over the alleged violation in respect of Raytheon and Machlett, the local remedies rule is inapplicable. The Chamber rejects these arguments. The United States also observed that at no time until the filing of the Respondent's Counter-Memorial in the present proceedings did Italy suggest that Raytheon and Machlett should sue in the Italian courts on the basis of the Treaty, and argued that this amounts to an estoppel. The Chamber however found that there are difficulties in constructing an estoppel from a mere failure to mention a matter at a particular point in somewhat desultory diplomatic exchanges.

On the question whether local remedies were, or were not, exhausted by Raytheon and Machlett, the Chamber notes that the damage claimed in this case to have been caused to Raytheon and Machlett is said to have resulted from the "losses incurred by ELSI's owners as a result of the involuntary change in the manner of disposing of ELSI's assets": and it is the requisition order that is said to have caused this change, and which is therefore at the core of the United States complaint. It was therefore right that local remedies be pursued by ELSI itself.

After examining the action taken by ELSI in its appeal against the requisition order and, later, by the trustee in bankruptcy, who claimed damages for the requisition, the Chamber considers that the municipal courts had been fully seized of the matter which is the substance of the Applicant's claim before the Chamber. Italy however contended that it was possible to cite the provision of the treaties themselves before the municipal courts, in conjunction with Article 2043 of the Italian Civil Code, which was never done.

After examining the jurisprudence cited by Italy, the Chamber concludes that it is impossible to deduce what the attitude of the Italian courts would have been if such a claim had been brought. Since it was for Italy to show the existence of a local remedy, and as Italy has not been able to satisfy the Chamber that there clearly remained some remedy which Raytheon and Machlett, independently of ELSI, and of ELSI's trustee in bankruptcy, ought to have pursued and exhausted, the Chamber rejects the objection of non-exhaustion of local remedies.

II. *Alleged Breaches of the Treaty of Friendship, Commerce and Navigation and its Supplementary Agreement*
(paras. 64–67)

Paragraph 1 of the United States Final Submissions claims that:

"(1) The Respondent violated the international legal obligations which it undertook by the Treaty of Friendship, Commerce and Navigation between the two countries, and the Supplement thereto, and in particular, violated Articles III, V, VII of the Treaty and Article I of the Supplement . . ."

The acts of the Respondent which are alleged to violate its treaty obligations were described by the Applicant's counsel in terms which it is convenient to cite here:

"First, the Respondent violated its legal obligations when it unlawfully requisitioned the ELSI plant on 1 April 1968 which denied the ELSI stockholders their direct right to liquidate the ELSI assets in an orderly fashion. Second, the Respondent violated its obligations when it allowed ELSI workers to occupy the plant. Third, the Respondent violated its obligations when it unreasonably delayed ruling on the lawfulness of the requisition for 16 months until immediately after the ELSI plant, equipment and work-in-process had all been acquired by ELTEL. Fourth and finally, the Respondent violated its obligations when it interfered with the ELSI bankruptcy proceedings, which allowed the Respondent to realize its previously expressed intention of acquiring ELSI for a price far less than its fair market value."

The most important of these acts of the Respondent which the Applicant claims to have been in violation of the FCN Treaty is the requisition of the ELSI plant by the Mayor of Palermo on 1 April 1968, which is claimed to have frustrated the plan for what the Applicant terms an "orderly liquidation" of the company. It is fair to describe the other impugned acts of the Respondent as ancillary to this core claim based on the requisition and its effects.

A. *Article III of FCN Treaty*
(paras. 68–101)

The allegation by the United States of a violation of Article III of the FCN Treaty by Italy relates to the first sentence of the second paragraph, which provides:

"The nationals, corporations and associations of either High Contracting Party shall be permitted, in conformity with the applicable laws and regulations within the territories of the other High Contracting Party, to organize, control and manage corporations and associations of such other High Contracting Party for engaging in commercial, manufacturing, processing, mining, educational, philanthropic, religious and scientific activities."

In terms of the present case, the effect of this sentence is that Raytheon and Machlett are to be permitted, in conformity with the applicable laws and regulations within the territory of Italy, to organize, control and manage ELSI. The claim of the United States focuses on the right to "control and manage". The Chamber considers whether there is a violation of this Article if, as the United States alleges, the requisition had the effect of depriving ELSI of both the right and practical possibility of selling off its plant and assets for satisfaction of its liabilities to its creditors and satisfaction of its shareholders.

A requisition of this kind must normally amount to a deprivation, at least in important part, of the right to control and manage. The reference in Article III to conformity with "the applicable laws and regulations" cannot mean that, if an act is in conformity with the municipal law and regulations (as, according to Italy, the requisition was), that would of itself exclude any possibility that it was an act in breach of the FCN Treaty. Compliance with municipal law and compliance with the provisions of a treaty are different questions.

The treaty right to be permitted to control and manage cannot be interpreted as a warranty that the normal exercise of control and management shall never be disturbed; every system of law must provide, for example, for interferences with the normal exercise of rights during public emergencies and the like.

The requisition was found both by the Prefect and by the Court of Appeal of Palermo not to have been justified in the applicable local law; if therefore, as seems to be the case, it deprived Raytheon and Machlett of what were at the moment their most crucial rights to control and manage, it might appear prima facie a violation of Article III, paragraph 2.

According to the Respondent, however, Raytheon and Machlett were, because of ELSI's financial position, already naked of those very rights of control and management of which they claim to have been deprived. The Chamber has therefore to consider what effect, if any, the financial position of ELSI may have had in that respect, first as a practical matter, and then also as a question of Italian law.

The essence of the Applicant's claim has been throughout that Raytheon and Machlett, which controlled ELSI, were by the requisition deprived of the right, and of the practical possibility, of conducting an orderly liquidation of ELSI's assets, the plan for which liquidation was however very much bound up with the financial state of ELSI.

After noting that the orderly liquidation was an alternative to the aim of keeping the place going, and that it was hoped that the threat of closure might bring pressure to bear on the Italian authorities, and that the Italian authorities did not come to the rescue on acceptable terms, the Chamber observes that the crucial question is whether Raytheon, on the eve of the requisition, and after the closure of the plant and the dismissal, on 29 March 1968, of the majority of the employees, was in a position to carry out its orderly liquidation plan, even apart from its alleged frustration by the requisition.

The successful implementation of a plan of orderly liquidation would have depended upon a number of factors not under the control of ELSI's management. Evidence has been produced by the Applicant that Raytheon was prepared to supply cash flow and other assistance necessary to effect the orderly liquidation, and the Chamber sees no reason to question that Raytheon had entered or was ready to enter into such a commitment; but other factors give rise to some doubt.

After considering these other factors governing the matter—the preparedness of creditors to co-operate in an orderly liquidation, especially in case of inequality among them, the likelihood of the sale of the assets realizing enough to pay all creditors in full, the claims of the dismissed employees, the difficulty of obtaining the best price for assets sold with a minimum delay, in view of the trouble likely at the plant when the closure plans became known, and the attitude of the Sicilian administration—the Chamber concludes that all these factors point toward a conclusion that the feasibility at 31 March 1968 of a plan of orderly liquidation, an essential link in the chain of reasoning upon which the United States claim rests, has not been sufficiently established.

Finally there was, beside the practicalities, the position in Italian bankruptcy law. If ELSI was in a state of legal insol-

vency at 31 March 1968, and if, as contended by Italy, a state of insolvency entailed an obligation on the company to petition for its own bankruptcy, then the relevant rights of control and management would not have existed to be protected by the FCN Treaty. While not essential to the Chamber's conclusion stated above, an assessment of ELSI's solvency as a matter of Italian law is thus highly material.

After considering the decision of the Prefect and the judgments of the courts of Palermo, the Chamber observes that whether their findings are to be regarded as determinations as a matter of Italian law that ELSI was insolvent on 31 March 1968, or as findings that the financial position of ELSI on that date was so desperate that it was past saving, makes no difference; they reinforce the conclusion that the feasibility of an orderly liquidation is not sufficiently established.

If, therefore, the management of ELSI, at the material time, had no practical possibility of carrying out successfully a scheme of orderly liquidation under its own management, and may indeed already have forfeited any right to do so under Italian law, it cannot be said that it was the requisition that deprived it of this faculty of control and management. There were several causes acting together that led to the disaster to ELSI, of which the effects of the requisition might no doubt have been one. The possibility of orderly liquidation is purely a matter of speculation. The Chamber is therefore unable to see here anything which can be said to amount to a violation by Italy of Article III, paragraph 2, of the FCN Treaty.

B. *Article V, paragraphs 1 and 3, of FCN Treaty* (paras. 102–112)

The Applicant's claim under paragraphs 1 and 3 of Article V of the FCN Treaty is concerned with protection and security of nationals and their property.

Paragraph 1 of Article V provides for "the most constant protection and security" for nationals of each High Contracting Party, both "for their persons and property"; and also that, in relation to property, the term "nationals" shall be construed to "include corporations and associations"; and in defining the nature of the protection, the required standard is established by a reference to "the full protection and security required by international law". Paragraph 3 elaborates this notion of protection and security further, by requiring no less than the standard accorded to the nationals, corporations and associations of the other High Contracting Party; and no less than that accorded to the nationals, corporations and associations of any third country. There are, accordingly, three different standards of protection, all of which have to be satisfied.

A breach of these provisions is seen by the Applicant to have been committed when the Respondent "allowed ELSI workers to occupy the plant". While noting the contention of Italy that the relevant "property", the plant in Palermo, belonged not to Raytheon and Machlett but to the Italian company ELSI, the Chamber examines the matter on the basis of the United States argument that the "property" to be protected was ELSI itself.

The reference in Article V to the provision of "constant protection and security" cannot be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed. In any event, considering that it is not established that any deterioration in the plant and machinery was due to the presence of the workers, and that the authorities were able not merely to protect the plant but even in some measure to continue production, the protection provided by the authorities could not be regarded as falling below "the full protection and security required by international law"; or indeed as less than the national or third-State standards. The mere fact that the occupation was referred to by the Court of Appeal of Palermo as unlawful does not, in the Chamber's view, necessarily mean that the protection afforded fell short of the national standard to which the FCN Treaty refers. The essential question is whether the local law, either in its terms or in its application, has treated United States nationals less well than Italian nationals. This, in the opinion of the Chamber, has not been shown. The Chamber must, therefore, reject the charge of any violation of Article V, paragraphs 1 and 3.

The Applicant sees a further breach of Article V, paragraphs 1 and 3, of the FCN Treaty, in the time taken—16 months—before the Prefect ruled on ELSI's administrative appeal against the Mayor's requisition order. For the reasons already explained in connection with Article III, the Chamber rejects the contention that, had there been a speedy decision by the Prefect, the bankruptcy might have been avoided.

With regard to the alternative contention that Italy was obliged to protect ELSI from the deleterious effects of the requisition, *inter alia* by providing an adequate method of overturning it, the Chamber observes that under Article V the "full protection and security" must conform to the minimum international standard, supplemented by the criteria of national treatment and most-favoured-nation treatment. It must be doubted whether in all the circumstances, the delay in the Prefect's ruling can be regarded as falling below the minimum international standard. As regards the contention of failure to accord a national standard of protection, the Chamber, though not entirely convinced by the Respondent's contention that such a lengthy delay as in ELSI's case was quite usual, is nevertheless not satisfied that a "national standard" of more rapid determination of administrative appeals has been shown to have existed. It is therefore unable to see in this delay a violation of paragraphs 1 and 3 of Article V of the FCN Treaty.

C. *Article V, paragraph 2, of FCN Treaty* (paras 113–119)

The first sentence of Article V, paragraph 2, of the FCN Treaty provides as follows:

> "2. The property of nationals, corporations and associations of either High Contracting Party shall not be taken within the territories of the other High Contracting Party without due process of law and without the prompt payment of just and effective compensation."

The Chamber notes a difference in terminology between the two authentic texts (English and Italian); the word "taking" is wider and looser than "espropriazione".

In the contention of the United States, first, both the Respondent's act of requisitioning the ELSI plant and its subsequent acts in acquiring the plant, assets, and work-in-progress, singly and in combination, constitute takings of property without due process of law and just compensation. Secondly, the United States claims that, by interference with the bankruptcy proceedings, the Respondent proceeded through the ELTEL company to acquire the ELSI plant and assets for less than fair market value.

The Chamber observes that the charge based on the combination of the requisition and subsequent acts is really that the requisition was the beginning of a process that led to the acquisition of the bulk of the assets of ELSI for far less than market value. What is thus alleged by the Applicant, if not an overt expropriation, might be regarded as a disguised expro-

priation; because, at the end of the process, it is indeed title to property itself that is at stake. The United States had, however, during the oral proceedings, disavowed any allegation that the Italian authorities were parties to a conspiracy to bring about the change of ownership.

Assuming, though without deciding, that "espropriazione" might be wide enough to include a disguised expropriation, account has further to be taken of the Protocol appended to the FCN Treaty, extending Article V, paragraph 2, to "interests held directly or indirectly by nationals" of the Parties.

The Chamber finds that it is not possible in this connection to ignore ELSI's financial situation and the consequent decision to close the plant and put an end to the company's activities. It cannot regard any of the acts complained of which occurred subsequent to the bankruptcy as breaches of Article V, paragraph 2, in the absence of any evidence of collusion, which is now no longer even alleged. Even if it were possible to see the requisition as having been designed to bring about bankruptcy, as a step towards disguised expropriation, then, if ELSI was already under an obligation to file a petition of bankruptcy, or in such a financial state that such a petition could not be long delayed, the requisition was an act of supererogation. Furthermore this requisition, independently of the motives which allegedly inspired it, being by its terms for a limited period, and liable to be overturned by administrative appeal, could not, in the Chamber's view, amount to a "taking" contrary to Article V unless it constituted a significant deprivation of Raytheon and Machlett's interest in ELSI's plant; as might have been the case if, while ELSI remained solvent, the requisition had been extended and the hearing of the administrative appeal delayed. In fact the bankruptcy of ELSI transformed the situation less than a month after the requisition. The requisition could therefore only be regarded as significant for this purpose if it caused or triggered the bankruptcy. This is precisely the proposition which is irreconcilable with the findings of the municipal courts, and with the Chamber's conclusions above.

D. *Article I of Supplementary Agreement to FCN Treaty* (paras. 120–130)

Article I of the Supplementary Agreement to the FCN Treaty, which confers rights not qualified by national or most-favoured-nation standards, provides as follows:

> "The nationals, corporations and associations of either High Contracting Party shall not be subjected to arbitrary or discriminatory measures within the territories of the other High Contracting Party resulting particularly in: (*a*) preventing their effective control and management of enterprises which they have been permitted to establish or acquire therein; or, (*b*) impairing their other legally acquired rights and interests in such enterprises or in the investments which they have made, whether in the form of funds (loans, shares or otherwise), materials, equipment, services, processes, patents, techniques or otherwise. Each High Contracting Party undertakes not to discriminate against nationals, corporations and associations of the other High Contracting Party as to their obtaining under normal terms the capital, manufacturing processes, skills and technology which may be needed for economic development."

The answer to the Applicant's claim that the requisition was an arbitrary or discriminatory act which violated both the "(*a*)" and the "(*b*)" clauses of the Article is the absence of a sufficiently palpable connection between the effects of the requisition and the failure of ELSI to carry out its planned orderly liquidation. However, the Chamber considers that the effect of the word "particularly", introducing the clauses "(*a*)" and "(*b*)", suggests that the prohibition of arbitrary (and discriminatory) acts is not confined to those resulting in the situations described in "(*a*)" and "(*b*)", but is in effect a prohibition of such acts whether or not they produce such results. It is necessary, therefore, to examine whether the requisition was, or was not, an arbitrary or discriminatory act of itself.

The United States claims that there was "discrimination" in favour of IRI, an entity controlled by Italy; there is, however, no sufficient evidence before the Chamber to support the suggestion that there was a plan to favour IRI at the expense of ELSI, and the claim of "discriminatory measures" in the sense of the Supplementary Agreement must therefore be rejected.

In order to show that the requisition order was an "arbitrary" act in the sense of the Supplementary Agreement, the Applicant has relied (*inter alia*) upon the status of that order in Italian law. It contends that the requisition "was precisely the sort of arbitrary action which was prohibited" by Article I of the Supplementary Agreement, in that "Under both the Treaty and Italian law, the requisition was unreasonable and improperly motivated"; it was "found to be illegal under Italian domestic law for precisely this reason".

Though examining the decisions of the Prefect of Palermo and the Court of Appeal of Palermo, the Chamber observes that the fact that an act of a public authority may have been unlawful in municipal law does not necessarily mean that that act was unlawful in international law. By itself, and without more, unlawfulness cannot be said to amount to arbitrariness. The qualification given to an act by a municipal authority (e.g., as unjustified, or unreasonable or arbitrary) may be a valuable indication, but it does not follow that the act is necessarily to be classed as arbitrary in international law.

Neither the grounds given by the Prefect for annulling the requisition, nor the analysis by the Court of Appeal of Palermo of the Prefect's decision as a finding that the Mayor's requisition was an excess of power, with the result that the order was subject to a defect of lawfulness, signify, in the Chamber's view, necessarily and in itself any view by the Prefect, or by the Court of Appeal of Palermo, that the Mayor's act was unreasonable or arbitrary. Arbitrariness is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety. Nothing in the decision of the Prefect, or in the judgment of the Court of Appeal of Palermo, conveys any indication that the requisition order of the Mayor was to be regarded in that light. Independently of the findings of the Prefect or of the local courts, the Chamber considers that it cannot be said to have been unreasonable or merely capricious for the Mayor to seek to use his powers in an attempt to do something about the situation in Palermo at the moment of the requisition. The Mayor's order was consciously made in the context of an operating system of law and of appropriate remedies of appeal, and treated as such by the superior administrative authority and the local courts. These are not at all the marks of an "arbitrary" act. Accordingly, there was no violation of Article I of the Supplementary Agreement.

E. *Article VII of FCN Treaty* (paras 131–135)

Article VII of the FCN Treaty, in four paragraphs, is principally concerned with ensuring the right "to acquire, own and dispose of immovable property or interests therein [in the

Italian text, *"beni immobili o . . . altri diritti reali"*] within the territories of the other High Contracting Party".

The Chamber notes the controversy between the Parties turning on the difference in meaning between the English, "interests", and the Italian, *"diritti reali"*, and the problems arising out of the qualification, by the Treaty, of the group of rights conferred by this Article, laying down alternative standards, and subject to a proviso. The Chamber considers, however, that, for the application of this Article, there remains precisely the same difficulty as in trying to apply Article III, paragraph 2, of the FCN Treaty: what really deprived Raytheon and Machlett, as shareholders, of their right to dispose of ELSI's real property, was not the requisition but the precarious financial state of ELSI, ultimately leading inescapably to bankruptcy. In bankruptcy the right to dispose of the property of a corporation no longer belongs even to the company, but to the trustee acting for it; and the Chamber has already decided that ELSI was on a course to bankruptcy even before the requisition. The Chamber therefore does not find that Article VII of the FCN Treaty has been violated.

