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ST/LEG/SER.F/1/Add.1

SUMMARIES OF

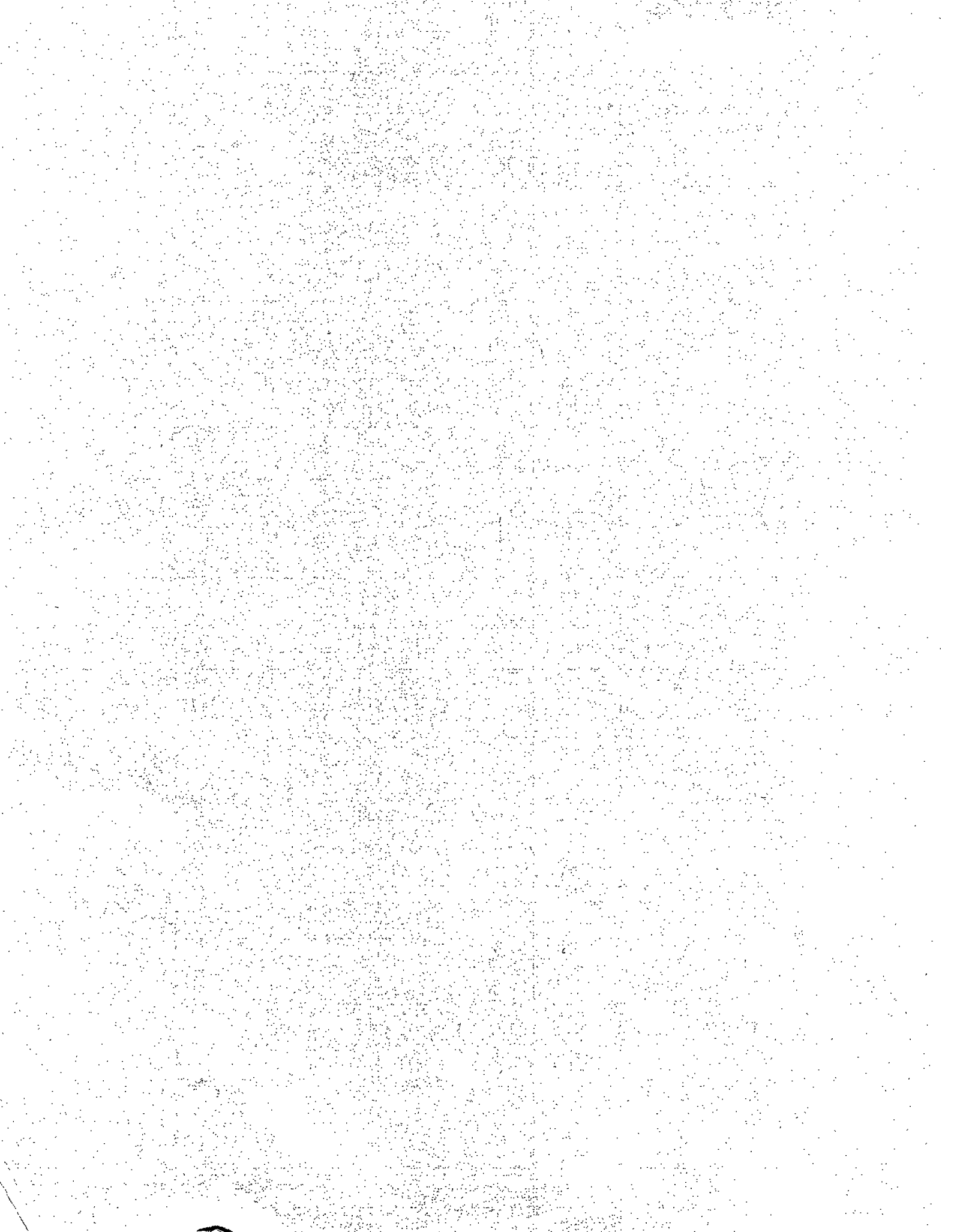
Judgments, Advisory Opinions and Orders

OF THE

International Court of Justice

1992-1996

UNITED NATIONS



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Summaries of Judgments, Advisory Opinions and Orders of the International Court of Justice

1992-1996

United Nations • New York, 1998

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FOREWORD

This publication contains summaries of judgments, advisory opinions and orders issued by the International Court of Justice from 1992 to 1996. It is a continuation of an earlier issue on the same subject (ST/LEG/SER.F/1) which covered the period 1948-1991.

The World Court is busier than ever before and has handled cases submitted to it with great skill and sensitivity. At the same time, Governments have shown a growing awareness of the Court's potential and an increased willingness to resort to it. In the programme for the activities to be carried out during the United Nations Decade of International Law for its final term, 1997-1999, the view has once again been expressed that it would be conducive to the teaching and dissemination of international law if the judgments and advisory opinions of the Court were to be made available in the six official languages of the United Nations.

The publication of this series is therefore intended to respond to this increased interest and need for information regarding the work of the International Court of Justice.

It should be noted that the materials contained herein are summaries of the judgments, advisory opinions and orders delivered by the Court. They were prepared by the Registry of the Court, but do not involve the responsibilities of the Court itself. These summaries are for information purposes and should not be quoted as the actual texts of the same. Nor do they constitute an interpretation of the original.

The Codification Division of the Office of Legal Affairs wishes to acknowledge the invaluable assistance received from the Registry of the Court in making available these summaries for publication.

90. QUESTIONS OF INTERPRETATION AND APPLICATION OF THE 1971 MONTREAL CONVENTION ARISING FROM THE AERIAL INCIDENT AT LOCKERBIE (LIBYAN ARAB JAMAHIRIYA *v.* UNITED KINGDOM) (PROVISIONAL MEASURES)

Order of 14 April 1992

In an Order issued in the case concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya *v.* United Kingdom), the Court found, by 11 votes to 5, that the circumstances of the case 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: Vice-President Oda, Acting President; President Sir Robert Jennings; Judges Lachs, Ago, Schwebel, Bedjaoui, Ni, Evensen, Tarassov, Guillaume, Shahabuddeen, Aguilar Mawdsley, Weeramantry, Ranjeva, Ajibola; Judge *ad hoc* El-Kosheri.

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The voting on the Order of the Court on the request for the indication of provisional measures made by Libya in the above case was as follows:

IN FAVOUR: Vice-President Oda, Acting President; President Sir Robert Jennings; Judges Lachs, Ago, Schwebel, Ni, Evensen, Tarassov, Guillaume, Shahabuddeen, Aguilar Mawdsley;

AGAINST: Judges Bedjaoui, Weeramantry, Ranjeva, Ajibola; Judge *ad hoc* El-Kosheri.

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* *

Acting President Oda and Judge Ni each appended a declaration to the Order of the Court; Judges Evensen, Tarassov, Guillaume and Aguilar Mawdsley a joint declaration.

Judges Lachs and Shahabuddeen appended separate opinions; and Judges Bedjaoui, Weeramantry, Ranjeva and Ajibola and Judge *ad hoc* El-Kosheri appended dissenting opinions to the Order.

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In its Order, the Court recalls that on 3 March 1992 the Libyan Arab Jamahiriya instituted proceedings against the United Kingdom in respect of "a dispute . . . between Libya and the United Kingdom over the interpretation or application of the Montreal Convention" of 23 September 1971, a dispute arising from the aerial incident that occurred over Lockerbie, Scotland, on 21 December 1988 and that led, in November 1991, to the Lord Advocate of Scotland charging two Libyan nationals with, *inter alia*, having "caused a bomb to be placed aboard [Pan Am flight 103] . . . , which bomb had exploded causing the aeroplane to crash".

The Court then recites the history of the case. It refers to the allegations and submissions made by Libya in its Application in which it asks the Court to adjudge and declare:

> "(*a*) that Libya has fully complied with all of its obligations under the Montreal Convention;
>
> (*b*) that the United Kingdom has breached, and is continuing to breach, its legal obligations to Libya under articles 5 (2), 5 (3), 7, 8 (2) and 11 of the Montreal Convention; and
>
> (*c*) that the United Kingdom is under a legal obligation immediately to cease and desist from such breaches and from the use of any and all force or threats against Libya, including the threat of force against Libya, and from all violations of the sovereignty, territorial integrity, and the political independence of Libya."

The Court also refers to Libya's request (filed, like the Application, on 3 March 1992, but later in the day) for the indication of the following provisional measures:

> "(*a*) to enjoin the United Kingdom from taking any action against Libya calculated to coerce or compel Libya to surrender the accused individuals to any jurisdiction outside of Libya; and
>
> (*b*) to ensure that no steps are taken that would prejudice in any way the rights of Libya with respect to the legal proceedings that are the subject of Libya's Application."

The Court further refers to the observations and submissions presented by both Libya and the United Kingdom at the public hearings on the request for the indication of provisional measures held on 26 and 28 March 1992.

The Court then takes note of the joint declaration issued on 27 November 1991 by the United Kingdom and the United States of America following on the charges brought by the Lord Advocate of Scotland against the two Libyan nationals in connection with the destruction of Pan Am flight 103, and which reads:

> "The British and American Governments today declare that the Government of Libya must:
>
> —surrender for trial all those charged with the crime; and accept responsibility for the actions of Libyan officials;
>
> —disclose all it knows of this crime, including the names of all those responsible, and allow full access to all witnesses, documents and other material evidence, including all the remaining timers;
>
> —pay appropriate compensation.
>
> We expect Libya to comply promptly and in full."

The Court also takes note of the fact that the subject of that declaration was subsequently considered by the United Nations Security Council, which on 21 January 1992 adopted resolution 731 (1992), of which the Court quotes, *inter alia*, the following passages:

"*Deeply concerned* over the results of investigations, which implicate officials of the Libyan Government and which are contained in Security Council documents that include the requests addressed to the Libyan authorities by France, the United Kingdom of Great Britain and Northern Ireland, and the United States of America [*S/23308*], in connection with the legal procedures related to the attacks carried out against Pan American flight 103 and Union de transports aériens flight 772,

. . .

2. *Strongly deplores* the fact that the Libyan Government has not yet responded effectively to the above requests to cooperate fully in establishing responsibility for the terrorist acts referred to above against Pan American flight 103 and Union de transports aériens flight 772;

3. *Urges* the Libyan Government immediately to provide a full and effective response to those requests so as to contribute to the elimination of international terrorism;".

The Court further notes that on 31 March 1992 (three days after the close of the hearings) the Security Council adopted resolution 748 (1992), stating, *inter alia*, that the Security Council:

" . . .

Deeply concerned that the Libyan Government has still not provided a full and effective response to the requests in its resolution 731 (1992) of 21 January 1992,

Convinced that the suppression of acts of international terrorism, including those in which States are directly or indirectly involved, is essential for the maintenance of international peace and security,

. . .

Determining, in this context, that the failure by the Libyan Government to demonstrate by concrete actions its renunciation of terrorism and in particular its continued failure to respond fully and effectively to the requests in resolution 731 (1992) constitute a threat to international peace and security,

. . .

Acting under Chapter VII of the Charter,

1. *Decides* that the Libyan Government must now comply without any further delay with paragraph 3 of resolution 731 (1992) regarding the requests contained in documents S/23306, S/23308 and S/23309;

2. *Decides also* that the Libyan Government must commit itself definitively to cease all forms of terrorist action and all assistance to terrorist groups and that it must promptly, by concrete actions, demonstrate its renunciation of terrorism;

3. *Decides* that on 15 April 1992 all States shall adopt the measures set out below, which shall apply until the Security Council decides that the Libyan Government has complied with paragraphs 1 and 2 above;

. . .

7. *Calls upon* all States, including States not members of the United Nations, and all international organizations, to act strictly in accordance with the provisions of the present resolution, notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement or any contract entered into or any licence or permit granted prior to 15 April 1992;".

The Court observes that document S/23308, to which reference was made in resolution 748 (1992), included the demands made by the United Kingdom and the United States of America in their joint declaration of 27 November 1991, as set out above.

After having referred to the observations on Security Council resolution 748 (1992) presented by both Parties in response to the Court's invitation, the Court goes on to consider as follows:

"Whereas, the Court, in the context of the present proceedings on a request for provisional measures, has, in accordance with Article 41 of the Statute, to consider the circumstances drawn to its attention as requiring the indication of such measures, but cannot make definitive findings either of fact or of law on the issues relating to the merits, and the right of the Parties to contest such issues at the stage of the merits must remain unaffected by the Court's decision;

Whereas both Libya and the United Kingdom, as Members of the United Nations, are obliged to accept and carry out the decisions of the Security Council in accordance with Article 25 of the Charter; whereas the Court, which is at the stage of proceedings on provisional measures, considers that prima facie this obligation extends to the decision contained in resolution 748 (1992); and whereas, in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention;

Whereas the Court, while thus not at this stage called upon to determine definitively the legal effect of Security Council resolution 748 (1992), considers that, whatever the situation previous to the adoption of that resolution, the rights claimed by Libya under the Montreal Convention cannot now be regarded as appropriate for protection by the indication of provisional measures;

Whereas, furthermore, an indication of the measures requested by Libya would be likely to impair the rights which appear prima facie to be enjoyed by the United Kingdom by virtue of Security Council resolution 748 (1992);

Whereas, in order to pronounce on the present request for provisional measures, the Court is not called upon to determine any of the other questions which have been raised before it in the present proceedings, including the question of its jurisdiction to entertain the merits of the case; and whereas the decision given in these proceedings in no way prejudges any such question, and leaves unaffected the rights of the Government of Libya and the Government of the United Kingdom to submit arguments in respect of any of these questions;

For these reasons,

THE COURT,

By eleven votes to five,

Finds that the circumstances of the case are not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures."

Declaration of Vice-President Oda, Acting President

Acting President Oda appended a declaration concurring with the Court's decision but expressing his view that it should not have been based solely on the consequences of Security Council resolution 748 (1992), since this sug-

gested the possibility that, prior to the adoption of the resolution, the Court could have reached legal conclusions with effects incompatible with the Council's actions, and the Court might in that case be blamed for not having acted sooner. As it happened, the Security Council, applying its own logic, acted with haste in adopting its new resolution before the Court could have reached a considered decision, a fact of which it must have been aware.

Acting President Oda is satisfied that the Court possessed jurisdiction prima facie, despite the six-month rule in article 14 (1) of the Montreal Convention, since the circumstances had appeared to leave no room to negotiate the organization of an arbitration.

However, the essential right of which the protection was claimed, that of not being forced to extradite one's own nationals, was a sovereign right under general international law, whereas the subject-matter of Libya's Application consisted of specific rights claimed under the Montreal Convention. Given the principle that the rights sought to be protected in proceedings for provisional measures must relate to the subject-matter of the case, this meant that the Court would in any case have had to decline to indicate the measures requested. Such a mismatch between the object of the Application and the rights sought to be protected ought, in the view of the Acting President, to have been the main reason for taking a negative decision, which would have been appropriate no less before than after the adoption of resolution 748 (1992).

Declaration of Judge Ni

Judge Ni, in his declaration, expresses his view that, according to the jurisprudence of the Court, the fact that a matter is before the Security Council should not prevent it from being dealt with by the Court. Although both organs deal with the same matter, there are differing points of emphasis. In the instant case, the Security Council, as a political organ, is more concerned with the elimination of international terrorism and the maintenance of international peace and security, while the International Court of Justice, as the principal judicial organ of the United Nations, is more concerned with legal procedures such as questions of extradition and proceedings in connection with prosecution of offenders and assessment of compensation, etc.

Concerning Libya's request for provisional measures, Judge Ni refers to the provisions in the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation on which Libya relies. According to article 14 (1) of that Convention, any one of the parties to a dispute may invoke jurisdiction of the International Court of Justice if within six months from the date of the request for arbitration no agreement is reached on the organization of the arbitration. In this case, Libya's proposed arbitration by a letter of 18 January 1992, only one-and-a-half months had elapsed before Libya instituted proceedings in the International Court of Justice on 3 March 1992.

Judge Ni considers that Libya's request should be denied on the sole ground of the non-fulfilment of the six-month period requirement, without having to decide at the same time on the other issues. Consequently, Libya will not be prevented from seeking a remedy of the Court in accordance with the provisions of the 1971 Montreal Convention, if, months later, the dispute still subsists and if the Applicant so desires.

Joint declaration of Judges Evensen, Tarassov, Guillaume and Aguilar Mawdsley

Judges Evensen, Tarassov, Guillaume and Aguilar Mawdsley, in a joint declaration, expressed their complete agreement with the decision of the Court, but made some additional comments. They stressed that, before the Security Council became involved in the case, the United States and the United Kingdom had been entitled to request Libya to extradite the accused and, to that end, to take any action consistent with international law. For its part, Libya was entitled to refuse such extradition and to recall in that connection that, in common with the law of many other countries, its domestic law prohibits the extradition of nationals.

The authors then showed that, in this particular case, that situation was not considered satisfactory by the Security Council, which was acting, with a view to combating international terrorism, within the framework of Chapter VII of the Charter of the United Nations. The Council accordingly decided that Libya should surrender the two accused to the countries that had requested their surrender.

Under those circumstances, Judges Evensen, Tarassov, Guillaume and Aguilar Mawdsley take the view that the Court, pronouncing on a request for the indication of provisional measures submitted by Libya in order to preserve the legal situation existing prior to the adoption of the Security Council resolutions, was fully justified in noting the changes that had been made to that situation by those resolutions. It was also fully justified in holding that, as a consequence, the circumstances of the case were not such as to require the exercise of its power to indicate such measures.

Separate opinion of Judge Lachs

The present cases, and the necessity for the Court to take an early decision on an interlocutory request, have brought out into the open problems of jurisdiction and what is known as *sub judice*. In fact, the Court is the guardian of legality for the international community as a whole, within and without the United Nations. There is no doubt that the Court's task is "to ensure respect for international law . . . " (*I.C.J. Reports 1949*, p. 35). It is its principal guardian. In the present case, not only has the wider issue of international terrorism been on the agenda of the Security Council but the latter adopted resolutions 731 (1992) and 748 (1992). The Order made should not be seen as an abdication of the Court's powers. Whether or not the sanctions ordered by resolution 748 (1992) have eventually to be applied, it is in any event to be hoped that the two principal organs concerned will be able to operate with due consideration for their mutual involvement in the preservation of the rule of law.

Separate opinion of Judge Shahabuddeen

In his separate opinion, Judge Shahabuddeen thought that Libya had presented an arguable case for an indication of provisional measures but that Security Council resolution 748 (1992) had the legal effect of rendering unenforceable the rights claimed by Libya. The decision of the Court, he said, resulted not from any collision between the competence of the Security Council and the competence of the Court, but from a collision between the obligations of Libya under the resolution of the Security Council and any obligations which Libya had under the Montreal Conven-

tion. Under the Charter, the obligations under the resolution of the Security Council prevailed.

Judge Shahabuddeen considered that the Respondent's demand that "Libya . . . must pay appropriate compensation . . . promptly and in full" presupposed a prior determination by the Respondent that the accused were guilty, since the responsibility of the Libyan State was premised on the guilt of the accused. In Judge Shahabuddeen's view, the implications for an impartial trial in the Respondent State were important. This was so because there was a fundamental sense in which it could be said that the question of an impartial trial lay at the root of the entire controversy relating to the Respondent's demand for the surrender of the two accused, the stated position of the Respondent being that an impartial trial could not be had in Libya.

Dissenting opinion of Judge Bedjaoui

Judge Mohammed Bedjaoui proceeds from the idea that there exist two altogether distinct disputes, one legal, the other practical. The former concerns the extradition of two nationals and is dealt with, as a legal matter, before the International Court of Justice at the request of Libya, whereas the latter concerns the wider question of State terrorism as well as the international responsibility of the Libyan State and, for its part, is being dealt with, politically, before the Security Council at the request of the United Kingdom and the United States.

Judge Bedjaoui considers that Libya was fully within its rights in bringing before the Court, with a view to its judicial settlement, the dispute concerning the extradition, just as the United Kingdom and the United States were fully within their rights in bringing before the Security Council, with a view to its political settlement, the dispute on the international responsibility of Libya. The situation should, in the opinion of Judge Bedjaoui, be summarized as follows: he is of the view, on the one hand, that the rights claimed by Libya exist prima facie and that all of the conditions normally required by the Court for the indication of provisional measures are fulfilled in this case so that these rights may be preserved in accordance with Article 41 of the Statute of the Court. And it is on this point that Judge Bedjaoui expressed reservations with regard to the two Orders of the Court. But it should also be noted that Security Council resolution 748 (1992) has annihilated these rights of Libya, without it being possible, at this stage of provisional measures, of, in other words, a prima facie pre-examination, for the Court to take it upon itself to decide prematurely the substantive question of the constitutional validity of that resolution, for which reason the resolution benefits from a presumption of validity and must prima facie be held to be lawful and binding. He is therefore in agreement with the Court as to this second point.

The situation thus characterized, with rights that deserve to be protected through the indication of provisional measures but which are almost immediately negated by a resolution of the Security Council that deserves to be considered valid prima facie, does not fall precisely within the bounds of Article 103 of the Charter; it exceeds them somewhat.

Subject to this nuance, it is clear that the Court could not but take note of the situation and hold that at this stage of the proceedings such a "conflict", governed by Article 103 of the Charter, resulted, in effect, in any indication of provisional measures being ineffectual. But the operative parts of the two orders remain at the threshold of the whole operation inasmuch as the Court states therein that, having regard to the circumstances, there is no reason for it to *exercise its power* of indicating provisional measures. The qualification made by Judge Bedjaoui is that in the present case the effective exercise of this power was justified; but he also observes that the *effects* of that exercise had been nullified by resolution 748 (1992). Judge Bedjaoui therefore arrives, concretely, at the same result as the Court, via an entirely different route but also with the important nuance mentioned, as a result of which he does not reject the request for interim measures but, rather, declares that its *effects* have disappeared.

That said, Judge Bedjaoui is of the view that the Court could not have avoided ordering provisional measures on the basis of the circumstances of the case submitted to it, even though the *effects* of such a decision were negated by resolution 748 (1992). It should be added that, even assuming that the majority entertained some doubt, which he personally did not share, as to whether the requesting State could fulfil one or another of the prerequisites to an indication of provisional measures, the Court could have made use of the power to indicate itself any provisional measure that it would have considered to be more appropriate than those sought by the requesting State.

Consequently, the Court could have decided to indicate provisional measures in the very general terms of an exhortation to all the Parties not to aggravate or extend the dispute. Thus, assuming that the Court would in this case have been justified in considering that one or another prerequisite to the indication of certain specific measures was lacking, it had at least one resource, namely, to adopt a general, distinct, measure taking the form of an appeal to the Parties not to aggravate or extend the dispute, or of an exhortation addressed to them to come together for the purpose of settling the dispute amicably, either directly, or through the Secretariat of the United Nations or that of the Arab League, thus conforming to what is nowadays established practice.

Moreover, given the grave circumstances of the present case, would an indication of a provisional measure of this nature not have been an elegant way of breaking out of the impasse arising from the opposition between, on the one hand, the more specific provisional measures that the Court should have ordered to meet the wishes of the requesting State and, on the other, Security Council resolution 748 (1992), which would in any event have negated the effects of such an order? This would have been an elegant way of sidestepping the main difficulty, and also a really beneficial way of doing so, in the interests of everyone, by assisting in the settlement of the dispute through methods that appear likely to be used.

Judge Bedjaoui therefore regrets that the Court was unable to indicate either specific provisional measures of the kind sought by the requesting States, or, *proprio motu*, general measures, a way that would have enabled it to make its own positive contribution to the settlement of the dispute. This is why, in the last analysis, he could not but vote against the two Orders.

Dissenting opinion of Judge Weeramantry

Judge Weeramantry, in his dissenting opinion, expressed the view that the circumstances invoked by the Applicant

appeared prima facie to afford a basis for the Court's jurisdiction.

The opinion draws attention to the unique nature of the present case in that it is the first time the International Court and the Security Council have been approached by opposite parties to the same dispute. This raised new questions which needed to be discussed in the light of the respective powers of the Council and the Court under the Charter of the United Nations and in the light of their relationship to each other.

After an examination of the relevant Articles of the Charter and of the *travaux préparatoires* of Articles 24 (2) and (1) in particular, the opinion concludes that the Court is not debarred from considering matters which the Security Council has considered under Chapter VI. Furthermore, the Security Council, in discharging its duties, is required to act in accordance with the principles of international law.

The Court is a coordinate body of the Security Council and, in its proper sphere of determining disputes, examines and decides questions of international law according to legal principles and judicial techniques. In regard to matters properly before it, the Court's function is to make judicial decisions according to law and it would not be deflected from this course by the fact the same matter has been considered by the Security Council. However, decisions made by the Security Council under Chapter VII are prima facie binding on all Members of the United Nations and would not be the subject of examination by the Court. Judge Weeramantry concludes that resolution 731 (1992) is only recommendatory and not binding but that resolution 748 (1992) is prima facie binding.

The opinion concludes that provisional measures can be indicated in such a manner as not to conflict with resolution 748 (1992) and indicates such measures *proprio motu* against both Parties preventing such aggravation or extension of the dispute as might result in the use of force by either or both Parties. This action is based on Article 41 of the Statute and Articles 73, 74 and 75 of the Rules of Court.

Dissenting opinion of Judge Ranjeva

In his dissenting opinion, Judge Ranjeva considers that the present dispute goes beyond the framework of relations between the Parties to the dispute and concerns the right of all States bound by the Montreal Convention. Given his right to choose, in accordance with the principle *aut dedere aut judicare*, the Applicant was justified in requesting the Court to indicate provisional measures; this right was incontestable until the date of the adoption of resolution 748 (1992). The fundamental change of circumstances that occurred subsequent to the filing of the Application, without any alteration in the factual circumstances of the case, prevented the Court from exercising its legal function to the full extent of its powers.

But, contrary to the opinion of the majority of the Members of the Court, Judge Ranjeva considers that, bearing in mind the development of case-law relating to the application of Articles 41 of the Statute and 75 of the Rules, as well as the autonomous nature of an appeal by the Court to the Parties in relation to the indication of provisional measures (case concerning *Passage through the Great Belt (Finland* v. *Denmark)*), [the Court could indicate] measures consisting, among other things, of an appeal to the Parties enjoining them to adopt a line of conduct which would prevent the aggravation or extension of the conflict. For such was the posture of the Court in the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* and the *Frontier Dispute* cases.

In the view of Judge Ranjeva, the new dimensions of the problem meant that the Court was unable to limit itself to a passive approach to its legal function, which, in a dynamic sense, falls within the scope of the fundamental obligation set out in Article 1, paragraph 1, of the Charter of the United Nations, namely, the maintenance of peace within the context of its role.

Dissenting opinion of Judge Ajibola

Judge Ajibola, in his dissenting opinion, regrets that the Court, by a majority decision, declined to indicate provisional measures even though Libya established sufficient warrant for its doing so under the applicable provisions of the Court's Statute and Rules.

He strongly believes that, even if the Court concluded that such measures should be declined because of the possible effect of Security Council resolution 748 (1992), the resolution did not raise any absolute bar to the Court's making in its Order pronouncements clearly extraneous to the resolution and definitely not in conflict with it.

He goes on to stress the Court's powers, especially under Article 75 of its Rules, to indicate provisional measures *proprio motu*, quite independently of the Applicant's request, for the purpose of ensuring peace and security among nations, and in particular the Parties to the case. It should therefore, *pendente lite*, have indicated provisional measures based on Article 41 of the Statute and Articles 73, 74 and 75 of the Rules of Court, with a view to preventing any aggravation or extension of the dispute which might result in the use of force by either Party or by both Parties.

Dissenting opinion of Judge ad hoc *El-Kosheri*

Judge *ad hoc* El-Kosheri, in his dissenting opinion, focused mainly on the legal reasons which led him to maintain that paragraph 1 of Security Council resolution 748 (1992) should not be considered having any legal effect on the jurisdiction of the Court, even on a prima facie basis, and accordingly the Libyan request for provisional measures has to be evaluated in conformity with habitual pattern as reflected in the established jurisprudence of the Court. In the light of the rules relied upon in the recent cases, he came to the conclusion that the Court should act *proprio motu* to indicate measures having for effect:

—pending a final decision of the Court, the two suspects whose names are identified in the present proceedings should be placed under the custody of the governmental authorities in another State that could ultimately provide a mutually agreed-upon convenient forum for their trial;

—moreover, the Court could have indicated that the Parties 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 likely to impede the proper administration of justice.

91. QUESTIONS OF INTERPRETATION AND APPLICATION OF THE 1971 MONTREAL CONVENTION ARISING FROM THE AERIAL INCIDENT AT LOCKERBIE (LIBYAN ARAB JAMAHIRIYA *v.* UNITED STATES) (PROVISIONAL MEASURES)

Order of 14 April 1992

In an Order issued in the case concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya *v.* United States of America), the Court found, by 11 votes to 5, that the circumstances of the case 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: Vice-President Oda, Acting President; President Sir Robert Jennings; Judges Lachs, Ago, Schwebel, Bedjaoui, Ni, Evensen, Tarassov, Guillaume, Shahabuddeen, Aguilar Mawdsley, Weeramantry, Ranjeva, Ajibola; Judge *ad hoc* El-Kosheri.

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The voting on the Order of the Court on the request for the indication of provisional measures made by Libya in the above case was as follows:

IN FAVOUR: Vice-President Oda, Acting President; President Sir Robert Jennings; Judges Lachs, Ago, Schwebel, Ni, Evensen, Tarassov, Guillaume, Shahabuddeen, Aguilar Mawdsley;

AGAINST: Judges Bedjaoui, Weeramantry, Ranjeva, Ajibola; Judge *ad hoc* El-Kosheri.

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Acting President Oda and Judge Ni each appended a declaration to the Order of the Court; Judges Evensen, Tarassov, Guillaume and Aguilar Mawdsley a joint declaration.

Judges Lachs and Shahabuddeen appended separate opinions; and Judges Bedjaoui, Weeramantry, Ranjeva and Ajibola and Judge *ad hoc* El-Kosheri appended dissenting opinions to the Order.

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In its Order, the Court recalls that on 3 March 1992 the Libyan Arab Jamahiriya instituted proceedings against the United States in respect of "a dispute . . . between Libya and the United States over the interpretation or application of the Montreal Convention" of 23 September 1971, a dispute arising from the aerial incident that occurred over Lockerbie, Scotland, on 21 December 1988 and that led to a Grand Jury of the United States District Court for the District of Columbia indicting, on 14 November 1991, two Libyan nationals, charging, *inter alia*, that they had "caused a bomb to be placed aboard [Pan Am flight 103] . . . , which bomb had exploded causing the aeroplane to crash".

The Court then recites the history of the case. It refers to the allegations and submissions made by Libya in its Application in which it asks the Court to adjudge and declare:

"(*a*) that Libya has fully complied with all of its obligations under the Montreal Convention;

(*b*) that the United States has breached, and is continuing to breach, its legal obligations to Libya under articles 5 (2), 5 (3), 7, 8 (2) and 11 of the Montreal Convention; and

(*c*) that the United States is under a legal obligation immediately to cease and desist from such breaches and from the use of any and all force or threats against Libya, including the threat of force against Libya, and from all violations of the sovereignty, territorial integrity, and the political independence of Libya."

The Court also refers to Libya's request (filed, like the Application, on 3 March 1992, but later in the day) for the indication of the following provisional measures:

"(*a*) to enjoin the United States from taking any action against Libya calculated to coerce or compel Libya to surrender the accused individuals to any jurisdiction outside of Libya; and

(*b*) to ensure that no steps are taken that would prejudice in any way the rights of Libya with respect to the legal proceedings that are the subject of Libya's Application."

The Court further refers to the observations and submissions presented by both Libya and the United States at the public hearings on the request for the indication of provisional measures held on 26, 27 and 28 March 1992.

The Court then takes note of the joint declaration issued on 27 November 1991 by the United States of America and the United Kingdom following on the charges brought by a Grand Jury of the United States District Court for the District of Columbia against the two Libyan nationals in connection with the destruction of Pan Am flight 103, and which reads:

"The British and American Governments today declare that the Government of Libya must:

—surrender for trial all those charged with the crime; and accept responsibility for the actions of Libyan officials;

—disclose all it knows of this crime, including the names of all those responsible, and allow full access to all witnesses, documents and other material evidence, including all the remaining timers;

—pay appropriate compensation.

We expect Libya to comply promptly and in full."

The Court also takes note of the fact that the subject of that declaration was subsequently considered by the United Nations Security Council, which on 21 January 1992 adopted resolution 731 (1992), of which the Court quotes, *inter alia*, the following passages:

"*Deeply concerned* over the results of investigations, which implicate officials of the Libyan Government and

which are contained in Security Council documents that include the requests addressed to the Libyan authorities by France, the United Kingdom of Great Britain and Northern Ireland, and the United States of America [*S/23308*], in connection with the legal procedures related to the attacks carried out against Pan American flight 103 and Union de transports aériens flight 772,

. . .

2. *Strongly deplores* the fact that the Libyan Government has not yet responded effectively to the above requests to cooperate fully in establishing responsibility for the terrorist acts referred to above against Pan American flight 103 and Union de transports aériens flight 772;

3. *Urges* the Libyan Government immediately to provide a full and effective response to those requests so as to contribute to the elimination of international terrorism;".

The Court further notes that on 31 March 1992 (three days after the close of the hearings) the Security Council adopted resolution 748 (1992), stating, *inter alia*, that the Security Council:

" . . .

Deeply concerned that the Libyan Government has still not provided a full and effective response to the requests in its resolution 731 (1992) of 21 January 1992,

Convinced that the suppression of acts of international terrorism, including those in which States are directly or indirectly involved, is essential for the maintenance of international peace and security,

. . .

Determining, in this context, that the failure by the Libyan Government to demonstrate by concrete actions its renunciation of terrorism and in particular its continued failure to respond fully and effectively to the requests in resolution 731 (1992) constitute a threat to international peace and security,

. . .

Acting under Chapter VII of the Charter,

1. *Decides* that the Libyan Government must now comply without any further delay with paragraph 3 of resolution 731 (1992) regarding the requests contained in documents S/23306, S/23308 and S/23309;

2. *Decides also* that the Libyan Government must commit itself definitively to cease all forms of terrorist action and all assistance to terrorist groups and that it must promptly, by concrete actions, demonstrate its renunciation of terrorism;

3. *Decides* that on 15 April 1992 all States shall adopt the measures set out below, which shall apply until the Security Council decides that the Libyan Government has complied with paragraphs 1 and 2 above;

. . .

7. *Calls upon* all States, including States not members of the United Nations, and all international organizations, to act strictly in accordance with the provisions of the present resolution, notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement or any contract entered into or any licence or permit granted prior to 15 April 1992;".

The Court observes that document S/23308, to which reference was made in resolution 748 (1992), included the demands made by the United States of America and the United Kingdom in their joint declaration of 27 November 1991, as set out above.

After having referred to the observations on Security Council resolution 748 (1992) presented by both Parties in response to the Court's invitation (as well as by the Agent of the United States in an earlier communication), the Court goes on to consider as follows:

"Whereas, the Court, in the context of the present proceedings on a request for provisional measures, has, in accordance with Article 41 of the Statute, to consider the circumstances drawn to its attention as requiring the indication of such measures, but cannot make definitive findings either of fact or of law on the issues relating to the merits, and the right of the Parties to contest such issues at the stage of the merits must remain unaffected by the Court's decision;

Whereas both Libya and the United States, as Members of the United Nations, are obliged to accept and carry out the decisions of the Security Council in accordance with Article 25 of the Charter; whereas the Court, which is at the stage of proceedings on provisional measures, considers that prima facie this obligation extends to the decision contained in resolution 748 (1992); and whereas, in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention;

Whereas the Court, while thus not at this stage called upon to determine definitively the legal effect of Security Council resolution 748 (1992), considers that, whatever the situation previous to the adoption of that resolution, the rights claimed by Libya under the Montreal Convention cannot now be regarded as appropriate for protection by the indication of provisional measures;

Whereas, furthermore, an indication of the measures requested by Libya would be likely to impair the rights which appear prima facie to be enjoyed by the United States by virtue of Security Council resolution 748 (1992);

Whereas, in order to pronounce on the present request for provisional measures, the Court is not called upon to determine any of the other questions which have been raised before it in the present proceedings, including the question of its jurisdiction to entertain the merits of the case; and whereas the decision given in these proceedings in no way prejudges any such question, and leaves unaffected the rights of the Government of Libya and the Government of the United States to submit arguments in respect of any of these questions;

For these reasons,

THE COURT,

By eleven votes to five,

Finds that the circumstances of the case are not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures."

Declaration of Vice-President Oda, Acting President

Acting President Oda appended a declaration concurring with the Court's decision but expressing his view that it should not have been based solely on the consequences of Security Council resolution 748 (1992), since this suggested the possibility that, prior to the adoption of the resolution, the Court could have reached legal conclusions with effects incompatible with the Council's actions, and the Court might in that case be blamed for not having acted sooner. As it happened, the Security Council, applying its own logic, acted with haste in adopting its new resolution

before the Court could have reached a considered decision, a fact of which it must have been aware.

Acting President Oda is satisfied that the Court possessed jurisdiction prima facie, despite the six-month rule in article 14 (1) of the Montreal Convention, since the circumstances had appeared to leave no room to negotiate the organization of an arbitration.

However, the essential right of which the protection was claimed, that of not being forced to extradite one's own nationals, was a sovereign right under general international law, whereas the subject-matter of Libya's Application consisted of specific rights claimed under the Montreal Convention. Given the principle that the rights sought to be protected in proceedings for provisional measures must relate to the subject-matter of the case, this meant that the Court would in any case have had to decline to indicate the measures requested. Such a mismatch between the object of the Application and the rights sought to be protected ought, in the view of the Acting President, to have been the main reason for taking a negative decision, which would have been appropriate no less before than after the adoption of resolution 748 (1992).

Declaration of Judge Ni

Judge Ni, in his declaration, expresses his view that, according to the jurisprudence of the Court, the fact that a matter is before the Security Council should not prevent it from being dealt with by the Court. Although both organs deal with the same matter, there are differing points of emphasis. In the instant case, the Security Council, as a political organ, is more concerned with the elimination of international terrorism and the maintenance of international peace and security, while the International Court of Justice, as the principal judicial organ of the United Nations, is more concerned with legal procedures such as questions of extradition and proceedings in connection with prosecution of offenders and assessment of compensation, etc.

Concerning Libya's request for provisional measures, Judge Ni refers to the provisions in the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation on which Libya relies. According to article 14 (1) of that Convention, any one of the parties to a dispute may invoke jurisdiction of the International Court of Justice if within six months from the date of the request for arbitration no agreement is reached on the organization of the arbitration. In this case, Libya's proposed arbitration by a letter of 18 January 1992, only one-and-a-half months had elapsed before Libya instituted proceedings in the International Court of Justice on 3 March 1992.

Judge Ni considers that Libya's request should be denied on the sole ground of the non-fulfilment of the six-month-period requirement, without having to decide at the same time on the other issues. Consequently, Libya will not be prevented from seeking a remedy of the Court in accordance with the provisions of the 1971 Montreal Convention, if, months later, the dispute still subsists and if the Applicant so desires.

Joint declaration of Judges Evensen, Tarassov, Guillaume and Aguilar Mawdsley

Judges Evensen, Tarassov, Guillaume and Aguilar Mawdsley, in a joint declaration, expressed their complete agreement with the decision of the Court, but made some additional comments. They stressed that, before the Security Council became involved in the case, the United States and the United Kingdom had been entitled to request Libya to extradite the accused and, to that end, to take any action consistent with international law. For its part, Libya was entitled to refuse such extradition and to recall in that connection that, in common with the law of many other countries, its domestic law prohibits the extradition of nationals.

The authors then showed that, in this particular case, that situation was not considered satisfactory by the Security Council which was acting, with a view to combating international terrorism, within the framework of Chapter VII of the Charter of the United Nations. The Council accordingly decided that Libya should surrender the two accused to the countries that had requested their surrender.

Under those circumstances, Judges Evensen, Tarassov, Guillaume and Aguilar Mawdsley take the view that the Court, pronouncing on a request for the indication of provisional measures submitted by Libya in order to preserve the legal situation existing prior to the adoption of the Security Council resolutions, was fully justified in noting the changes that had been made to that situation by those resolutions. It was also fully justified in holding that, as a consequence, the circumstances of the case were not such as to require the exercise of its power to indicate such measures.

Separate opinion of Judge Lachs

The present cases, and the necessity for the Court to take an early decision on an interlocutory request, have brought out into the open problems of jurisdiction and what is known as *sub judice*. In fact, the Court is the guardian of legality for the international community as a whole, within and without the United Nations. There is no doubt that the Court's task is "to ensure respect for international law . . . " (*I.C.J. Reports 1949*, p. 35). It is its principal guardian. In the present case, not only has the wider issue of international terrorism been on the agenda of the Security Council but the latter adopted resolutions 731 (1992) and 748 (1992). The Order made should not be seen as an abdication of the Court's powers. Whether or not the sanctions ordered by resolution 748 (1992) have eventually to be applied, it is in any event to be hoped that the two principal organs concerned will be able to operate with due consideration for their mutual involvement in the preservation of the rule of law.

Separate opinion of Judge Shahabuddeen

In his separate opinion, Judge Shahabuddeen thought that Libya had presented an arguable case for an indication of provisional measures but that Security Council resolution 748 (1992) had the legal effect of rendering unenforceable the rights claimed by Libya. The decision of the Court, he said, resulted not from any collision between the competence of the Security Council and the competence of the Court, but from a collision between the obligations of Libya under the resolution of the Security Council and any obligations which Libya had under the Montreal Convention. Under the Charter, the obligations under the resolution of the Security Council prevailed.

Judge Shahabuddeen noted that the Respondent's demand for the surrender of the two accused Libyan nationals was based largely on the view that an impartial trial could not be had in Libya. However, the Respondent's demand

that "Libya . . . must pay appropriate compensation . . . promptly and in full" presupposed a determination by the Respondent that the accused were guilty, since the responsibility of the Libyan State was premised on the guilt of the accused. Consequently, there was an issue as to possible prejudgment of the case by the Respondent.

Dissenting opinion of Judge Bedjaoui

Judge Mohammed Bedjaoui proceeds from the idea that there exist two altogether distinct disputes, one legal, the other practical. The former concerns the extradition of two nationals and is dealt with, as a legal matter, before the International Court of Justice at the request of Libya, whereas the latter concerns the wider question of State terrorism as well as the international responsibility of the Libyan State and, for its part, is being dealt with, politically, before the Security Council at the request of the United Kingdom and the United States.

Judge Bedjaoui considers that Libya was fully within its rights in bringing before the Court, with a view to its judicial settlement, the dispute concerning the extradition, just as the United Kingdom and the United States were fully within their rights in bringing before the Security Council, with a view to its political settlement, the dispute on the international responsibility of Libya. The situation should, in the opinion of Judge Bedjaoui, be summarized as follows: he is of the view, on the one hand, that the rights claimed by Libya exist prima facie and that all of the conditions normally required by the Court for the indication of provisional measures are fulfilled in this case so that these rights may be preserved in accordance with Article 41 of the Statute of the Court. And it is on this point that Judge Bedjaoui expressed reservations with regard to the two Orders of the Court. But it should also be noted that Security Council resolution 748 (1992) has annihilated these rights of Libya, without it being possible, at this stage of provisional measures, of, in other words, a prima facie pre-examination, for the Court to take it upon itself to decide prematurely the substantive question of the constitutional validity of that resolution, for which reason the resolution benefits from a presumption of validity and must prima facie be held to be lawful and binding. He is therefore in agreement with the Court as to this second point.

The situation thus characterized, with rights that deserve to be protected through the indication of provisional measures but which are almost immediately negated by a resolution of the Security Council that deserves to be considered valid prima facie, does not fall precisely within the bounds of Article 103 of the Charter; it exceeds them somewhat.

Subject to this nuance, it is clear that the Court could not but take note of the situation and hold that at this stage of the proceedings such a "conflict", governed by Article 103 of the Charter, resulted, in effect, in any indication of provisional measures being ineffectual. But the operative parts of the two Orders remain at the threshold of the whole operation inasmuch as the Court states therein that, having regard to the circumstances, there is no reason for it to *exercise its power* of indicating provisional measures. The qualification made by Judge Bedjaoui is that in the present case the effective exercise of this power was justified; but he also observes that the *effects* of that exercise had been nullified by resolution 748 (1992). Judge Bedjaoui therefore arrives, concretely, at the same result as the Court, via an entirely different route but also with the important nuance mentioned, as a result of which he does not reject the request for interim measures but, rather, declares that its *effects* have disappeared.

That said, Judge Bedjaoui is of the view that the Court could not have avoided ordering provisional measures on the basis of the circumstances of the case submitted to it, even though the *effects* of such a decision were negated by resolution 748 (1992). It should be added that, even assuming that the majority entertained some doubt, which he personally did not share, as to whether the requesting State could fulfil one or another of the prerequisites to an indication of provisional measures, the Court could have made use of the power to indicate itself any provisional measure that it would have considered to be more appropriate than those sought by the requesting State.

Consequently, the Court could have decided to indicate provisional measures in the very general terms of an exhortation to all the Parties not to aggravate or extend the dispute. Thus, assuming that the Court would in this case have been justified in considering that one or another prerequisite to the indication of certain specific measures was lacking, it had at least one resource, namely, to adopt a general, distinct, measure taking the form of an appeal to the Parties not to aggravate or extend the dispute, or of an exhortation addressed to them to come together for the purpose of settling the dispute amicably, either directly, or through the Secretariat of the United Nations or that of the Arab League, thus conforming to what is nowadays established practice.

Moreover, given the grave circumstances of the present case, would an indication of a provisional measure of this nature not have been an elegant way of breaking out of the impasse arising from the opposition between, on the one hand, the more specific provisional measures that the Court should have ordered to meet the wishes of the requesting State and, on the other, Security Council resolution 748 (1992), which would in any event have negated the effects of such an order? This would have been an elegant way of sidestepping the main difficulty, and also a really beneficial way of doing so, in the interests of everyone, by assisting in the settlement of the dispute through methods that appear likely to be used.

Judge Bedjaoui therefore regrets that the Court was unable to indicate either specific provisional measures of the kind sought by the requesting States, or, *proprio motu*, general measures, a way that would have enabled it to make its own positive contribution to the settlement of the dispute. This is why, in the last analysis, he could not but vote against the two Orders.

Dissenting opinion of Judge Weeramantry

Judge Weeramantry, in his dissenting opinion, expressed the view that the circumstances invoked by the Applicant appeared prima facie to afford a basis for the Court's jurisdiction.

The opinion draws attention to the unique nature of the present case in that it is the first time the International Court and the Security Council have been approached by opposite parties to the same dispute. This raised new questions which needed to be discussed in the light of the respective powers of the Council and the Court under the Charter of the United Nations and in the light of their relationship to each other.

After an examination of the relevant Articles of the Charter and of the *travaux préparatoires* of Articles 24 (2) and (1) in particular, the opinion concludes that the Court is not debarred from considering matters which the Security Council has considered under Chapter VI. Furthermore, the Security Council, in discharging its duties, is required to act in accordance with the principles of international law.

The Court is a coordinate body of the Security Council and, in its proper sphere of determining disputes, examines and decides questions of international law according to legal principles and judicial techniques. In regard to matters properly before it, the Court's function is to make judicial decisions according to law and it would not be deflected from this course by the fact the same matter has been considered by the Security Council. However, decisions made by the Security Council under Chapter VII are prima facie binding on all Members of the United Nations and would not be the subject of examination by the Court. Judge Weeramantry concludes that resolution 731 (1992) is only recommendatory and not binding but that resolution 748 (1992) is prima facie binding.

The opinion concludes that provisional measures can be indicated in such a manner as not to conflict with resolution 748 (1992) and indicates such measures *proprio motu* against both Parties preventing such aggravation or extension of the dispute as might result in the use of force by either or both Parties. This action is based on Article 41 of the Statute and Articles 73, 74 and 75 of the Rules of Court.

Dissenting opinion of Judge Ranjeva

In his dissenting opinion, Judge Ranjeva considers that the present dispute goes beyond the framework of relations between the Parties to the dispute and concerns the right of all States bound by the Montreal Convention. Given his right to choose, in accordance with the principle *aut dedere aut judicare*, the Applicant was justified in requesting the Court to indicate provisional measures; this right was incontestable until the date of the adoption of resolution 748 (1992). The fundamental change of circumstances that occurred subsequent to the filing of the Application, without any alteration in the factual circumstances of the case, prevented the Court from exercising its legal function to the full extent of its powers.

But, contrary to the opinion of the majority of the Members of the Court, Judge Ranjeva considers that, bearing in mind the development of case-law relating to the application of Articles 41 of the Statute and 75 of the Rules, as well as the autonomous nature of an appeal by the Court to the Parties in relation to the indication of provisional measures (case concerning *Passage through the Great Belt (Finland* v. *Denmark)*), [the Court could indicate] measures consisting, among other things, of an appeal to the Parties enjoining them to adopt a line of conduct which would prevent the aggravation or extension of the conflict. For such was the posture of the Court in the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* and the *Frontier Dispute* cases.

In the view of Judge Ranjeva, the new dimensions of the problem meant that the Court was unable to limit itself to a passive approach to its legal function, which, in a dynamic sense, falls within the scope of the fundamental obligation set out in Article 1, paragraph 1, of the Charter of the United Nations, namely, the maintenance of peace within the context of its role.

Dissenting opinion of Judge Ajibola

Judge Ajibola, in his dissenting opinion, regrets that the Court, by a majority decision, declined to indicate provisional measures even though Libya established sufficient warrant for its doing so under the applicable provisions of the Court's Statute and Rules.

He strongly believes that, even if the Court concluded that such measures should be declined because of the possible effect of Security Council resolution 748 (1992), the resolution did not raise any absolute bar to the Court's making in its Order pronouncements clearly extraneous to the resolution and definitely not in conflict with it.

He goes on to stress the Court's powers, especially under Article 75 of its Rules, to indicate provisional measures *proprio motu*, quite independently of the Applicant's request, for the purpose of ensuring peace and security among nations, and in particular the Parties to the case. It should therefore, *pendente lite*, have indicated provisional measures based on Article 41 of the Statute and Articles 73, 74 and 75 of the Rules of Court, with a view to preventing any aggravation or extension of the dispute which might result in the use of force by either Party or by both Parties.

Dissenting opinion of Judge ad hoc *El-Kosheri*

Judge *ad hoc* El-Kosheri, in his dissenting opinion, focused mainly on the legal reasons which led him to maintain that paragraph 1 of Security Council resolution 748 (1992) should not be considered having any legal effect on the jurisdiction of the Court, even on a prima facie basis, and accordingly the Libyan request for provisional measures has to be evaluated in conformity with habitual pattern as reflected in the established jurisprudence of the Court. In the light of the rules relied upon in the recent cases, he came to the conclusion that the Court should act *proprio motu* to indicate measures having for effect:

—pending a final decision of the Court, the two suspects whose names are identified in the present proceedings should be placed under the custody of the governmental authorities in another State that could ultimately provide a mutually agreed-upon convenient forum for their trial;

—moreover, the Court could have indicated that the Parties 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 likely to impede the proper administration of justice.

92. CASE CONCERNING CERTAIN PHOSPHATE LANDS IN NAURU (NAURU *v.* AUSTRALIA) (PRELIMINARY OBJECTIONS)

Judgment of 26 June 1992

In its Judgment on the preliminary objections filed by Australia in the case concerning Certain Phosphate Lands in Nauru (Nauru *v.* Australia), the Court rejected Australia's objections concerning the circumstances in which the dispute relating to the rehabilitation of the phosphate lands worked out prior to 1 July 1967 arose between Nauru and Australia; it also rejected the objection based on the fact that New Zealand and the United Kingdom are not parties to the proceedings; and lastly, it upheld Australia's objection based on Nauru's claim concerning the overseas assets of the British Phosphate Commissioners being a new one. The Court thus found, by 9 votes to 4, that it had jurisdiction to entertain the Application and that the Application was admissible; it also found, unanimously, that the Nauruan claim concerning the overseas assets of the British Phosphate Commissioners was inadmissible.