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* *

Having found that the Respondent has not violated the FCN Treaty in the manner asserted by the Applicant, it follows that the Chamber rejects also the claim for reparation made in the Submissions of the Applicant.

SUMMARY OF OPINIONS APPENDED TO THE JUDGMENT OF THE COURT

Separate Opinion of Judge Oda

Judge Oda, in his separate opinion, agrees with the operative findings of the Judgment. He notes, however, that, in initiating the proceedings, the United States espoused the cause of its nationals (Raytheon and Machlett) as shareholders in an Italian company (ELSI), whereas, as the Court itself determined in the *Barcelona Traction* Judgment of 1970, the rights of shareholders as such lie beyond the reach of diplomatic protection under general international law.

In Judge Oda's view, the 1948 FCN Treaty was intended neither to alter the shareholders' status nor to augment the shareholders' rights in any way. The provisions in the FCN Treaty upon which the Applicant relied, and which are extensively addressed in the Judgment, were not intended to protect the rights of Raytheon and Machlett as shareholders of ELSI.

The 1948 FCN Treaty, like similar FCN treaties to which the United States is a party, enables one State party to espouse the cause of a company of the other State party in an action against the latter when the company in question is controlled by nationals of the party bringing the action. The United States could thus have brought an action for breach of certain provisions of the 1948 Treaty which entitled it to defend an Italian company (ELSI) in which its nationals (Raytheon and Machlett) possessed a controlling interest.

Yet the Applicant had not relied on those provisions, and the Chamber in its Judgment had made scarcely any reference to them. Even if the proceedings had been brought as an espousal of ELSI's cause, the Applicant, in Judge Oda's view, would still have had to prove a denial of justice. This it had failed to do.

Dissenting Opinion of Judge Schwebel

Judge Schwebel agreed with the Judgment in what he termed two paramount respects which have important implications for the vitality and growth of international law.

First, the Judgment applies a rule of reason in its interpretation of the reach of the requirement of the exhaustion of local remedies. It holds not that every possible local remedy must have been exhausted to satisfy the local remedies rule but that, where in substance local remedies have been exhausted, that suffices to meet the requirements of the rule even if it may be that a variation on the pursuit of local remedies was not played out. This holding thus confines certain prior constructions of the rule to a sensible limit.

Second, the Judgment largely construes the FCN Treaty in ways which sustain rather than constrain it as an instrument for the protection of the rights of nationals and corporations of the United States and Italy. The Chamber declined to accept a variety of arguments pressed upon it which, if accepted, would have deprived the Treaty of much of its value. In particular, the Chamber declined to hold that ELSI, an Italian corporation whose shares were owned by United States corporations, was outside the scope of protection afforded by the Treaty. The claims of the United States in the case were not sustained, but that was not because the Chamber found against the United States on the law of the Treaty; it found against the United States on the practical and legal significance to be attached to the facts of the case.

The Treaty and its Supplementary Agreement were to be interpreted as a unit, since the Agreement was specified to be "an integral part" of the Treaty. Because the United States and Italy advanced conflicting interpretations of the Treaty which demonstrated that certain of its provisions were ambiguous, this was a case in which recourse to the preparatory work and circumstances of the Treaty's conclusion were in order. It was the fact that Italy had requested negotiation of the Supplementary Agreement to meet the ascertained needs of U.S. investors for investment in Italy. Italian parliamentary proceedings in ratification of the Treaty and Supplement demonstrate that it was the intent of the Parties to give investors "guarantees against political risks" and "freedom to manage the companies" which investors established or procured in implementation of "the principles of equitable treatment" which are stated to be set forth in the Treaty. In the entire, detailed record of ratification, there is no trace of support for the interpretation that the manifold treaty rights granted investors were conditioned upon investment being made in a corporation of the investor's nationality.

The requisition deprived Raytheon of its Treaty right to control and manage and hence liquidate ELSI

The Chamber's cardinal conclusion in the case is that, because of the practicalities of ELSI's financial situation and the legalities of Italian bankruptcy practice, Raytheon was no longer able, as of the date of the requisition, to control and manage—and hence liquidate—ELSI and thus could not have been deprived by the requisition of its Treaty right to do so. In Judge Schwebel's view, that conclusion was incorrect for the following reasons.

First, ELSI had been advised in March 1968, on financial and legal grounds, that it was entitled to liquidate its assets, in a process to be managed by ELSI.

Second, as of the day of the requisition, no legal or practical steps had been taken in any quarter to place ELSI in, or force ELSI into, bankruptcy.

Third, in the weeks and days preceding, and following, the requisition, the most senior officials of Sicily and the Italian Government, while graphically informed of ELSI's precarious financial condition, pressed ELSI not to close the plant, not to dismiss the workforce, and most particularly not to go into bankruptcy, but rather to take measures in concert with the Italian public and private sectors to keep open or reopen the plant and carry out liquidation over a period of time. The Prime Minister of Italy and the President of Sicily and their associates presumably acted, and must be presumed to have acted, in accordance with the law of Italy. Thus whether in this case Italian or United States counsel are correct in their differing interpretations of Italian bankruptcy law, it is clear that the "living law" of Italy as of the time of the requisition was inconsistent with Italy's current plea and the Chamber's acceptance of it. Italy in 1989 should not be heard to maintain the opposite of what it maintained in 1968.

Fourth, the Chamber's cardinal conclusion is not fully consistent with the holding of the Court of Appeal of Palermo on which the Judgment relies. That Court concluded that ELSI's bankruptcy was caused not by the requisition but by its prior state of insolvency. But it neither concluded nor implied that such insolvency dissolved existing rights of management and control of ELSI. It rather awarded damages "derivable from the operational unavailability" of the plant as the result of what it found to be an "unlawful" requisition order. Thus the Court imported that ELSI continued as of the date of the requisition and thereafter to have possessory rights in ELSI even though it had been insolvent before that date.

Fifth, Italy's experts differed among themselves as to whether ELSI was insolvent as of the time of the requisition.

Sixth, and most important, the question of whether ELSI was insolvent as of 1 April 1968 essentially depended on the policy of Raytheon, whose resources were ample. The Chamber accepts that Raytheon had transferred fresh capital to pay small creditors; that Raytheon was ready to purchase ELSI's large accounts receivable at 100 per cent of value; and that Raytheon was prepared to advance sufficient cash-flow funds to enable ELSI to engage in an orderly liquidation. Why then does it accept the inconsistent conclusion that, as of the time of the requisition, ELSI was insolvent or, if not, was in any event fast slipping into bankruptcy? If the requisition had not intervened, and if ELSI's immediate cash-flow requirements had been met by Raytheon, thus buying time in order to sell assets, can it really be held that ELSI would have been forced into bankruptcy, at any rate *when* it was? Even if bankruptcy had eventually come, such a later date would have enabled Raytheon materially to reduce its losses relative to those which actually were incurred. Moreover, if the requisition had not intervened, it would have been in the interest of the Italian banks to have settled their claims against ELSI for 40 or 50 per cent of value.

An orderly liquidation, Judge Schwebel acknowledged, would have been beset by uncertainties, but they go not so much to ELSI's ability and entitlement to liquidate its assets as to the calculability of damages which may be found to flow from denial of that right.

The conclusion that by imposition of the requisition Italy violated a viable right of Raytheon to control and manage ELSI is the more compelling in the light of the meaning of the Treaty which the processes of its ratification elucidate. It was not consistent with investors' "unobstructed control" of companies they "procured", with the Treaty's "guaranty against political risks", and with the "principles of equitable treatment" which the Treaty was designed to ensure.

The requisition was an arbitrary measure which violated the Treaty

The Chamber's conclusion that the requisition of ELSI's plant and equipment was not an arbitrary measure in breach of the Treaty is based on three holdings, which Judge Schwebel saw as unfounded: first, that the Palermo Prefect and Court of Appeal did not find the requisition to be arbitrary; second, that in international law the requisition was neither unreasonable nor capricious; and third, that in any event the Italian processes of appeal and redress to which the requisition order was subject ultimately ensured that the order was not arbitrary.

(i) *The rulings of the Prefect and Court of Appeal*

The Prefect held that the Mayor, in issuing the requisition order, relied on provisions of law which, in conditions of grave public necessity and unforeseen urgency, entitle the Mayor to requisition private property; but in this case, the Prefect found, these conditions were present "from the purely theoretical standpoint", a finding which appears to mean that they were not actually present. The Prefect's decision indicates that in fact those conditions were not present since the Prefect's decision concludes that (*a*) the order of requisition could not restore ELSI's plant to operation or solve the company's problems; (*b*) the order in fact did not; (*c*) the plant remained closed and occupied by former employees and (*d*) public order was in any event disturbed by the plant's closure: in short, that the requisition order proved unjustified on all counts. The Prefect's holding that, since the requisition order was incapable of achieving its purported purposes, it lacked the juridical cause which might justify it, is not far from stating that the requisition was ill-motivated and hence unreasonable or even capricious.

Moreover, the Prefect held that the order by its terms showed that the Mayor issued the order to show his intent to intervene "in one way or another", as a step "aimed more than anything else at bringing out his intention to tackle the problem just the same". The Prefect there referred to the provision of the Mayor's order stating that "the local press is taking a great interest in the situation . . . being very critical toward the authorities and is accusing them of indifference to this serious civic problem . . .". The Court of Appeal of Palermo characterized that holding of the Prefect as "severe" and as "showing a typical case of excess of power" on the part of the Mayor—i.e., a classic arbitrary act. Moreover, the Court of Appeal taxed the Mayor with compounding the "unlawful" requisition by failing to pay the indemnity for requisition for which the order itself provided—a failure which is at odds with the due process which is antithetical to an arbitrary act.

(ii) *The unreasonable and capricious nature of the requisition*

What is unreasonable or capricious in international law, while having a sense in customary international law, has no invariable, plain meaning, but can be appreciated only in the particular context of the facts of a case. In this case, the order of requisition as motivated, issued and implemented was arbitrary since:

—the legal bases on which the Mayor's order relied were justified only in theory;

—the order was incapable of achieving, and did not achieve, its purported purposes;

—the order "also" was issued "mainly" to appease public criticism rather than on its merits, a "typical case of excess of power";

—the order violated its own terms by failing to pay an indemnity for the requisition;

—a paramount purpose of the requisition order was to prevent ELSI's liquidation and possible dispersal of its assets, a purpose pursued without regard to Treaty obligations of contrary tenor (despite Italy's contention that these obligations were binding internally).

(iii) *The process of appeal did not render the measure non-arbitrary*

Italy's objective processes of administrative and judicial review of the requisition order might be argued to have ensured, by their existence and application, that the requisition, even if initially arbitrary, ultimately was not, thus absolving Italy of any consummated breach of international responsibility.

However, as the Draft Articles on State Responsibility of the United Nations International Law Commission put it:

> "There is a breach by a State of an international obligation requiring it to achieve, by means of its own choice, a specified result, if, by the conduct adopted, the State does not achieve the result required of it by that obligation."

That fits this case, for Italy did not provide ELSI or its representative with "full and complete compensation" (as the ILC requires) for what otherwise was the arbitrary act of requisition. The requisition order was annulled by the Prefect, but 16 months after it was promulgated, by which time ELSI had suffered irreparable damage as a result of it. The Court of Palermo awarded minimal damages for the requisition, which, however, took no account of principal elements of ELSI's actual losses. It accordingly follows that ELSI was not placed in the position it would have been in had there been no requisition, or in an equivalent position. For that reason, Italian administrative and judicial processes, however estimable, did not absolve Italy of having committed an arbitrary act within the meaning of the Treaty.

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85. APPLICABILITY OF ARTICLE VI, SECTION 22, OF THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS

Advisory Opinion of 15 December 1989

The Court delivered a unanimous Advisory Opinion on the question concerning the Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations. That opinion had been requested by the United Nations Economic and Social Council under its resolution 1989/75 of 24 May 1989, of which the integral text is as follows:

> "The Economic and Social Council,
>
> "*Having considered* resolution 1988/37 of 1 September 1988 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities and Commission on Human Rights resolution 1989/37 of 6 March 1989,
>
> "1. *Concludes* that a difference has arisen between the United Nations and the Government of Romania as to the applicability of the Convention on the Privileges and Immunities of the United Nations [General Assembly resolution 22 A (I)] to Mr. Dumitru Mazilu as Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities;
>
> "2. *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) of 11 December 1946, 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 Mr. Dumitru Mazilu as Special Rapporteur of the Sub-Commission."

In reply to the question put to it, the Court expressed the opinion that Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations is applicable in the case of Mr. Dumitru Mazilu as a special rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities.

The Court was composed as follows: *President* Ruda; *Judges* Lachs, Elias, Oda, Ago, Schwebel, Jennings, Bedjaoui, Ni, Evensen, Tarassov, Guillaume, Shahabuddeen and Pathak.

Judges Oda, Evensen and Shahabuddeen appended separate opinions to the Advisory Opinion.

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I. *Review of the Proceedings and Summary of Facts* (paras. 1–26)

The Court outlines the successive stages of the proceedings before it (paras. 1–8) and then summarizes the facts of the case (paras. 9–26). A brief survey of those facts will now be presented.

On 13 March 1984 the Commission on Human Rights—a subsidiary organ of the Economic and Social Council (hereinafter called "the Council"), created by it in 1946 in accordance with Articles 55 (*c*) and 68 of the Charter of the United Nations—elected Mr. Dumitru Mazilu, a Romanian national nominated by Romania, to serve as a member of the Sub-Commission on Prevention of Discrimination and Protection of Minorities—a subsidiary organ set up in 1947 by the Commission on Human Rights (hereinafter called "the Commission")—for a three-year term due to expire on 31 December 1986. As the Commission had called upon the Sub-Commission on Prevention of Discrimination and Protection of Minorities (hereinafter called "the Sub-Commission") to pay due attention to the role of youth in the field of human rights, the Sub-Commission at its thirty-eighth session adopted on 29 August 1985 resolution 1985/12 whereby it requested Mr. Mazilu to "prepare a report on human rights and youth analysing the efforts and measures for securing the implementation and enjoyment by

youth of human rights, particularly, the right to life, education and work" and requested the Secretary-General to provide him with all necessary assistance for the completion of his task.

The thirty-ninth session of the Sub-Commission, at which Mr. Mazilu's report was to be presented, was not convened in 1986 as originally scheduled but was postponed until 1987. The three-year mandate of its members—originally due to expire on 31 December 1986—was extended by Council decision 1987/102 for an additional year. When the thirty-ninth session of the Sub-Commission opened in Geneva on 10 August 1987 no report had been received from Mr. Mazilu, nor was he present. By a letter received by the United Nations Office at Geneva on 12 August 1987, the Permanent Mission of Romania to that office informed it that Mr. Mazilu had suffered a heart-attack and was still in hospital. According to the written statement of the Secretary-General, a telegram signed "D. Mazilu" was received in Geneva on 18 August 1987 and informed the Sub-Commission of his inability, due to heart illness, to attend the current session. In these circumstances, the Sub-Commission adopted decision 1987/112 on 4 September 1987, whereby it deferred consideration of item 14 of its agenda—under which the report on human rights and youth was to have been discussed—until its fortieth session scheduled for 1988. Notwithstanding the scheduled expiration on 31 December 1987 of Mr. Mazilu's term as a member of the Sub-Commission, the latter included reference to a report to be submitted by him, identified by name, under the agenda item "Prevention of discrimination and protection of children", and entered the report, under the title "Human rights and youth" in the "List of studies and reports under preparation by members of the Sub-Commission in accordance with the existing legislative authority".

After the thirty-ninth session of the Sub-Commission, the Centre for Human Rights of the United Nations Secretariat in Geneva made various attempts to contact Mr. Mazilu to provide him with assistance in the preparation of his report, including arranging a visit to Geneva. In December 1987, Mr. Mazilu informed the Under-Secretary-General for Human Rights that he had not received the previous communications of the Centre. In January 1988, Mr. Mazilu informed him that he had been twice in hospital in 1987 and that he had been forced to retire, as of 1 December 1987, from his various governmental posts. He also stated that he was willing to travel to Geneva for consultations, but that the Romanian authorities were refusing him a travel permit. In April and May 1988, Mr. Mazilu, in a series of letters, further described his personal situation; in particular, he alleged that he had refused to comply with the request addressed to him on 22 February 1988 by a special commission from the Romanian Ministry of Foreign Affairs voluntarily to decline to submit his report to the Sub-Commission and, moreover, consistently complained that strong pressure had been exerted on him and on his family.

On 31 December 1987 the terms of all members of the Sub-Commission, including Mr. Mazilu, expired as has already been indicated. On 29 February 1988 the Commission, upon nomination by their respective Governments, elected new members of the Sub-Commission among whom was Mr. Ion Diaconu, a Romanian national.

All the rapporteurs and special rapporteurs of the Sub-Commission were invited to attend its fortieth session (8 August–2 September 1988), but Mr. Mazilu again did not appear. A special invitation was cabled to him, to go to Geneva to present his report, but the telegrams were not delivered and the United Nations Information Centre in Bucharest was unable to locate Mr. Mazilu. On 15 August 1988, the Sub-Commission adopted decision 1988/102, whereby it requested the Secretary-General

> "to establish contact with the Government of Romania and to bring to the Government's attention the Sub-Commission's urgent need to establish personal contact with its Special Rapporteur Mr. Dumitru Mazilu and to convey the request that the Government assist in locating Mr. Mazilu and facilitate a visit to him by a member of the Sub-Commission and the secretariat to help him in the completion of his study on human rights and youth if he so wished".

The Under-Secretary-General for Human Rights informed the Sub-Commission on 17 August 1988 that, in contacts between the Secretary-General's Office and the Chargé d'affaires of the Romanian Permanent Mission to the United Nations in New York, he had been told that the position of the Romanian Government was that any intervention by the United Nations Secretariat and any form of investigation in Bucharest would be considered interference in Romania's internal affairs. On 1 September 1988, the Sub-Commission adopted resolution 1988/37 by which, *inter alia*, it requested the Secretary-General to approach once more the Government of Romania and invoke the applicability of the Convention on the Privileges and Immunities of the United Nations (hereinafter called "the General Convention"); and further requested him, in the event that the Government of Romania did not concur in the applicability of the provisions of that Convention in that case, to bring the difference between the United Nations and Romania immediately to the attention of the Commission in 1989. It also requested the Commission, in that event, to urge the Council

> "to request, in accordance with General Assembly resolution 89 (I) of 11 December 1946, from the International Court of Justice an advisory opinion on the applicability of the relevant provisions of the Convention on the Privileges and Immunities of the United Nations to the present case and within the scope of the present resolution".