The Court was composed as follows: President Sir Robert Jennings; Vice-President Oda; Judges Lachs, Ago, Schwebel, Bedjaoui, Ni, Evensen, Tarassov, Guillaume, Shahabuddeen, Aguilar Mawdsley, Ranjeva; Registrar Valencia-Ospina.

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The complete text of the operative paragraph of the Judgment is as follows:

"THE COURT

(1) (*a*) *rejects*, unanimously, the preliminary objection based on the reservation made by Australia in its declaration of acceptance of the compulsory jurisdiction of the Court;

(*b*) *rejects*, by twelve votes to one, the preliminary objection based on the alleged waiver by Nauru, prior to accession to independence, of all claims concerning the rehabilitation of the phosphate lands worked out prior to 1 July 1967;

IN FAVOUR: President Sir Robert Jennings; Judges Lachs, Ago, Schwebel, Bedjaoui, Ni, Evensen, Tarassov, Guillaume, Shahabuddeen, Aguilar Mawdsley, Ranjeva;

AGAINST: Vice-President Oda;

(*c*) *rejects*, by twelve votes to one, the preliminary objection based on the termination of the trusteeship over Nauru by the United Nations;

IN FAVOUR: President Sir Robert Jennings; Judges Lachs, Ago, Schwebel, Bedjaoui, Ni, Evensen, Tarassov, Guillaume, Shahabuddeen, Aguilar Mawdsley, Ranjeva;

AGAINST: Vice-President Oda;

(*d*) *rejects*, by twelve votes to one, the preliminary objection based on the effect of the passage of time on the admissibility of Nauru's Application;

IN FAVOUR: President Sir Robert Jennings; Judges Lachs, Ago, Schwebel, Bedjaoui, Ni, Evensen, Tarassov, Guillaume, Shahabuddeen, Aguilar Mawdsley, Ranjeva;

AGAINST: Vice-President Oda;

(*e*) *rejects*, by twelve votes to one, the preliminary objection based on Nauru's alleged lack of good faith;

IN FAVOUR: President Sir Robert Jennings; Judges Lachs, Ago, Schwebel, Bedjaoui, Ni, Evensen, Tarassov, Guillaume, Shahabuddeen, Aguilar Mawdsley, Ranjeva;

AGAINST: Vice-President Oda;

(*f*) *rejects*, by nine votes to four, the preliminary objection based on the fact that New Zealand and the United Kingdom are not parties to the proceedings;

IN FAVOUR: Judges Lachs, Bedjaoui, Ni, Evensen, Tarassov, Guillaume, Shahabuddeen, Aguilar Mawdsley, Ranjeva;

AGAINST: President Sir Robert Jennings; Vice-President Oda; Judges Ago, Schwebel;

(*g*) *upholds*, unanimously, the preliminary objection based on the claim concerning the overseas assets of the British Phosphate Commissioners being a new one;

(2) *finds*, by nine votes to four, that, on the basis of Article 36, paragraph 2, of the Statute of the Court, it has jurisdiction to entertain the Application filed by the Republic of Nauru on 19 May 1989 and that the said Application is admissible;

IN FAVOUR: Judges Lachs, Bedjaoui, Ni, Evensen, Tarassov, Guillaume, Shahabuddeen, Aguilar Mawdsley, Ranjeva;

AGAINST: President Sir Robert Jennings; Vice-President Oda; Judges Ago, Schwebel;

(3) *finds*, unanimously, that the claim concerning the overseas assets of the British Phosphate Commissioners, made by Nauru in its Memorial of 20 April 1990, is inadmissible."

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Judge Shahabuddeen appended a separate opinion to the Judgment; President Sir Robert Jennings, Vice-President Oda and Judges Ago and Schwebel appended dissenting opinions.

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I. *History of the case*
(paras. 1-6)

In its Judgment, the Court recalls that on 19 May 1989 Nauru filed in the Registry of the Court an Application instituting proceedings against Australia in respect of a "dispute . . . over the rehabilitation of certain phosphate lands [in Nauru] worked out before Nauruan independence". It notes that to found the jurisdiction of the Court the Application relies on the declarations made by the two States accepting the jurisdiction of the Court, as provided for in Article 36, paragraph 2, of the Statute of the Court.

The Court then recites the history of the case. It recalls that time-limits for the filing of the Memorial of Nauru and

the Counter-Memorial of Australia were fixed by an Order of 18 July 1989. The Memorial was filed on 20 April 1990, within the prescribed time-limit. On 16 January 1991, within the time-limit fixed for the filing of the Counter-Memorial, the Government of Australia filed preliminary objections submitting that the Application was inadmissible and that the Court lacked jurisdiction to hear the claims made therein. Accordingly, by an Order dated 8 February 1991, the Court, recording that by virtue of the provisions of Article 79, paragraph 3, of the Rules of Court, the proceedings on the merits were suspended, fixed a time-limit for the presentation by the Government of Nauru of a written statement of its observations and submissions on the preliminary objections. That statement was filed on 17 July 1991, within the prescribed time-limit, and the case became ready for hearing in respect of the preliminary objections.

The Court then sets out the following submissions presented by Nauru in the Memorial:

"On the basis of the evidence and legal argument presented in this Memorial, the Republic of Nauru

Requests the Court to adjudge and declare

that the Respondent State bears responsibility for breaches of the following legal obligations:

First: the obligations set forth in Article 76 of the Charter of the United Nations and articles 3 and 5 of the Trusteeship Agreement for Nauru of 1 November 1947.

Second: the international standards generally recognized as applicable in the implementation of the principle of self-determination.

Third: the obligation to respect the right of the Nauruan people to permanent sovereignty over their natural wealth and resources.

Fourth: the obligation of general international law not to exercise powers of administration in such a way as to produce a denial of justice *lato sensu*.

Fifth: the obligation of general international law not to exercise powers of administration in such a way as to constitute an abuse of rights.

Sixth: the principle of general international law that a State which is responsible for the administration of territory is under an obligation not to bring about changes in the condition of the territory which will cause irreparable damage to, or substantially prejudice, the existing or contingent legal interest of another State in respect of that territory.

Requests the Court to adjudge and declare further

that the Republic of Nauru has a legal entitlement to the Australian allocation of the overseas assets of the British Phosphate Commissioners which were marshalled and disposed of in accordance with the trilateral Agreement concluded on 9 February 1987.

Requests the Court to adjudge and declare

that the Respondent State is under a duty to make appropriate reparation in respect of the loss caused to the Republic of Nauru as a result of the breaches of its legal obligations detailed above and its failure to recognize the interest of Nauru in the overseas assets of the British Phosphate Commissioners."

It further sets out the submissions presented by Australia in its preliminary objections and by Nauru in the written statement of its observations and submissions on the preliminary objections, as well as the final submissions presented by each of the Parties at the hearings, the latter of which are as follows:

On behalf of Australia,

"On the basis of the facts and law set out in its preliminary objections and its oral pleadings, and for all or any of the grounds and reasons set out therein, the Government of Australia requests the Court to adjudge and declare that the claims by Nauru against Australia set out in their Application and Memorial are inadmissible and that the Court lacks jurisdiction to hear the claims."

On behalf of Nauru,

"In consideration of its written and oral pleadings the Government of the Republic of Nauru requests the Court:

To reject the preliminary objections raised by Australia, and

To adjudge and declare:

(*a*) that the Court has jurisdiction in respect of the claims presented in the Memorial of Nauru, and

(*b*) that the claims are admissible.

In the alternative, the Government of the Republic of Nauru requests the Court to declare that some or all of the Australian preliminary objections do not possess, in the circumstances of the case, an exclusively preliminary character, and in consequence, to join some or all of these objections to the merits."

II. *Objections concerning the circumstances in which the dispute arose* (paras. 8-38)

1. The Court begins by considering the question of its jurisdiction. Nauru bases jurisdiction on the declarations whereby Australia and Nauru have accepted the jurisdiction of the Court under Article 36, paragraph 2, of the Statute. The declaration of Australia specifies that it "does not apply to any dispute in regard to which the parties thereto have agreed or shall agree to have recourse to some other method of peaceful settlement".

Australia contends that as a result of the latter reservation the Court lacks jurisdiction to deal with Nauru's Application. It recalls that Nauru was placed under the Trusteeship System provided for in Chapter XII of the Charter of the United Nations by a Trusteeship Agreement approved by the General Assembly on 1 November 1947 and argues that any dispute which arose in the course of the trusteeship between "the Administering Authority and the indigenous inhabitants" should be regarded as having been settled by the very fact of the termination of the trusteeship, provided that that termination was unconditional.

The effect of the Agreement relating to the Nauru Island Phosphate Industry, concluded on 14 November 1967 between the Nauru Local Government Council, on the one hand, and Australia, New Zealand and the United Kingdom, on the other, was, in Australia's submission, that Nauru waived its claims to rehabilitation of the phosphate lands. Australia maintains, moreover, that on 19 December 1967 the United Nations General Assembly terminated the trusteeship without making any reservation relating to the administration of the territory. In those circumstances, Australia contends that, with respect to the dispute presented in Nauru's Application, Australia and Nauru had agreed "to have recourse to some other method of peaceful settlement" within the meaning of the reservation in Australia's declaration, and that consequently the Court lacks jurisdiction to deal with that dispute.

The Court considers that declarations made pursuant to Article 36, paragraph 2, of the Statute of the Court can only relate to disputes between States. The declaration of Australia only covers that type of dispute; it is made expressly "in relation to any other State accepting the same obligation . . . ". In these circumstances, the question that arises in this case is whether Australia and the Republic of Nauru did or did not, after 31 January 1968, when Nauru acceded to independence, conclude an agreement whereby the two States undertook to settle their dispute relating to rehabilitation of the phosphate lands by resorting to an agreed procedure other than recourse to the Court. No such agreement has been pleaded or shown to exist. That question has therefore to be answered in the negative. The Court thus considers that the objection raised by Australia on the basis of the above-mentioned reservation must be rejected.

2. Australia's second objection is that the Nauruan authorities, even before acceding to independence, waived all claims relating to rehabilitation of the phosphate lands. This objection contains two branches. In the first place, the waiver, it is said, was the implicit but necessary result of the above-mentioned Agreement of 14 November 1967. It is also said to have resulted from the statements made in the United Nations in the autumn of 1967 by the Nauruan Head Chief on the occasion of the termination of the trusteeship. In the view of Australia, Nauru may not go back on that twofold waiver and its claim should accordingly be rejected as inadmissible.

Having taken into consideration the negotiations which led to the Agreement of 14 November 1967, the Agreement itself, and the discussions at the United Nations, the Court concludes that the Nauruan local authorities did not, before independence, waive their claim relating to rehabilitation of the phosphate lands worked out prior to 1 July 1967. The Court finds therefore that the second objection raised by Australia must be rejected.

3. Australia's third objection is that Nauru's claim is

> "inadmissible on the ground that termination of the Trusteeship by the United Nations precludes allegations of breaches of the Trusteeship Agreement from now being examined by the Court".

The Court notes that, by its resolution 2347 (XXII) of 19 December 1967, the General Assembly of the United Nations resolved

> "in agreement with the Administering Authority, that the Trusteeship Agreement for the Territory of Nauru . . . shall cease to be in force upon the accession of Nauru to independence on 31 January 1968".

The Court observes that such a resolution had "definitive legal effect" (*Northern Cameroons, Judgment, I.C.J. Reports 1963*, p. 32), and that consequently the Trusteeship Agreement was "terminated" on that date and "is no longer in force" (ibid., p. 37). It then examines the particular circumstances in which the trusteeship for Nauru was terminated. It concludes that the facts show that, when, on the recommendation of the Trusteeship Council, the General Assembly terminated the trusteeship over Nauru in agreement with the Administering Authority, everyone was aware of subsisting differences of opinion between the Nauru Local Government Council and the Administering Authority with regard to rehabilitation of the phosphate lands worked out before 1 July 1967. Accordingly, though General Assembly resolution 2347 (XXII) did not expressly reserve any rights which Nauru might have had in that regard, the Court cannot view that resolution as giving a discharge to the Administering Authority with respect to such rights. In the opinion of the Court, the rights Nauru might have had in connection with rehabilitation of the lands remained unaffected. The Court therefore finds that, regard being had to the particular circumstances of the case, Australia's third objection must be rejected.

4. Australia's fourth objection stresses that Nauru achieved independence on 31 January 1968 and that, as regards rehabilitation of the lands, it was not until December 1988 that that State formally "raised with Australia and the other former Administering Powers its position". Australia therefore contends that Nauru's claim is inadmissible on the ground that it has not been submitted within a reasonable time.

The Court recognizes that, even in the absence of any applicable treaty provision, delay on the part of a claimant State may render an application inadmissible. It notes, however, that international law does not lay down any specific time-limit in that regard. It is therefore for the Court to determine in the light of the circumstances of each case whether the passage of time renders an application inadmissible. The Court then takes note of the fact that Nauru was officially informed, at the latest by letter of 4 February 1969, of the position of Australia on the subject of rehabilitation of the phosphate lands worked out before 1 July 1967. Nauru took issue with that position in writing only on 6 October 1983. In the meantime, however, as stated by Nauru and not contradicted by Australia, the question had on two occasions been raised by the President of Nauru with the competent Australian authorities. The Court considers that, given the nature of relations between Australia and Nauru, as well as the steps thus taken, Nauru's Application was not rendered inadmissible by passage of time, but that it will be for the Court, in due time, to ensure that Nauru's delay in seising it will in no way cause prejudice to Australia with regard to both the establishment of the facts and the determination of the content of the applicable law.

5. The Court further considers that Australia's fifth objection to the effect that "Nauru has failed to act consistently and in good faith in relation to rehabilitation" and that therefore "the Court in exercise of its discretion, and in order to uphold judicial propriety should . . . decline to hear the Nauruan claims" must also be rejected, as the Application of Nauru has been properly submitted in the framework of the remedies open to it and as there has been no abuse of process.

III. *Objection based on the fact that New Zealand and the United Kingdom are not parties to the proceedings* (paras. 39-57)

6. The Court then considers the objection by Australia based on the fact that New Zealand and the United Kingdom are not parties to the proceedings.

In order to assess the validity of this objection, the Court first refers to the Mandate and trusteeship regimes and the way in which they applied to Nauru. It notes that the three Governments mentioned in the Trusteeship Agreement constituted, in the very terms of that Agreement, "the Administering Authority" for Nauru; that this Authority did not have an international legal personality distinct from those of the States thus designated; and that, of those States, Australia played a very special role established by the Trusteeship Agreement of 1947, by the Agreements of 1919, 1923 and 1965, and by practice.

The Court observes that Australia's preliminary objection in this respect appears to contain two branches, the first of which can be dealt with briefly. It is first contended by Australia that, in so far as Nauru's claims are based on the conduct of Australia as one of the three States making up the Administering Authority under the Trusteeship Agreement, the nature of the responsibility in that respect is such that a claim may only be brought against the three States jointly, and not against one of them individually. The Court does not consider that any reason has been shown why a claim brought against only one of the three States should be declared inadmissible *in limine litis* merely because that claim raises questions of the administration of the territory, which was shared with two other States. It cannot be denied that Australia had obligations under the Trusteeship Agreement, in its capacity as one of the three States forming the Administering Authority, and there is nothing in the character of that Agreement which debars the Court from considering a claim of a breach of those obligations by Australia.

Secondly, Australia argues that, since together with itself, New Zealand and the United Kingdom made up the Administering Authority, any decision of the Court as to the alleged breach by Australia of its obligations under the Trusteeship Agreement would necessarily involve a finding as to the discharge by those two other States of their obligations in that respect, which would be contrary to the fundamental principle that the jurisdiction of the Court derives solely from the consent of States. The question that arises is accordingly whether, given the regime thus described, the Court may, without the consent of New Zealand and the United Kingdom, deal with an Application brought against Australia alone.

The Court then examines its own case-law on questions of this kind (cases concerning the *Monetary Gold Removed from Rome in 1943 (Preliminary Question)*, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* and the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*). It refers to the fact that national courts, for their part, have more often than not the necessary power to order *proprio motu* the joinder of third parties who may be affected by the decision to be rendered; and that that solution makes it possible to settle a dispute in the presence of all the parties concerned. It goes on to consider that on the international plane, however, the Court has no such power. Its jurisdiction depends on the consent of States and, consequently, the Court may not compel a State to appear before it, even by way of intervention. A State, however, which is not a party to a case is free to apply for permission to intervene in accordance with Article 62 of the Statute. But the absence of such a request for intervention in no way precludes the Court from adjudicating upon the claims submitted to it, provided that the legal interests of the third State which may possibly be affected do not form the very subject-matter of the decision that is applied for. Where the Court is so entitled to act, the interests of the third State which is not a party to the case are protected by Article 59 of the Statute of the Court, which provides that "the decision of the Court has no binding force except between the parties and in respect of that particular case".

The Court then finds that in the present case, the interests of New Zealand and the United Kingdom do not constitute the very subject-matter of the Judgment to be rendered on the merits of Nauru's Application and that, although a finding by the Court regarding the existence or the content of the responsibility attributed to Australia by Nauru might well have implications for the legal situation of the two other States concerned, no finding in respect of that legal situation will be needed as a basis for the Court's decision on Nauru's claims against Australia. Accordingly, the Court cannot decline to exercise its jurisdiction and the objection put forward in this respect by Australia must be rejected.

IV. *Objections to the claim by Nauru British Phosphate Commissioners*
(paras. 58-71)

7. Finally, the Court examines the objections addressed by Australia to the claim by Nauru concerning the overseas assets of the British Phosphate Commissioners. At the end of its Memorial on the merits, Nauru requests the Court to adjudge and declare that

> "the Republic of Nauru has a legal entitlement to the Australian allocation of the overseas assets of the British Phosphate Commissioners which were marshalled and disposed of in accordance with the trilateral Agreement concluded on 9 February 1987"

and that

> "the Respondent State is under a duty to make appropriate reparation in respect of the loss caused to the Republic of Nauru as a result of . . . its failure to recognize the interest of Nauru in the overseas assets of the British Phosphate Commissioners".

The British Phosphate Commissioners were established by article 3 of the Agreement of 2 July 1919 between the United Kingdom, Australia and New Zealand, one Commissioner to be appointed by each of the Partner Governments. These Commissioners managed an enterprise entrusted with the exploitation of the phosphate deposits on the island of Nauru.

Australia, *inter alia*, maintains that Nauru's claim concerning the overseas assets of the British Phosphate Commissioners is inadmissible on the ground that it is a new claim which appeared for the first time in the Nauruan Memorial; that Nauru has not proved the existence of any real link between that claim, on the one hand, and its claims relating to the alleged failure to observe the Trusteeship Agreement and to the rehabilitation of the phosphate lands, on the other; and that the claim in question seeks to transform the dispute brought before the Court into a dispute that would be of a different nature.

The Court concludes that the Nauruan claim relating to the overseas assets of the British Phosphate Commissioners is inadmissible inasmuch as it constitutes, both in form and in substance, a new claim, and the subject of the dispute originally submitted to the Court would be transformed if it entertained that claim. It refers in this connection to Article 40, paragraph 1, of the Statute of the Court, which provides that the "subject of the dispute" must be indicated in the Application; and to Article 38, paragraph 2, of the Rules of Court, which requires "the precise nature of the claim" to be specified in the Application.

The Court therefore finds that the preliminary objection raised by Australia on this point is well founded, and that it is not necessary for the Court to consider here the other objections of Australia with regard to the submissions of Nauru concerning the overseas assets of the British Phosphate Commissioners.

Separate opinion of Judge Shahabuddeen

In his separate opinion, Judge Shahabuddeen gave his reasons for agreeing with the decision of the Court rejecting Australia's preliminary objection that Nauru's Application was inadmissible in the absence of New Zealand and the United Kingdom as parties. In his opinion, the obligations of the three Governments under the Trusteeship Agreement were joint and several, with the consequence that Australia could be sued alone. However, he considered that, even if the obligations were joint, this, in law, did not prevent Australia from being sued alone. Also, in his view, while a possible Judgment on the merits against Australia might be based on a course of reasoning which was capable of extension to New Zealand and the United Kingdom, that reasoning would operate only at the level of precedential influence in any case that might be separately brought by Nauru against those two States; it would not by itself amount to a judicial determination made in this case of the responsibilities of those two States to Nauru. Consequently, there was no question of the Court exercising jurisdiction in this case against non-party States.

Dissenting opinion of President Sir Robert Jennings

President Jennings dissented from the Court's decision to reject that Australian objection to jurisdiction, which is based on the fact that New Zealand and the United Kingdom are not parties to the proceedings. The Mandate for Nauru was in 1920 conferred upon "His Britannic Majesty"; the Trusteeship Agreement of 1947 designated

> "The Governments of Australia, New Zealand and the United Kingdom (hereinafter called 'the Administering Authority') as the joint authority which will exercise the administration of the Territory";

New Zealand and the United Kingdom were two of the three members of the British Phosphate Commission; and they were both joint parties with Australia to the Canberra Agreement of 1967.

Thus, the legal interests of New Zealand and the United Kingdom are so inextricably bound up with those of Australia in this matter that they "would not only be affected by a decision, but would form the very subject-matter of the decision" (*I.C.J. Reports 1954*, p. 32); and this would be a breach of the principle of the Court's consensual basis of jurisdiction.

Dissenting opinion of Vice-President Oda

In his dissenting opinion, Vice-President Oda analyses the historical developments considered by the Court and demonstrates why he differs from the Judgment in the construction he places upon them. Under the trusteeship the possibility of rehabilitating the worked-out lands was thoroughly discussed in the relevant organs of the United Nations, the only forums in which a claim could have been put forward on behalf of the Nauruan people. Nevertheless, the Canberra Agreement to which all parties subscribed on the eve of independence made no mention of the issue, neither was it then dealt with separately. Considering that, at that critical point, Nauru failed to reserve a claim to land rehabilitation, the silence of the Agreement can be construed as implying a waiver. Furthermore, in the debates on Nauru within the Trusteeship Council, the rehabilitation question was repeatedly aired, but the Council eventually took no position on the matter in recommending the termination of the trusteeship. Neither did the General Assembly in adopting that recommendation, even if one or two allusions to the subject were made from the floor. Consequently, the responsibility of the Administering Authority, as well as the rights and duties of the Administrator, were completely terminated by resolution 2347 (XXII) of 19 December 1967, and that put an end to any claims arising from the implementation of the Trusteeship Agreement. No such claim, therefore, was taken over by the State of Nauru.

Even supposing a fresh claim could have been raised by independent Nauru, none was officially asserted until 1983 at the earliest. So long a silence made it inappropriate for the Court to find the claim admissible. Neither had Nauru taken any steps to rehabilitate lands worked since independence. In the Vice-President's view, this conduct, combined with lack of due diligence, disqualifies Nauru from alleging Australian responsibility to rehabilitate lands worked under trusteeship.

In consequence, Vice-President Oda considers that the Court should have upheld Australia's objections based on alleged waiver, the termination of the trusteeship, the effect of the passage of time, and lack of good faith. The fact that he voted against rejecting the objection based on the absence from the proceedings of New Zealand and the United Kingdom did not, however, mean that he necessarily upheld that objection also, since he considered that it was too closely bound up with the merits to be decided at the preliminary stage.

Dissenting opinion of Judge Ago

Judge Ago has regretfully been unable to join those of his colleagues who voted in favour of the Judgment of the Court because in his opinion there exists an insurmountable contradiction between two facts: Nauru has filed an Application against Australia alone, without also bringing proceedings against the United Kingdom and New Zealand, even though first the League of Nations and then the United Nations jointly entrusted three different States—the United Kingdom, Australia and New Zealand—on a basis of complete legal equality, with the administration of Nauru.

This being so, the Court should have upheld the preliminary objection of Australia based on the absence from the proceedings of two of the three Powers to which the trusteeship over Nauru had been entrusted.

Having brought its action against Australia alone, Nauru has thus placed the Court before an insurmountable difficulty, that of defining the possible obligations of Australia with respect to the rehabilitation of Nauru's territory without at the same time defining those of the two other States not parties to the proceedings. But the Court's ruling on the complaints against Australia alone will inevitably affect the legal situation of the United Kingdom and New Zealand, that is, the rights and the obligations of these two States. Were the Court to determine the share of responsibility falling upon Australia, it would thereby indirectly establish that the remainder of that responsibility is to fall upon the two other States. Even if the Court were to decide—on what would, incidentally, be an extremely questionable basis—that Australia was to shoulder in full the responsibility in question, that holding would equally inevitably and just as unacceptably affect the legal situation of two States that are not parties to the proceedings. In

either case the exercise by the Court of its jurisdiction would be deprived of its indispensable consensual basis.

Dissenting opinion of Judge Schwebel

Judge Schwebel, dissenting, maintained that the salient issue was, where more than one State is charged with a joint (or joint and several) commission of an act wrongful under international law, but only one such State is before the Court, may the Court proceed to adjudge the present State even though a determination of its liability may or will entail the effective determination of the liability of an absent State? In answering this question, private law sources and analogies are of little use, since in national law jurisdiction is compulsory whereas in this Court it is consensual.

The principal precedent is the *Monetary Gold* case. In that case, a holding as to the responsibility of the absent Albania was a temporal and logical precondition of rendering a Judgment between the Parties present, whereas it is agreed that, in the instant case, the determination of the responsibility of New Zealand or the United Kingdom is not a prerequisite for the determination of the responsibility of Australia. The Court unpersuasively assigns dispositive force to that distinction. Whether determination of the responsibility of the absent State is antecedent or simultaneous is not significant. What rather is dispositive is whether the determination of the legal rights of the present Party effectively determines the legal rights of the absent party.

The Court's reliance on its 1984 holding in *Military and Paramilitary Activities in and against Nicaragua* is misplaced since that latter holding was in error in this as in some other respects. In that case, Nicaragua brought suit against the United States alone, even though it claimed that El Salvador, Honduras and Costa Rica were vitally involved in its alleged delicts. For its part, the United States maintained that it was acting in collective self-defence with those three States to counter Nicaraguan subversive intervention which was tantamount to armed attack. In 1986, on the merits, the Court held that no responsibility could be attributed to Nicaragua for any flow of arms across its territory to Salvadorian insurgents. When that Judgment is read together with the Court's Judgment in 1984 that El Salvador, Honduras and Costa Rica would be protected by Article 59 of the Statute against any adverse effects of a Judgment on the merits against the United States, it appears that its articulate factual holding of 1986 was the inarticulate factual premise of its Judgment of 1984, for, assuming the factual allegations of the United States and El Salvador in 1984 to have been correct, it was clear then and is clear today that Article 59 furnished no meaningful protection to third States so situated. If the United States were to have ceased to act in support of El Salvador pursuant to the Court's 1986 Judgment, the latter's Government, far from having its interests conserved by the force of Article 59, could have fallen before the onslaught of the insurrection so significantly supported by Nicaragua.

Judge Schwebel maintained that, despite Nicaragua's sworn and reiterated denials before the Court of any material support of the Salvadorian insurrection, it later transpired that revelations, and admissions of the Governments of the Soviet Union and Nicaragua, demonstrated the reality and significance of that material support, and, hence, the disutility of Article 59. Such precedential status as the Court's 1984 Judgment may be thought to have was further prejudiced by Nicaragua's acting in 1986 contrary to its 1984 contention before the Court that its claims were against the United States alone.

In sum, the security interests of the States in whose collective self-defence the United States in 1984 claimed to be acting were as close, if not closer, to "the very subject-matter of the case" as were the interests of Albania in *Monetary Gold*. Moreover, the precedent of the *Land, Island and Maritime Boundary Dispute* appears to cut against the Court's conclusion in the current case.

It is clear from the facts of the instant case that Nauru was subject to the governance of a Mandatory and Trust Administering Authority composed of Australia, New Zealand and the United Kingdom; and that, by the terms of the governing international legal instruments, Australia uniformly acted "on the joint behalf" of the three States, and "on behalf" of the Administering Authority, as part of what those instruments termed "the joint Authority". The three Governments were described and regarded as "Partner Governments". All communications regarding the Mandate and trusteeship ran not between Australia and the League, and Australia and the United Nations, but between the tripartite Administering Authority and those Organizations. The phosphates operations themselves were run by the British Phosphate Commissioners who represented the three Governments. Nauru itself regularly maintained that not Australia alone, but the Administering Authority, the three Partner Governments, were responsible for restoration of worked-out phosphate lands. When it brought suit against Australia alone, it officially reiterated its identical claims against New Zealand and the United Kingdom.

Consequently, a Judgment by the Court upon the responsibility of Australia would appear to be tantamount to a Judgment upon the responsibility of New Zealand and the United Kingdom, States not before the Court. For this reason, proceeding against Australia alone is inadmissible.

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93. CASE CONCERNING LAND, ISLAND AND MARITIME FRONTIER DISPUTE (EL SALVADOR/HONDURAS: NICARAGUA INTERVENING)

Judgment of 11 September 1992

The Chamber constituted by the Court in the case concerning the Land, Island and Maritime Frontier Dispute between El Salvador and Honduras, Nicaragua intervening, first adopted the course of the boundary line in the disputed land sections between El Salvador and Honduras. It then ruled on the legal status of the islands of the Gulf of Fonseca, as well as on the legal situation of the maritime spaces within and outside the closing line of that Gulf.

The Chamber was composed as follows: Judge Sette-Camara, President of the Chamber; President Sir Robert Jennings; Vice-President Oda; Judges *ad hoc* Valticos, Torres Bernárdez.

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The full text of the operative part of the Judgment is as follows:

"425. For the reasons set out in the present Judgment, in particular paragraphs 68 to 103 thereof,

THE CHAMBER,

Unanimously,

Decides that the boundary line between the Republic of El Salvador and the Republic of Honduras in the first sector of their common frontier not described in article 16 of the General Treaty of Peace signed by the Parties on 30 October 1980 is as follows:

From the international tripoint known as El Trifinio on the summit of the Cerro Montecristo (point A on Map No. I annexed; coordinates: 14°25′10″ N, 89°21′20″ W), the boundary runs in a generally easterly direction along the watershed between the rivers Frío or Sesecapa and Del Rosario as far as the junction of this watershed with the watershed of the basin of the *quebrada* de Pomola (point B on Map No. I annexed; coordinates: 14°25′05″ N, 89°20′41″ W); thereafter in a north-easterly direction along the watershed of the basin of the *quebrada* de Pomola until the junction of this watershed with the watershed between the *quebrada* de Cipresales and the *quebrada* del Cedrón, Peña Dorada and Pomola proper (point C on Map No. I annexed; coordinates: 14°25′09″ N, 89°20′30″ W); from that point, along the last-named watershed as far as the intersection of the centre-lines of the *quebradas* of Cipresales and Pomola (point D on Map No. I annexed; coordinates: 14°24′42″ N, 89°18′19″ W); thereafter, downstream along the centre-line of the *quebrada* de Pomola, until the point on that centre-line which is closest to the boundary marker of Pomola at El Talquezalar; and from that point in a straight line as far as that marker (point E on Map No. I annexed; coordinates: 14°24′51″ N, 89°17′54″ W); from there in a straight line in a south-easterly direction to the boundary marker of the Cerro Piedra Menuda (point F on Map No. I annexed; coordinates: 14°24′02″ N, 89°16′40″ W), and thence in a straight line to the boundary marker of the Cerro Zapotal (point G on Map No. I annexed; coordinates: 14°23′26″ N, 89°14′43″ W); for the purposes of illustration, the line is indicated on Map No. I annexed.

426. For the reasons set out in the present Judgment, in particular paragraphs 104 to 127 thereof,

THE CHAMBER,

Unanimously,

Decides that the boundary line between the Republic of El Salvador and the Republic of Honduras in the second sector of their common frontier not described in article 16 of the General Treaty of Peace signed by the Parties on 30 October 1980 is as follows:

From the Peña de Cayaguanca (point A on Map No. II annexed; coordinates: 14°21′54″ N, 89°10′11″ W), the boundary runs in a straight line somewhat south of east to the Loma de Los Encinos (point B on Map No. II annexed; coordinates: 14°21′08″ N, 89°08′54″ W), and from there in a straight line to the hill known as El Burro or Piedra Rajada (point C on Map No. II annexed; coordinates: 14°22′46″ N, 89°07′32″ W); from there the boundary runs in a straight line to the head of the *quebrada* Copantillo, and follows the middle of the *quebrada* Copantillo downstream to its confluence with the river Sumpul (point D on Map No. II annexed; coordinates: 14°24′12″ N, 89°06′07″ W), and then follows the middle of the river Sumpul downstream to its confluence with the *quebrada* Chiquita or Oscura (point E on Map No. II annexed; coordinates: 14°20′25″ N, 89°04′57″ W); for the purposes of illustration, the line is indicated on Map No. II annexed.

427. For the reasons set out in the present Judgment, in particular paragraphs 128 to 185 thereof,

THE CHAMBER,

Unanimously,

Decides that the boundary line between the Republic of El Salvador and the Republic of Honduras in the third sector of their common frontier not described in article 16 of the General Treaty of Peace signed by the Parties on 30 October 1980 is as follows:

From the Pacacio boundary marker (point A on Map No. III annexed; coordinates: 14°06′28″ N, 88°49′18″ W) along the río Pacacio upstream to a point (point B on Map No. III annexed; coordinates: 14°06′38″ N, 88°48′47″ W) west of the Cerro Tecolate or Los Tecolates; from there up the *quebrada* to the crest of the Cerro Tecolate or Los Tecolates (point C on Map No. III annexed; coordinates: 14°06′33″ N, 88°48′18″ W), and along the watershed of this hill as far as a ridge approximately 1 kilometre to the north-east (point D on Map No. III annexed; coordinates: 14°06′48″ N, 88°47′52″ W); from there in an easterly direction to the neighbouring hill above the source of the Torrente La Puerta (point E on Map No. III annexed; coordinates: 14°06′48″ N, 88°47′31″ W) and down that stream to where it meets the river Gualsinga (point F on Map No. III annexed; coordinates: 14°06′19″ N, 88°47′01″ W); from there the boundary runs along the middle of the river Gualsinga downstream to its confluence with the river Sazalapa (point G on Map No. III annexed; coordinates: 14°06′12″ N, 88°46′58″ W), and thence upstream along the middle of the river Sazalapa to the confluence of the *quebrada* Llano Negro with that river (point H on Map No. III annexed; coordinates: 14°07′11″ N, 88°44′21″ W); from there south-eastwards to the top of the hill (point I on Map No. III annexed; coordinates: 14°07′01″ N, 88°44′07″ W), and thence south-eastwards to the crest of the hill marked on the map as a spot height of 1,017 metres (point J on Map No. III annexed; coordinates: 14°06′45″ N, 88°43′45″ W); from there the boundary, inclining still more to the south, runs through the triangulation point known as La Cañada (point K on Map No. III annexed; coordinates: 14°06′00″ N, 88°43′52″ W) to the ridge joining the hills indicated on the map as Cerro El Caracol and Cerro El Sapo (through point L on Map No. III annexed; coordinates: 14°05′23″ N, 88°43′47″ W) and from there to the feature marked on the map as the Portillo El Chupa Miel (point M on Map No. III annexed; coordinates: 14°04′35″ N, 88°44′10″ W); from there, following the ridge, to the Cerro El Cajete (point N on Map No. III annexed; coordinates: 14°03′55″ N, 88°44′20″ W), and thence to the point

where the present-day road from Arcatao to Nombre de Jesús passes between the Cerro El Ocotillo and the Cerro Lagunetas (point O on Map No. III annexed; coordinates: 14°03′18″ N, 88°44′16″ W); from there south-eastwards to the crest of a hill marked on the map as a spot height of 848 metres (point P on Map No. III annexed; coordinates: 14°02′58″ N, 88°43′56″ W); from there slightly south of eastwards to a *quebrada* and down the bed of the *quebrada* to its junction with the Gualcuquín river (point Q on Map No. III annexed; coordinates: 14°02′42″ N, 88°42′34″ W); the boundary then follows the middle of the Gualcuquín river downstream to the Poza del Cajon (point R on Map No. III annexed; coordinates: 14°01′28″ N, 88°41′10″ W); for purposes of illustration, this line is shown on Map No. III annexed.

428. For the reasons set out in the present Judgment, in particular paragraphs 186 to 267 thereof,

THE CHAMBER,

By four votes to one,

Decides that the boundary line between the Republic of El Salvador and the Republic of Honduras in the fourth sector of their common frontier not described in article 16 of the General Treaty of Peace signed by the Parties on 30 October 1980 is as follows:

From the source of the Orilla stream (point A on Map No. IV annexed; coordinates: 13°53′46″ N, 88°20′36″ W), the boundary runs through the pass of El Jobo to the source of the Cueva Hedionda stream (point B on Map No. IV; coordinates: 13°53′39″ N, 88°20′20″ W), and thence down the middle of that stream to its confluence with the river Las Cañas (point C on Map No. IV annexed; coordinates: 13°53′19″ N, 88°19′00″ W), and thence following the middle of the river upstream as far as a point (point D on Map No. IV annexed; coordinates: 13°56′14″ N, 88°15′33″ W) near the settlement of Las Piletas; from there eastwards over a col indicated as point E on Map No. IV annexed (coordinates: 13°56′19″ N, 88°14′12″ W), to a hill indicated as point F on Map No. IV annexed (coordinates: 13°56′11″ N, 88°13′40″ W), and then north-eastwards to a point on the river Negro or Pichigual (marked G on Map No. IV annexed; coordinates: 13°57′12″ N, 88°13′11″ W); downstream along the middle of the river Negro or Pichigual to its confluence with the river Negro-Quiagara (point H on Map No. IV; coordinates: 13°59′37″ N, 88°14′18″ W); then upstream along the middle of the river Negro-Quiagara as far as the Las Pilas boundary marker (point I on Map No. IV; coordinates: 14°00′02″ N, 88°06′29″ W), and from there in a straight line to the Malpaso de Similatón (point J on Map No. IV; coordinates: 13°59′28″ N, 88°04′22″ W); for the purposes of illustration, the line is indicated on Map No. IV annexed.

IN FAVOUR: Judge Sette-Camara, President of the Chamber; President Sir Robert Jennings; Vice-President Oda; Judge *ad hoc* Torres Bernárdez;

AGAINST: Judge *ad hoc* Valticos.

429. For the reasons set out in the present Judgment, in particular paragraphs 268 to 305 thereof,

THE CHAMBER,

Unanimously,

Decides that the boundary line between the Republic of El Salvador and the Republic of Honduras in the fifth sector of their common frontier not described in article 16 of the General Treaty of Peace signed by the Parties on 30 October 1980 is as follows:

From the confluence with the river Torola of the stream identified in the General Treaty of Peace as the *quebrada* de Mansupucagua (point A on Map No. V annexed; coordinates: 13°53′59″ N, 87°54′30″ W), the boundary runs upstream along the middle of the river Torola as far as its confluence with a stream known as the *quebrada* del Arenal or *quebrada* de Aceituno (point B on Map No. V annexed; coordinates: 13°53′50″ N, 87°50′40″ W); thence up the course of that stream as far as a point at or near its source (point C on Map No. V annexed; coordinates: 13°54′30″ N, 87°50′20″ W), and thence in a straight line somewhat north of east to a hill some 1,100 metres high (point D on Map No. V annexed; coordinates: 13°55′03″ N, 87°49′50″ W); thence in a straight line to a hill near the river Unire (point E on Map No. V annexed; coordinates: 13°55′16″ N, 87°48′20″ W), and thence to the nearest point on the river Unire; downstream along the middle of that river to the point known as the Paso de Unire (point F on Map No. V annexed; coordinates: 13°52′07″ N, 87°46′01″ W); for the purposes of illustration, the line is indicated on Map No. V annexed.

430. For the reasons set out in the present Judgment, in particular paragraphs 306 to 322 thereof,

THE CHAMBER,

Unanimously,

Decides that the boundary line between the Republic of El Salvador and the Republic of Honduras in the sixth sector of their common frontier not described in article 16 of the General Treaty of Peace signed by the Parties on 30 October 1980 is as follows:

From the point on the river Goascorán known as Los Amates (point A on Map No. VI annexed; coordinates: 13°26′28″ N, 87°43′25″ W), the boundary follows the course of the river downstream, in the middle of the bed, to the point where it emerges in the waters of the Bahía La Unión, Gulf of Fonseca, passing to the north-west of the Islas Ramaditas, the coordinates of the end-point in the bay being 13°24′26″ N, 87°49′05″ W; for the purposes of illustration, the line is indicated on Map No. VI annexed.

431. For the reasons set out in the present Judgment, in particular paragraphs 323 to 368 thereof,

THE CHAMBER,

1. By four votes to one,

Decides that the Parties, by requesting the Chamber, in article 2, paragraph 2, of the Special Agreement of 24 May 1986, 'to determine the legal situation of the islands . . . ', have conferred upon the Chamber jurisdiction to determine, as between the Parties, the legal situation of all the islands of the Gulf of Fonseca; but that such jurisdiction should only be exercised in respect of those islands which have been shown to be the subject of a dispute;

IN FAVOUR: Judge Sette-Camara, President of the Chamber; President Sir Robert Jennings; Vice-President Oda; Judge *ad hoc* Valticos;

AGAINST: Judge *ad hoc* Torres Bernárdez;

2. *Decides* that the islands shown to be in dispute between the Parties are:

(i) by four votes to one, El Tigre;

IN FAVOUR: Judge Sette-Camara, President of the Chamber; President Sir Robert Jennings; Vice-President Oda; Judge *ad hoc* Valticos;

AGAINST: Judge *ad hoc* Torres Bernárdez;

(ii) unanimously, Meanguera and Meanguerita;

3. Unanimously,

Decides that the island of El Tigre is part of the sovereign territory of the Republic of Honduras;

4. Unanimously,

Decides that the island of Meanguera is part of the sovereign territory of the Republic of El Salvador;

5. By four votes to one,

Decides that the island of Meanguerita is part of the sovereign territory of the Republic of El Salvador.

IN FAVOUR: Judge Sette-Camara, President of the Chamber; President Sir Robert Jennings; Vice-President Oda; Judge *ad hoc* Valticos;

AGAINST: Judge *ad hoc* Torres Bernárdez.

432. For the reasons set out in the present Judgment, in particular paragraphs 369 to 420 thereof,

THE CHAMBER,

1. By four votes to one,

Decides that the legal situation of the waters of the Gulf of Fonseca is as follows: the Gulf of Fonseca is an historic bay the waters whereof, having previously to 1821 been under the single control of Spain, and from 1821 to 1839 of the Federal Republic of Central America, were thereafter succeeded to and held in sovereignty by the Republic of El Salvador, the Republic of Honduras, and the Republic of Nicaragua, jointly, and continue to be so held, as defined in the present Judgment, but excluding a belt, as at present established, extending 3 miles (1 marine league) from the littoral of each of the three States, such belt being under the exclusive sovereignty of the coastal State, and subject to the delimitation between Honduras and Nicaragua effected in June 1900, and to the existing rights of innocent passage through the 3-mile belt and the waters held in sovereignty jointly; the waters at the central portion of the closing line of the Gulf, that is to say, between a point on that line 3 miles (1 marine league) from Punta Amapala and a point on that line 3 miles (1 marine league) from Punta Cosigüina, are subject to the joint entitlement of all three States of the Gulf unless and until a delimitation of the relevant maritime area be effected;

IN FAVOUR: Judge Sette-Camara, President of the Chamber; President Sir Robert Jennings; Judge *ad hoc* Valticos; Judge *ad hoc* Torres Bernárdez;

AGAINST: Vice-President Oda;

2. By four votes to one,

Decides that the Parties, by requesting the Chamber, in article 2, paragraph 2, of the Special Agreement of 24 May 1986, 'to determine the legal situation of the . . . maritime spaces', have not conferred upon the Chamber jurisdiction to effect any delimitation of those maritime spaces, whether within or outside the Gulf;

IN FAVOUR: Judge Sette-Camara, President of the Chamber; President Sir Robert Jennings; Vice-President Oda; Judge *ad hoc* Valticos;

AGAINST: Judge *ad hoc* Torres Bernárdez;

3. By four votes to one,

Decides that the legal situation of the waters outside the Gulf is that, the Gulf of Fonseca being an historic bay with three coastal States, the closing line of the Gulf constitutes the baseline of the territorial sea; the territorial sea, continental shelf and exclusive economic zone of El Salvador and those of Nicaragua off the coasts of those two States are also to be measured outwards from a section of the closing line extending 3 miles (1 marine league) along that line from Punta Amapala (in El Salvador) and 3 miles (1 marine league) from Punta Cosigüina (in Nicaragua) respectively; but entitlement to territorial sea, continental shelf and exclusive economic zone seaward of the central portion of the closing line appertains to the three States of the Gulf, El Salvador, Honduras and Nicaragua; and that any delimitation of the relevant maritime areas is to be effected by agreement on the basis of international law.

IN FAVOUR: Judge Sette-Camara, President of the Chamber; President Sir Robert Jennings; Judge *ad hoc* Valticos; Judge *ad hoc* Torres Bernárdez;

AGAINST: Vice-President Oda."

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Vice-President Oda appended a declaration to the Judgment; Judges *ad hoc* Valticos and Torres Bernárdez appended separate opinions; Vice-President Oda appended a dissenting opinion.

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I. *Qualités*
(paras. 1-26)

The Chamber recapitulates the successive phases of the proceedings, namely: notification to the Registrar, on 11 December 1986, of the Special Agreement signed on 24 May 1986 (in force on 1 October 1986) for the submission to a Chamber of the Court of a dispute between the two States; formation by the Court, on 8 May 1987, of the Chamber to deal with the case; filing by Nicaragua, on 17 November 1989, of an Application for permission to intervene in the case; Order by the Court, of 28 February 1990, on the question whether Nicaragua's Application for permission to intervene was a matter within the competence of the full Court or of the Chamber; Judgment of the Chamber of 13 September 1990 acceding to Nicaragua's application for permission to intervene (but solely in respect of the question of the status of the waters of the Gulf of Fonseca); and holding of oral proceedings.

Article 2 of the Special Agreement, which defines the subject of the dispute, reads, in an agreed English translation:

"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."

The Judgment then quotes the submissions of the Parties, and the "conclusions" of the intervening State, as formulated at the various stages of the proceedings.

II. *General introduction* (paras. 27-39)

The dispute before the Chamber has three elements: a dispute over the land boundary; a dispute over the legal situation of islands (in the Gulf of Fonseca); and a dispute over the legal situation of maritime spaces (within and outside the Gulf of Fonseca).

The two Parties (and the intervening State) came into being with the break-up of the Spanish Empire in Central America; their territories correspond to administrative subdivisions of that Empire. It was from the outset accepted that the new international boundaries should, in accordance with the principle generally applied in Spanish America of the *uti possidetis juris*, follow the colonial administrative boundaries.

After the independence of Central America from Spain was proclaimed on 15 September 1821, Honduras and El Salvador first made up, together with Costa Rica, Guatemala and Nicaragua, the Federal Republic of Central America, corresponding to the former Captaincy-General of Guatemala or Kingdom of Guatemala. On the disintegration of that Republic in 1839, El Salvador and Honduras, along with the other component States, became separate States.

The Chamber outlines the development of the three elements of the dispute, beginning with the genesis of the island dispute in 1854 and of the land dispute in 1861. Border incidents led to tension and subsequently to armed conflict in 1969, but in 1972 El Salvador and Honduras were able to agree on the major part of their land boundary, which had not yet been delimited, leaving, however, six sectors to be settled. A mediation process begun in 1978 led to a General Treaty of Peace, signed and ratified in 1980 by the two Parties, which defined the agreed sections of the boundary.

The Treaty further provided that a Joint Frontier Commission should delimit the frontier in the remaining six sectors and "determine the legal situation of the islands and the maritime spaces". It provided that if within five years total agreement was not reached, the Parties would, within six months, negotiate and conclude a special agreement to submit any existing controversy to the International Court of Justice.

As the Commission did not accomplish its task within the time fixed, the Parties negotiated and concluded on 24 May 1986 the Special Agreement mentioned above.

III. *The land boundary: introduction* (paras. 40-67)

The Parties agree that the fundamental principle for determining the land frontier is the *uti possidetis juris*. The Chamber notes that the essence of the agreed principle is its primary aim of securing respect for the territorial boundaries at the time of independence, and its application has resulted in colonial administrative boundaries being transformed into international frontiers.

In Spanish Central America there were administrative boundaries of different kinds or degrees, and the jurisdictions of general administrative bodies did not necessarily coincide territorially with those of bodies possessing particular or special jurisdiction. In addition to the various civil jurisdictions there were ecclesiastical ones, which the main administrative units had to follow in principle.

The Parties have indicated to which colonial administrative divisions (provinces) they claim to have succeeded. The problem is to identify the areas, and the boundaries, which corresponded to these provinces, which in 1821 became respectively El Salvador and Honduras. No legislative or similar material indicating this has been produced, but the Parties have submitted, *inter alia*, documents referred to collectively as "titles" (*títulos*), concerning grants of land by the Spanish Crown in the disputed areas, from which, it is claimed, the provincial boundaries can be deduced.

The Chamber then analyses the various meanings of the term "title". It concludes that, reserving, for the present, the special status El Salvador attributes to "formal title deeds to commons", none of the titles produced recording grants of land to individuals or Indian communities can be considered as "titles" in the same sense as, for example, a Spanish Royal Decree attributing certain areas to a particular administrative unit; they are rather comparable to "colonial *effectivités*" as defined in a previous case, i.e., "the conduct of the administrative authorities as proof of the effective exercise of territorial jurisdiction in the region during the colonial period" (*I.C.J. Reports 1986*, p. 586, para. 63). In some cases the grant of a title was not perfected, but the record, particularly of a survey, remains a "colonial *effectivité*" which may serve as evidence of the position of a provincial boundary.

Referring to the seven sectors of the boundary agreed in the General Treaty of Peace, the Chamber assumes that the agreed boundary was arrived at applying principles and processes similar to those urged upon the Chamber for the non-agreed sectors. Observing the predominance of local features, particularly rivers, in the definition of the agreed sectors, the Chamber has taken some account of the suitability of certain topographical features to provide an identifiable and convenient boundary. The Chamber is here appealing not so much to any concept of "natural frontiers", but rather to a presumption underlying the boundaries on which the *uti possidetis juris* operates.

Under article 5 of the Special Agreement, the Chamber is to take into account the rules of international law applicable between the Parties, "including, where pertinent, the provisions of" the Treaty. This presumably means that the Chamber should also apply, where pertinent, even those articles which in the Treaty are addressed specifically to the Joint Frontier Commission. One of these is article 26 of the Treaty, to the effect that the Commission shall take as a basis for delimitation the documents issued by the Spanish Crown or any other Spanish authority, secular or ecclesiastical, during the colonial period, and indicating the jurisdictions or limits of territories or settlements, as well as other evidence and arguments of a legal, historical, human or any other kind, brought before it by the Parties and admitted under international law.

Drawing attention to the difference between its task and that of the Commission, which had merely to propose a frontier line, the Chamber observes that article 26 is not an applicable law clause, but rather a provision about evidence. In this light, the Chamber comments on one particular class of titles, referred to as the "formal title-deeds to commons", for which El Salvador has claimed a particular status in Spanish colonial law, that of acts of the Spanish Crown directly determining the extent of the territorial jurisdiction of an administrative division. These titles, the so-called *títulos ejidales*, are, according to El Salvador, the

best possible evidence in relation to the application of the *uti possidetis juris* principle.

The Chamber does not accept any interpretation of article 26 as signifying that the Parties have by treaty adopted a special rule or method of determination of the *uti possidetis juris* boundaries, on the basis of divisions between Indian *poblaciones*. It was the administrative boundaries between Spanish colonial administrative units, not the boundaries between Indian settlements as such, that were transformed into international boundaries in 1821.