Pursuant to that resolution the Secretary-General, on 26 October 1988, addressed a Note Verbale to the Permanent Representative of Romania to the United Nations in New York, in which he invoked the General Convention in respect of Mr. Mazilu and requested the Romanian Government to accord Mr. Mazilu the necessary facilities in order to enable him to complete his assigned task. As no reply had been received to that Note Verbale, the Under-Secretary-General for Human Rights on 19 December 1988 wrote a letter of reminder to the Permanent Representative of Romania to the United Nations Office at Geneva, in which he asked that the Romanian Government assist in arranging for Mr. Mazilu to visit Geneva so that he could discuss with the Centre for Human Rights the assistance it might give him in preparing his report. On 6 January 1989 the Permanent Representative of Romania handed to the Legal Counsel of the United Nations an Aide-Mémoire in which was set forth the Romanian Government's position concerning Mr. Mazilu. On the facts of the case, Romania stated that Mr. Mazilu, who had not prepared or produced anything on the subject entrusted to him, had in 1987 become gravely ill; that he had had repeatedly to go into hospital; that he had, at his own request, been placed on the retired list on grounds of ill-health for an initial period of one year, in accordance with Romanian law; and that retirement had been extended after he had been further examined by a similar panel of doctors. On the law, Romania expressed the view that "the problem of the application of the General Convention [did] not arise in this case". It went on to explain, *inter alia*, that the Convention "does not

equate rapporteurs, whose activities are only occasional, with experts on missions for the United Nations"; that "even if rapporteurs are given some of the status of experts, . . . they can enjoy only functional immunities and privileges"; that the "privileges and immunities provided by the Convention begin to apply only at the moment when the expert leaves on a journey connected with the performance of his mission"; and that "in the country of which he is a national . . . an expert enjoys privileges and immunities only in respect of actual activities . . . which he performs in connection with his mission". Moreover, Romania stated expressly that it was opposed to a request for advisory opinion from the Court of any kind in this case. Similar contentions were also put forward in the written statement presented by Romania to the Court.

On 6 March 1989 the Commission adopted its resolution 1989/37, recommending that the Council request an advisory opinion from the Court. The Council on 24 May 1989 adopted its resolution 1989/75, by which it requested the Court to render an opinion.

The Court has also been informed by the Secretary-General of the following events which have occurred since the request for Advisory Opinion was made. A report on Human Rights and Youth prepared by Mr. Mazilu was circulated as a document of the Sub-Commission bearing the date 10 July 1989; the text of this report had been transmitted by Mr. Mazilu to the Centre for Human Rights through various channels. On 8 August 1989, the Sub-Commission decided, in accordance with its practice, to invite Mr. Mazilu to participate in the meetings at which his report was to be considered: no reply was received to the invitation extended. By a Note Verbale dated 15 August 1989 from the Permanent Mission of Romania to the United Nations Office at Geneva addressed to that office, the Permanent Mission referred to "the so-called report" by Mr. Mazilu, expressed surprise "that the medical opinions made available to the Centre for Human Rights . . . have been ignored" and indicated, *inter alia,* that since becoming ill in 1987, Mr. Mazilu did not "possess the intellectual capacity necessary for making an objective, responsible and unbiased analysis that could serve as the substance of a report consistent with the requirements of the United Nations". On 1 September 1989, the Sub-Commission adopted resolution 1989/45 entitled "The report on human rights and youth prepared by Mr. Dumitru Mazilu" by which, noting that Mr. Mazilu's report had been prepared in difficult circumstances and that the relevant information collected by the Secretary-General appeared not to have been delivered to him, it invited him to present the report in person to the Sub-Commission at its next session, and also requested the Secretary-General to continue providing Mr. Mazilu with all the assistance he might need in updating his report, including consultations with the Centre for Human Rights.

II. *The Question Laid before the Court* (para. 27)

The Court recalls the terms of the question laid before it by the Council. It points out that, in his written statement, the Secretary-General emphasized that the Council's request related to the applicability of Section 22 of the Convention in the case of Mr. Mazilu, but not to "the consequences of that applicability, that is . . . [the question of] what privileges and immunities Mr. Mazilu might enjoy as a result of his status and whether or not these had been violated". The Court moreover notes that, during the oral proceedings, the representative of the Secretary-General observed that it was suggestive of the Council's intention that, having referred to a "difference", it "then did not attempt to have that difference as a whole resolved by the question it addressed to the Court", but "merely addressed a preliminary legal question to the Court".

III. *Competence of the Court to give an Advisory Opinion* (paras. 28–36)

The Court begins by pointing out that the present request for advisory opinion is the first request made by the Council, pursuant to paragraph 2 of Article 96 of the Charter. It goes on to note that, in accordance with that provision, the General Assembly, by its resolution 89 (I) of 11 December 1946, authorized the Council to request advisory opinions of the Court on legal questions arising within the scope of its activities. Then, having considered the question which is the subject of the request, the Court takes the view, firstly, that it is a legal question in that it involves the interpretation of an international convention in order to determine its applicability and, moreover, that it is a question arising within the scope of the activities of the Council, as Mr. Mazilu's assignment was pertinent to a function and programme of the Council and as the Sub-Commission, of which he was appointed special rapporteur, is a subsidiary organ of the Commission which is itself a subsidiary organ of the Council.

As Romania has nonetheless contended that the Court "cannot find that it has jurisdiction to give an advisory opinion" in this case, the Court then considers its arguments. Romania claims that, because of the reservation made by it to Section 30 of the General Convention, the United Nations cannot, without Romania's consent, submit a request for advisory opinion in respect of its difference with Romania. The reservation, it is said, subordinates the competence of the Court to "deal with any dispute that may have arisen between the United Nations and Romania, including a dispute within the framework of the advisory procedure," to the consent of the parties to the dispute. Romania points out that it did not agree that an opinion should be requested of the Court in the present case.

Section 30 of the General Convention 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."

The reservation contained in Romania's instrument of accession to that Convention is worded as follows:

> "The Romanian People's Republic does not consider itself bound by the terms of Section 30 of the Convention which provide for the compulsory jurisdiction of the International Court in differences arising out of the interpretation or application of the Convention; with respect to the competence of the International Court in such differences, the Romanian People's Republic takes the view that, for the purpose of the submission of any dispute whatsoever to the Court for a ruling, the consent of all the parties to the dispute is required in every individual case. This reservation is equally applicable to the provisions contained in the said section which stipulates that the advisory opinion of the International Court is to be accepted as decisive."

The Court begins by referring to its earlier jurisprudence, recalling that the consent of States is not a condition precedent to its competence under Article 96 of the Charter and Article 65 of the Statute to give advisory opinions, although such advisory opinions are not binding. This applies even when the request for an opinion is seen as relating to a legal question pending between the United Nations and a Member State. The Court then notes that Section 30 of the General Convention operates on a different plane and in a different context from that of Article 96 of the Charter as, when the provisions of that Section are read in their totality, it is clear that their object is to provide a dispute settlement mechanism. If the Court had been seised with a request for an advisory opinion made under Section 30, it would of course have had to consider any reservation which a party to the dispute had made to that Section. However, in the present case, the Court recalls that the Council's resolution contained no reference to Section 30 and considers that it is evident from the dossier that, in view of the existence of the Romanian reservation, it was not the intention of the Council to invoke that Section. The Court finds that the request was not made under Section 30 and that it accordingly does not need to determine the effect of the Romanian reservation to that provision.

Romania has, however, contended *inter alia* that

> "If it were accepted that a State party to the Convention, or the United Nations, might ask for disputes concerning the application or interpretation of the Convention to be brought before the Court on a basis other than the provisions of Section 30 of the Convention, that would disrupt the unity of the Convention, by separating the substantive provisions from those relating to dispute settlement, which would be tantamount to a modification of the content and extent of the obligations entered into by States when they consented to be bound by the Convention."

The Court recalls that the nature and purpose of the present proceedings are those of a request for advice on the applicability of a part of the General Convention, and not the bringing of a dispute before the Court for determination. It adds that the "content and extent of the obligations entered into by States"—and, in particular, by Romania—"when they consented to be bound by the Convention" are not modified by the request and by the present advisory opinion.

The Court thus finds that the reservation made by Romania to Section 30 of the General Convention does not affect the Court's jurisdiction to entertain the request submitted to it.

IV. *Propriety of the Court giving an Opinion*
(paras. 37–39)

While the absence of the consent of Romania to the proceedings before the Court can have no effect on its jurisdiction, the Court finds that this is a matter to be considered when examining the propriety of its giving an opinion. The Court has recognized in its earlier jurisprudence, *inter alia*, that in "certain circumstances . . . the lack of consent of an interested State may render the giving of an an advisory opinion incompatible with the Court's judicial character" and has observed that 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". The Court considers that in the present case to give a reply would have no such effect. Certainly the Council, in its resolution 1989/75, did conclude that a difference had arisen between the United Nations and the Government of Romania as to the *applicability* of the Convention . . . to Mr. Dumitru Mazilu. It nonetheless seems to the Court that this difference, and the question put to the Court in the light of it, is not to be confused with the dispute between the United Nations and Romania with respect to the *application* of the General Convention in the case of Mr. Mazilu. Accordingly, the Court does not find any "compelling reason" to refuse an advisory opinion, and decides to reply to the legal question on which such an opinion has been requested.

V. *Meaning of Article VI, Section 22, of the General Convention*
(paras. 40–52)

The General Convention contains an Article VI entitled "Experts on Missions for the United Nations", divided into two sections. Section 22 provides as follows:

> "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."

The Court considers first what is meant by "experts on missions" for the purposes of Section 22 and notes that the General Convention gives no definition of "experts on missions". From Section 22 it is clear, firstly that the officials of the Organization, even if chosen in consideration of their technical expertise in a particular field, are not included in the category of experts within the meaning of that provision; and secondly that only experts performing missions for the Organization are covered by Section 22. This Section does not, however, furnish any indication of the nature, duration or place of these missions. Nor do the *travaux préparatoires* provide any more guidance in this respect. The Court finds that the purpose of Section 22 is nevertheless 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 exercise of their functions". The Court notes that in practice, according to the information supplied by the Secretary-General, the United Nations has had occasion to entrust missions—increasingly varied in nature—to persons not having the status of United Nations officials. Such persons have been entrusted with mediation, with preparing reports, preparing studies, conducting investigations or finding and establishing facts. In addition, many committees, commissions or similar bodies

whose members serve, not as representatives of States, but in a personal capacity, have been set up within the Organization. In all these cases, the practice of the United Nations shows that the persons so appointed, and in particular the members of these committees and commissions, have been regarded as experts on missions within the meaning of Section 22.

The Court then turns its attention to the meaning of the phrase "during the period of their missions, including the time spent on journeys", which is part of that Section. In this connection the question arises whether "experts on missions" are covered by Section 22 only during missions requiring travel or whether they are also covered when there is no such travel or apart from such travel. To answer this question, the Court considers it necessary to determine the meaning of the word "mission" in English and *mission* in French, the two languages in which the General Convention was adopted. Initially, the word referred to a task entrusted to a person only if that person was sent somewhere to perform it. It has, however, long since acquired a broader meaning and nowadays embraces in general the tasks entrusted to a person, whether or not those tasks involve travel. The Court considers that Section 22, in its reference to experts performing missions for the United Nations, uses the word "mission" in a general sense. While some experts have necessarily to travel in order to perform their tasks, others can perform them without having to travel. In either case, the intent of Section 22 is to ensure the independence of such experts in the interests of the Organization by according them the privileges and immunities necessary for the purpose. The Court accordingly concludes that Section 22 is applicable to every expert on mission, whether or not he travels.

The Court finally takes up the question whether experts on missions can invoke the privileges and immunities provided for in Section 22 against the States of which they are nationals or on the territory of which they reside. In this connection, it notes that Section 15 of the General Convention provides that the terms of Article IV, Sections 11, 12 and 13, relating to the representatives of Members, "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", and observes that Article V, concerning officials of the Organization, and Article VI, concerning experts on missions for the United Nations, do not contain any comparable rule. It finds that this difference of approach can readily be explained: the privileges and immunities of Articles V and VI are conferred with a view to ensuring the independence of international officials and experts in the interests of the Organization; this independence must be respected by all States, including the State of nationality and the State of residence. The Court notes, moreover, that some States parties to the General Convention have entered reservations to certain provisions of Article V or of Article VI itself, as regards their nationals or persons habitually resident on their territory. In its view, the very fact that it was felt necessary to make these reservations confirms that in the absence of such reservations, experts on missions enjoy the privileges and immunities provided for under the General Convention in their relations with the States of which they are nationals or on the territory of which they reside.

To sum up, the Court takes the view that Section 22 of the General Convention is applicable to persons (other than United Nations officials) to whom a mission has been entrusted by the Organization and who are therefore entitled to enjoy the privileges and immunities provided for in this Section with a view to the independent exercise of their functions; that during the whole period of such missions, experts enjoy these functional privileges and immunities whether or not they travel; and that those privileges and immunities may be invoked as against the State of nationality or of residence unless a reservation to Section 22 of the General Convention has been validly made by that State.

VI. *Applicability of Article VI, Section 22, of the General Convention to Special Rapporteurs of the Sub-Commission*
(paras. 53–55)

Having emphasized that the situation of rapporteurs of the Sub-Commission is one which touches on the legal position of rapporteurs in general and is thus one of importance for the whole of the United Nations system, the Court notes that on 28 March 1947, the Council decided that the Sub-Commission would be composed of 12 eminent persons, designated by name, subject to the consent of their respective national governments, and that the members of the Sub-Commission, at present 25 in number, were subsequently chosen by the Commission under similar conditions; it observes that the Council, in resolution 1983/32 of 27 May 1983, expressly "recall[ed] . . . that members of the Sub-Commission are elected by the Commission . . . as experts in their individual capacity". The Court therefore finds that, since their status is neither that of a representative of a Member State nor that of a United Nations official, and since they perform independently for the Sub-Commission functions contemplated in its remit, the members of the Sub-Commission must be regarded as experts on missions within the meaning of Section 22.

The Court further notes that, in accordance with the practice followed by many United Nations bodies, the Sub-Commission has from time to time appointed rapporteurs or special rapporteurs with the task of studying specified subjects; it also notes that, while these rapporteurs or special rapporteurs are normally selected from among members of the Sub-Commission, there have been cases in which special rapporteurs have been appointed from outside the Sub-Commission or have completed their report only after their membership of the Sub-Commission had expired. In any event, rapporteurs or special rapporteurs are entrusted by the Sub-Commission with a research mission. The Court concludes that since their status is neither that of a representative of a Member State nor that of a United Nations official, and since they carry out such research independently on behalf of the United Nations, they must be regarded as experts on missions within the meaning of Section 22, even in the event that they are not, or are no longer, members of the Sub-Commission. This leads the Court to infer that they enjoy, in accordance with that Section, the privileges and immunities necessary for the exercise of their functions, and in particular for the establishment of any contacts which may be useful for the preparation, the drafting and the presentation of their reports to the Sub-Commission.

VII. *Applicability of Article VI, Section 22, of the General Convention in the Case of Mr. Dumitru Mazilu*
(paras. 56–60)

The Court observes, in the light of the facts presented, that Mr. Mazilu had, from 13 March 1984 to 29 August 1985, the status of a member of the Sub-Commission; that from 29 August 1985 to 31 December 1987, he was both a member and a rapporteur of the Sub-Commission; and finally that, although since the last-mentioned date he has no longer been a member of the Sub-Commission, he has remained a special rapporteur. The Court finds that at no time during this period

has he ceased to have the status of an expert on mission within the meaning of Section 22, or ceased to be entitled to enjoy for the exercise of his functions the privileges and immunities provided for therein.

The Court nevertheless recalls that doubt was expressed by Romania as to whether Mr. Mazilu was capable of performing his task as special rapporteur after being taken seriously ill in May 1987 and being subsequently placed on the retired list pursuant to decisions taken by the competent medical practitioners, in accordance with the applicable Romanian legislation; that Mr. Mazilu himself informed the United Nations that the state of his health did not prevent him from preparing his report or from going to Geneva; and finally that, when a report by Mr. Mazilu was circulated as a document of the Sub-Commission, Romania called in question his "intellectual capacity" to draft "a report consistent with the requirements of the United Nations". After pointing out that it is not for it to pronounce on the state of Mr. Mazilu's health or on its consequences on the work he has done or is to do for the Sub-Commission, the Court points out that it was for the United Nations to decide whether in the circumstances it wished to retain Mr. Mazilu as special rapporteur and takes note that decisions to that effect have been taken by the Sub-Commission.

The Court is of the opinion that in these circumstances, Mr. Mazilu continues to have the status of special rapporteur, that as a consequence he must be regarded as an expert on mission within the meaning of Section 22 of the General Convention and that that Section is accordingly applicable in the case of Mr. Mazilu.

VII. *Operative Paragraph* (para. 61)

The complete text of the *operative paragraph* will be found below:

"For these reasons,

"THE COURT,

"Unanimously,

"*Is of the opinion* that Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations is applicable in the case of Mr. Dumitru Mazilu as a special rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities."

* *
* *

SUMMARY OF OPINIONS APPENDED TO THE ADVISORY OPINION OF THE COURT

Separate Opinion of Judge Oda

Judge Oda expressed some doubts as to whether the Court, by simply giving the answer as stated in the Court's Opinion, had adequately responded to what ECOSOC had in mind when formulating its request for an advisory opinion. The way in which the request was actually framed gave scope, in his view, to certain pronouncements on the modalities of the application of Section 22 of the Convention.

He reconstructed the background to the request for an advisory opinion in a slightly different manner from that adopted by the Court, in accordance with his view that greater emphasis could have been laid upon certain facts seen as more directly relevant to the subject-matter of the opinion sought; while the Court had not been asked to give a general opinion on the range of privileges and immunities enjoyed by a Special Rapporteur, the question put by ECOSOC did imply some requirement of attention to the material consequences of Mr. Mazilu's entitlement to the benefits of Section 22 of the Convention.

In Judge Oda's view, the Court did not focus sufficiently upon the essential aspects of the concrete *case* of Mr. Mazilu, including the fact that he was unable to receive documentation from, enter into contact with, or be approached by the United Nations Centre for Human Rights in Geneva, and was prevented by his Government from travelling to Geneva for consultations with the United Nations Centre. Those aspects were fundamental to the case of Mr. Mazilu, which the Court had been asked to look into.

In his conclusion, Judge Oda stated that the final paragraph of the Opinion could have been slightly expanded. It should have stated more explicitly: firstly, that a Special Rapporteur of the Sub-Commission falls within the category of "Experts on Mission for the United Nations"; secondly, that Mr. Mazilu was, at the time of the request for the opinion by the ECOSOC, a Special Rapporteur of the Sub-Commission and that he still exercises that function and, finally, that Mr. Mazilu was, in the interest of the United Nations, entitled to receive from all parties to the Convention on the Privileges and Immunities of the United Nations, including his national State, all facilities within their power for the fulfilment of his mission. If the Court had made such a pronouncement, it would usefully have drawn attention to the necessity of allowing Mr. Mazilu unimpeded communication with and access to the United Nations Centre for Human Rights.