El Salvador contends that the commons whose formal title-deeds it relies on were not private properties but belonged to the municipal councils of the corresponding *poblaciones*. Control over those communal lands being exercised by the municipal authorities, and over and above them by those of the colonial province to which the commons had been declared to belong, El Salvador maintains that if such a grant of commons to a community in one province extended to lands situated within another, the administrative control of the province to which the community belonged was determinative for the application of the *uti possidetis juris*, i.e., that, on independence, the whole area of the commons appertained to the State within which the community was situated. The Chamber, which is faced with a situation of this kind in three of six disputed sectors, has, however, been able to resolve the issue without having to determine this particular question of Spanish colonial law, and therefore sees no reason to attempt to do so.

In the absence of legislative instruments formally defining provincial boundaries, not only land grants to Indian communities but also grants to private individuals afford some evidence as to the location of boundaries. There must be a presumption that such grants would normally avoid straddling a boundary between different administrative authorities, and where the provincial boundary location was doubtful the common boundaries of two grants by different provincial authorities could well have become the provincial boundary. The Chamber therefore considers the evidence of each of these grants on its merits and in relation to other arguments, but without treating them as necessarily conclusive.

With regard to the land that had not been the subject of grants of various kinds by the Spanish Crown, referred to as crown lands, *tierras realengas*, the Parties agree that such land was not unattributed but appertained to the one province or the other and accordingly passed, on independence, into the sovereignty of the one State or the other.

With regard to post-independence grants or titles, the so-called "republican titles", the Chamber considers that they may well provide some evidence of the position in 1821 and both Parties have offered them as such.

El Salvador, while admitting that the *uti possidetis juris* is the primary element for determining the land boundary, also puts forward, in reliance on the second part of article 26, arguments referred to as either "arguments of a human nature" or arguments based on *effectivités*. Honduras also recognizes a certain confirmatory role for *effectivités* and has submitted evidence of acts of administration of its own for that purpose.

El Salvador has first advanced arguments and material relating to demographic pressures in El Salvador creating a need for territory, as compared with the relatively sparsely populated Honduras, and to the superior natural resources said to be enjoyed by Honduras. El Salvador, however, does not appear to claim that a frontier based on the principle of *uti possidetis juris* could be adjusted subsequently (except by agreement) on the ground of unequal population density. The Chamber will not lose sight of this dimension of the matter, which is, however, without direct legal incidence.

El Salvador also relies on the alleged occupation of disputed areas by Salvadorians, their ownership of land in those areas, the supply by it of public services there and its exercise in the areas of government powers, and claims, *inter alia*, that the practice of effective administrative control has demonstrated an "animus" to possess the territories. Honduras rejects any argument of "effective control", suggesting that the concept refers only to administrative control prior to independence. It considers that, at least since 1884, no acts of sovereignty in the disputed areas can be relied on in view of the duty to respect the status quo in a disputed area. It has, however, presented considerable material to show that Honduras can also rely on arguments of a human kind.

The Chamber considers that it may have regard, in certain instances, to documentary evidence of post-independence *effectivités* affording indications of the 1821 *uti possidetis juris* boundary, provided a relationship exists between the *effectivités* and the determination of that boundary.

El Salvador drew attention to difficulties in collecting evidence in certain areas owing to interference with governmental activities due to acts of violence. The Chamber, while appreciating these difficulties, cannot apply a presumption that evidence which is unavailable would, if produced, have supported a particular Party's case, still less a presumption of the existence of evidence not produced. In view of these difficulties, El Salvador requested the Chamber to consider exercising its functions under Article 66 of the Rules of Court to obtain evidence *in situ*. The Parties were, however, informed that the Chamber did not consider it necessary to exercise the functions in question, nor to exercise its power, under Article 50 of the Statute, to arrange for an inquiry or expert opinion in the case, as El Salvador had also requested it to do.

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The Chamber will examine, in respect of each disputed sector, the evidence of post-colonial *effectivités*. Even when claims of *effectivité* are given their due weight, it may occur in some areas that, following the delimitation of the disputed sector, nationals of one Party will find themselves in the territory of the other. The Chamber has every confidence that the necessary measures to take account of this will be taken by the Parties.

In connection with the concept of the "critical date", the Chamber observes that there seems to be no reason why acquiescence or recognition should not operate where there is sufficient evidence to show that the Parties have in effect clearly accepted a variation or an interpretation of the *uti possidetis juris* position.

IV. *First sector of the land boundary* (paras. 68-103)

The first disputed sector of the land boundary runs from the agreed tripoint where the frontiers of El Salvador, Guatemala and Honduras converge (Cerro Montecristo) to the summit of the Cerro Zapotal (see sketch-map A on page 35).

Both Parties recognize that most of the area between the lines they put forward corresponds to the land that was the subject of a *título ejidal* over the mountain of Tepangüisir, granted in 1776 to the Indian community of San Francisco de Citalá, which was situated in, and under the jurisdiction of, the province of San Salvador. El Salvador contends that on independence the lands so granted became part of El Salvador, so that in 1821 the boundary of the two provinces was defined by the north-eastern boundary of the Citalá *ejido*. Honduras, on the other hand, points out that when the 1776 title was granted, those lands included in it were specifically stated to be in the Honduran province of Gracias a Dios, so that the lands became on independence part of Honduras.

The Chamber considers that it is not required to resolve this question. All negotiations prior to 1972 over the dispute as to the location of the frontier in this sector were conducted on the basis, accepted by both sides, that it was the boundary between the *ejidos* of Citalá and Ocotepeque that defined the frontier. The frontier corresponding to Honduras's current interpretation of the legal effect of the 1776 Citalá title was first put forward in negotiations held in 1972. Moreover, a title granted by Honduras in 1914, and the position taken by Honduras in the course of tripartite negotiations held between El Salvador, Guatemala and Honduras in 1934-1935, confirmed the agreement between the Parties that the boundary between Citalá and Ocotepeque defined the frontier between them. After recalling that the effect of the *uti possidetis juris* principle was not to freeze for all time the provincial boundaries, the Chamber finds that Honduras's conduct from 1881 to 1972 may be regarded as acquiescence in a boundary corresponding to that between the Tepangüisir lands of Citalá and those of Ocotepeque.

The Chamber then turns to the question of a triangular area where, according to Honduras, the 1818 title of Ocotepeque penetrated the north-eastern boundary of Citalá, and to the disagreement between the Parties as to the interpretation of the Citalá survey as regards the north-western area.

With regard to the triangular area, the Chamber does not consider that such an overlapping would have been consciously made, and that it should only be concluded that an overlap came about by mistake if there is no doubt that the two titles are not compatible. The identification of the various relevant geographical locations cannot, however, be achieved with sufficient certainty to demonstrate an overlap.

With respect to the disagreement on the boundary of the Citalá title, the Chamber concludes that on this point the Honduran interpretation of the relevant survey record is to be preferred.

The Chamber then turns to the part of the disputed area lying between the lands comprised in the Citalá title and the international tripoint. Honduras contends that since, according to the survey, the land in this area was crown land (*tierras realengas*), and the survey was being effected in the province of Gracias a Dios, these must have been *tierras realengas* of that province and hence are now part of Honduras.

El Salvador, however, claims this area on the basis of *effectivités*, and points to a number of villages or hamlets belonging to the municipality of Citalá within the area. The Chamber notes, however, the absence of evidence that the area or its inhabitants were under the administration of that municipality. El Salvador also relies on a report by a Honduran Ambassador stating that the lands of the disputed area belonged to inhabitants of the municipality of Citalá in El Salvador. The Chamber, however, does not regard this as sufficient since to constitute an *effectivité* relevant to the delimitation of the frontier at least some recognition or evidence was required of the effective administration of the municipality of Citalá in the area, which, it notes, has not been proved.

El Salvador also contends that ownership of land by Salvadorians in the disputed area less than 40 kilometres from the line Honduras claims as the frontier shows that the area was not part of Honduras, as under the Constitution of Honduras land within 40 kilometres of the frontier may only be acquired or possessed by native Hondurans. The Chamber rejects this contention since at the very least some recognition by Honduras of the ownership of land by Salvadorians would have to be shown, which is not the case.

The Chamber observes that in the course of the 1934-1935 negotiations agreement was reached on a particular frontier line in this area. The agreement by the representatives of El Salvador was only *ad referendum*, but the Chamber notes that while the Government of El Salvador did not ratify the terms agreed upon *ad referendum*, neither did it denounce them; nor did Honduras retract its consent.

The Chamber considers that it can adopt the 1935 line, primarily since for the most part it follows the watersheds, which provide a clear and unambiguous boundary; it reiterates its view that the suitability of topographical features to provide a readily identifiable and convenient boundary is the material aspect where no conclusion unambiguously pointing to another boundary emerges from the documentary material.

As regards material put forward by Honduras concerning the settlement of Hondurans in the disputed areas and the exercise there of government functions by Honduras, the Chamber finds this material insufficient to affect the decision by way of *effectivités*.

The Chamber's conclusion regarding the first disputed sector of the land frontier is as follows:[1]

> "It begins at the tripoint with Guatemala, the 'point known as El Trifinio on the summit of the Cerro Montecristo' . . . From this point, the frontier between El Salvador and Honduras runs in a generally easterly direction, following the direct line of watersheds, in accordance with the agreement reached in 1935, and accepted *ad referendum* by the representatives of El Salvador, . . . In accordance with the 1935 agreement . . . , the frontier runs 'along the watershed between the rivers Frío or Sesecapa and Del Rosario as far as the junction of this watershed with the watershed of the basin of the *quebrada* de Pomola' . . . ; 'thereafter in a north-easterly direction along the watershed of the basin of the *quebrada* de Pomola until the junction of this watershed with the watershed between the *quebrada* de Cipresales and the *quebrada* del Cedrón, Peña Dorada and Pomola proper' . . . ; 'from that point, along the last-named watershed as far as the intersection of the centre-lines of the *quebradas* of Cipresales and Pomola' . . . ; 'thereafter, downstream along the centre-line of the

[1] See sketch-map A on page 35; for the identification letters and coordinates of the various defined points, see the operative clause of the Judgment, set out above, and the 1:50,000 maps available for inspection in the Registry.

quebrada de Pomola, until the point on that centre-line which is closest to the boundary marker of Pomola at El Talquezalar; and from that point in a straight line as far as that marker' . . . From the boundary marker of El Talquezalar, the frontier continues in a straight line in a south-easterly direction to the boundary marker of the Cerro Piedra Menuda . . . , and thence in a straight line to the boundary marker of the Cerro Zapotal . . . "

V. *Second sector of the land boundary* (paras. 104-127)

The second disputed sector of the land boundary lies between the Peña de Cayaguanca, and the confluence of the stream of Chiquita or Oscura with the river Sumpul (see sketch-map B on page 36). Honduras bases its claim chiefly on the 1742 title of Jupula, issued in the context of the long-standing dispute between the Indians of Ocotepeque, in the province of Gracias a Dios, and those of Citalá, in the province of San Salvador. The principal outcome was the confirmation and agreement of the boundaries of the lands of Jupula, over which the Indians of Ocotepeque claimed to have rights and which were attributed to the Indians of Citalá. It was, however, recorded that the inhabitants of Ocotepeque, having recognized the entitlement of the inhabitants of Citalá to the land surveyed, also requested "that there be left free for them a mountain called Cayaguanca which is above the Jupula river, which is crown land", and this request was acceded to.

The Chamber finds that the Jupula title was evidence that in 1742 the mountain of Cayaguanca was *tierras realengas* and since the community of Ocotepeque, in the province of Gracias a Dios, was to cultivate it, it concludes that the mountain was *tierras realengas* of that province, for which reason the mountain must on independence have formed part of Honduras on the basis of the *uti possidetis juris*.

The Chamber then turns to the location and extent of the mountain, which, according to Honduras, extended over the whole of the disputed area in this sector, a claim disputed by El Salvador. In addition to arguments based on the wording of the 1742 title, El Salvador refers to the 1818 title of Ocotepeque, issued to the community of Ocotepeque to re-establish the boundary markers of its lands, contending that the mountain of Cayaguanca would necessarily have been included in that title if it had truly been awarded to the inhabitants of Ocotepeque in 1742. The Chamber does not accept this argument; it finds that in 1821 the Indians of Ocotepeque, in the province of Gracias a Dios, were entitled to the land resurveyed in 1818, and also to rights of usage over the mountain of Cayaguanca somewhere to the east, and that the area subject to these rights, being *tierras realengas* of the province of Gracias a Dios, became Honduran upon independence.

The problem remains, however, of determining the extent of the mountain of Cayaguanca. The Chamber sees no evidence of its boundaries, and in particular none to support the Honduran claim that the area so referred to in 1742 extended as far east as the river Sumpul, as claimed by Honduras.

The Chamber next considers what light might be thrown on the matter by the republican title invoked by El Salvador, referred to as that of Dulce Nombre de la Palma, granted in 1833 to the community of La Palma in El Salvador. The Chamber considers this title significant in that it showed how the *uti possidetis juris* position was understood when it was granted, i.e., very shortly after independence. The Chamber examines in detail the Parties' conflicting interpretation of the title; it does not accept El Salvador's interpretation whereby it would extend as far west as the Peña de Cayaguanca, and as coterminous with the land surveyed in 1742 for the Jupula title, and concludes that there was an intervening area not covered by either title. On this basis the Chamber determines the course of the north-western boundary of the title of Dulce Nombre de la Palma; the eastern boundary, as recognized by both Parties, is the river Sumpul.

The Chamber then examines three Honduran republican titles in the disputed area, concluding that they do not conflict with the Dulce Nombre de la Palma title so as to throw doubt on its interpretation.

The Chamber goes on to examine the *effectivités* claimed by each Party to ascertain whether they support the conclusion based on the latter title. The Chamber concludes that there is no reason to alter its findings as to the position of the boundary in this region.

The Chamber next turns to the claim by El Salvador to a triangular strip along and outside the north-west boundary of the Dulce Nombre de la Palma title, which El Salvador claims to be totally occupied by Salvadorians and administered by Salvadorian authorities. No evidence to that effect has, however, been laid before the Chamber. Nor does it consider that a passage in the Reply of Honduras regarded by El Salvador as an admission of the existence of Salvadorian *effectivités* in this area can be so read. There being no other evidence to support El Salvador's claim to the strip in question, the Chamber holds that it appertains to Honduras, having formed part of the "mountain of Cayaguanca" attributed to the community of Ocotepeque in 1742.

The Chamber turns finally to the part of the boundary between the Peña de Cayaguanca and the western boundary of the area covered by the Dulce Nombre de la Palma title. It finds that El Salvador has not made good any claim to any area further west than the Loma de los Encinos or "Santa Rosa hillock", the most westerly point of the Dulce Nombre de la Palma title. Noting that Honduras has only asserted a claim, on the basis of the rights of Ocotepeque to the "mountain of Cayaguanca", so far south as a straight line joining the Peña de Cayaguanca to the beginning of the next agreed sector, the Chamber considers that neither the principle *ne ultra petita*, nor any suggested acquiescence by Honduras in the boundary asserted by it, debars the Chamber from enquiring whether the "mountain of Cayaguanca" might have extended further south, so as to be coterminous with the eastern boundary of the Jupula title. In view of the reference in the latter to Cayaguanca as lying east of the most easterly landmark of Jupula, the Chamber considers that the area between the Jupula and the la Palma lands belongs to Honduras, and that in the absence of any other criteria for determining the southward extent of that area, the boundary between the Peña de Cayaguanca and the Loma de los Encinos should be a straight line.

The Chamber's conclusion regarding the course of the frontier in the second disputed sector is as follows:[2]

[2]See sketch-map B on page 36; for the identification letters and coordinates of the various defined points, see the operative clause of the Judgment, set out above, and the 1:50,000 maps available for inspection in the Registry.

"From . . . the Peña de Cayaguanca, the frontier runs in a straight line somewhat south of east to the Loma de Los Encinos . . . , and from there in a straight line on a bearing of N 48° E, to the hill shown on the map produced by El Salvador as El Burro (and on the Honduran maps and the United States Defense Mapping Agency maps as Piedra Rajada) . . . The frontier then takes the shortest course to the head of the *quebrada* del Copantillo, and follows the *quebrada* del Copantillo downstream to its confluence with the river Sumpul . . . , and follows the river Sumpul in turn downstream until its confluence with the *quebrada* Chiquita or Oscura . . . "

VI. *Third sector of the land boundary* (paras. 128-185)

The third sector of the land boundary in dispute lies between the boundary marker of the Pacacio, on the river of that name, and the boundary marker Poza del Cajón, on the river known as El Amatillo or Gualcuquín (see sketch-map C on page 37).

In terms of the grounds asserted for the claims of the Parties the Chamber divides the disputed area into three parts.

In the first part, the north-western area, Honduras invokes the *uti possidetis juris* of 1821 on the basis of land titles granted between 1719 and 1779. El Salvador, on the contrary, claims the major part of the area on the basis of post-independence *effectivités* or arguments of a human nature. It does, however, claim a portion of the area as part of the lands of the 1724 title of Arcatao.

In the second part, the essential question is the validity, extent and relationship to each other of the Arcatao title relied on by El Salvador and eighteenth-century titles invoked by Honduras.

In the third part, the south-east section, there is a similar conflict between the Arcatao title and a lost title, that of Nombre de Jesús in the province of San Salvador, on the one hand, and the Honduran titles of San Juan de Arcatao, supplemented by the Honduran republican titles of La Virtud and San Sebastián del Palo Verde. El Salvador claims a further area, outside the asserted limits of the Arcatao and Nombre de Jesús titles, on the basis of *effectivités* and human arguments.

The Chamber first surveys the *uti possidetis juris* position on the basis of the various titles produced.

With regard to the first part of the third sector, the Chamber upholds Honduras's contention in principle that the position of the pre-independence provincial boundary is defined by two eighteenth-century Honduran titles. After first reserving the question of precisely where their southern limits lay, since if the Chamber found in favour of El Salvador's claim based on *effectivités*, it would not have to be considered, the Chamber ultimately determines the boundary in this area on the basis of these titles.

As for the second part of the third sector, the Chamber considers it impossible to reconcile all the landmarks, distances and directions given in the various eighteenth-century surveys: the most that can be achieved is a line which harmonizes with such features as are identifiable with a high degree of probability, corresponds more or less to the recorded distances and does not leave any major discrepancy unexplained. The Chamber considers that three features are identifiable and that these three reference points make it possible to reconstruct the boundary between the province of Gracias a Dios and that of San Salvador in the area under consideration and thus the *uti possidetis juris* line, which the Chamber describes.

With regard to the third part of the sector, the Chamber considers that on the basis of the reconstructed 1742 title of Nombre de Jesús and the 1766 and 1786 surveys of San Juan de Arcatao, it is established that the *uti possidetis juris* line corresponded to the boundary between those two properties, which line the Chamber describes. In order to define the line more precisely the Chamber considers it legitimate to have regard to the republican titles granted by Honduras in the region, the line found by the Chamber being consistent with what it regards as the correct geographical location of those titles.

Having completed its survey of the *uti possidetis juris* position, the Chamber examines the claims made in the whole of the third sector on the basis of *effectivités*. Regarding the claims made by El Salvador on such grounds, the Chamber is unable to regard the relevant material as sufficient to affect its conclusion as to the position of the boundary. The Chamber reaches the same conclusion as regards the evidence of *effectivités* submitted by Honduras.

The Chamber's conclusion regarding the course of the boundary in the third sector is as follows:[3]

"From the Pacacio boundary marker . . . along the río Pacacio upstream to a point . . . west of the Cerro Tecolate or Los Tecolates; from there up the *quebrada* to the crest of the Cerro Tecolate or Los Tecolates . . . , and along the watershed of this hill as far as a ridge approximately 1 kilometre to the north-east . . . ; from there in an easterly direction to the neighbouring hill above the source of the Torrente La Puerta . . . and down that stream to where it meets the river Gualsinga . . . ; from there the boundary runs along the middle of the river Gualsinga downstream to its confluence with the Sazalapa . . . , and thence upstream along the middle of the river Sazalapa to the confluence with the river Sazalapa of the *quebrada* Llano Negro . . . ; from there south-eastwards to the hill indicated . . . , and thence to the crest of the hill marked on maps as being an elevation of 1,017 metres . . . ; from there the boundary, inclining still more to the south, runs through the triangulation point known as La Cañada . . . to the ridge joining the hills indicated on the El Salvador map as Cerro El Caracol and Cerro El Sapo . . . , and from there to the feature marked on the maps as the Portillo El Chupa Miel . . . ; from there following the ridge to the Cerro El Cajete . . . , and thence to the point where the present-day road from Arcatao to Nombre de Jesús passes between the Cerro El Ocotillo and the Cerro Lagunetas . . . ; from there south-eastwards, to the top of the hill . . . marked on the maps with a spot height of 848 metres; from there slightly south of east to a small *quebrada*; eastwards down the bed of the *quebrada* to its junction with the river Amatillo or Gualcuquín . . . ; the boundary then follows the middle of the Gualcuquín river downstream to the Poza del Cajón . . . , the point where the next agreed sector of boundary begins."

[3]See sketch-map C on page 37; for the identification letters and coordinates of the various defined points, see the operative clause of the Judgment, set out above, and the 1:50,000 maps available for inspection in the Registry.

VII. *Fourth sector of the land boundary* (paras. 186-267)

The fourth, and longest, disputed sector of the land boundary, also involving the largest area in dispute, lies between the source of the Orilla stream and the Malpaso de Similatón boundary marker (see sketch-map D on page 38).

The principal issue in this sector, at least as regards the size of the area concerned, is whether the boundary follows the river Negro-Quiagara, as Honduras contends, or a line contended for by El Salvador, some 8 kilometres to the north. In terms of the *uti possidetis juris* principle, the issue is whether or not the province of San Miguel, which on independence became part of El Salvador, extended to the north of that river or whether on the contrary the latter was in 1821 the boundary between that province and the province of Comayagua, which became part of Honduras. El Salvador relies on a title issued in 1745 to the communities of Arambala and Perquín in the province of San Miguel; the lands so granted extended north and south of the river Negro-Quiagara, but Honduras contends that, north of that river, the lands were in the province of Comayagua.

The Chamber first sets out the relevant events, in particular a dispute between the Indian community of Arambala and Perquín, in the province of San Miguel, and an Indian community established in Jocora or Jocoara in the province of Comayagua. The position of the boundary between the province of San Miguel and that of Comayagua was one of the main issues in the dispute between the two communities, which gave rise to a judicial decision of 1773. In 1815 a decision was issued by the *Real Audiencia* of Guatemala confirming the rights of the Indians of Arambala-Perquín. The Parties made extensive reference to these decisions in support of their contentions as to the location of the boundary; the Chamber is, however, reluctant to base a conclusion, one way or the other, on the 1773 decision and does not regard the 1815 one as wholly conclusive in respect of the location of the provincial boundary.

The Chamber then considers a contention by Honduras that El Salvador had in 1861 admitted that the Arambala-Perquín *ejidos* extended across the provincial boundary. It refers to a note of 14 May 1861 in which the Minister for Foreign Relations of El Salvador suggested negotiations to settle a long-standing dispute between the inhabitants of the villages of Arambala and Perquín, on the one hand, and the village of Jocoara, on the other, and to the report of surveyors appointed to resolve the inter-village dispute. It considers this note to be significant not only as, in effect, a recognition that the lands of the Arambala-Perquín community had, prior to independence, straddled the provincial boundary, but also as recognition that, as a result, they straddled the international frontier.

The Chamber then turns to the south-western part of the disputed boundary, referred to as the sub-sector of Colomoncagua. The problem here is, in broad terms, the determination of the extent of the lands of Colomoncagua, province of Comayagua (Honduras), to the west, and those of the communities of Arambala-Perquín and Torola, province of San Miguel (El Salvador), to the east and south-east. Both Parties rely on titles and other documents of the colonial period; El Salvador has also submitted a remeasurement and renewed title of 1844. The Chamber notes that apart from the difficulties of identifying landmarks and reconciling the various surveys, the matter is complicated by doubts each Party casts on the regularity or relevance of titles invoked by the other.

After listing chronologically the titles and documents claimed by the one side or the other to be relevant, the Chamber assesses five of these documents to which the Parties took objection on various grounds.

The Chamber goes on to determine, on the basis of an examination of the titles and an assessment of the arguments advanced by the Parties by reference to them, the line of the *uti possidetis juris* in the sub-sector under consideration. Having established that the inter-provincial boundary was, in one area, the river Las Cañas, the Chamber relies on a presumption that such a boundary is likely to follow the river so long as its course is in the same general direction.

The Chamber then turns to the final section of the boundary between the river Las Cañas and the source of the Orilla stream (end-point of the sector). With respect to this section, the Chamber accepts the line claimed by Honduras on the basis of a title of 1653.

The Chamber next addresses the claim of El Salvador, based upon the *uti possidetis juris* in relation to the concept of *tierras realengas* (crown land), to areas to the west and south-west of the land comprised in the *ejidos* of Arambala Perquín, lying on each side of the river Negro-Quiagara, bounded on the west by the river Negro-Pichigual. The Chamber finds in favour of part of El Salvador's claim, south of the river Negro-Pichigual, but is unable to accept the remainder.

The Chamber has finally to deal with the eastern part of the boundary line, that between the river Negro-Quiagara and Malpaso de Similatón. An initial problem is that the Parties do not agree on the position of the Malpaso de Similatón, although this point defines one of the agreed sectors of the boundary as recorded in article 16 of the 1980 Peace Treaty, the two locations contended for being 2,500 metres apart. The Chamber therefore concludes that there is a dispute between the Parties on this point, which it has to resolve.

The Chamber notes that this dispute is part of a disagreement as to the course of the boundary beyond the Malpaso de Similatón, in the sector which is deemed to have been agreed. While it does not consider that it has jurisdiction to settle disputed questions in an "agreed" sector, neither does it consider that the existence of such a disagreement affects its jurisdiction to determine the boundary up to and including the Malpaso de Similatón.

Noting that neither side has offered any evidence whatever as to the line of the *uti possidetis juris* in this region, the Chamber, being satisfied that this line is impossible to determine in this area, considers it right to fall back on equity *infra legem*, in conjunction with an unratified delimitation of 1869. The Chamber considers that it can in this case resort to the line then proposed in negotiations, as a reasonable and fair solution in all the circumstances, particularly since there is nothing in the records of the negotiations to suggest any fundamental disagreement between the Parties on that line.

The Chamber then considers the question of the *effectivités* El Salvador claims in the area north of the river Negro-Quiagara, which the Chamber has found to fall on the Honduran side of the line of the *uti possidetis juris*, as well as the areas outside those lands. After reviewing the evidence presented by El Salvador, the Chamber finds that,

to the extent that it can relate various place-names to the disputed areas and to the *uti possidetis juris* boundary, it cannot regard this material as sufficient evidence of any kind of *effectivités* which could be taken into account in determining the boundary.

Turning to the *effectivités* claimed by Honduras, the Chamber does not see here sufficient evidence of Honduran *effectivités* to an area clearly shown to be on the El Salvador side of the boundary line to justify doubting that that boundary represents the *uti possidetis juris* line.

The Chamber's conclusion regarding the course of the boundary in the fourth disputed sector is as follows:[4]

"from the source of the Orilla stream . . . the boundary runs through the pass of El Jobo to the source of the Cueva Hedionda stream . . . , and thence down the middle of that stream to its confluence with the river Las Cañas . . . , and thence following the middle of the river upstream as far as a point . . . near the settlement of Las Piletas; from there eastwards over a col . . . to a hill . . . , and then north-eastwards to a point on the river Negro or Pichigual . . . ; downstream along the middle of the river Negro or Pichigual to its confluence with the river Negro-Quiagara . . . ; then upstream along the middle of the river Negro-Quiagara as far as the Las Pilas boundary marker . . . , and from there in a straight line to the Malpaso de Similatón as identified by Honduras".

VIII. *Fifth sector of the land boundary* (paras. 268-305)

The fifth disputed sector extends from "the point on the north bank of the river Torola where it is joined by the Manzupucagua stream" to the Paso de Unire in the Unire river (see sketch-map E on page 39).

El Salvador's claim is based essentially on the *título ejidal* granted to the village of Polorós, province of San Miguel, in 1760, following a survey; the boundary line El Salvador claims is what it considers to be the northern boundary of the lands comprised in that title, save for a narrow strip on the western side, claimed on the basis of "human arguments".

Honduras, while disputing El Salvador's geographic interpretation of the Polorós title, concedes that it extended across part of the river Torola, but nevertheless claims that the frontier today should follow that river. It contends that the northern part of the *ejidos* granted to Polorós in 1760, including all the lands north of the river and also extending south of it, had formerly been the land of San Miguel de Sapigre, a village which had disappeared owing to an epidemic some time after 1734, and that the village had been in the jurisdiction of Comayagua, so that those lands, although granted to Polorós, remained within that jurisdiction. It follows, according to Honduras, that the *uti possidetis juris* line ran along the boundary between those lands and the other Polorós lands; but Honduras concedes that as a result of events in 1854 it acquiesced in a boundary further north, formed by the Torola. Alternatively, Honduras claims the Polorós lands north of the river on the basis that El Salvador acquiesced, in the nineteenth century, in the Torola as frontier. The western part of the disputed area, which Honduras considers to fall outside the Polorós title, is claimed by it as part of the lands of Cacaoterique, a village in the jurisdiction of Comayagua.

Noting that the title of Polorós was granted by the authorities of the province of San Miguel, the Chamber considers that it must be presumed that the lands comprised in the survey were all within the jurisdiction of San Miguel, a presumption which, the Chamber notes, is supported by the text.

After examining the available material as to the existence, location and extent of the village of San Miguel de Sapigre, the Chamber concludes that the claim of Honduras through that extinct village is not supported by sufficient evidence; it does not therefore have to go into the question of the effect of the inclusion in an *ejido* of one jurisdiction of *tierras realengas* of another. It concludes that the *ejido* granted in 1760 to the village of Polorós, in the province of San Miguel, was wholly situated in that province and that accordingly the provincial boundary lay beyond the northern limit of that *ejido* or coincided with it. There being equally no evidence of any change in the situation between 1760 and 1821, the *uti possidetis juris* line may be taken to have been in the same position.

The Chamber then examines the claim of Honduras that, whatever the 1821 position, El Salvador had, by its conduct between 1821 and 1897, acquiesced in the river Torola as boundary. The conduct in question was the granting by the Government of El Salvador, in 1842, of a title to an estate that both Parties claim was carved out of the *ejidos* of Polorós and El Salvador's reaction, or lack of reaction, to the granting of two titles over lands north of the river Torola by Honduras in 1856 and 1879. From an examination of these events, the Chamber does not find it possible to uphold Honduras's claim that El Salvador acquiesced in the river Torola as the boundary in the relevant area.

The Chamber goes on to interpret the extent of the Polorós *ejido* as surveyed in 1760, on the face of the text and in the light of developments after 1821. Following a lengthy and detailed analysis of the Polorós title, the Chamber concludes that neither of the interpretations of it by the Parties can be reconciled with the relevant landmarks and distances; the inconsistency crystallized during the negotiations that led up to the unratified Cruz-Letona Convention in 1884. In the light of certain republican titles, the Chamber arrives at an interpretation of the Polorós title which, if not perfectly in harmony with all the relevant data, produces a better fit than either of the Parties' interpretations. As to neighbouring titles, the Chamber takes the view that, on the material available, no totally consistent mapping of the Polorós title and the survey of Cacaoterique can be achieved.

In the eastern part of the sector, the Chamber notes that the Parties agree that the river Unire constitutes the boundary of their territories for some distance upstream of the "Paso de Unire", but disagree as to which of two tributaries is to be regarded as the headwaters of the Unire. Honduras claims that between the Unire and the headwaters of the Torola the boundary is a straight line corresponding to the south-western limit of the lands comprised in the 1738 Honduran title of San Antonio de Padua. After analysing the Polorós title and 1682 and 1738 surveys of San Antonio, the Chamber finds that it is not convinced by the Honduran argument that the San Antonio lands extended westwards across the river Unire and holds that it was the river which was the *uti possidetis juris* line, as claimed by El Salvador.

[4] See sketch-map D on page 38; for the identification letters and coordinates of the various defined points, see the operative clause of the Judgment, set out above, and the 1:50,000 maps available for inspection in the Registry.

To the west of the Polorós lands, since El Salvador's claim to land north of the river is based solely on the Polorós title (save for the strip on the west claimed on the basis of "human arguments"), the river Torola forms the boundary between the Polorós lands and the starting point of the sector. With regard to the strip of land claimed by El Salvador on the west, the Chamber considers that, for lack of evidence, this claim cannot be sustained.

Turning finally to the evidence of *effectivités* submitted by Honduras with respect to all six sectors, the Chamber concludes that this is insufficient to justify re-examining its conclusion as to the boundary line.

The Chamber's conclusion regarding the course of the boundary in the fifth disputed sector is as follows:[5]

> "From the confluence with the river Torola of the stream identified in the General Treaty of Peace as the *quebrada* de Mansupucagua . . . the boundary runs upstream along the middle of the river Torola as far as its confluence with a stream known as the *quebrada* del Arenal or *quebrada* de Aceituno . . . ; thence up the middle of the course of that stream as far as [a] point, at or near its source, . . . , and thence in a straight line somewhat north of east to a hill some 1,100 metres high . . . ; thence in a straight line to a hill near the river Unire . . . , and thence to the nearest point on the river Unire; downstream along that river to the point known as the Paso de Unire . . ."

IX. *Sixth sector of the land boundary* (paras. 306-322)

The sixth and final disputed sector of the land boundary is that between a point on the river Goascorán known as Los Amates, and the waters of the Gulf of Fonseca (see sketch-map F on page 40). Honduras contends that in 1821 the river Goascorán constituted the boundary between the colonial units to which the two States have succeeded, that there has been no material change in the course of the river since 1821, and that the boundary therefore follows the present stream flowing into the Gulf north-west of the Islas Ramaditas in the Bay of La Unión. El Salvador, however, claims that it is a previous course followed by the river which defines the boundary and that this course can be traced and reaches the Gulf at Estero La Cutú.

The Chamber begins by examining an argument El Salvador bases on history. The Parties agree that during the colonial period a river called the Goascorán constituted the boundary between the province of San Miguel and the Alcaldía Mayor de Minas of Tegucigalpa, and that El Salvador succeeded on independence to the territory of the province; but El Salvador denies that Honduras acquired any rights over the former territory of the Alcaldía Mayor of Tegucigalpa, which according to El Salvador did not in 1821 belong to the province of Honduras but was an independent entity. The Chamber, however, observes that on the basis of the *uti possidetis juris*, El Salvador and Honduras succeeded to all the relevant colonial territories, leaving no *terra nullius*, and that the former Alcaldía Mayor was at no time after 1821 an independent state additional to them. Its territory had to pass either to El Salvador or to Honduras and the Chamber understands it to have passed to Honduras.

The Chamber observes that El Salvador's argument of law, on the basis that the former bed of the river Goascorán forms the *uti possidetis juris* boundary, is that where a boundary is formed by the course of a river and the stream suddenly forms a new bed, this process of "avulsion" does not bring about a change in the boundary, which continues along the old channel. No record of an abrupt change of course having occurred has been brought to the Chamber's attention, but were the Chamber satisfied that the course was earlier so radically different from its present one, then an avulsion might reasonably be inferred. The Chamber notes that there is no scientific evidence that the previous course was such that the river debouched in the Estero La Cutú rather than in any of the other neighbouring inlets in the coastline.

El Salvador's case appears to be that if the change in the river's course occurred after 1821, the river was the boundary which under the *uti possidetis juris* had become the international frontier, and would have been maintained as it was by virtue of a rule of international law; if the course changed before 1821 and no further change took place after 1821, El Salvador's claim to the "old" course as the modern boundary would be based on a rule concerning avulsion which would be one not of international law but of Spanish colonial law. El Salvador has not committed itself to an opinion on the position of the river in 1821, but does contend that a rule on avulsion supporting its claim was part of Spanish colonial law.

In the Chamber's view, however, any claim by El Salvador that the boundary follows an old course of the river abandoned at some time *before* 1821 must be rejected. It is a claim that was first made in 1972 and is inconsistent with the previous history of the dispute.

The Chamber then turns to the evidence concerning the course of the Goascorán in 1821. El Salvador relies on certain titles to private lands, beginning with a 1695 survey. Honduras produces land titles dating from the seventeenth and nineteenth centuries as well as a map or chart of the Gulf of Fonseca prepared by an expedition in 1794-1796, and a map of 1804.

The Chamber considers that the report of the expedition that led to the preparation of the 1796 map, and the map itself, leave little room for doubt that in 1821 the Goascorán was already flowing in its present-day course. It emphasizes that the 1796 map is not one which purports to indicate frontiers or political divisions, but the visual representation of what was recorded in the contemporary report. The Chamber sees no difficulty in basing a conclusion on the expedition report combined with the map.

The Chamber adds that similar weight may be attached to the conduct of the Parties in negotiations in 1880 and 1884. In 1884 it was agreed that the Goascorán river was to be regarded as the boundary between the two Republics, "from its mouth in the Gulf of Fonseca . . . upstream as far as the confluence with the Guajiniquil or Pescado river . . . ", and the 1880 record refers to the boundary following the river from its mouth "upstream in a north-easterly direction", i.e., the direction taken by the present course, not the hypothetical old course of the river. The Chamber also observes that an interpretation of these texts as referring to the old course of the river is untenable in view of the cartographic material of the period, presumably available to the delegates, which pointed overwhelmingly to the river being then in its present course and forming the international boundary.

[5] See sketch-map E on page 39; for the identification letters and coordinates of the various defined points, see the operative clause of the Judgment, set out above, and the 1:50,000 maps available for inspection in the Registry.

Referring to a suggestion by El Salvador that the river Goascorán would have returned to its old course had it not been prevented from so doing by a wall or dike built by Honduras in 1916, the Chamber does not consider that this allegation, even if proved, would affect its decision.

At its mouth in the Bay of La Unión the river divides into several branches, separated by islands and islets. Honduras has indicated that its claimed boundary passes to the north-west of these islands, thus leaving them all in Honduran territory. El Salvador, contending as it does that the boundary does not follow the present course of the Goascorán at all, has not expressed a view on whether a line following that course should pass north-west or south-east of the islands or between them. The area at stake is very small and the islets involved do not seem to be inhabited or habitable. The Chamber considers, however, that it would not complete its task of delimiting the sixth sector were it to leave unsettled the question of the choice of one of the present mouths of the Goascorán as the situation of the boundary line. It notes at the same time that the material on which to found a decision is scanty. After describing the position taken by Honduras since negotiations held in 1972, as well as its position during the work of the Joint Frontier Commission and in its submissions, the Chamber considers that it may uphold the relevant Honduran submissions in the terms in which they were presented.

The Chamber's conclusion regarding the sixth disputed sector is as follows:[6]

> "From the point known as Los Amates . . . the boundary follows the middle of the bed of the river Goascorán to the point where it emerges in the waters of the Bahía La Unión, Gulf of Fonseca, passing to the north-west of the Islas Ramaditas."

X. *Legal situation of the islands* (paras. 323-368)

The major islands in the Gulf are indicated on sketch-map G on page 41. El Salvador asks the Chamber to declare that it has sovereignty over all the islands within the Gulf except Zacate Grande and the Farallones; Honduras asks it to declare that only Meanguera and Meanguerita islands are in dispute between the Parties and that Honduras has sovereignty over them.

In the view of the Chamber, the provision of the Special Agreement that it determine "*la situación jurídica insular*" confers upon it jurisdiction in respect of all the islands of the Gulf. A judicial determination, however, is only required in respect of such islands as are in dispute between the Parties; this excludes, *inter alia*, the Farallones, which are recognized by both Parties as belonging to Nicaragua.

The Chamber considers that prima facie the existence of a dispute over an island can be deduced from the fact of its being the subject of specific and argued claims. Noting that El Salvador has pressed its claim to El Tigre island with arguments in support and that Honduras has advanced counter-arguments, though with the object of showing that there is no dispute over El Tigre, the Chamber considers that, either since 1985 or at least since issue was joined in these proceedings, the islands in dispute are El Tigre, Meanguera and Meanguerita.

Honduras contends, however, that, since the 1980 General Treaty of Peace uses the same terms as article 2, paragraph 2, of the Special Agreement, the jurisdiction of the Chamber must be limited to the islands in dispute at the time the Treaty was concluded, i.e., Meanguera and Meanguerita, the Salvadorian claim to El Tigre having been made only in 1985. The Chamber, however, observes that the question whether a given island is in dispute is relevant, not to the question of the existence of jurisdiction, but to that of its exercise. Honduras also claims that there is no real dispute over El Tigre, which has since 1854 been recognized by El Salvador as belonging to Honduras, but that El Salvador has made a belated claim to it as a political or tactical move. The Chamber notes that for it to find that there is no dispute would require it first to determine that El Salvador's claim is wholly unfounded, and to do so can hardly be viewed as anything but the determination of a dispute. The Chamber therefore concludes that it should determine whether Honduras or El Salvador has jurisdiction over each of the islands of El Tigre, Meanguera and Meanguerita.

Honduras contends that by virtue of article 26 of the General Treaty of Peace the law applicable to the dispute is solely the *uti possidetis juris* of 1821, while El Salvador maintains that the Chamber has to apply the modern law on acquisition of territory and look at the effective exercise or display of State sovereignty over the islands as well as historical titles.

The Chamber has no doubt that the determination of sovereignty over the islands must start with the *uti possidetis juris*. In 1821, none of the islands of the Gulf, which had been under the sovereignty of the Spanish Crown, were *terra nullius*. Sovereignty over them could therefore not be acquired by occupation and the matter was thus one of the succession of the newly independent States to the islands. The Chamber will therefore consider whether the appurtenance in 1821 of each disputed island to one or the other of the various administrative units of the Spanish colonial structure can be established, regard being had not only to legislative and administrative texts of the colonial period, but also to "colonial *effectivités*". The Chamber observes that in the case of the islands the legal and administrative texts are confused and conflicting, and that it is possible that Spanish colonial law gave no clear and definite answer as to the appurtenance of some areas. It therefore considers it particularly appropriate to examine the conduct of the new States during the period immediately after 1821. Claims then made, and the reaction—or lack of reaction—to them may throw light on the contemporary appreciation of what the situation in 1821 had been, or should be taken to have been.

The Chamber notes that El Salvador claims all the islands in the Gulf (except Zacate Grande) on the basis that during the colonial period they were within the jurisdiction of the township of San Miguel in the colonial province of San Salvador, which was in turn within the jurisdiction of the *Real Audiencia* of Guatemala. Honduras asserts that the islands formed part of the bishopric and province of Honduras, that the Spanish Crown had attributed Meanguera and Meanguerita to that province and that ecclesiastical jurisdiction over the islands appertained to the parish of Choluteca and the Guardanía of Nacaome, assigned to the bishopric of Comayagua. Honduras has also presented an array of incidents and events by way of colonial *effectivités*.

[6] See sketch-map F on page 40; for the identification letters and coordinates of the various defined points, see the operative clause of the Judgment, set out above, and the 1:50,000 maps available for inspection in the Registry.

The fact that the ecclesiastical jurisdiction has been relied on as evidence of "colonial *effectivités*" presents difficulties, as the presence of the church on the islands, which were sparsely populated, was not permanent.

The Chamber's task is made more difficult by the fact that many of the historical events relied on can be, and have been, interpreted in different ways and thus used to support the arguments of either Party.

The Chamber considers it unnecessary to analyse in further detail the arguments each Party advances to show that it acquired sovereignty over some or all of the islands by the application of the *uti possidetis juris* principle, the material available being too fragmentary and ambiguous to admit of any firm conclusion. The Chamber must therefore consider the post-independence conduct of the Parties, as indicative of what must have been the 1821 position. This may be supplemented by considerations independent of the *uti possidetis juris* principle, in particular the possible significance of the conduct of the Parties as constituting acquiescence. The Chamber also notes that under article 26 of the General Treaty of Peace, it may consider all "other evidence and arguments of a legal, historical, human or other kind, brought before it by the Parties and admitted under international law".

The law of acquisition of territory, invoked by El Salvador, is in principle clearly established and buttressed by arbitral and judicial decisions. The difficulty with its application here is that it was developed primarily to deal with the acquisition of sovereignty over *terra nullius*. Both Parties, however, assert a title of succession from the Spanish Crown, so that the question arises whether the exercise or display of sovereignty by the one Party, particularly when coupled with lack of protest by the other, could indicate the presence of an *uti possidetis juris* title in the former Party, where the evidence based on titles or colonial *effectivités* is ambiguous. The Chamber notes that in the *Minquiers and Ecrehos* case in 1953 the Court did not simply disregard the ancient titles and decide on the basis of more recent displays of sovereignty.

In the view of the Chamber, where the relevant administrative boundary in the colonial period was ill-defined or its position disputed, the behaviour of the two States in the years following independence may serve as a guide to where the boundary was, either in their shared view, or in the view acted on by one and acquiesced in by the other.

Being uninhabited or sparsely inhabited, the islands did not arouse any interest or dispute until the years nearing the mid-nineteenth century. What then occurred appears to be highly material. The islands were not *terra nullius* and in legal theory each island already appertained to one of the Gulf States as heir to the appropriate part of the Spanish colonial possession, which precluded acquisition by occupation; but effective possession by one of the States of an island could constitute a post-colonial *effectivité*, throwing light on the contemporary appreciation of the legal situation. Possession backed by the exercise of sovereignty may confirm the *uti possidetis juris* title. The Chamber does not find it necessary to decide whether such possession could be recognized even in contradiction of such a title, but in the case of the islands, where the historical material of colonial times is confused and contradictory and independence was not immediately followed by unambiguous acts of sovereignty, this is practically the only way in which the *uti possidetis juris* could find formal expression.

The Chamber deals first with El Tigre, and reviews the historical events concerning it from 1833 onward. Noting that Honduras has remained in effective occupation of the island since 1849, the Chamber concludes that the conduct of the Parties in the years following the dissolution of the Federal Republic of Central America was consistent with the assumption that El Tigre appertained to Honduras. Given the attachment of the Central American States to the principle of *uti possidetis juris*, the Chamber considers that that contemporary assumption also implied belief that Honduras was entitled to the island by succession from Spain, or, at least, that such succession by Honduras was not contradicted by any known colonial title. Although Honduras has not formally requested a finding of its sovereignty over El Tigre, the Chamber considers that it should define its legal situation by holding that sovereignty over El Tigre belongs to Honduras.

Regarding Meanguera and Meanguerita, the Chamber observes that throughout the argument the two islands were treated by both Parties as constituting a single insular unity. The smallness of Meanguerita, its contiguity to the larger island, and the fact that it is uninhabited allow its characterization as a "dependency" of Meanguera. That Meanguerita is "capable of appropriation" is undoubted: although without fresh water, it is not a low-tide elevation and is covered by vegetation. The Parties have treated it as capable of appropriation, since they claim sovereignty over it.

The Chamber notes that the initial formal manifestation of the dispute occurred in 1854, when a circular letter made widely known El Salvador's claim to the island. Furthermore, in 1856 and 1879 El Salvador's official journal carried reports concerning administrative acts relating to it. The Chamber has seen no record of reactions or protest by Honduras over these publications.

The Chamber observes that from the late nineteenth century the presence of El Salvador on Meanguera intensified, still without objection or protest from Honduras, and that it has received considerable documentary evidence on the administration of Meanguera by El Salvador. Throughout the period covered by that documentation there is no record of any protest by Honduras, with the exception of one recent event, described later. Furthermore, El Salvador called a witness, a Salvadorian resident of the island, and his testimony, not challenged by Honduras, shows that El Salvador has exercised State power over Meanguera.

According to the material before the Chamber, it was only in January 1991 that the Government of Honduras made protests to the Government of El Salvador concerning Meanguera, which were rejected by the latter Government. The Chamber considers that the Honduran protest was made too late to affect the presumption of acquiescence on the part of Honduras. The conduct of Honduras vis-à-vis earlier *effectivités* reveals some form of tacit consent to the situation.

The Chamber's conclusion is thus the following. In relation to the islands, the "documents which were issued by the Spanish Crown or by any other Spanish authority, whether secular or ecclesiastical", do not appear sufficient to "indicate the jurisdictions or limits of territories or settlements" in terms of article 26 of that Treaty, so that no firm conclusion can be based upon such material, taken in isolation, for deciding between the two claims to an *uti possidetis juris* title. Under the final sentence of article 26, the Chamber is, however, entitled to consider both the effective interpretation of the *uti possidetis juris* by the Parties, in the

years following independence, as throwing light on the application of the principle, and the evidence of effective possession and control of an island by one Party without protest by the other as pointing to acquiescence. The evidence as to possession and control, and the display and exercise of sovereignty, by Honduras over El Tigre and by El Salvador over Meanguera (to which Meanguerita is an appendage), coupled in each case with the attitude of the other Party, clearly shows that Honduras was treated as having succeeded to Spanish sovereignty over El Tigre, and El Salvador to Spanish sovereignty over Meanguera and Meanguerita.

XI. *Legal situation of the maritime spaces* (paras. 369-420)

The Chamber first recalls that Nicaragua had been authorized to intervene in the proceedings, but solely on the question of the legal regime of the waters of the Gulf of Fonseca. Referring to complaints by the Parties that Nicaragua had dealt with matters beyond the limits of its permitted intervention, the Chamber observes that it has taken account of Nicaragua's arguments only where they appear relevant in its consideration of the regime of the waters of the Gulf of Fonseca.

The Chamber then refers to the disagreement between the Parties on whether article 2, paragraph 2, of the Special Agreement empowers or requires the Chamber to delimit a maritime boundary, within or without the Gulf. El Salvador maintains that "the Chamber has no jurisdiction to effect any delimitation of the maritime spaces", whereas Honduras seeks the delimitation of the maritime boundary inside and outside the Gulf. The Chamber notes that these contentions have to be seen in relation to the position of the Parties as to the legal status of the Gulf waters: El Salvador claims that they are subject to a condominium in favour of the three coastal States and that delimitation would therefore be inappropriate, whereas Honduras argues that within the Gulf there is a community of interests which necessitates a judicial delimitation.

In application of the normal rules of treaty interpretation (article 31 of the Vienna Convention on the Law of Treaties), the Chamber first considers what is the "ordinary meaning" of the terms of the Special Agreement. It concludes that no indication of a common intention to obtain a delimitation from the Chamber can be derived from the text as it stands. Turning to the context, the Chamber observes that the Special Agreement used the wording "to delimit the boundary line" regarding the land frontier, while confining the task of the Chamber as it relates to the islands and maritime spaces to "determine [their] legal situation", the same contrast of wording being observed in article 18, paragraph 2, of the General Treaty of Peace. Noting that Honduras itself recognizes that the island dispute is not a conflict of delimitation but of attribution of sovereignty over a detached territory, the Chamber observes that it is difficult to accept that the wording "to determine the legal situation", used for both the islands and the maritime spaces, would have a completely different meaning regarding the islands and regarding maritime spaces.

Invoking the principle of effectiveness, Honduras argues that the context of the Treaty and the Special Agreement militate against the Parties having intended merely a determination of the legal situation of the spaces unaccompanied by delimitation, the object and purpose of the Special Agreement being to dispose completely of a long-standing corpus of disputes. In the Chamber's view, however, in interpreting a text of this kind, regard must be had to the common intention as it is expressed. In effect, what Honduras is proposing is recourse to the "circumstances" of the conclusion of the Special Agreement, which constitute no more than a supplementary means of interpretation.