Separate Opinion of Judge Evensen

In the request of ECOSOC the Court was asked to examine "the legal question of the applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities". The Court was not requested to express itself on concrete violations of these provisions. But it seems evident that the pressures complained of have caused concern and hardship not only to Mr. Mazilu but also to his family. The protection provided for in Article VI, Section 22, of the 1946 Convention cannot be confined only to the "expert Mazilu" but must to a reasonable extent apply to his family as well.

The integrity of a person's family and family life is a basic human right protected by prevailing principles of international law which derive not only from conventional international law or customary international law but from "general principles of law recognized by civilized nations".

Thus in the Universal Declaration of Human Rights adopted by the United Nations General Assembly on 10 December 1948 the integrity of family and family life was laid down as a basic human right in Article 16, paragraph 3, which states: "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."

The respect for a person's family and family life must be considered as integral parts of the "privileges and immunities" that are necessary for the independent exercise of the functions of United Nations experts under Article VI, Section 22, of the 1946 Convention on Privileges and Immunities.

Separate Opinion of Judge Shahabuddeen

In his separate opinion, Judge Shahabuddeen dealt with the competence of the Court to determine questions of prior-

ity in the hearing of cases. As to the Romanian reservation, in his view this did not affect the Court's advisory jurisdiction under Article 96 of the Charter because, for reasons which he gave, it could not apply to the latter. As to the question of Mr. Mazilu's state of health, he thought that Romania was taking the position that illness disabled Mr. Mazilu from functioning and so disentitled him to any of the privileges and immunities (these being functionally based) and that the determination of his state of health lay within Romania's exclusive domestic jurisdiction. Judge Shahabuddeen, however, considered that the exclusiveness of that jurisdiction was qualified by Romania's obligations under the Convention. Finally, he gave his reasons for holding that an expert on mission was entitled to invoke the privileges and immunities for the specific purpose of commencing a journey in connection with his mission.

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86. CASE CONCERNING THE ARBITRAL AWARD OF 31 JULY 1989 (GUINEA-BISSAU *v.* SENEGAL)

Order of 2 March 1990

In an Order issued in the case concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau *v.* Senegal), the Court dismissed, by fourteen votes to one, the request of the Republic of Guinea-Bissau for the indication of provisional measures.

The Court was composed as follows:

President Ruda; *Vice-President* Mbaye; *Judges* Lachs, Elias, Oda, Ago, Schwebel, Sir Robert Jennings, Ni, Evensen, Tarassov, Guillaume, Shahabuddeen and Pathak; *Judge* ad hoc Thierry.

Judges Evensen and Shahabuddeen appended separate opinions to the Order of the Court; Judge *ad hoc* Thierry appended a dissenting opinion.

In its Order the Court recalls that on 23 August 1989 Guinea-Bissau instituted proceedings against Senegal in respect of a dispute concerning the existence and validity of the arbitral award delivered on 31 July 1989 by the Arbitration Tribunal for the Determination of the Maritime Boundary between the two States.

On 18 January 1990 Guinea-Bissau, on the ground of actions stated to have been taken by the Senegalese Navy in a maritime area which Guinea-Bissau regards as an area disputed between the Parties, requested the Court to indicate the following provisional measures:

> "In order to safeguard the rights of each of the Parties, they shall abstain in the disputed area from any act or action of any kind whatever, during the whole duration of the proceedings until the decision is given by the Court."

*
* *

The Court further recalls the events leading to the present proceedings: on 26 April 1960 an Agreement by exchange of letters was concluded between France and Portugal for the purpose of defining the maritime boundary between Senegal (at that time an autonomous State within the *Communauté*) and the Portuguese Province of Guinea; after the accession to independence of Senegal and Guinea-Bissau a dispute arose between them concerning the delimitation of their maritime territories; in 1985 the Parties concluded an Arbitration Agreement for submission of that dispute to an Arbitration Tribunal, Article 2 of which provided that the following questions should be put to the Tribunal:

> "(1) Does the agreement concluded by an exchange of letters on 26 April 1960, and which relates to the maritime boundary, have the force of law in the relations between the Republic of Guinea-Bissau and the Republic of Senegal?
>
> "(2) In the event of a negative answer to the first question, what is the course of the line delimiting the maritime territories appertaining to the Republic of Guinea-Bissau and the Republic of Senegal respectively?"

and Article 9 of which provided that the decision of the Tribunal "shall include the drawing of the boundary line on a map".

On 31 July 1989 the Arbitration Tribunal pronounced, by two votes (including that of the President of the Tribunal) to one, an award of which the operative clause was as follows:

> "For the reasons stated above, the Tribunal *decides* . . . to reply as follows to the first question formulated in Article 2 of the Arbitration Agreement: The Agreement concluded by an exchange of letters on 26 April 1960, and relating to the maritime boundary, has the force of law in the relations between the Republic of Guinea-Bissau and the Republic of Senegal with regard solely to the areas mentioned in that Agreement, namely the territorial sea, the contiguous zone and the continental shelf. The straight line drawn at 240° is a loxodromic line."

In that award the Tribunal also stated its conclusion that "it is not called upon to reply to the second question", and that "in view of its decision it has not thought it necessary to append a map showing the course of the boundary line"; the President of the Arbitration Tribunal appended a declaration to the award.

Guinea-Bissau contends in its Application to the Court that "A new dispute then came into existence, relating to the applicability of the text issued by way of award on 31 July 1989"; and requests the Court, in respect of the decision of the Arbitration Tribunal, to adjudge and declare:

> "—that that so-called decision is inexistent in view of the fact that one of the two arbitrators making up the appearance of a majority in favour of the text of the 'award', has, by a declaration appended to it, expressed a view in contradiction with the one apparently adopted by the vote;
>
> "—subsidiarily, that that so-called decision is null and void, as the Tribunal did not give a complete answer to the two-fold question raised by the Agreement and so did not arrive at a single delimitation line duly recorded on a map, and as it has not given the reasons for the restrictions thus improperly placed upon its jurisdiction;
>
> "—that the Government of Senegal is thus not justified in seeking to require the Government of Guinea-Bissau to apply the so-called award of 31 July 1989;"

The Court observes that Guinea-Bissau explains in its request for the indication of provisional measures that that request was prompted by

"acts of sovereignty by Senegal which prejudge both the judgment on the merits to be given by the Court and the maritime delimitation to be effected subsequently between the States;"

It then summarizes the incidents which took place and which involved actions by both Parties with regard to foreign fishing vessels.

*
* *

On the question of its jurisdiction the Court subsequently considers that, whereas on a request for provisional measures it need not, before deciding whether or not to indicate them, finally satisfy itself that it has jurisdiction on the merits of the case, yet it ought not to indicate such measures unless the provisions invoked by the Applicant appear, prima facie, to afford a basis on which the jurisdicton of the Court might be founded; and finds that the two declarations made by the Parties under Article 36, paragraph 2, of the Statute and invoked by the Applicant do appear, prima facie, to afford a basis of jurisdiction.

It observes that that decision in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case.

*
* *

Guinea-Bissau has requested the Court to exercise in the present proceedings the power conferred upon it by Article 41 of the Statute of the Court "to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party".

The Court observes that the purpose of exercising this power is to protect "rights which are the subject of dispute in judicial proceedings" (*Aegean Sea Continental Shelf, I.C.J. Reports 1976*, p. 9, para. 25; *Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1979*, p. 19, para. 36); that such measures are provisional and indicated "pending the final decision" (Article 41, paragraph 2, of the Statute); and that therefore they are to be measures such that they will no longer be required as such once the dispute over those rights has been resolved by the Court's judgment on the merits of the case.

It further notes that Guinea-Bissau recognizes in its Application that the dispute of which it has seised the Court is not the dispute over maritime delimitation brought before the Arbitration Tribunal, but a "new dispute . . . relating to the applicability of the text issued by way of award of 31 July 1989"; that however it has been argued by Guinea-Bissau that provisional measures may be requested, in the context of judicial proceedings on a subsidiary dispute, to protect rights in issue in the underlying dispute; that the only link essential for the admissibility of measures is the link between the measures contemplated and the conflict of interests underlying the question or questions put to the Court—that conflict of interests in the present case being the conflict over maritime delimitation—and that this is so whether the Court is seised of a main dispute or of a subsidiary dispute, a fundamental dispute or a secondary dispute, on the sole condition that the decision by the Court on the questions of substance which are submitted to it be a necessary prerequisite for the settlement of the conflict of interests to which the measures relate; that in the present case Guinea-Bissau claims that the basic dispute concerns the conflicting claims of the Parties to control, exploration and exploitation of maritime areas, and that the purpose of the measures requested is to preserve the integrity of the maritime area concerned, and that the required relationship between the provisional measures requested by Guinea-Bissau and the case before the Court is present.

The Court observes that the Application instituting proceedings asks the Court to declare the 1989 award to be "inexistent" or, subsidiarily, "null and void", and to declare "that the Government of Senegal is thus not justified in seeking to require the Government of Guinea-Bissau to apply the so-called award of 31 July 1989"; that the Application thus asks the Court to pass upon the existence and validity of the award but does not ask the Court to pass upon the respective rights of the Parties in the maritime areas in question; it finds that accordingly the alleged rights sought to be made the subject of provisional measures are not the subject of the proceedings before the Court on the merits of the case; and that any such measures could not be subsumed by the Court's judgment on the merits.

Moreover, a decision of the Court that the award is inexistent or null and void would in no way entail any decision that the Applicant's claims in respect of the disputed maritime delimitation are well founded, in whole or in part; and that the dispute over those claims will therefore not be resolved by the Court's judgment.

OPERATIVE PARAGRAPH

Accordingly,

THE COURT,

by fourteen votes to one,

Dismisses the request of the Republic of Guinea-Bissau, filed in the Registry on 18 January 1990, for the indication of provisional measures."

SUMMARY OF OPINIONS APPENDED TO THE ORDER OF THE COURT

Separate Opinion of Judge Evensen

The circumstances of the present case do not seem to require the exercise of the Court's power under Article 41 of the Statute of the International Court of Justice to indicate interim measures.

But the Court does not need finally to establish that it has jurisdiction on the merits of the case before deciding whether or not to indicate interim measures. The absence at this stage of any challenge to the Court's jurisdiction is relevant in this context.

The avoidance of irreparable damage should not be a condition for the stipulation of interim measures. Neither Article 41 of the Statute of the Court nor Article 73 of the Rules of Court contain any reference to "irreparable damage". The Court's discretionary powers should not be limited in such a manner.

In the present case guidance may be found in the United Nations Convention on the Law of the Sea of 10 December 1982, especially in Part V on the Exclusive Economic Zone and in Part VI on the Continental Shelf. Both the Government of Guinea-Bissau and the Government of Senegal have signed and ratified this Convention.

Article 74, paragraph 1, of the 1982 Convention, dealing with the *delimitation of the exclusive economic zone* between neighbouring coastal States provides that the delimitation of the zone "*shall be effected by agreement*". Identical provisions are found in Article 83 of the Convention *on the delimitation of the continental shelf*. The Convention has not yet entered into force.

But these articles give expression to governing principles of international law in this field. They entail that coastal States should conclude agreements, where necessary, concerning the allowable catch of fishstocks, the distribution of this catch between the States concerned, the issuance of fisheries licenses, the character and modes of fishing gear, the protection of spawning grounds, the maintenance of the necessary contacts between the relevant national fisheries authorities together with other means for the rational and peaceful exploitation of these vital resources of the oceans.

Separate Opinion of Judge Shahabuddeen

In his separate opinion, it appears to Judge Shahabuddeen that Guinea-Bissau has been contending for a more liberal view than that adopted by the Court of the kind of link which should exist between rights sought to be preserved by provisional measures and rights sought to be adjudicated in the case. But, in his view, such an approach is limited by the reflection that the situation created by an indication of provisional measures should be consistent with the effect of a possible decision in the main case in favour of the State applying for such measures. In this case, if Guinea-Bissau were to succeed in obtaining a declaration that the award was inexistent or invalid, the original dispute would be reopened and each party would be at liberty to act within the limits allowed by international law. This liberty of action, resulting from such a decision in Guinea-Bissau's favour, would be actually inconsistent with the situation created by an indication of provisional measures restraining both parties from carrying out any activities, instead of being consistent with it as in the normal case. Consequently, Judge Shahabuddeen does not consider that the approach suggested by Guinea-Bissau could lead to a decision different from that reached by the Court.

Dissenting Opinion of Judge ad hoc *Thierry*

In his dissenting opinion, Judge Thierry gives the reasons which have unfortunately prevented him from associating himself with the Court's decision. Indeed, he takes the view that:

1. The incidents set forth in the Order were such as to require the indication of provisional measures which ought, for that reason, to have been indicated in accordance with Article 41 of the Statute and Article 75, paragraph 2, of the Rules of Court.

2. There was, in this case, no legal impediment to the exercise, by the Court, of its power to indicate provisional measures, since the finding that it is called upon to reach with regard to the merits (i.e., on the validity of the Arbitral Award of 31 July 1989) is bound to affect the rights of the Parties in the disputed maritime area.

3. The Court ought to have enjoined the Parties to negotiate on the basis of the assurances given by Senegal in that regard, in order to forestall any aggravation of the dispute for the time being.

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87. CASE CONCERNING THE LAND, ISLAND AND MARITIME FRONTIER DISPUTE (EL SALVADOR/HONDURAS) (APPLICATION FOR PERMISSION TO INTERVENE)

Judgment of 13 September 1990

The Chamber formed to deal with the case concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), delivered its Judgment on the Application for permission to intervene in that case filed by Nicaragua under Article 62 of the Statute. It found, unanimously, that Nicaragua had shown that it has an interest of a legal nature which may be affected by part of the Judgment of the Chamber on the merits in the case and decided that Nicaragua was accordingly permitted to intervene in the case in certain respects.

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The composition of the Chamber was as follows: President, Judge Sette-Camara; Judges Oda and Sir Robert Jennings; Judges *ad hoc* Valticos and Torres Bernárdez.

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* *

The complete text of the operative paragraph of the Judgment reads as follows:

"For these reasons,

"THE CHAMBER,

"Unanimously,

"1. *Finds* that the Republic of Nicaragua has shown that it has an interest of a legal nature which may be affected by part of the Judgment of the Chamber on the merits in the present case, namely its decision on the legal régime of the waters of the Gulf of Fonseca, but has not shown such an interest which may be affected by any decision which the Chamber may be required to make concerning the delimitation of those waters, or any decision as to the legal situation of the maritime spaces outside the Gulf, or any decision as to the legal situation of the islands in the Gulf;

"2. *Decides* accordingly that the Republic of Nicaragua is permitted to intervene in the case, pursuant to Article 62 of the Statute, to the extent, in the manner and for the purposes set out in the present Judgment, but not further or otherwise."

*
* *

Judge Oda appended a separate opinion to the Judgment. In this opinion the Judge concerned stated and explained

the position he adopted in regard to certain points dealt with in the Judgment.

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* *

I. *Proceedings and submissions by the Parties* (paras. 1–22)

1. By a joint notification dated 11 December 1986, filed in the Registry of the Court the same day, the Ministers for Foreign Affairs of the Republic of Honduras and the Republic of El Salvador transmitted to the Registrar a certified copy of a Special Agreement in Spanish, signed in the City of Esquipulas, Republic of Guatemala, on 24 May 1986. Its preamble refers to the conclusion on 30 October 1980, in Lima, Peru, of a General Peace Treaty between the two States, whereby, *inter alia*, they delimited certain sections of their common land frontier; and it records that no direct settlement had been achieved in respect of the remaining land areas, or as regards "the legal situation of the islands and maritime spaces".

Article 2 of the Special Agreement, which defines the subject of the dispute, reads, in a translation by the Registry of the Court,

"The Parties request the Chamber:

"1. To delimit the frontier line in the areas or sections not described in Article 16 of the General Peace Treaty of 30 October 1980.

"2. To determine the legal situation of the islands and maritime spaces."

On 17 November 1989 Nicaragua filed a request for permission to intervene under Article 62 of the Statute of the Court in the proceedings instituted by the notification of the Special Agreement.

The Court, in an Order dated 28 February 1990, found that it was for the Chamber formed to deal with the present case to decide whether Nicaragua's request should be granted.

II. *Nature and extent of the dispute* (paras. 23–33)

The Chamber observes that the dispute between El Salvador and Honduras which is the subject of the Special Agreement concerns several distinct though in some respects interrelated matters. The Chamber is asked first to delimit the land frontier line between the two States in the areas or sections not described in Article 16 of the General Peace Treaty concluded by them on 30 October 1980; Nicaragua is not seeking to intervene in this aspect of the proceedings. The Chamber is also to "determine the legal situation of the islands", and that of the "maritime spaces". The geographical context of the island and maritime aspects of the dispute, and the nature and extent of the dispute as appears from the Parties' claims before the Chamber, is as follows.

The Gulf of Fonseca lies on the Pacific coast of Central America, opening to the ocean in a generally south-westerly direction. The north-west coast of the Gulf is the land territory of El Salvador, and the south-east coast that of Nicaragua; the land territory of Honduras lies between the two, with a substantial coast on the inner part of the Gulf. The entry to the Gulf, between Punta Amapala in El Salvador to the north-west, and Punta Cosigüina in Nicaragua to the south-east, is some 19 nautical miles wide. The penetration of the Gulf from a line drawn between these points varies between 30 and 32 nautical miles. Within the Gulf of Fonseca, there is a considerable number of islands and islets.

El Salvador asks the Chamber to find that "El Salvador has and had sovereignty over all the islands in the Gulf of Fonseca, with the exception of the Island of Zacate Grande which can be considered as forming part of the coast of Honduras". Honduras for its part invites the Chamber to find that the islands of Meanguera and Meanguerita are the only islands in dispute between the Parties, so that the Chamber is not, according to Honduras, called upon to determine sovereignty over any of the other islands, and to declare the sovereignty of Honduras over Meanguera and Meanguerita.

The Chamber considers that the detailed history of the dispute is not here to the purpose, but that two events concerning the maritime areas must be mentioned. First, the waters within the Gulf of Fonseca between Honduras and Nicaragua were to an important extent delimited in 1900 by a Mixed Commission established pursuant to a Treaty concluded between the two States on 7 October 1894, but the delimitation line does not extend so far as to meet a closing line between Punta Amapala and Punta Cosigüina.

The second event to be mentioned is the following. In 1916 El Salvador brought proceedings against Nicaragua in the Central American Court of Justice, claiming *inter alia* that the Bryan-Chamorro Treaty concluded by Nicaragua with the United States of America, for the construction of a naval base, "ignored and violated the rights of co-ownership possessed by El Salvador in the Gulf of Fonseca".

Nicaragua resisted the claim contending (*inter alia*) that the lack of demarcation of frontiers between the riparian States did "not result in common ownership". The Decision of the Central American Court of Justice dated 9 March 1917 records the unanimous view of the judges that the international status of the Gulf of Fonseca was that it was "an historic bay possessed of the characteristics of a closed sea", and in its "Examination of facts and law", the Court found:

"Whereas: The legal status of the Gulf of Fonseca having been recognized by this Court to be that of a historic bay possessed of the characteristics of a closed sea, the three riparian States of El Salvador, Honduras and Nicaragua are, therefore, recognized as co-owners of its waters, except as to the littoral marine league which is the exclusive property of each, . . ."

It is claimed by El Salvador in its Memorial in the present case that:

"On the basis of the 1917 judgement an objective legal régime has been established in the Gulf. Even if initially the judgement was binding only in respect of the direct parties to the litigation, Nicaragua and El Salvador, the legal status recognized therein has been consolidated in the course of time[;] its effects extend to third States, and, in particular, they extend to Honduras";

and further that the juridical situation of the Gulf "does not permit the dividing up of the waters held in condominium", with the exception of "a territorial sea within the Gulf", recognized by the Central American Court of Justice. It therefore asks the Chamber to adjudge and declare that:

"The juridical position of the maritime spaces within the Gulf of Fonseca corresponds to the juridical position established by the Judgement of the Central American Court of Justice rendered March 9th 1917, as accepted and applied thereafter."

It also contends that

"So far as the maritime spaces are concerned, the Parties have not asked the Chamber either to trace a line of delimitation or to define the Rules and Principles of Public

International Law applicable to a delimitation of maritime spaces, either inside or outside the Gulf of Fonseca."

Honduras rejects the view that the 1917 Judgement produced or reflected an objective legal régime, contending that in the case of

"a judgment or arbitral award laying down a delimitation as between the parties to a dispute, the solution therein adopted can only be opposed to the parties".

It also observes that

"it is not the 1917 Judgement which confers sovereignty upon the riparian States over the waters of the Bay of Fonseca. That sovereignty antecedes considerably that judgment between two riparian States, since it dates back to the creation of the three States concerned."

Honduras's contention as to the legal situation of the maritime spaces, to be examined further below, involves their delimitation between the Parties. It considers that the Chamber has jurisdiction under the Special Agreement to effect such delimitation, and has indicated what, in the view of Honduras, should be the course of the delimitation line.

As regards maritime spaces situated outside the closing line of the Gulf, Honduras asks the Chamber to find that the "community of interests" between El Salvador and Honduras as coastal States of the Gulf implies that they each have an equal right to exercise jurisdiction over such spaces. On this basis, it asks the Chamber to determine a line of delimitation extending 200 miles seaward, to delimit the territorial sea, the exclusive economic zone and the continental shelf of the two Parties. El Salvador however contends that the Chamber does not, under the Special Agreement, have jurisdiction to delimit maritime areas outside the closing line of the Gulf. El Salvador denies that Honduras has any legitimate claim to any part of the continental shelf or exclusive economic zone in the Pacific, outside the Gulf; it is however prepared to accept that this question be decided by the Chamber.

III. *Requirements for intervention under Article 62 of the Statute and Article 81 of the Rules of Court* (paras. 35–101)

In its Application for permission to intervene, filed on 17 November 1989, Nicaragua stated that the Application was made by virtue of Article 36, paragraph 1, and Article 62 of the Statute. An application under Article 62 is required by Article 81, paragraph 1, of the Rules of Court to be filed "as soon as possible, and not later than the closure of the written proceedings". The Application of Nicaragua was filed in the Registry of the Court two months before the time-limit fixed for the filing of the Parties' Replies.

By Article 81, paragraph 2, of the Rules of Court a State seeking to intervene is required to specify the case to which it relates and to set out:

"(*a*) the interest of a legal nature which the State applying to intervene considers may be affected by the decision in that case;

"(*b*) the precise object of the intervention;

"(*c*) any basis of jurisdiction which is claimed to exist as between the State applying to intervene and the parties to the case".

The Chamber first examines arguments of El Salvador which were put forward as grounds for the Chamber to reject the Application of Nicaragua *in limine*, without there being any need for further examination of its compliance with Article 62 of the Statute of the Court. These arguments, none of which were upheld by the Chamber, related to the formal compliance of the Application with the requirements of Article 81, paragraph 2, of the Rules of Court, to the alleged "untimeliness" of the Application in view of requests contained in it which would be disruptive at the present advanced stage of the proceedings, and to the absence of negotiations prior to the filing of the Application.

(a) *Interest of a legal nature* (paras. 37 and 52–84)

Nicaragua states in its Application that: "As can be appreciated in Article 2 of the Special Agreement . . . , the Government of Nicaragua has an interest of a legal nature which must inevitably be affected by a decision of the Chamber." (Para. 2.) It then proceeds to enumerate the "particular considerations supporting this opinion". The Chamber observes that as the Court has made clear in previous cases, in order to obtain permission to intervene under Article 62 of the Statute, a State has to show an interest of a legal nature which may be affected by the Court's decision in the case, or that *un intérêt d'ordre juridique est pour lui en cause*—the criterion stated in Article 62.

In the present case, Nicaragua has gone further: citing the case concerning *Monetary Gold Removed from Rome in 1943* (*I.C.J. Reports 1954*, p. 19), it has argued that its interests are so much part of the subject-matter of the case that the Chamber could not properly exercise its jurisdiction without the participation of Nicaragua. The Chamber therefore examines the way in which the interests of Albania would have formed "the very subject-matter of the decision" in the case concerning *Monetary Gold Removed from Rome in 1943*, and explains that the Court's finding in that case was that, while the presence in the Statute of Article 62 might impliedly authorize continuance of the proceedings in the absence of a State whose "interests of a legal nature" might be "affected", this did not justify continuance of proceedings in the absence of a State whose international responsibility would be "the very subject-matter of the decision". There had been no need to decide what the position would have been had Albania applied for permission to intervene under Article 62. The Chamber concludes that, if in the present case the legal interests of Nicaragua would form part of "the very subject-matter of the decision", as Nicaragua has suggested, this would doubtless justify an intervention by Nicaragua under Article 62 of the Statute, which lays down a less stringent criterion. The question would then arise, however, whether such intervention under Article 62 of the Statute would enable the Chamber to pronounce upon the legal interests of Nicaragua which it is suggested by Nicaragua would form the very subject-matter of the decision. The Chamber will therefore first consider whether Nicaragua has shown the existence of an "interest of a legal nature which may be affected by the decision", so as to justify an intervention; and if such is the case, will then consider whether that interest may in fact form "the very subject-matter of the decision" as did the interests of Albania in the case concerning *Monetary Gold Removed from Rome in 1943*.

The Chamber further observes that Article 62 of the Statute contemplates intervention on the basis of an interest of a legal nature "which may be affected by the decision in the case". In the present case, however, what is requested of the Chamber by the Special Agreement is not a decision on a single circumscribed issue, but several decisions on various aspects of the overall dispute between the Parties. The Chamber has to consider the possible effect on legal interests asserted by Nicaragua of its eventual decision on each of the different issues which might fall to be determined, in order to

define the scope of any intervention which may be found to be justified under Article 62 of the Statute. If a State can satisfy the Court that it has an interest of a legal nature which may be affected by the decision in the case, it may be permitted to intervene in respect of that interest. But that does not mean that the intervening State is then also permitted to make excursions into other aspects of the case; this is in fact recognized by Nicaragua. Since the scope of any permitted intervention has to be determined, the Chamber has to consider the matters of the islands, the situation of the waters within the Gulf, the possible delimitation of the waters within the Gulf, the situation of the waters outside the Gulf, and the possible delimitation of the waters outside the Gulf.

Whether all of these matters are indeed raised by the wording of Article 2, paragraph 2, of the Special Agreement is itself disputed between the Parties to the case. Accordingly, the list of matters to be considered must in this phase of the proceedings be entirely without prejudice to the meaning of Article 2, paragraph 2, as a whole, or of any of the terms as used in that Article. The Chamber clearly cannot take any stand in the present proceedings on the disputes between the Parties concerning the proper meaning of the Special Agreement: it must determine the questions raised by Nicaragua's Application while leaving these questions of interpretation entirely open.

Burden of proof
(paras. 61–63)

There was some argument before the Chamber on the question of the extent of the burden of proof on a State seeking to intervene. In the Chamber's opinion, it is clear, first, that it is for a State seeking to intervene to demonstrate convincingly what it asserts, and thus to bear the burden of proof; and, second, that it has only to show that its interest "may" be affected, not that it will or must be affected. What needs to be shown by a State seeking permission to intervene can only be judged *in concreto* and in relation to all the circumstances of a particular case. It is for the State seeking to intervene to identify the interest of a legal nature which it considers may be affected by the decision in the case, and to show in what way that interest may be affected; it is not for the Court itself—or in the present case the Chamber—to substitute itself for the State in that respect. The Chamber also recalls in this connection the problem that the Parties to the case are in dispute about the interpretation of the very provision of the Special Agreement invoked in Nicaragua's Application. The Chamber notes the reliance by Nicaragua on the principle of recognition, or on estoppel, but does not accept Nicaragua's contentions in this respect.

The Chamber then turns to consideration of the several specific issues in the case which may call for decision, as indicated above, in order to determine whether it has been shown that such decision may affect a Nicaraguan interest of a legal nature.

1. *Legal situation of the islands*
(paras. 65–66)

So far as the decision requested of the Chamber by the Parties is to determine the legal situation of the islands, the Chamber concludes that it should not grant permission for intervention by Nicaragua, in the absence of any Nicaraguan interest liable to be directly affected by a decision on that issue. Any possible effects of the islands as relevant circumstances for delimitation of maritime spaces fall to be considered in the context of the question whether Nicaragua should be permitted to intervene on the basis of a legal interest which may be affected by a decision on the legal situation of the waters of the Gulf.

2. *Legal situation of the waters within the Gulf*
(paras. 67–79)

(i) *The régime of the waters*

It is El Salvador's case that, as between El Salvador, Honduras and Nicaragua, there exists "a régime of community, co-ownership or joint sovereignty" over such of the waters of the Gulf of Fonseca "as lie outside the area of exclusive jurisdiction", an "objective legal régime" on the basis of the 1917 Judgement of the Central American Court of Justice. On that basis, El Salvador considers that the juridical situation of the Gulf does not permit the dividing up of the waters held in condominium. El Salvador also contends that the Special Agreement does not confer jurisdiction to effect any such delimitation. Honduras on the other hand contends, *inter alia*, that "the Gulf's specific geographical situation creates a special situation between the riparian States which generates a community of interests" which in turn "calls for a special legal régime to determine their mutual relations"; that the community of interests "does not mean integration and the abolition of boundaries" but, on the contrary, "the clear definition of those boundaries as a condition of effective co-operation"; and that each of the three riparian States "has an equal right to a portion of the internal waters".

The Chamber considers that quite apart from the question of the legal status of the 1917 Judgement, however, the fact is that El Salvador now claims that the waters of the Gulf are subject to a condominium of the coastal States, and has indeed suggested that that régime "would in any case have been applicable to the Gulf under customary international law". Nicaragua has referred to the fact that Nicaragua plainly has rights in the Gulf of Fonseca, the existence of which is undisputed, and contends that

> "The condominium, if it is declared to be applicable, would by its very nature involve three riparians, and not only the parties to the Special Agreement."

In the opinion of the Chamber, this is a sufficient demonstration by Nicaragua that it has an interest of a legal nature in the determination whether or not this is the régime governing the waters of the Gulf: the very definition of a condominium points to this conclusion. Furthermore, a decision in favour of some of the Honduran theses would equally be such as may affect legal interests of Nicaragua. The "community of interests" which is the starting-point of the arguments of Honduras is a community which, like the condominium claimed by El Salvador, embraces Nicaragua as one of the three riparian States, and Nicaragua must therefore be interested also in that question. The Chamber, therefore, finds that Nicaragua has shown to the Chamber's satisfaction the existence of an interest of a legal nature which may be affected by its decision on these questions.

On the other hand, while the Chamber is thus satisfied that Nicaragua has a legal interest which may be affected by the decision of the Chamber on the question whether or not the waters of the Gulf of Fonseca are subject to a condominium or a "community of interests" of the three riparian States, it cannot accept the contention of Nicaragua that the legal interest of Nicaragua "would form the very subject-matter of the decision", in the sense in which that phrase was used in the case concerning *Monetary Gold Removed from Rome in 1943* to describe the interests of Albania. It follows that the question whether the Chamber would have power to take a decision on these questions, without the participation of Nic-

aragua in the proceedings, does not arise; but that the conditions for an intervention by Nicaragua in this aspect of the case are nevertheless clearly fulfilled.

(ii) *Possible delimitation of the waters*

If the Chamber were not satisfied that there is a condominium over the waters of the Gulf of such a kind as to exclude any delimitation, it might then be called upon, if it were satisfied that it has jurisdiction to do so, to effect a delimitation. The Chamber has therefore to consider whether a decision as to delimitation of the waters of the Gulf might affect an interest of a legal nature appertaining to Nicaragua, in order to determine whether Nicaragua should be permitted to intervene in respect of this aspect of the case also. It does not, however, have to consider the possible effect on Nicaragua's interests of every possible delimitation which might be arrived at; it is for the State seeking to intervene to show that its interests might be affected by a particular delimitation, or by delimitation in general. Honduras has already indicated in its pleadings how, in its view, the delimitation should be effected. El Salvador, consistently with its position, has not indicated its views on possible lines of delimitation. Nicaragua, for its part, has not given any indication of any specific line of delimitation which it considers would affect its interests.

The Chamber examines arguments put forward in the Nicaraguan Application as considerations supporting its assertion of a legal interest; it does not consider that an interest of a third State in the general legal rules and principles likely to be applied by the decision can justify an intervention, or that the taking into account of all the coasts and coastal relationships within the Gulf as a geographical fact for the purposes of a delimitation between El Salvador and Honduras means that the interest of a third riparian State, Nicaragua, may be affected. The Chamber observes that the essential difficulty in which the Chamber finds itself, on this matter of a possible delimitation within the waters of the Gulf, is that Nicaragua did not in its Application indicate any maritime spaces in which Nicaragua might have a legal interest which could be said to be affected by a possible delimitation line between El Salvador and Honduras.

Accordingly the Chamber is not satisfied that a decision in the present case either as to the law applicable to a delimitation, or effecting a delimitation, between Honduras and El Salvador, of the waters of the Gulf (except as regards the alleged "community of interests"), would affect Nicaragua's interests. The Chamber therefore considers that although Nicaragua has, for purposes of Article 62 of the Statute, shown an interest of a legal nature which may be affected by the Chamber's decision on the question of the existence or nature of a régime of condominium or community of interests within the Gulf of Fonseca, it has not shown such an interest which might be affected by the Chamber's decision on any question of delimitation within the Gulf. This finding also disposes of the question, referred to above, of the possible relevance of a decision in the island dispute.

3. *Legal situation of waters outside the Gulf* (paras. 80–84)

The Chamber now turns to the question of the possible effect on Nicaragua's legal interests of its future decision on the waters outside the Gulf. Honduras claims that by the Special Agreement

> "the Parties have necessarily endowed the Court with competence to delimit the zones of territorial sea and the exclusive economic zones pertaining to Honduras and El Salvador respectively"

and asks the Chamber to endorse the delimitation line advanced by Honduras for the waters outside the Gulf as "productive of an equitable solution". El Salvador interprets the Special Agreement as not authorizing the Chamber to effect any delimitation. Both Parties contend that Nicaragua has no legal interest which may be affected by the decision on the "legal situation" of the maritime spaces outside the Gulf and both Parties deny that the carrying out by the Chamber of their respective interpretations of Article 2 could affect Nicaragua's legal interests.

The Chamber notes Honduras' demonstration of a proposed scheme of delimitation designed to avoid any impingement upon waters outside the Gulf which might conceivably be claimed by Nicaragua, upon which the Chamber cannot pass in these incidental proceedings, and before hearing argument on the merits. That demonstration did call for some indication in response, by the State seeking to intervene, of how those proposals would affect a specific interest of that State, or what other possible delimitation would affect that interest. The charted proposition of Honduras thus gave Nicaragua the opportunity to indicate how the Honduran proposals might affect "to a significant extent" any possible Nicaraguan legal interest in waters west of that Honduran line. Nicaragua failed to indicate how this delimitation, or any other delimitation regarded by it as a possible one, would affect an actual Nicaraguan interest of a legal nature. The Chamber therefore cannot grant Nicaragua permission to intervene over the delimitation of the waters outside the Gulf closing line.

(b) *Object of the intervention* (paras. 85–92)

The Chamber turns to the question of the object of Nicaragua's Application for permission to intervene in the case. A statement of the "precise object of the intervention" is required by Article 81, paragraph 2 (*b*), of the Rules of Court.

Nicaragua's indication, in its Application for permission to intervene, of the object of its intervention in the present case, is as follows:

> "The intervention for which permission is requested has the following objects:
>
> "*First,* generally to protect the legal rights of the Republic of Nicaragua in the Gulf of Fonseca and the adjacent maritime areas by all legal means available.
>
> "*Secondly,* to intervene in the proceedings in order to inform the Court of the nature of the legal rights of Nicaragua which are in issue in the dispute. This form of intervention would have the conservative purpose of seeking to ensure that the determination of the Chamber did not trench upon the legal rights and interests of the Republic of Nicaragua . . ."

At the hearings, the Agent of Nicaragua emphasized its willingness to adjust to any procedure indicated by the Chamber. It has been contended, in particular by El Salvador, that Nicaragua's stated object is not a proper object.

So far as the object of Nicaragua's intervention is "to inform the Court of the nature of the legal rights of Nicaragua which are in issue in the dispute", it cannot be said that this object is not a proper one: it seems indeed to accord with the function of intervention. The use in an Application to intervene of a perhaps somewhat more forceful expression ("trench upon the legal rights and interests") is immaterial,

provided the object actually aimed at is a proper one. Secondly, it does not seem to the Chamber that for a State to seek by intervention "to protect its claims by all legal means" necessarily involves the inclusion in such means of "that of seeking a favourable judicial pronouncement" on its own claims. The "legal means available" must be those afforded by the institution of intervention for the protection of a third State's legal interests. So understood, that object cannot be regarded as improper.

(c) *Basis of jurisdiction: Valid link of jurisdiction* (paras. 93–101)

The Chamber has now further to consider the argument of El Salvador that for Nicaragua to intervene it must in addition show a "valid link of jurisdiction" between Nicaragua and the Parties. In its Application, Nicaragua does not assert the existence of any basis of jurisdiction other than the Statute itself, and expresses the view that Article 62 does not require a separate title of jurisdiction.

The question is whether the existence of a valid link of jurisdiction with the parties to the case—in the sense of a basis of jurisdiction which could be invoked, by a State seeking to intervene, in order to institute proceedings against either or both of the parties—is an essential condition for the granting of permission to intervene under Article 62 of the Statute. In order to decide the point the Chamber must consider the general principle of consensual jurisdiction in its relation with the institution of intervention.