To explain the absence of any specific reference to delimitation in the Special Agreement, Honduras points to a provision in the Constitution of El Salvador such that its representatives could never have intended to sign a special agreement contemplating any delimitation of the waters of the Gulf. Honduras contends that it was for this reason that the expression "determine the legal situation" was chosen, intended as a neutral term which would not prejudice the position of either Party. The Chamber is unable to accept this contention, which amounts to a recognition that the Parties were unable to agree that the Chamber should have jurisdiction to delimit the waters of the Gulf. It concludes that the agreement between the Parties, expressed in article 2, paragraph 2, of the Special Agreement, that the Chamber should determine the legal situation of the maritime spaces did not extend to their delimitation.

Relying on the fact that the expression "determine the legal situation of the island and the maritime spaces" is also used in article 18 of the General Treaty of Peace of 1980, defining the role of the Joint Frontier Commission, Honduras invokes the subsequent practice of the Parties in the application of the Treaty and invites the Chamber to take into account the fact that the Joint Frontier Commission examined proposals aimed at such delimitation. The Chamber considers that, while both customary law and the Vienna Convention on the Law of Treaties (art. 31, para. 3 (*b*)) allow such practice to be taken into account for purposes of interpretation, none of the considerations raised by Honduras can prevail over the absence from the text of any specific reference to delimitation.

The Chamber then turns to the legal situation of the waters of the Gulf, which falls to be determined by the application of "the rules of international law applicable between the Parties, including, where pertinent, the provisions of the General Treaty of Peace", as provided in articles 2 and 5 of the Special Agreement.

Following a description of the geographical characteristics of the Gulf, the coastline of which is divided between El Salvador, Honduras and Nicaragua (see sketch-map G on page 41), and the conditions of navigation within it, the Chamber points out that the dimensions and proportions of the Gulf are such that it would nowadays be a juridical bay under the provisions (which might be found to express general customary law) of the Convention on the Territorial Sea and the Contiguous Zone (1958) and the Convention on the Law of the Sea (1982), the consequence being that, if it were a single-State bay, a closing line might now be drawn and the waters be thereby enclosed and "considered as internal waters". The Parties and the intervening State, as well as commentators generally, are agreed that the Gulf is an historic bay, and that its waters are accordingly historic waters. Such waters were defined in the *Fisheries* case between the United Kingdom and Norway as "waters which are treated as internal waters but which would not have that character were it not for the existence of an historic title" (*I.C.J. Reports 1951*, p. 130). This should be read in the light of the observation in the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case that

"general international law . . . does not provide for a *single* 'régime' for 'historic waters' or 'historic bays', but only for a particular régime for each of the concrete, recognized cases of 'historic waters' or 'historic bays'" (*I.C.J. Reports 1982*, p. 74).

The Court concludes that it is clearly necessary to investigate the particular history of the Gulf to discover the "régime" resulting therefrom, adding that the particular historical regime established by practice must be especially important in a pluri-State bay, a kind of bay for which there are notoriously no agreed and codified general rules of the kind so well established for single-State bays.

Since its discovery in 1522 until 1821, the Gulf was a single-State bay the waters of which were under the single sway of the Spanish Crown. The rights in the Gulf of the present coastal States were thus acquired, like their land territories, by succession from Spain. The Chamber must therefore enquire into the legal situation of the waters of the Gulf in 1821, for the principle of *uti possidetis juris* should apply to those waters as well as to the land.

The legal status of the Gulf waters after 1821 was a question which faced the Central American Court of Justice in the case between El Salvador and Nicaragua concerning the Gulf in which it rendered its judgement of 9 March 1917. That judgement, which examined the particular regime of the Gulf of Fonseca, must therefore be taken into consideration as an important part of the Gulf's history. The case before the Central American Court was brought by El Salvador against Nicaragua because of the latter's entry into the Bryan-Chamorro Treaty of 1914 with the United States, by which Nicaragua granted the latter a concession for the construction of an interoceanic canal and of a naval base in the Gulf, an arrangement that would allegedly prejudice El Salvador's own rights in the Gulf.

On the underlying question of the status of the waters of the Gulf there were three matters which practice and the 1917 judgement took account of: first, the practice of all three coastal States had established and mutually recognized a 1-marine-league (3-nautical-mile) littoral maritime belt off their respective mainland coasts and islands, in which belt they each exercised an exclusive jurisdiction and sovereignty, though with rights of innocent passage conceded on a mutual basis; second, all three States recognized a further belt of 3 marine leagues (9 nautical miles) for rights of "maritime inspection" for fiscal purposes and for national security; third, there was an Agreement of 1900 between Honduras and Nicaragua by which a partial maritime boundary between the two States had been delimited, which, however, stopped well short of the waters of the main entrance to the bay.

Furthermore, the Central American Court unanimously held that the Gulf "is an historic bay possessed of the characteristics of a closed sea" and that " . . . the parties are agreed that the Gulf is a closed sea . . . "; by "closed sea" the Court seems to mean simply that it is not part of the high seas and its waters are not international waters. At another point the judgement describes the Gulf as "an historic or vital bay".

The Chamber then points out that the term "territorial waters" used in the judgement did not then necessarily indicate what would now be called "territorial sea"; and explains what might appear to be an inconsistency in the judgement concerning rights of "innocent use", which are at odds with the present general understanding of the legal status of the waters of a bay as constituting "internal waters". The Chamber observes that the rules and principles normally applicable to single-State bays are not necessarily appropriate to a bay which is a pluri-State bay and also an historic one. Moreover, there is a need for shipping to have access to any of the three coastal States through the main channels between the bay and the ocean. Rights of innocent passage are not inconsistent with a regime of historic waters. There is, furthermore, the practical point that since these waters were outside the 3-mile maritime belt of exclusive jurisdiction in which innocent passage was nevertheless recognized in practice, it would have been absurd not to recognize passage rights in these waters, which have to be crossed in order to reach those maritime belts.

All three coastal States continue to claim that the Gulf is an historic bay with the character of a closed sea, and it seems also to continue to be the subject of that "acquiescence on the part of other nations" to which the 1917 judgement refers; moreover, that position has been generally accepted by commentators. The problem is the precise character of the sovereignty the three coastal States enjoy in these historic waters. Recalling the former view that in a pluri-State bay, if it is not historic waters, the territorial sea follows the sinuosities of the coast and the remainder of the waters of the bay are part of the high seas, the Chamber notes that this solution is not possible in the case of the Gulf of Fonseca since it is an historic bay and therefore a "closed sea".

The Chamber then quotes the holding by the Central American Court that " . . . the legal status of the Gulf of Fonseca . . . is that of property belonging to the three countries that surround it . . . " and that " . . . the high parties are agreed that the waters which form the entrance to the Gulf intermingle . . . ". In addition, the judgement recognized that maritime belts of 1 marine league from the coast were within the exclusive jurisdiction of the coastal State and therefore should "be excepted from the community of interests or ownership". After quoting the paragraphs of the judgement setting forth the Court's general conclusions, the Chamber observes that the essence of its decision on the legal status of the waters of the Gulf was that these historic waters were then subject to a "co-ownership" (*condominio*) of the three coastal States.

The Chamber notes that El Salvador approves strongly of the condominium concept, and holds that this status not only prevails but also cannot be changed without its consent. Honduras opposes the condominium idea and accordingly calls in question the correctness of this part of the 1917 judgement, whilst also relying on the fact that it was not a party to the case and so cannot be bound by the decision. Nicaragua is, and has consistently been, opposed to the condominium solution.

Honduras also argues against the condominium on the ground that condominia can only be established by agreement. It is doubtless right in claiming that condominia, in the sense of arrangements for the common government of territory, have ordinarily been created by treaty. But what the Central American Court had in mind was a joint sovereignty arising as a juridical consequence of the 1821 succession. State succession is one of the ways in which territorial sovereignty passes from one State to another and there seems no reason in principle why a succession should not create a joint sovereignty where a single and undivided maritime area passes to two or more new States. The Chamber thus sees the 1917 judgement as using the term condominium to describe what it regards as the joint inheri-

tance by three States of waters which had belonged to a single State and in which there were no maritime administrative boundaries in 1821 or indeed at the end of the Federal Republic of Central America in 1839.

Thus, the *ratio decidendi* of the judgement appears to be that there was, at the time of independence, no delimitation between the three countries; and the waters of the Gulf have remained undivided and in a state of community which entails a condominium or co-ownership. Further, the existence of a community was evidenced by continued and peaceful use of the waters by all the riparian States after independence.

As regards the status of the 1917 judgement, the Chamber observes that although the Court's jurisdiction was contested by Nicaragua, which also protested the judgement, it is nevertheless a valid decision of a competent court. Honduras, which, on learning of the proceedings before the Court, formally protested to El Salvador that it did not recognize the status of co-ownership in the waters of the Gulf, has, in the present case, relied on the principle that a decision in a judgment or an arbitral award can only be opposed to the parties. Nicaragua, a party to the 1917 case, is an intervener but not a party in the present one. It therefore does not appear that the Chamber is required to pronounce upon the question whether the 1917 judgement is *res judicata* between the States parties to it, only one of which is a Party to the present proceedings, a question which is not helpful in a case raising a question of the joint ownership of three coastal States. The Chamber must make up its own mind on the status of the waters of the Gulf, taking such account of the 1917 decision as it appears to the Chamber to merit.

The opinion of the Chamber on the regime of the historic waters of the Gulf parallels the opinion expressed in the 1917 judgement. The Chamber finds that, reserving the question of the 1900 Honduras/Nicaragua delimitation, the Gulf waters, other than the 3-mile maritime belt, are historic waters and subject to a joint sovereignty of the three coastal States, basing itself on the following reasons. As to the historic character of the Gulf waters, there are the consistent claims of the three coastal States and the absence of protest from other States. As to the character of rights in the waters of the Gulf, these were waters of a single State bay during the greater part of their known history and were not divided or apportioned between the different administrative units which became the three coastal States. There was no attempt to divide and delimit the waters according to the principle of *uti possidetis juris*, this being a fundamental difference between the land areas and the maritime area. The delimitation effected between Nicaragua and Honduras in 1900, which was substantially an application of the method of equidistance, gives no clue that it was in any way inspired by the application of the *uti possidetis juris*. A joint succession of the three States to the maritime area therefore seems to be the logical outcome of the principle of *uti possidetis juris* itself.

The Chamber notes that Honduras, whilst arguing against the condominium, does not consider it sufficient simply to reject it, but proposes an alternative idea, that of "community of interests" or of "interest". That there is a community of interests of the three coastal States of the Gulf is not open to doubt, but it seems odd to postulate such a community as an argument against a condominium, which is almost an ideal embodiment of the community of interest requirements of equality of user, common legal rights and the "exclusion of any preferential privilege". The essential feature of the "community of interests" existing, according to Honduras, in respect of the waters of the Gulf, and which distinguishes it from the *condominio* referred to by the Central American Court or the condominium asserted by El Salvador, is that the "community of interests" does not merely permit of a delimitation but necessitates it.

El Salvador for its part is not suggesting that the waters subject to joint sovereignty cannot be divided, if there is agreement to do so. What it maintains is that a decision on the status of the waters is an essential prerequisite to the process of delimitation. Moreover, the geographical situation of the Gulf is such that mere delimitation without agreement on questions of passage and access would leave many practical problems unsolved.

The Chamber notes that the normal geographical closing line of the bay would be the line Punta Amapala to Punta Cosigüina; it rejects a thesis elaborated by El Salvador of an "inner gulf" and an "outer gulf", based on a reference in the 1917 judgement to an inner closing line, there being nothing in that judgement to support the suggestion that Honduran legal interests in the Gulf waters were limited to the area inside the inner line. Recalling that there had been considerable argument between the Parties about whether the closing line of the Gulf is also a baseline, the Chamber accepts the definition of it as the ocean limit of the Gulf, which, however, must be the baseline for whatever regime lies beyond it, which must be different from that of the Gulf.

As to the legal status of the waters inside the Gulf closing line other than the 3-mile maritime belts, the Chamber considers whether or not they are "internal waters"; noting that rights of passage through them must be available to vessels of third States seeking access to a port in any of the three coastal States, it observes that it might be sensible to regard those waters, in so far as they are the subject of the condominium or co-ownership, as *sui generis*. The essential juridical status of these waters is, however, the same as that of internal waters, since they are claimed *à titre de souverain* and are not territorial sea.

With regard to the 1900 Honduran/Nicaraguan delimitation line, the Chamber finds, from the conduct of El Salvador, that the existence of the delimitation has been accepted by it in the terms indicated in the 1917 judgement.

In connection with any delimitation of the waters of the Gulf, the Chamber finds that the existence of joint sovereignty in all the waters subject to a condominium other than those subject to the treaty or customary delimitations means that Honduras has existing legal rights (not merely an interest) in the Gulf waters up to the bay closing line, subject, of course, to the equivalent rights of El Salvador and Nicaragua.

Regarding the question of the waters outside the Gulf, the Chamber observes that it involves entirely new concepts of law unthought of in 1917, in particular continental shelf and the exclusive economic zone. There is also a prior question about territorial sea. The littoral maritime belts of 1 marine league along the coastlines of the Gulf are not truly territorial seas in the sense of the modern law of the sea, for a territorial sea normally has beyond it the continental shelf, and either waters of the high seas or an exclusive economic zone and the maritime belts within the Gulf do not have outside them any of these areas. The maritime belts may properly be regarded as the internal waters of the

coastal State, even though subject, as indeed are all the waters of the Gulf, to rights of innocent passage.

The Chamber therefore finds that there is a territorial sea proper seawards of the closing line of the Gulf and, since there is a condominium of the waters of the Gulf, there is a tripartite presence at the closing line and Honduras is not locked out from rights in respect of the ocean waters outside the bay. It is only seaward of the closing line that modern territorial seas can exist, since otherwise the Gulf waters could not be waters of an historic bay, which the Parties and the intervening State agree to be the legal position. And if the waters internal to that bay are subject to a threefold joint sovereignty, it is the *three* coastal States that are entitled to territorial sea outside the bay.

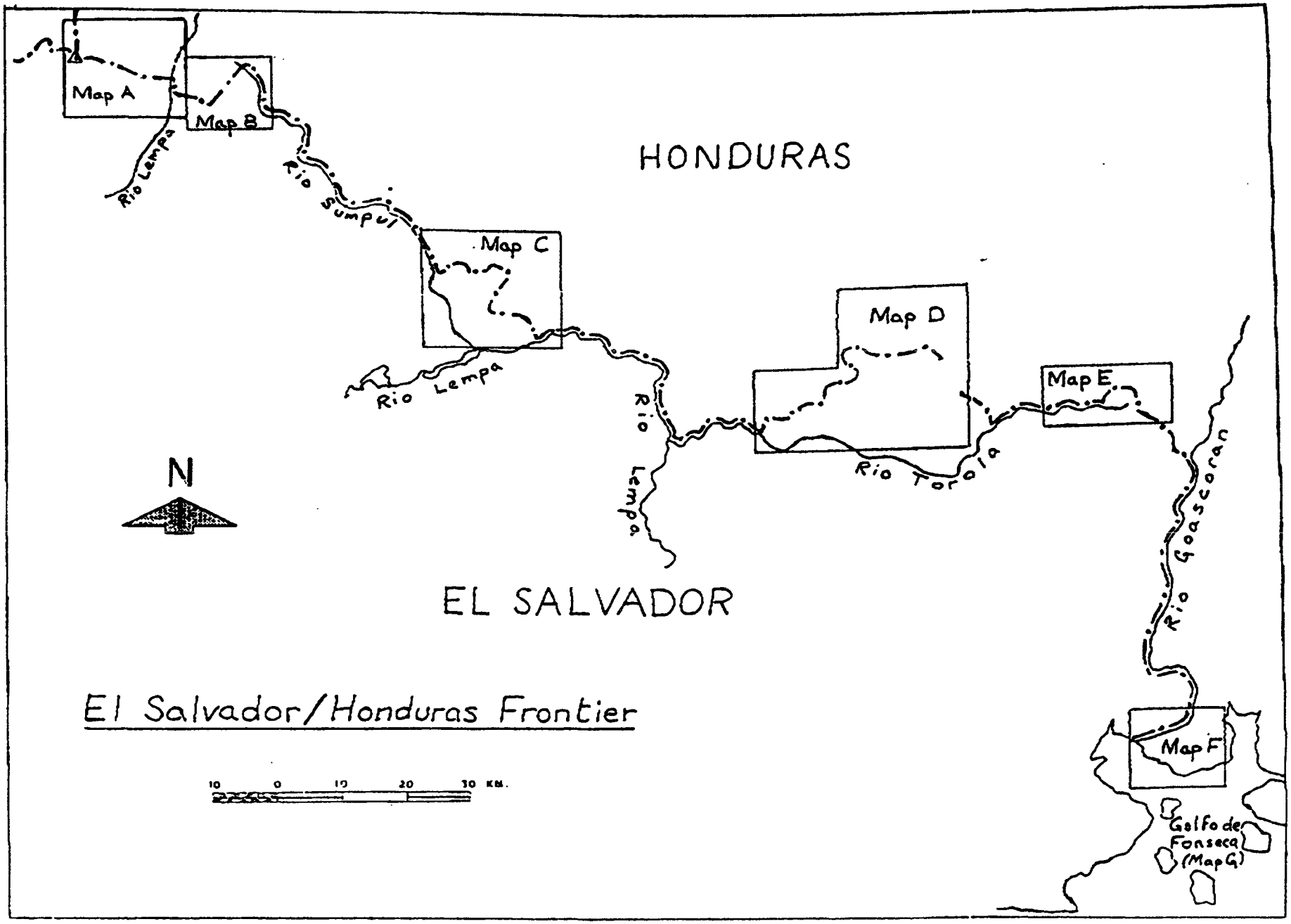
As for the legal regime of the waters, seabed and subsoil off the closing line of the Gulf, the Chamber first observes that the problem must be confined to the area off the baseline but excluding a 3-mile, or 1-marine-league, strip of it at either extremity, corresponding to the existing maritime belts of El Salvador and Nicaragua, respectively. At the time of the Central American Court's decision the waters outside the remainder of the baseline were high seas. Nevertheless, the modern law of the sea has added territorial sea extending from the baseline, has recognized continental shelf as extending beyond the territorial sea and belonging *ipso jure* to the coastal State, and confers a right on the coastal State to claim an exclusive economic zone extending up to 200 miles from the baseline of the territorial sea.

Since the legal situation on the landward side of the closing line is one of joint sovereignty, it follows that all three of the joint sovereigns must be entitled outside the closing line to territorial sea, continental shelf and exclusive economic zone. Whether this situation should remain in being or be replaced by a division and delimitation into three separate zones is, as inside the Gulf also, a matter for the three States to decide. Any such delimitation of maritime areas will fall to be effected by agreement on the basis of international law.

XII. *Effect of Judgment for the intervening State* (paras. 421-424)

Turning to the question of the effect of its Judgment for the intervening State, the Chamber observes that the terms in which intervention was granted were that Nicaragua would not become party to the proceedings. Accordingly, the binding force of the Judgment for the Parties, as contemplated by Article 59 of the Statute of the Court, does not extend to Nicaragua as intervener.

In its Application for permission to intervene, Nicaragua had stated that it "intends to subject itself to the binding effect of the decision", but from the written statement submitted by Nicaragua it is clear that Nicaragua does not now regard itself as obligated to treat the Judgment as binding upon it. With regard to the effect, if any, of the statement in Nicaragua's Application, the Chamber notes that its Judgment of 13 September 1990 emphasized the need, if an intervener is to become a party, for the consent of the existing parties to the case; it observes that if an intervener becomes a party, and is thus bound by the judgment, it becomes entitled equally to assert the binding force of the judgment against the other parties. Noting that neither Party has given any indication of consent to Nicaragua's being recognized to have any status enabling it to rely on the Judgment, the Chamber concludes that in the circumstances of the case the Judgment is not *res judicata* for Nicaragua.