There can be no doubt of the importance of this general principle. The pattern of international judicial settlement under the Statute is that two or more States agree that the Court shall hear and determine a particular dispute. Such agreement may be given *ad hoc*, by Special Agreement or otherwise, or may result from the invocation, in relation to the particular dispute, of a compromissory clause of a treaty or of the mechanism of Article 36, paragraph 2, of the Court's Statute. Those States are the "parties" to the proceedings, and are bound by the Court's eventual decision because they have agreed to confer jurisdiction on the Court to decide the case, the decision of the Court having binding force as provided for in Article 59 of the Statute. Normally, therefore, no other State may involve itself in the proceedings without the consent of the original parties. Nevertheless, procedures for a "third" State to intervene in a case are provided in Articles 62 and 63 of the Court's Statute. The competence of the Court in this matter of intervention is not, like its competence to hear and determine the dispute referred to it, derived from the consent of the parties to the case, but from the consent given by them, in becoming parties to the Court's Statute, to the Court's exercise of its powers conferred by the Statute. Thus the Court has the competence to permit an intervention even though it be opposed by one or both of the parties to the case. The nature of the competence thus created by Article 62 of the Statute is definable by reference to the object and purpose of intervention, as this appears from Article 62 of the Statute.

Intervention under Article 62 of the Statute is for the purpose of protecting a State's "interest of a legal nature" that might be affected by a decision in an existing case already established between other States, namely the parties to the case. It is not intended to enable a third State to tack on a new case, to become a new party, and so have its own claims adjudicated by the Court. Intervention cannot have been intended to be employed as a substitute for contentious proceedings. Acceptance of the Statute by a State does not of itself create jurisdiction to entertain a particular case: the specific consent of the parties is necessary for that. If an intervener were held to become a party to a case merely as a consequence of being permitted to intervene in it, this would be a very considerable departure from the principle of consensual jurisdiction. It is therefore clear that a State, which is allowed to intervene in a case, does not, by reason only of being an intervener, become also a party to the case.

It thus follows from the juridical nature and from the purposes of intervention that the existence of a valid link of jurisdiction between the would-be intervener and the parties is not a requirement for the success of the application. On the contrary, the procedure of intervention is to ensure that a State with possibly affected interests may be permitted to intervene even though there is no jurisdictional link and it therefore cannot become a party. The Chamber therefore concludes that the absence of a jurisdictional link between Nicaragua and the Parties to this case is no bar to permission being given for intervention.

IV. *Procedural rights of State permitted to intervene* (paras. 102–104)

Since this is the first case in the history of the two Courts in which a State will have been accorded permission to intervene under Article 62 of the Statute, it appears appropriate to give some indication of the extent of the procedural rights acquired by the intervening State as a result of that permission. In the first place, as has been explained above, the intervening State does not become party to the proceedings, and does not acquire the rights, or become subject to the obligations, which attach to the status of a party, under the Statute and Rules of Court, or the general principles of procedural law. Nicaragua, as an intervener, has of course a right to be heard by the Chamber. That right is regulated by Article 85 of the Rules of Court, which provides for submission of a written statement, and participation in the hearings.

The scope of the intervention in this particular case, in relation to the scope of the case as a whole, necessarily involves limitations of the right of the intervener to be heard. An initial limitation is that it is not for the intervener to address argument to the Chamber on the interpretation of the Special Agreement concluded between the Parties on 24 May 1986, because the Special Agreement is, for Nicaragua, *res inter alios acta;* and Nicaragua has disclaimed any intention of involving itself in the dispute over the land boundary. The Chamber then summarizes the aspects of the case in respect of which Nicaragua has shown the existence of an interest of a legal nature and those in respect of which it has not, with the consequent limitations on the scope of the intervention permitted.

SUMMARY OF THE SEPARATE OPINION OF JUDGE ODA

While agreeing strongly with the Chamber in permitting Nicaragua to intervene in the case brought to the Court pursuant to the Special Agreement of 24 May 1986 between Honduras and El Salvador, Judge Oda expresses the view that Nicaragua's intervention should not have been restricted to the sole question of the legal régime of the waters within the Gulf. In his view, once it had, if only in very general terms, shown that it had an interest of a legal nature which might be affected by the decision in the case, then (i) Nicaragua, having now been permitted to intervene in respect of the legal régime within the waters of the Gulf, should not have been excluded from expressing its views in due course on any delimitation between El Salvador and Honduras within the

Gulf which may fall to be effected by the Chamber; and, moreover, (ii) Nicaragua should not have been excluded from expressing its views in due course with respect to any delimitation which may fall to be effected outside the Gulf in the event that some title may have been established in favour of Honduras.

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88. CASE CONCERNING PASSAGE THROUGH THE GREAT BELT (FINLAND *v.* DENMARK) (PROVISIONAL MEASURES)

Order of 29 July 1991

In an Order made in the case concerning the Passage through the Great Belt (Finland *v.* Denmark) the Court found, unanimously, that the circumstances, as they 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.

The Court was composed as follows: President Sir Robert Yewdall Jennings; Vice-President Shigeru Oda; Judges: Manfred Lachs, Roberto Ago, Stephen M. Schwebel, Mohammed Bedjaoui, Ni Zhengyu, Jens Evensen, Nikolaï Tarassov, Gilbert Guillaume, Mohamed Shahabuddeen, Andrés Aguilar Mawdsley, Christopher G. Weeramantry, Raymond Ranjeva; Judges *ad hoc* Paul Fischer and Bengt Broms.

Judge Tarassov appended a declaration to the Order of the Court.

Vice-President ODA, Judge Shahabuddeen and Judge *ad hoc* Broms appended separate opinions to the Order of the Court.

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* *

In its Order, the Court recalls that on 17 May 1991 Finland instituted proceedings against Denmark in respect of a dispute concerning passage through the Great Belt (Storebaelt), and the project by the Government of Denmark to construct a fixed traffic connection for both road and rail traffic across the West and East Channels of the Great Belt. The effect of this project, and in particular of the planned high-level suspension bridge over the East Channel, would be permanently to close the Baltic for deep draught vessels of over 65 metres' height, thus preventing the passage of such drill ships and oil rigs manufactured in Finland as require more than that clearance.

The Government of Finland requested the Court to adjudge and declare:

"(*a*) That there is a right of free passage through the Great Belt which applies to all ships entering and leaving Finnish ports and shipyards;

"(*b*) That this right extends to drill ships, oil rigs and reasonably foreseeable ships;

"(*c*) That the construction of a fixed bridge over the Great Belt as currently planned by Denmark would be incompatible with the right of passage mentioned in subparagraphs (*a*) and (*b*) above;

"(*d*) That Denmark and Finland should start negotiations, in good faith, on how the right of free passage, as set out in subparagraphs (*a*) to (*c*) above shall be guaranteed."

On 23 May 1991, Finland filed in the Registry of the Court a request for indication of provisional measures, relying on Article 41 of the Statute of the Court and Article 73 of the Rules of Court, by which it requested the Court to indicate the following provisional measures:

"(1) Denmark should, pending the decision by the Court on the merits of the present case, refrain from continuing or otherwise proceeding with such construction works in connection with the planned bridge project over the East Channel of the Great Belt as would impede the passage of ships, including drill ships and oil rigs, to and from Finnish ports and shipyards;

"(2) Denmark should refrain from any other action that might prejudice the outcome of the present proceedings."

On 28 June 1991 Denmark filed in the Registry of the Court its written observations on the request for provisional measures and requested the Court

"(1) To adjudge and declare that . . . the Request of Finland for an order of provisional measures be rejected.

"(2) In the alternative, and in the event that the Court should grant the Request in whole or in part, to indicate that Finland shall undertake to compensate Denmark for any and all losses incurred in complying with such provisional measures, should the Court reject Finland's submissions on the merits".

At public hearings held from 1 to 5 July 1991 the Court heard oral argument presented on behalf of the two Parties.

On the question of jurisdiction, the Court, recalling that it ought not to indicate provisional measures unless the provisions invoked by the Applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded, noted that Finland founded the jurisdiction of the Court primarily upon declarations made by the Parties accepting the compulsory jurisdiction of the Court, and that it had been stated by Denmark that the Court's jurisdiction on the merit was not in dispute. The Court concluded that in the circumstances of the case it was satisfied that it had the power to indicate provisional measures.

The right which Finland submits is entitled to protection is the right of passage through the Great Belt of ships, including drill ships and oil rigs; this right is of particular importance because, according to Finland, the East Channel of the Great Belt is for certain vessels the only passage-way to and from the Baltic. Denmark, while acknowledging that there is a right of free passage through the Danish Straits for merchant ships of all States, denies that there is such a right of passage for structures up to 170 metres high, on the ground, *inter alia*, that such structures are not ships. Denmark contends that no measures should be granted because not even a prima facie case has been made out in favour of Finland. The Court however notes that the existence of a right of Finland of passage through the Great Belt is not challenged, the dispute between the Parties being over its nature and extent, and concludes that such a disputed right may be protected by provisional measures.

The Court observes that provisional measures are only justified if there is urgency in the sense that action prejudicial to the rights of either party is likely to be taken before a final decision is given. According to the planned schedule for construction of the East Channel Bridge, no physical hindrance for the passage through the Great Belt will occur before the end of 1994; Denmark contends that by that time the case could have been finally decided by the Court, so that no indication of provisional measures is required. Denmark also contends that the construction of the East Channel Bridge will hardly represent any practical hindrance for the passing of drill ships and oil rigs, inasmuch as most of the units in question will be able to take another route, and the remainder will be able to pass under the planned East Channel Bridge if left partly unassembled until after passage of the bridge.

The Court however notes that the right claimed by Finland is to passage specifically through the Great Belt of its drill ships and oil rigs, without modification or disassembly, in the same way as such passage has been effected in the past, and observes that it cannot at this interlocutory stage of the proceedings suppose that interference with the right claimed by Finland might be justified on the grounds that the passage to and from the Baltic of drill ships and oil rigs might be achieved by other means, which may moreover be less convenient or more costly. The Court concludes that if construction works on the East Channel Bridge which would obstruct the right of passage claimed were expected to be carried out prior to the decision of the Court on the merits, this might justify the indication of provisional measures. However the Court, placing on record the assurances given by Denmark that no physical obstruction of the East Channel will occur before the end of 1994, and considering that the proceedings on the merits in the present case would, in the normal course, be completed before that time, finds that it has not been shown that the right claimed will be infringed by construction work during the pendency of the proceedings.

Finland claims moreover that the Danish project is already causing damage to tangible economic interests inasmuch as Finnish shipyards can no longer fully participate in tenders regarding vessels which would be unable to pass through the Great Belt after completion of the East Channel Bridge, and that the existence of the bridge project is having and will continue to have a negative effect on the behaviour of potential customers of those shipyards. In this respect, however, the Court finds that proof of the damage alleged has not been supplied.

Finland observes further that the inter-relation between the various elements of the Great Belt project has as a consequence that completion of any one element would reduce the possibilities of modifying other elements, and concludes that there is thus urgency, inasmuch as many of the activities involved in the project anticipate a final closing of the Great Belt by excluding practical possibilities for accommodating Finnish interests and giving effect to Finnish rights in the event of a judgment in favour of Finland. Denmark on the other hand argues that, if the Court ruled in favour of Finland on the merits, any claim by Finland could not be dealt with by an order for restitution, but could only be satisfied by damages inasmuch as restitution in kind would be excessively onerous.

The Court, while not at present called upon to determine the character of any decision which it might make on the merits, observes that in principle if it is established that the construction of works involves an infringement of a legal right, the possibility cannot and should not be excluded *a priori* of a judicial finding that such works must not be continued or must be modified or dismantled. The Court adds that no action taken *pendente lite* by a State engaged in a dispute before the Court with another State can have any effect whatever as regards the legal situation which the Court is called upon to define, and such action cannot improve its legal position *vis-à-vis* that other State.

After observing that it is for Denmark to consider the impact which a judgment upholding Finland's claim could have upon the implementation of the Great Belt project, and to decide whether or to what extent it should accordingly delay or modify that project, and that it is for Finland to decide whether or not to promote reconsideration of ways of enabling drill ships and oil rigs to pass through the Danish Straits in the event that the Court should decide against it, the Court states that, pending a decision of the Court on the merits, any negotiation between the Parties with a view to achieving a direct and friendly settlement is to be welcomed.

In conclusion, the Court declares that it is clearly in the interest of both Parties that their respective rights and obligations be determined definitively as early as possible, and therefore it is appropriate that the Court, with the co-operation of the Parties, ensure that the decision on the merits be reached with all possible expedition.

Judge Tarassov, in a declaration, expresses his preoccupation that Denmark's East Channel Bridge project is so conceived that even in the construction process it would impose serious limitations not only on passage for Finland through the international strait of the Great Belt but on navigation into and out of the Baltic by craft of all States. Moreover, its integration in a wider communications plan would render it even less amenable to modification if Finland were to win the case.

Judge Tarassov sees the Order's main significance in its reflection of the Court's intention to forestall the *fait accompli* that could be created by any accelerated execution of an unmodified project. He analyses those paragraphs which emphasize that intention, and which alone enabled him, like the other judges, to conclude that the circumstances did not require the immediate indication of special provisional measures.

Judge Tarassov is further of the opinion that the reference to negotiations should have taken the form of a straightforward call to seek a technical method of ensuring the continuance of free passage as in the past between the Kattegat and the Baltic, and believes that the Court had power to recommend that the Parties invite the participation of experts from third countries or proceed under the aegis of the International Maritime Organization.

Vice-President Oda, in his separate opinion, agrees with the finding that no urgency existed to justify a grant of interim measures—that is, in his view, a sufficient ground for rejecting the Finnish request—but regrets that the Court did not underline the fact that such a grant would in any case have done little to help Finland, in that would-be customers of its shipyards would still have had to weigh the risk of the Court's finally rejecting Finland's case. In fact, the only way the Court could assist either Party is by handing down a judgment as soon as possible.

Meanwhile the Court had been well-advised to warn Denmark that, if it should lose the case, it could not rely on the Court's determining that compensation would be an acceptable alternative to restitution.

It had not however been necessary to suggest at this stage that Finland consider promoting reconsideration of ways to enable drill ships and oil rigs to continue passing through the Danish Straits. It would now be sufficient for Finland to recognize the obvious possibility that in the event of its losing

the case it might have to abandon or modify any plans to construct drill ships and oil rigs higher than 65 metres.

Another, in Judge Oda's view, superfluous component of the Order was the encouragement of negotiations prior to the conclusion of the case. While he was not opposed to any initiative the Parties might take in that sense, they needed the Court to resolve some central legal issues first. Indeed, their very readiness to negotiate on a basis of law made it imperative to finish the case as speedily as possible.

Judge Shahabuddeen, in his separate opinion, refers to Denmark's submission that, to justify a grant of interim measures, Finland had been required, *inter alia,* to show a prima facie case as to the existence of the right sought to be preserved. In his view, Finland had indeed been obliged to do so, in the sense of demonstrating a possibility of existence of the specific right of passage claimed in respect of drill ships and oil rigs of over 65 metres' clearance height; it had in fact done so.

The Court in its jurisprudence had never pronounced on the general validity of the proposition inherent in Denmark's submission, and Judge Shahabuddeen recognized the need to avoid any appearance of prejudging the merits of rights claimed.

Nevertheless, given the consensual basis of the Court's jurisdiction, the exceptional character of the procedure and the potentially serious impact of provisional measures on States constrained, the Court must be concerned to satisfy itself that there is at least a possibility of the rights claimed existing, the degree of proof required depending on the circumstances of the particular case. In Judge Shahabuddeen's view, the limited nature of the required examination did not create any significant risk of prejudgment.

Judge Broms, in his separate opinion, stresses the importance of Denmark's assurance that no physical hindrance to passage through the Great Belt will exist before the end of 1994. This, combined with the Court's resolve to finish the case well before then, had enabled the issue of urgency to be seen in a new light and diminished the material grounds for indicating provisional measures. The Parties, especially Finland, had furthermore received an additional guarantee in the emphasis laid by the Court on the norm that a litigant State could not improve its legal position *vis-à-vis* its adversary by any action taken in the course of the proceedings.

Judge Broms points out that Finland, in the event of injury to its alleged right, is seeking restitution, not compensation. He therefore endorses the Court's declining to confirm Denmark's contention that compensation might be an acceptable alternative should Finland win its case and restitution appears excessively onerous. He welcomes the Court's encouragement of negotiations and considers that these might well focus on the technical possibilities of modifying the Danish project so as to accommodate an opening in the fixed-bridge for taller drill ships and oil rigs, to use their right of free passage.

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89. CASE CONCERNING THE ARBITRAL AWARD OF 31 JULY 1989 (GUINEA-BISSAU *v.* SENEGAL)

Judgment of 12 November 1991

In its judgment on the case concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau *v.* Senegal), the Court rejected the submissions of Guinea-Bissau that: (1) the Award of 31 July 1989 is inexistent; (2) subsidiarily, it is absolutely null and void; (3) the Government of Senegal is not justified in seeking to require Guinea-Bissau to apply the Award. The Court then found, on the submission to that effect of Senegal, that the Award was valid and binding for both States, which had the obligation to apply it.

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* *

The Court was composed as follows: *President* Sir Robert Jennings; *Vice-President* Oda; Judges Lachs, Ago, Schwebel, Ni, Evensen, Tarassov, Guillaume, Shahabuddeen, Aguilar Mawdsley, Weeramantry, Ranjeva; *Judges* ad hoc Thierry, Mbaye.

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The full text of the operative part of the Judgment is as follows:

"THE COURT,

"(1) Unanimously,

"*Rejects* the submission of the Republic of Guinea-Bissau that the Arbitral Award given on 31 July 1989 by the Arbitration Tribunal established pursuant to the Agreement of 12 March 1985 between the Republic of Guinea-Bissau and the Republic of Senegal is inexistent;

"(2) By eleven votes to four,

"*Rejects* the submission of the Republic of Guinea-Bissau that the Arbitral Award of 31 July 1989 is absolutely null and void;

"FOR: *President* Sir Robert Jennings; *Vice-President* Oda; *Judges* Lachs, Ago, Schwebel, Ni, Evensen, Tarassov, Guillaume, Shahabuddeen; *Judge* ad hoc Mbaye.

"AGAINST: *Judges* Aguilar Mawdsley, Weeramantry, Ranjeva; *Judge* ad hoc Thierry.

"(3) By twelve votes to three,

"*Rejects* the submission of the Republic of Guinea-Bissau that the Government of Senegal is not justified in seeking to require the Government of Guinea-Bissau to apply the Arbitral Award of 31 July 1989; and, on the submission to that effect of the Republic of Senegal, *finds* that the Arbitral Award of 31 July 1989 is valid and binding for the Republic of Senegal and the Republic of Guinea-Bissau, which have the obligation to apply it.

"FOR: *President* Sir Robert Jennings; *Vice-President* Oda; *Judges* Lachs, Ago, Schwebel, Ni, Evensen, Tarassov, Guillaume, Shahabuddeen, Ranjeva; *Judge* ad hoc Mbaye.

"AGAINST: *Judges* Aguilar Mawdsley, Weeramantry; *Judge* ad hoc Thierry."

Judge Tarassov and *Judge* ad hoc Mbaye appended declarations to the Judgment of the Court.

Vice-President Oda, *Judges* Lachs, Ni and Shahabuddeen appended separate opinions to the Judgment of the Court.

Judges Aguilar Mawdsley and Ranjeva appended a joint dissenting opinion, and *Judge* Weeramantry and *Judge* ad hoc Thierry dissenting opinions, to the Judgment of the Court.

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I. *Review of the proceedings and summary of facts* (paras. 1–21)

The Court outlines the successive stages of the proceedings as from the time the case was brought before it (paras. 1–9) and sets out the submissions of the Parties (paras. 10–11). It recalls that, on 23 August 1989, Guinea-Bissau instituted proceedings against Senegal in respect of a dispute concerning the existence and the validity of the Arbitral Award delivered on 31 July 1989 by an Arbitration Tribunal consisting of three arbitrators and established pursuant to an Arbitration Agreement concluded by the two States on 12 March 1985. The Court goes on to summarize the facts of the case as follows (paras. 12–21):

On 26 April 1960, an agreement by exchange of letters was concluded between France and Portugal for the purpose of defining the maritime boundary between the Republic of Senegal (at that time an autonomous State within the *Communauté* established by the constitution of the French Republic of 1958) and the Portuguese Province of Guinea. The letter of France proposed (*inter alia*) that:

> "As far as the outer limit of the territorial sea, the boundary shall consist of a straight line drawn at 240° from the intersection of the prolongation of the land frontier and the low-water mark, represented for that purpose by the Cape Roxo lighthouse.
>
> "As regards the contiguous zones and the continental shelf, the delimitation shall be constituted by the prolongation in a straight line, in the same direction, of the boundary of the territorial seas."

The letter of Portugal expressed its agreement to this proposal.

After the accession to independence of Senegal and Portuguese Guinea, which became Guinea-Bissau, a dispute arose between these two States concerning the delimitation of their maritime areas. This dispute was the subject of negotiations between them from 1977 onward, in the course of which Guinea-Bissau insisted that the maritime areas in question be delimited without reference to the 1960 Agreement, disputing its validity and its opposability to Guinea-Bissau.

On 12 March 1985 the Parties concluded an Arbitration Agreement for submission of that dispute to an Arbitration Tribunal, Article 2 of which Agreement read as follows:

> "The Tribunal is requested to decide in accordance with the norms of international law on the following questions:
>
> "1. Does the Agreement concluded by an exchange of letters on 26 April 1960, and which relates to the maritime boundary, have the force of law in the relations between the Republic of Guinea-Bissau and the Republic of Senegal?
>
> "2. In the event of a negative answer to the first question, what is the course of the line delimiting the maritime territories appertaining to the Republic of Guinea-Bissau and the Republic of Senegal respectively?"

Article 9 of the Arbitration Agreement provided, among other things, that the decision "shall include the drawing of the boundary line on a map".

An Arbitration Tribunal (hereinafter called "the Tribunal") was duly constituted under the Agreement, Mr. Mohammed Bedjaoui and Mr. André Gros having successively been appointed as arbitrators and Mr. Julio A. Barberis as President. On 31 July 1989 the Tribunal pronounced the Award the existence and validity of which Guinea-Bissau has challenged in the present case.

The findings of the Tribunal were summarized by the Court as follows: the Tribunal concluded that the 1960 Agreement was valid and could be opposed to Senegal and to Guinea-Bissau (Award, para. 80); that it had to be interpreted in the light of the law in force at the date of its conclusion (*ibid.*, para. 85); that

> "the 1960 Agreement does not delimit those maritime spaces which did not exist at that date, whether they be termed exclusive economic zone, fishery zone or whatever . . .",

but that

> "the territorial sea, the contiguous zone and the continental shelf . . . are expressly mentioned in the 1960 Agreement and they existed at the time of its conclusion" (*ibid.*).

After examining "the question of determining how far the boundary line extends . . . today, in view of the evolution of the definition of the concept of 'continental shelf' ", the Tribunal explained that

> "Bearing in mind the above conclusions reached by the Tribunal and the wording of Article 2 of the Arbitration Agreement, in the opinion of the Tribunal it is not called upon to reply to the second question.
>
> "Furthermore, in view of its decision, the Tribunal considered that there was no need to append a map showing the course of the boundary line." (Award, para. 87.)

The operative clause of the Award was as follows:

> "For the reasons stated above, the Tribunal *decides* by two votes to one:
>
> "To reply as follows to the first question formulated in Article 2 of the Arbitration Agreement: The Agreement concluded by an exchange of letters of 26 April 1960, and relating to the maritime boundary, has the force of law in the relations between the Republic of Guinea-Bissau and the Republic of Senegal with regard solely to the areas mentioned in that Agreement, namely the territorial sea, the contiguous zone and the continental shelf. The 'straight line drawn at 240°' is a loxodromic line." (Para. 88.)

Mr. Barberis, President of the Tribunal, who, together with Mr. Gros, voted for the Award, appended a declaration to it, while Mr. Bedjaoui, who had voted against the Award, appended a dissenting opinion. The declaration of Mr. Barberis read, in particular, as follows:

> "I feel that the reply given by the Tribunal to the first question put by the Arbitration Agreement could have been more precise. I would have replied to that question as follows:
>
> " 'The Agreement concluded by an exchange of letters of 26 April 1960, and relating to the maritime boundary, has the force of law in the relations between the Republic of Guinea-Bissau and the Republic of Senegal with respect to the territorial sea, the contiguous zone and the continental shelf, but does not have the force of law with respect to the waters of the exclusive

economic zone or the fishery zone. The "straight line drawn at 240°" mentioned in the Agreement of 26 April 1960 is a loxodromic line.'

"This partially affirmative and partially negative reply is, in my view, the exact description of the legal position existing between the Parties. As suggested by Guinea-Bissau in the course of the present arbitration (Reply, p. 248), this reply would have enabled the Tribunal to deal in its Award with the second question put by the Arbitration Agreement. The *partially* negative reply to the first question would have conferred on the Tribunal a *partial* competence to reply to the second, i.e., to do so to the extent that the reply to the first question would have been negative.

". . ."

The Tribunal held a public sitting on 31 July 1989 for delivery of the Award; Mr. Barberis, the President, and Mr. Bedjaoui were present, but not Mr. Gros. At that sitting, after the Award had been delivered, the representative of Guinea-Bissau indicated that, pending full reading of the documents and consultation with his Government, he reserved the position of Guinea-Bissau regarding the applicability and validity of the Award, which did not, in his opinion, satisfy the requirements laid down by agreement between the two Parties. After contacts between the Governments of the two Parties, in which Guinea-Bissau indicated its reasons for not accepting the Award, the proceedings were brought before the Court by Guinea-Bissau.

II. *Question of the jurisdiction of the Court, of the admissibility of the Application and the possible effect of the absence of an arbitrator from the meeting at which the Award was delivered*
(paras. 22–29)

The Court first considers its jurisdiction. In its application, Guinea-Bissau founds the jurisdiction of the Court on "the declarations by which the Republic of Guinea-Bissau and the Republic of Senegal have respectively accepted the jurisdiction of the Court under the conditions set forth in Article 36, paragraph 2, of the Statute" of the Court. These declarations were deposited with the Secretary-General of the United Nations, in the case of Senegal on 2 December 1985, and in the case of Guinea-Bissau on 7 August 1989. Guinea-Bissau's declaration contained no reservation. Senegal's declaration, which replaced the previous declaration of 3 May 1985, provided among other things that "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 means of settlement . . .", and specified that it applied only to "all legal disputes arising after the present declaration . . .".

Senegal observed that if Guinea-Bissau were to challenge the decision of the Tribunal on the merits, it would be raising a question excluded from the Court's jurisdiction by the terms of Senegal's declaration. According to Senegal, the dispute concerning the maritime delimitation was the subject of the Arbitration Agreement of 12 March 1985 and consequently fell into the category of disputes "in regard to which the parties have agreed to have recourse to some other method of settlement". Furthermore, in the view of Senegal, that dispute arose before 2 December 1985, the date on which Senegal's acceptance of the compulsory jurisdiction of the Court became effective, and is thus excluded from the category of disputes "arising after" that declaration.

However, the Parties were agreed that there was a distinction between the substantive dispute relating to maritime delimitation, and the dispute relating to the Award rendered by the Tribunal, and that only the latter dispute, which arose after the Senegalese declaration, is the subject of the proceedings before the Court. Guinea-Bissau also took the position, which Senegal accepted, that those proceedings were not intended by way of appeal from the Award or as an application for revision of it. Thus, both Parties recognize that no aspect of the substantive delimitation dispute was involved. On this basis, Senegal did not dispute that the Court had jurisdiction to entertain the application under Article 36, paragraph 2, of the Statute. In the circumstances of the case the Court regarded its jurisdiction as established and emphasized that, as the Parties were both agreed, the proceedings allege the inexistence and nullity of the Award rendered by the Tribunal and were not by way of appeal from it or application for revision of it.

The Court then considers a contention by Senegal that Guinea-Bissau's application is inadmissible in so far as it sought to use the declaration of President Barberis for the purpose of casting doubt on the validity of the Award. Senegal argues in particular that that declaration is not part of the Award, and therefore that any attempt by Guinea-Bissau to make use of it for that purpose "must be regarded as an abuse of process aimed at depriving Senegal of the rights belonging to it under the Award".

The Court considers that Guinea-Bissau's application has been properly presented in the framework of its right to have recourse to the Court in the circumstances of the case. Accordingly it does not accept Senegal's contention that Guinea-Bissau's application, or the arguments used in support of it, amounts to an abuse of process.

Guinea-Bissau contends that the absence of Mr. Gros from the meeting of the Tribunal at which the Award was pronounced amounted to a recognition that the Tribunal had failed to resolve the dispute, that this was a particularly important meeting of the Tribunal and that the absence of Mr. Gros lessened the Tribunal's authority. The Court notes that it is not disputed that Mr. Gros participated in the voting when the Award was adopted. The absence of Mr. Gros from that meeting could not affect the validity of the Award which had already been adopted.

III. *Question of the inexistence of the Award*
(paras. 30–34)

In support of its principal contention that the Award is inexistent, Guinea-Bissau claims that the Award is not supported by a real majority. It does not dispute the fact that the Award was expressed to have been adopted by the votes of President Barberis and Mr. Gros; it contends however that President Barberis's declaration contradicted and invalidated his vote, thus leaving the Award unsupported by a real majority. In this regard Guinea-Bissau drew attention to the terms of the operative clause of the Award (see p. 4 above) and on the language advocated by President Barberis in his declaration (*ibid.*).

The Court considers that, in putting forward this formulation, what President Barberis had in mind was that the Tribunal's answer to the first question "could have been more precise"—to use his own words—, not that it had to be more precise in the sense indicated in his formulation, which was, in his view, a preferable one, not a necessary one. In the opinion of the Court, the formulation discloses no contradiction with that of the Award.

Guinea-Bissau also drew attention to the fact that President Barberis expressed the view that his own formulation "would have enabled the Tribunal to deal in its Award with

the second question put by the Arbitration Agreement" and that the Tribunal would in consequence "have been competent to delimit the waters of the exclusive economic zone or the fishery zone between the two countries", in addition to the other areas. The Court considers that the view expressed by President Barberis, that the reply which he would have given to the first question would have enabled the Tribunal to deal with the second question, represented not a position taken by him as to what the Tribunal was required to do but only an indication of what he considered would have been a better course. His position therefore could not be regarded as standing in contradiction with the position adopted by the Award.

Furthermore, even if there had been any contradiction, for either of the two reasons relied on by Guinea-Bissau, between the view expressed by President Barberis and that stated in the Award, the Court notes that such contradiction could not prevail over the position which President Barberis had taken when voting for the Award. In agreeing to the Award, he definitively agreed to the decisions, which it incorporated, as to the extent of the maritime areas governed by the 1960 Agreement, and as to the Tribunal not being required to answer the second question in view of its answer to the first. The Court adds that as the practice of international tribunals shows, it sometimes happens that a member of a tribunal votes in favour of a decision of the tribunal even though he might individually have been inclined to prefer another solution. The validity of his vote remains unaffected by the expression of any such differences in a declaration or separate opinion of the member concerned, which are therefore without consequence for the decision of the tribunal.

Accordingly, in the opinion of the Court, the contention of Guinea-Bissau that the Award was inexistent for lack of a real majority cannot be accepted.

IV. *Question of the nullity of the Award* (paras. 35–65)

Subsidiarily, Guinea-Bissau maintains that the Award is, as a whole, null and void, on the grounds of *excès de pouvoir* and of insufficiency of reasoning. Guinea-Bissau observes that the Tribunal did not reply to the second question put in Article 2 of the Arbitration Agreement, and did not append to the Award the map provided for in Article 9 of that Agreement. It is contended that these two omissions constitute an *excès de pouvoir*. Furthermore, no reasons, it is said, were given by the Tribunal for its decision not to proceed to the second question, for not producing a single delimitation line, and for refusing to draw that line on a map.

1. *Absence of a reply to the second question*

(*a*) Guinea-Bissau suggests that what the Tribunal did was not to decide not to answer the second question put to it; it simply omitted, for lack of a real majority, to reach any decision at all on the issue. In this respect Guinea-Bissau stresses that what is referred to in the first sentence of paragraph 87 of the Award as an "opinion of the Tribunal" on the point appears in the statement of reasoning, not in the operative clause of the Award; that the Award does not specify the majority by which that paragraph would have been adopted; and that only Mr. Gros could have voted in favour of this paragraph. In the light of the declaration made by President Barberis, Guinea-Bissau questions whether any vote was taken on paragraph 87. The Court recognizes that the structure of the Award is, in that respect, open to criticism. Article 2 of the Arbitration Agreement put two questions to the Tribunal. The latter was, according to Article 9, to "inform the two Governments of its decision regarding the questions set forth in Article 2". Consequently, the Court considers that it would have been normal to include in the operative part of the Award both the answer given to the first question and the decision not to answer the second. It is to be regretted that this course was not followed. Nevertheless the Court is of the opinion that the Tribunal, when it adopted the Award, was not only approving the content of paragraph 88, but was also doing so for the reasons already stated in the Award and, in particular, in paragraph 87. It is clear from that paragraph, taken in its context, and also from the declaration of President Barberis, that the Tribunal decided by two votes to one that, as it had given an affirmative answer to the first question, it did not have to answer the second. The Court observes that, by so doing, the Tribunal did take a decision: namely, not to answer the second question put to it. It concludes that the Award is not flawed by any failure to decide.

(*b*) Guinea-Bissau argues, secondly, that any arbitral award must, in accordance with general international law, be a reasoned one. Moreover, according to Article 9 of the Arbitration Agreement, the Parties had specifically agreed that "the Award shall state in full the reasons on which it is based". Yet, according to Guinea-Bissau, the Tribunal in this case did not give any reasoning in support of its refusal to reply to the second question put by the Parties or, at the very least, gave "wholly insufficient" reasoning. The Court observes that in paragraph 87 of the Award, referred to above, the Tribunal, "bearing in mind the . . . conclusions" that it had reached, together with "the wording of Article 2 of the Arbitration Agreement", took the view that it was not called upon to reply to the second question put to it. The reasoning is brief, and could doubtless have been developed further. But the references in paragraph 87 to the Tribunal's conclusions and to the wording of Article 2 of the Arbitration Agreement make it possible to determine, without difficulty, the reasons why the Tribunal decided not to answer the second question. The Court observes that, by referring to the wording of Article 2 of the Arbitration Agreement, the Tribunal was noting that, according to that Article, it was asked, first, whether the 1960 Agreement had "the force of law in the relations" between Guinea-Bissau and Senegal, and then, "in the event of a negative answer to the first question, what is the course of the line delimiting the maritime territories" of the two countries. By referring to the conclusions that it had already reached, the Tribunal was noting that it had, in paragraphs 80 *et seq.* of the Award, found that the 1960 Agreement, in respect of which it had already determined the scope of its substantive validity, was "valid and can be opposed to Senegal and to Guinea-Bissau". Having given an affirmative answer to the first question, and basing itself on the actual text of the Arbitration Agreement, the Tribunal found as a consequence that it did not have to reply to the second question. The Court observes that that statement of reasoning, while succinct, is clear and precise, and concludes that the second contention of Guinea-Bissau must also be dismissed.

(*c*) Thirdly, Guinea-Bissau challenges the validity of the reasoning thus adopted by the Tribunal on the issue whether it was required to answer the second question:

(i) Guinea-Bissau first argues that the Arbitration Agreement, on its true construction, required the Tribunal to answer the second question whatever might have been its reply to the first. In this connection, the Court would first recall that in the absence of any agreement to the contrary an international tribunal

has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction. In the present case, the Arbitration Agreement had confirmed that the Tribunal had the power to determine its own jurisdiction and to interpret the Agreement for that purpose. The Court observes that by its argument set out above, Guinea-Bissau is in fact criticizing the interpretation in the Award of the provisions of the Arbitration Agreement which determine the Tribunal's jurisdiction, and proposing another interpretation. However, the Court does not have to enquire whether or not the Arbitration Agreement could, with regard to the Tribunal's competence, be interpreted in a number of ways, and if so to consider which would have been preferable. The Court is of the opinion that by proceeding in that way it would be treating the request as an appeal and not as a *recours en nullité*. The Court could not act in that way in the present case. The Court has simply to ascertain whether by rendering the disputed Award the Tribunal acted in manifest breach of the competence conferred on it by the Arbitration Agreement, either by deciding in excess of, or by failing to exercise, its jurisdiction. Such manifest breach might result from, for example, the failure of the Tribunal properly to apply the relevant rules of interpretation to the provisions of the Arbitration Agreement which govern its competence. The Court observes that an arbitration agreement is an agreement between States which must be interpreted in accordance with the general rules of international law governing the interpretation of treaties. It then recalls the principles of interpretation laid down by its case-law and observes that these principles are reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, which may in many respects be considered as a codification of existing customary international law on the point. The Court also notes that when States sign an arbitration agreement, they are concluding an agreement with a very specific object and purpose: to entrust an arbitration tribunal with the task of settling a dispute in accordance with the terms agreed by the parties. In the performance of the task entrusted to it, the tribunal must conform to those terms.

The Court observes that, in the present case, Article 2 of the Arbitration Agreement presented a first question concerning the 1960 Agreement, and then a second question relating to delimitation. A reply had to be given to the second question "in the event of a negative answer to the first question". The Court notes that those last words, which were originally proposed by Guinea-Bissau itself, are categorical. It goes on to examine situations in which international judicial bodies were asked to answer successive questions made conditional on each other or not. The Court notes that in fact in the present case the Parties could have used some such expression as that the Tribunal should answer the second question "taking into account" the reply given to the first, but they did not do so; they directed that the second question should be answered only "in the event of a negative answer" to that first question. Relying on various elements of the text of the Arbitration Agreement, Guinea-Bissau nevertheless considers that the Tribunal was required to delimit by a single line the whole of the maritime areas appertaining to one or the other State. As, for the reasons given by the Tribunal, its answer to the first question put in the Arbitration Agreement could not lead to a comprehensive delimitation, it followed, in Guinea-Bissau's view, that, notwithstanding the prefatory words to the second question, the Tribunal was required to answer that question and to effect the overall delimitation desired by both Parties.

After recalling the circumstances in which the Arbitration Agreement was drawn up, the Court notes that the two questions had a completely different subject-matter. The first concerned the issue whether an international agreement had the force of law in the relations between the Parties; the second was directed to a maritime delimitation in the event that that agreement did not have such force. Senegal was counting on an affirmative answer to the first question, and concluded that the straight line on a bearing of 240°, adopted by the 1960 Agreement, would constitute the single line separating the whole of the maritime areas of the two countries. Guinea-Bissau was counting on a negative answer to the first question and concluded that a single dividing line for the whole of the maritime areas of the two countries would be fixed *ex novo* by the Tribunal in reply to the second question. The two States intended to obtain a delimitation of the whole of their maritime areas by a single line. But Senegal was counting on achieving this result through an affirmative answer to the first question, and Guinea-Bissau through a negative answer to that question. The Court notes that no agreement had been reached between the Parties as to what should happen in the event of an affirmative answer leading only to a partial delimitation, and as to what might be the task of the Tribunal in such case, and that the *travaux préparatoires* accordingly confirm the ordinary meaning of Article 2. The Court considers that this conclusion is not at variance with the circumstance that the Tribunal adopted as its title "Arbitration Tribunal for the Determination of the Maritime Boundary: Guinea-Bissau/Senegal", or with its definition, in paragraph 27 of the Award, of the "sole object of the dispute" as being one relating to "the determination of the maritime boundary between the Republic of Senegal and the Republic of Guinea-Bissau, a question which they have not been able to settle by means of negotiation . . .". In the opinion of the Court, that title and that definition are to be read in the light of the Tribunal's conclusion, which the Court shares, that, while the Tribunal's mandate did include the making of a delimitation of all the maritime areas of the Parties, this fell to be done only under the second question and "in the event of a negative answer to the first question". The Court notes, in short, that although the two States had expressed in general terms in the Preamble of the Arbitration Agreement their desire to reach a settlement of their dispute, their consent thereto had only been given in the terms laid down by Article 2 of the Arbitration Agreement. The Court concludes that consequently the Tribunal did not act in manifest breach of its competence to determine its own jurisdiction by deciding that it was not required to answer the second question except in the event of a negative answer to the first, and that the first argument must be rejected.

(ii) Guinea-Bissau then argues that the answer in fact given by the Tribunal to the first question was a partially negative answer and that this sufficed to satisfy the prescribed condition for entering into the second question. Accordingly, and as was to be shown by the declaration of President Barberis, the Tribunal was, it is said, both entitled and bound to answer the second question.

The Court observes that Guinea-Bissau cannot base its arguments upon a form of words (that of President Barberis) which was not in fact adopted by the Tribunal. The Tribunal found, in reply to the first question, that the 1960 Agreement had the force of law in the relations between the Parties, and at the same time it defined the substantive scope of that Agreement. Such an answer did not permit of a delimitation of the whole of the maritime areas of the two States, and a complete settlement of the dispute between them. It achieved a partial delimitation. But that answer was nonetheless both a complete and an affirmative answer to the first question. The Tribunal could thus find, without manifest breach of its competence, that its answer to the first question was not a negative one, and that it was therefore not competent to answer the second question. The Court concludes that in this respect also, the contention of Guinea-Bissau that the entire Award is a nullity must be rejected.

2. *Absence of a map*

Finally Guinea-Bissau recalls that, according to Article 9, paragraph 2, of the Arbitration Agreement, the decision of the Tribunal was to "include the drawing of the boundary line on a map", and that no such map was produced by the Tribunal. Guinea-Bissau contends that the Tribunal also did not give sufficient reasons for its decision on that point. It is contended that the Award should, for these reasons, be considered wholly null and void.

The Court considers that the reasoning of the Tribunal on this point is, once again, brief but sufficient to enlighten the Parties and the Court as to the reasons that guided the Tribunal. It found that the boundary line fixed by the 1960 Agreement was a loxodromic line drawn at 240° from the point of intersection of the prolongation of the land frontier and the low-water line, represented for that purpose by the Cape Roxo lighthouse. Since it did not reply to the second question, it did not have to define any other line. It thus considered that there was no need to draw on a map a line which was common knowledge, and the definitive characteristics of which it had specified.

In view of the wording of Articles 2 and 9 of the Arbitration Agreement, and the positions taken by the Parties before the Tribunal, the Court notes that it is open to argument whether, in the absence of a reply to the second question, the Tribunal was under an obligation to produce the map envisaged by the Arbitration Agreement. The Court does not however consider it necessary to enter into such a discussion. In the circumstances of the case, the absence of a map cannot in any event constitute such an irregularity as would render the Award invalid. The Court concludes that the last argument of Guinea-Bissau is therefore also not accepted.

V. *Final observations*
(paras. 66–68)

The Court nonetheless takes note of the fact that the Award has not brought about a complete delimitation of the maritime areas appertaining respectively to Guinea-Bissau and to Senegal. It would however observe that that result is due to the wording of Article 2 of the Arbitration Agreement.

The Court has moreover taken note of the fact that on 12 March 1991 Guinea-Bissau filed in the Registry of the Court a second Application requesting the Court to adjudge and declare:

"What should be, on the basis of the international law of the sea and of all the relevant elements of the case, including the future decision of the Court in the case concerning the arbitral *'award'* of 31 July 1989, the line (to be drawn on the map) delimiting all the maritime territories appertaining respectively to Guinea-Bissau and Senegal."

It has also taken note of the declaration made by the Agent of Senegal in the present proceedings, according to which one solution

"would be to negotiate with Senegal, which has no objection to this, a boundary for the exclusive economic zone or, should it prove impossible to reach an agreement, to bring the matter before the Court".

Having regard to that Application and that declaration, and at the close of a long and difficult arbitral procedure and of these proceedings before the Court, the Court considers it highly desirable that the elements of the dispute that were not settled by the Arbitral Award of 31 July 1989 be resolved as soon as possible, as both Parties desire.

SUMMARY OF DECLARATIONS AND OPINIONS APPENDED TO THE JUDGEMENT OF THE COURT

Declaration by Judge Tarassov

Judge Tarassov begins his declaration by stating that he voted for the Judgment bearing in mind that its sole purpose is to solve the dispute between the Republic of Guinea-Bissau and the Republic of Senegal relating to the validity or nullity of the Arbitral Award of 31 July 1989, and that the Court did not examine—and was not asked by the Parties to examine—any of the circumstances and evidence relating to the determination of the maritime boundary itself. From a procedural point of view, he agrees with the analysis and conclusions of the Court that the submissions and arguments of Guinea-Bissau against the existence or validity of the Award are not convincing.

He then points out that the Award contains some serious deficiencies which call for strong criticisms. In his view, the Arbitration Tribunal did not accomplish the main task entrusted to it by the Parties, inasmuch as it did not definitively settle the dispute about the delimitation of all adjacent maritime territories appertaining to each of the States. The Tribunal should have informed the Parties of its decision with respect to the two questions put in Article 2, and its contention in paragraph 87 of the Award that it was not called upon to reply to the second question because of "the actual wording of Article 2 of the Arbitration Agreement" does not suffice to substantiate the decision taken on such an important issue.

The Tribunal also did not state whether the straight line drawn at 240° provided by the 1960 Agreement might or might not be used for the delimitation of the economic zone. Judge Tarassov considers that all these omissions, together with the Tribunal's refusal to append a map (in contradiction with Article 9 of the Arbitration Agreement), did not help to solve the whole dispute between the Parties and merely paved the way to the new Application by Guinea-Bissau to the Court.

Declaration by Judge Mbaye

In his Declaration Judge Mbaye expresses serious doubts over the jurisdiction of the Court to entertain, on the sole basis of the provisions of Article 36, paragraph 2, of its Statute, an application contesting the validity of an arbitral award. This is why he is pleased that the Court, taking note of the position of the Parties, considered its jurisdiction to be established only in view of "the circumstances" of the case, thus avoiding a precedent that could bind it in future.

Separate Opinion of Vice-President Oda

In his separate opinion, Vice-President Oda expresses the view that the submissions of Guinea-Bissau could have been rejected on simpler grounds than those set forth at length in the Judgment. In the first place, Guinea-Bissau's contention that the Award was inexistent because the President of the Tribunal, in his declaration, "expressed a view in contradiction with the one apparently adopted by the vote" was untenable because the declaration corroborated the substance of the decision voted upon in paragraph 88 of the Award, and any difference of view disclosed by it related solely to paragraph 87. Secondly, Guinea-Bissau's allegation of nullity, based on the facts that the Tribunal did not answer the second question put to it, and neither delimited the maritime area as a whole nor recorded a single line upon a map, simply reflected the fact that the Arbitration Agreement had not been drafted in terms which Guinea-Bissau found to be in its interest. The allegation could not be sustained, because the Tribunal had given a fully affirmative answer to the first question put to it, as was shown by the very fact that President Barberis had had to rephrase that answer in order to suggest that it could be seen as partially negative. Hence no answer to the second question had been required.

Vice-President Oda continued by analysing the background to the dispute and the drafting of the Arbitration Agreement, pointing out that the two States had had opposite reasons for highlighting the question of the validity of the 1960 Agreement while each intending to achieve a delimitation for their exclusive economic zones as well as other maritime areas. The Arbitration Agreement had not however been drafted in such a way as to guarantee that result, a deficiency for which the Tribunal could not be blamed. It was rather the representatives of the two countries who had displayed insufficient grasp of the premises of their negotiation in the light, particularly, of the interrelation of the exclusive economic zone and the continental shelf.

Vice-President Oda further doubts whether the introduction of proceedings in the Court had any meaningful object, since the positions of the Parties in relation to the principal object of their dispute—namely, the delimitation of their exclusive economic zones—would have remained unaffected even if the Court had declared the Award inexistent or null and void. The present issue between the two States should be the delimitation of those zones in a situation where the existence of a loxodromic line at 240° for the continental shelf has been confirmed. Accordingly, and without prejudice to the interpretation of the new Application presented to the Court, Vice-President Oda points out, finally, that in any further negotiation the two States must proceed on one of two assumptions, either that separate régimes for the continental shelf and exclusive economic zone may co-exist, or that they intend to arrive at a single line of delimitation for both; in the latter case, however, there would be room for negotiation only on the assumption that the now established continental shelf boundary may be subject to alteration or adjustment.

Separate Opinion of Judge Lachs

Judge Lachs, in his separate opinion, stresses that while not acting as a court of appeal, the Court was not barred from dealing with the entire process traversed by the Tribunal in its deliberations, which has shown serious flaws. The declaration of the President of the Tribunal created a serious dilemma and a challenge. He finds the way the reply was framed open to serious objections. It is not only too brief but inadequate. The absence of a chart did not constitute "such an irregularity as would render the Award invalid" but elementary courtesy required that the matter be dealt with in a different way. He regrets that the Tribunal did not succeed in producing a decision with the cogency to command respect.

Separate Opinion of Judge Ni

Judge Ni states in his separate opinion that he agrees generally with the line of reasoning in the Judgment but he feels that certain aspects call for elaboration. He thinks that the question of the exclusive economic zone constituted no part of the object of the arbitration and that Mr. Barberis's declaration attached to the Award did not override or invalidate his vote for the Award. Judge Ni thinks that a reply by the Arbitration Tribunal to the second question in Article 2, paragraph 2, of the Arbitration Agreement would have been mandatory only if the first question had been answered in the negative. This is not only clearly stated in the Arbitration Agreement, but also confirmed by the negotiations which preceded the conclusion of the Arbitration Agreement. Since the first question was answered in the affirmative, no *ex novo* delimitation by a single line of all the maritime spaces was to take place, no new line of the boundary would be drawn and consequently no map could have been appended. All these are interlinked and the reasoning in the Arbitral Award is to be viewed in its entirety.

Separate Opinion of Judge Shahabuddeen

In his separate opinion, Judge Shahabuddeen observed that, on the main issue as to whether the Tribunal should have answered the second question put to it by the Arbitration Agreement, the Court sustained the Award on the ground that, in holding that it was not competent to reply to that question, the Tribunal interpreted the Agreement in a way in which it could have been interpreted without manifest breach of competence. He noted that the Court did not go on to consider whether the Tribunal's interpretation on that point was indeed correct. This was because the Court, in reliance on the distinction between nullity and appeal, took the view that it was beyond its authority to do so. Judge Shahabuddeen considered, first, that that distinction did not preclude the Court from pronouncing on whether the Tribunal's interpretation was correct, provided that in doing so the Court took account of considerations of security of the arbitral process with reference to the finality of awards; and, second, that the Tribunal's interpretation was indeed correct.

Joint Dissenting Opinion of Judges Aguilar Mawdsley and Ranjeva

Judges Aguilar Mawdsley and Ranjeva have appended a joint dissenting opinion that primarily centres upon an epistemological criticism of the approach adopted by the Arbitration Tribunal. The problem of the nullity/validity or invalidity of an arbitral award involves more than an assessment resting exclusively on the axiomatic foundations of law. The authority of *res judicata* with which any judicial decision is

vested performs its function fully when that decision is subscribed to by the *convictio juris*.

Confining themselves to the Court's jurisdiction to exercise control over arbitral awards once they have become final, Judges Aguilar Mawdsley and Ranjeva refrain from substituting their own way of thinking and interpretation for those of the Arbitration Tribunal but take exception to its method—which is, moreover, recognized by the Court as being open to criticism. How, indeed, can one justify the Tribunal's complete failure to explain the absence of a complete delimitation resulting, on the one hand, from the affirmative reply given to the first question and, on the other, from the decision to refuse to answer the second? Contrary to the opinion of the Court, the authors of the joint dissenting opinion take the view that the Arbitration Tribunal, by declining to give an answer to the second question has committed an *excès de pouvoir infra petita* or through omission—a hypothesis hardly ever encountered in the international jurisprudence. The Tribunal should have simultaneously taken into account the three constitutive elements of the Arbitration Agreement, namely, the letter, the object and the purpose, in order to interpret that Arbitration Agreement when it came to restructure the dispute. Recourse to a technique of argument by logical conclusion as a basis for the reasoning leading to the dismissal, firstly, of an application aimed at the recognition of a right and, subsequently, of a request for the compilation of a map constitutes, in the view of Judges Aguilar Mawdsley and Ranjeva, an *excès de pouvoir*, in as much as the logical conclusion is conceivable only if the relations of causality between the two propositions are ineluctable in nature, which is manifestly not the case with the contested Award, given the declaration of Mr. Barberis, the President of the Tribunal, and the dissenting opinion of one arbitrator, Mr. Bedjaoui.

In the judgment of the authors of the joint opinion, since the Court was not acting as a court of appeal or of cassation, it was under a duty to be critical of any arbitral awards with which it might deal. Among the tasks comprising the mission of the principal judicial organ of the international community is that of guaranteeing both respect for the rights of parties and a certain quality of reasoning by other international courts and tribunals. The members of the international community are indeed entitled to benefit from a sound administration of international justice.

Dissenting Opinion of Judge Weeramantry

Judge Weeramantry, in his dissenting opinion, expressed his full agreement with the Court's rejection of Guinea-Bissau's plea of inexistence of the Award and of Senegal's contentions of lack of jurisdiction and abuse of legal process.

However, he disagreed with the majority of the Court on the interpretation of the Arbitration Award and on the question of its nullity. While it is important to preserve the integrity of arbitral awards, he stressed that it was also important to ensure that the award complied with the terms of the *compromis*. Where there was a serious discrepancy between the award and the *compromis*, the principle of *compétence de la compétence* did not protect the award.

In his view, the Award in this case departed materially from the terms of the *compromis* in that it did not answer Question 2 and left the work of the Tribunal substantially incomplete by not determining the boundaries of the exclusive economic zone and the fishery zone. An interpretation of the *compromis* in the light of its context and its objects and purposes led necessarily to the conclusion that what was referred to the Tribunal for determination was one integral question relating to the entire maritime boundary. This made it imperative for the Tribunal to address Question 2 without which its task was not discharged. The Tribunal was thus not entitled to decide not to address Question 2 and the decision not to do so constituted an *excès de pouvoir*, thereby rendering the Award a nullity.

Furthermore, the interlinked nature of the boundaries determined by the Award and those left undetermined was likely to cause serious prejudice to Guinea-Bissau in a future determination of the remaining zones so long as the boundaries of the territorial sea, the contiguous zone and the continental shelf remained fixed by the present Award. Consequently, the finding of nullity extended also to the determinations made in answer to Question 1.

Dissenting Opinion of Judge Thierry

Judge *ad hoc* Thierry sets out the reasons for which he is unable to concur with the Court's decision. His dissent focuses on the legal consequences of the fact, recognized by the Court, that the Arbitral Award of 31 July 1989:

> "has not brought about a complete delimitation of the maritime areas appertaining respectively to Guinea-Bissau and to Senegal" (para. 66 of the Court's Judgment).

In the opinion of Judge Thierry, the Arbitration Tribunal, established by the Arbitration Agreement of 12 March 1985, did not settle the dispute, concerning the determination of the maritime boundary between the two States, that was submitted to it.

As provided in the Preamble and Articles 2, paragraph 2, and 9 of that Agreement, the Tribunal was to determine the "maritime boundary" between the two States by a "boundary line" to be drawn on a map to be included in the Award.

As it did not perform these tasks, the Arbitration Tribunal failed to accomplish its jurisdictional mission. This defect should have led the Court to declare the Award of 31 July 1989 null and void.

In the view of Judge Thierry, the Tribunal's failure to carry out its mission could not be justified by the terms of Article 2, paragraph 2, of the Arbitration Agreement. This provision sets out two questions put to the Tribunal by the Parties. The first, concerning the applicability of the Franco-Portuguese Agreement of 1960, received an affirmative reply, but, relying on the phrase "In the event of a negative answer to the first question", at the beginning of the second question, the Tribunal implicitly decided not to answer this question, which concerned the course of the boundary line, thereby leaving unresolved the essential part of the dispute, including the delimitation of the exclusive economic zone.

Judge Thierry is of the opinion that the Tribunal should have interpreted Article 2 in the light of the object and purpose of the Arbitration Agreement, consistently with the rules of international law applicable to the interpretation of treaties, and should have answered the second question accordingly, seeing that the reply to the first question could not by itself bring about the settlement of the dispute, which was the Tribunal's primary task and its *raison d'être*.

Judge Thierry nevertheless concurs in the points made in paragraphs 66 to 68 of the Court's Judgment with a view to the settlement of "the elements of the dispute that were not settled by the Arbitral Award of 31 July 1989". What is necessary is, in his opinion, to bring about an equitable determination of the maritime boundary between the two States in conformity with the principles and rules of international law.

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