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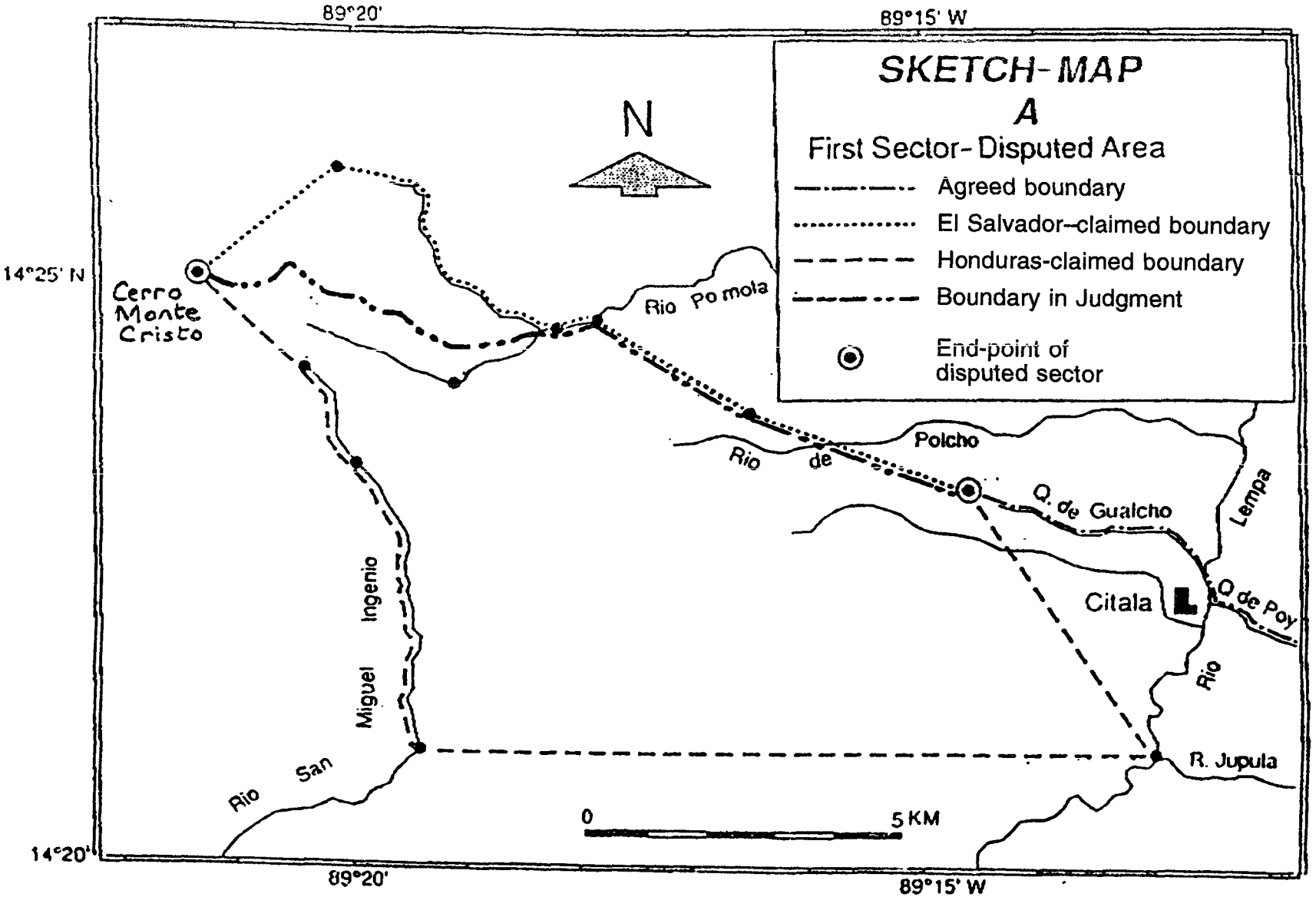
89°20'
89°15' W
SKETCH-MAP
A
First Sector- Disputed Area
Agreed boundary
El Salvador--claimed boundary
Honduras-claimed boundary
Boundary in Judgment
End-point of disputed sector
N
14°25' N
Cerro Monte Cristo
Rio Pomola
Rio de Polcho
Q. de Gualcho
Lempa
Citala
Q. de Poy
Rio Ingenio Miguel
Rio San
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5 KM
14°20'
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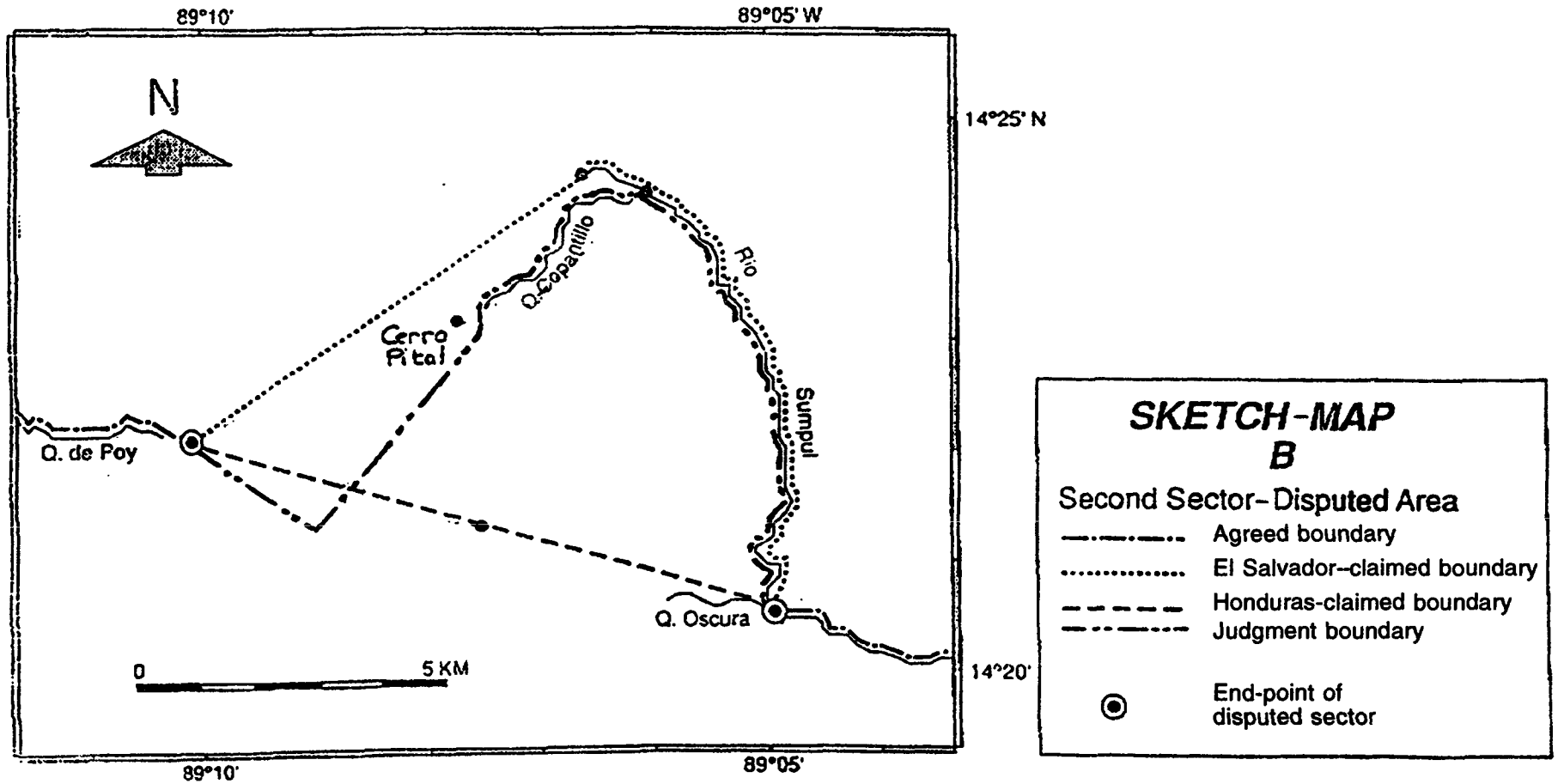
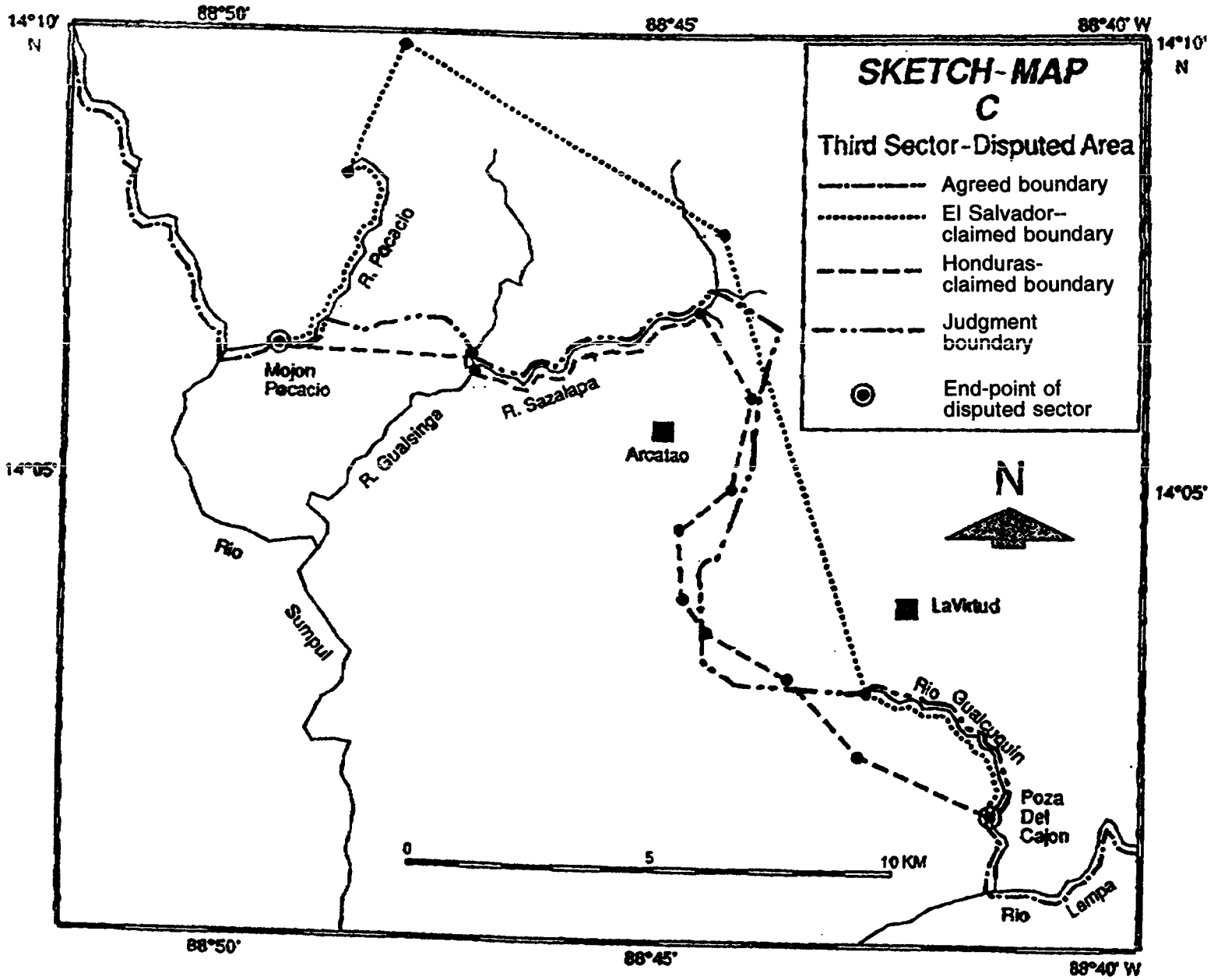
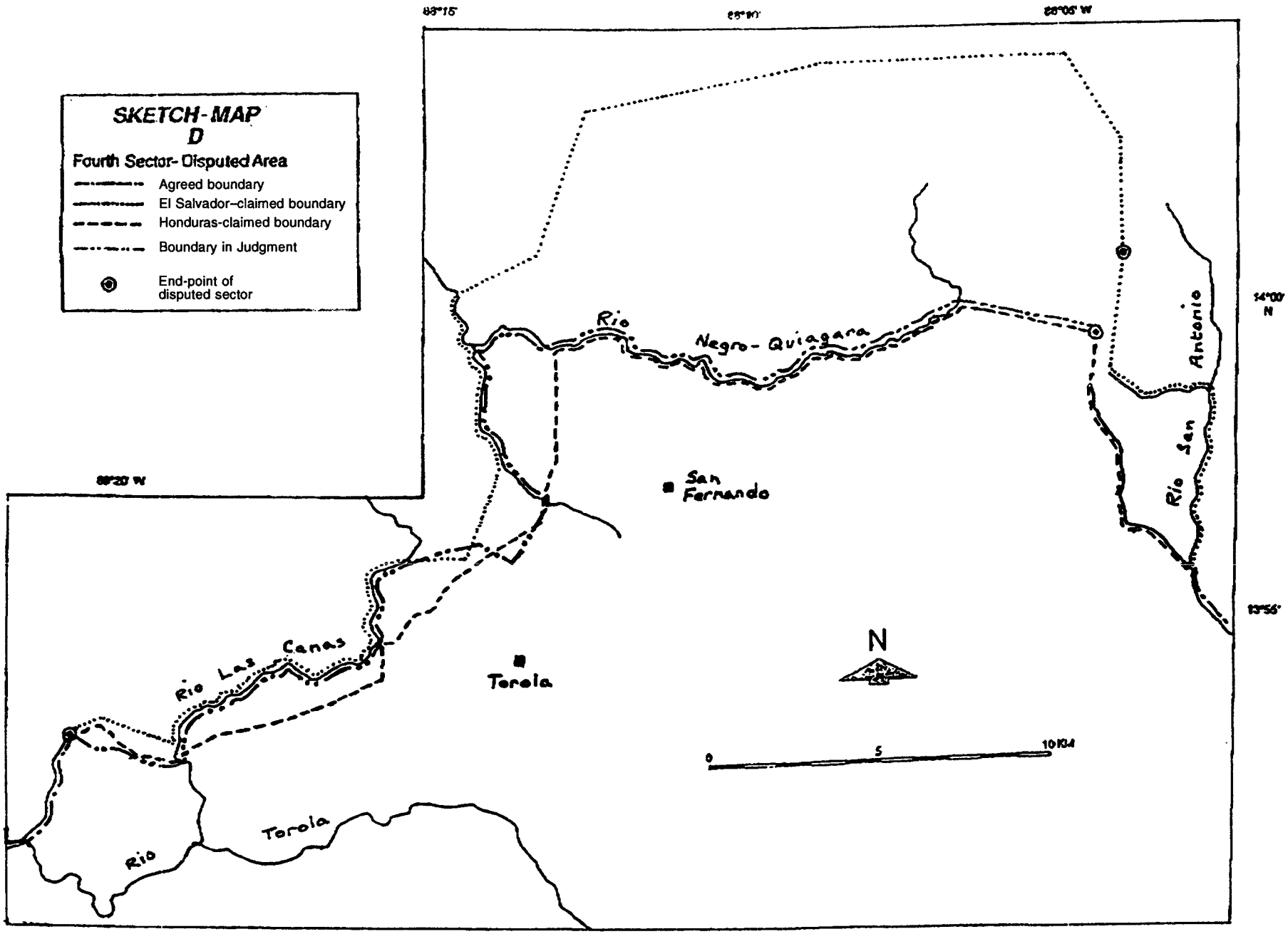
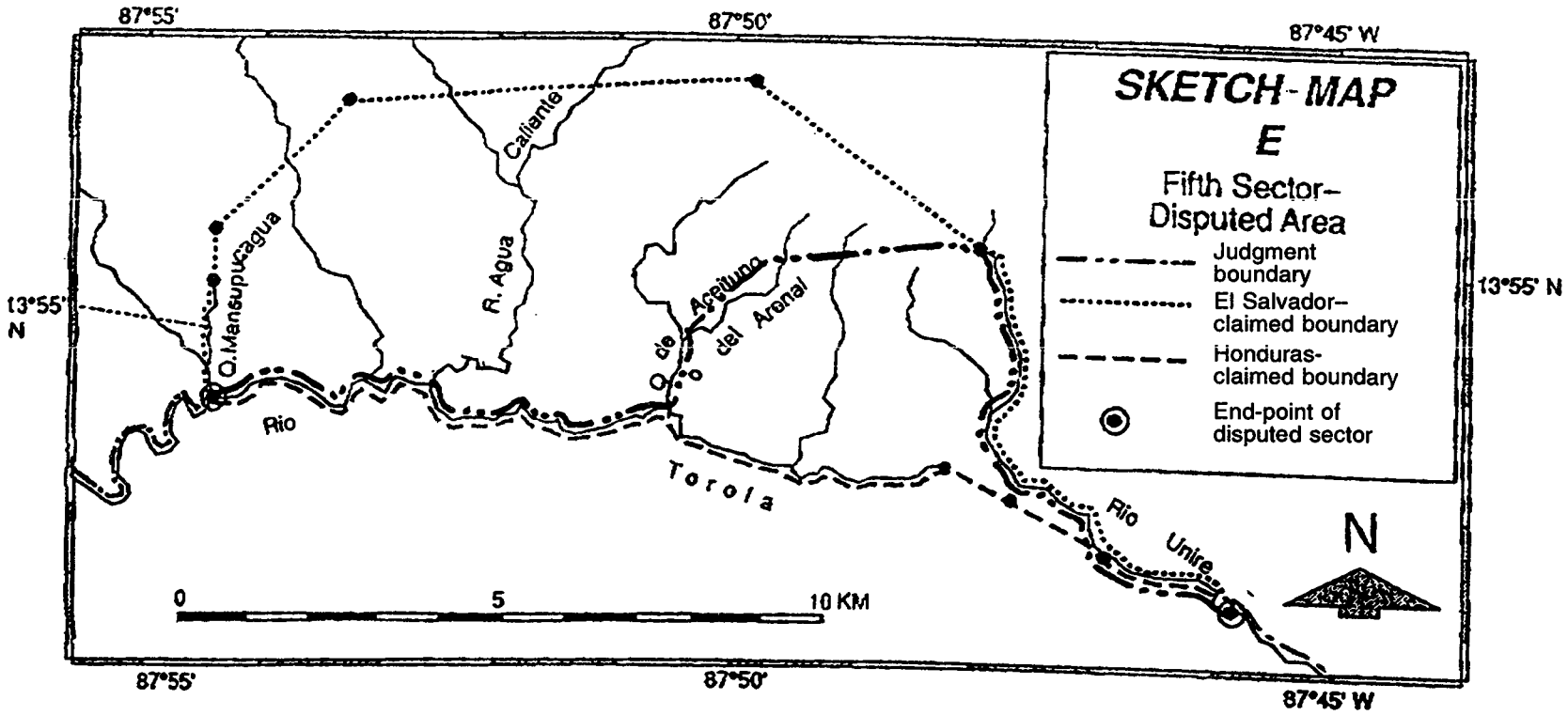
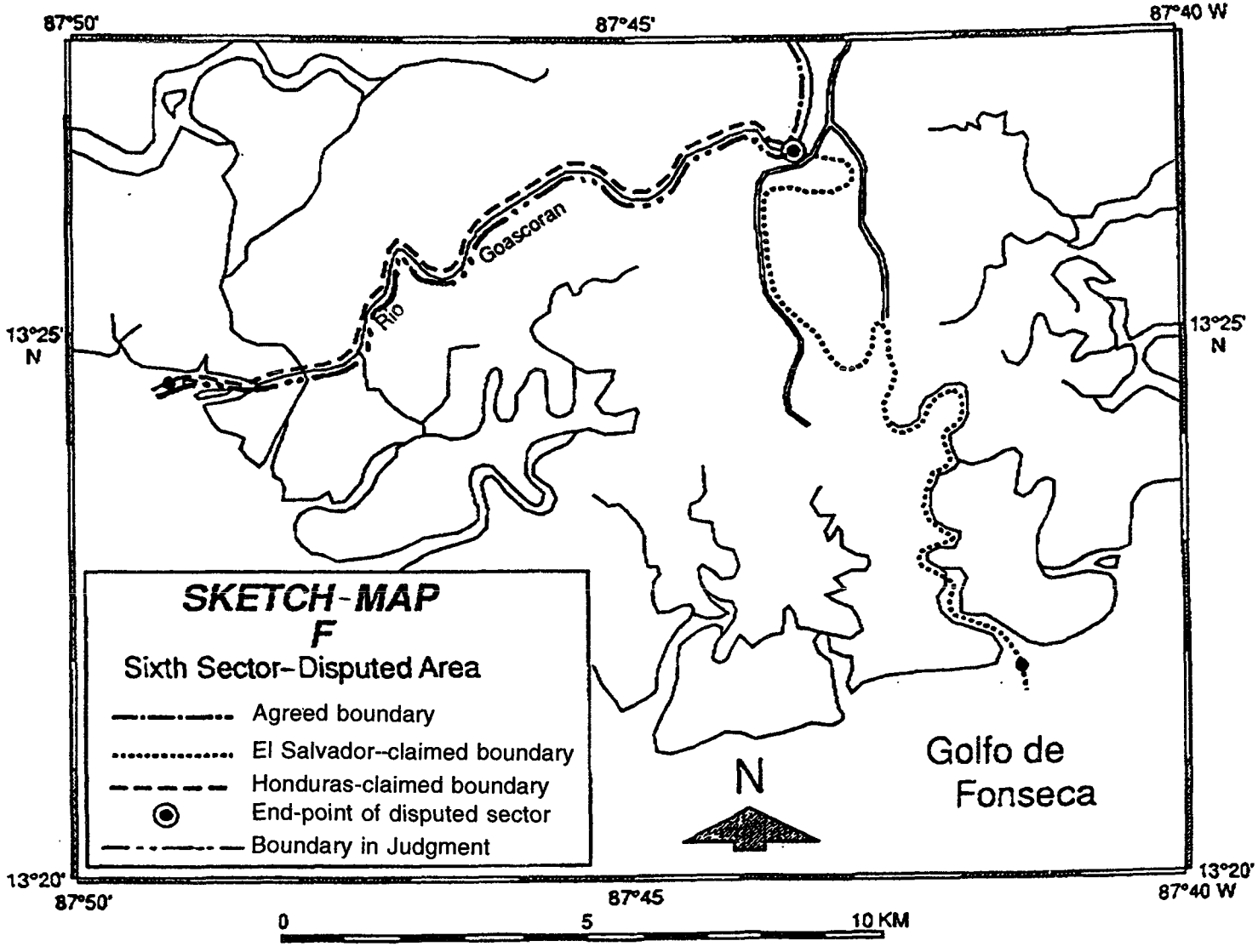
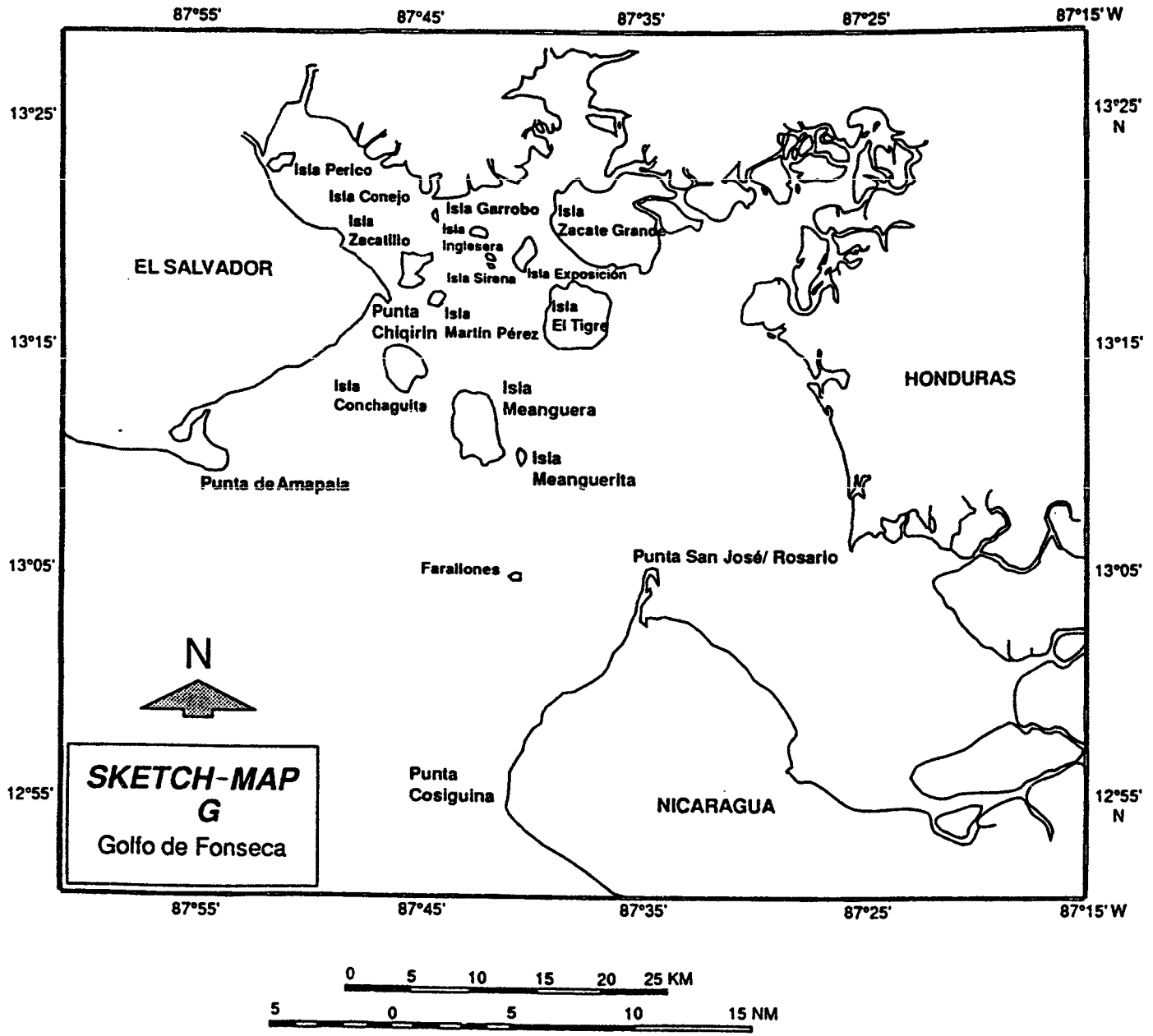

89°10'
89°05' W
N
14°25' N
Q. Copantillo
Río
Cerro Pital
Sumpul
Q. de Poy
Q. Oscura
0
5 KM
14°20'
89°10'
89°05'
SKETCH-MAP
B
Second Sector–Disputed Area
Agreed boundary
El Salvador–claimed boundary
Honduras-claimed boundary
Judgment boundary
End-point of disputed sector


SKETCH-MAP
C
Third Sector - Disputed Area
Agreed boundary
El Salvador--claimed boundary
Honduras-claimed boundary
Judgment boundary
End-point of disputed sector
14°10' N
88°50'
88°45'
88°40' W
14°05'
N
Mojon Pacacio
R. Pacacio
R. Sazalapa
R. Gualsinga
Arcatao
La Virtud
Rio Sumpul
Rio Guaicuquin
Poza Del Cajon
Rio Lempa
0
5
10 KM


SKETCH-MAP
D
Fourth Sector- Disputed Area
Agreed boundary
El Salvador–claimed boundary
Honduras-claimed boundary
Boundary in Judgment
End-point of disputed sector
Rio Negro - Quiagara
Rio San Antonio
San Fernando
Rio Las Canas
Torola
Rio Torola
N
0
5
10 Km
14°00' N
13°56'
88°20' W


87°55'
87°50'
87°45' W
13°55' N
SKETCH-MAP E
Fifth Sector–Disputed Area
Judgment boundary
El Salvador–claimed boundary
Honduras-claimed boundary
End-point of disputed sector
Caliente
R. Agua
Q. Mansupucagua
Aceituno
del Arenal
Río Torola
Río Unire
N
0
5
10 KM


87°50'
87°45'
87°40 W
13°25' N
13°20'
Río Goascoran
SKETCH-MAP F
Sixth Sector–Disputed Area
Agreed boundary
El Salvador--claimed boundary
Honduras-claimed boundary
End-point of disputed sector
Boundary in Judgment
N
Golfo de Fonseca
0
5
10 KM


87°55'
87°45'
87°35'
87°25'
87°15' W
13°25'
13°25' N
13°15'
13°15'
13°05'
13°05'
12°55'
12°55' N
Isla Perico
Isla Conejo
Isla Zacatillo
Isla Garrobo
Isla Inglesera
Isla Zacate Grande
Isla Sirena
Isla Exposición
Isla El Tigre
Punta Chiqirin
Isla Martín Pérez
EL SALVADOR
HONDURAS
Isla Conchaguita
Isla Meanguera
Isla Meanguerita
Punta de Amapala
Farallones
Punta San José/ Rosario
Punta Cosiguina
NICARAGUA
N
SKETCH-MAP G
Golfo de Fonseca
0 5 10 15 20 25 KM
5 0 5 10 15 NM

Declaration of Vice-President Oda

On the subject of Nicaragua's intervention, Judge Oda, in an appended declaration, disputes the Chamber's findings as to its Judgment's lack of binding effect upon the intervening State. Though not a party to the case, Nicaragua will in his view certainly be bound by the Judgment in so far as it relates to the legal situation of the maritime spaces of the Gulf, and he refers in that connection to his views on the general subject of the effects of Judgments on intervening States as expressed in two previous cases.

Judge Oda states that, by his declaration, he does not, however, intend to lend his accord to the Chamber's findings on the maritime spaces dispute, the subject of his dissenting opinion.

Separate opinion of Judge ad hoc *Valticos*

The scope of the uti possidetis juris *principle and the* effectivités

The application of the *uti possidetis juris* principle has given rise to difficulties inasmuch as the rights involved could date back several centuries and it has not been easy to determine those that were relevant in determining the boundaries in question. According to the opinion summarized, in view of the conditions in which and the reasons for which they were granted, the issue of *títulos ejidales* could not be disregarded for purposes of delimiting the boundaries.

Furthermore, the role given to the *effectivités* has been insufficient.

In any event, the care the Chamber has taken to resolve the difficulties it has met is worthy of praise.

Tepangüisir sector. While in various respects the author of the opinion concurs with the views of the Chamber, he believes that the boundary drawn to the west of Talquezalar should have run in a north-westerly direction, towards the Cerro Oscuro, before once again turning downward (in a south-westerly direction towards the tripoint of Montecristo).

Sazalapa-Arcatao sector. The Chamber based itself on various questionable titles, as a result of which it cut back El Salvador's claims excessively, particularly with regard to two protrusions to the north-west and the north-east of the area in question, as well as in the central part, at the level of the so-called Gualcimaca title.

Naguaterique sector. The author of the opinion disagrees with the boundary line drawn by the Chamber along the river Negro-Quiagara. He sets forth his reasons for prefering the Cerro La Ardilla line.

Dolores sector. The 1760 title concerning Poloros should take precedence in this regard and the boundary should run to the north of the river Torola. The difficulty is due to the distances and the area mentioned in the title. The Chamber has therefore decided to grant El Salvador, in this area, a quadrilateral considerably smaller than what that State claimed. But this solution has involved a questionable change in the names of the summits and rivers concerned.

The maritime spaces. Despite the serious objections to which they are open, the author of the opinion feels that the arguments endorsed by the majority of the Chamber are acceptable, regard being had to the special character of the Gulf of Fonseca as a historic bay with three coastal States.

With regard to the various other points (concerning the land, the islands and the waters within the Gulf), the author of the opinion concurs fully with the views of the Chamber.

Separate opinion of Judge ad hoc *Torres Bernárdez*

In his separate opinion, Judge Torres Bernárdez gives the reasons for his overall concurrence with the Judgment of the Chamber and for his having voted for all its operative part, with the exception of the decisions concerning the attribution of sovereignty over the island of Meanguerita and the interpretation of article 2, paragraph 2, of the Special Agreement. Following an introduction underlining the unity of the case as well as its fundamental, although not exclusive, State succession character, the considerations, observations and reservations contained in the opinion are presented under the main headings of the three major aspects of the case, namely, the "land boundary dispute", the "island dispute" and the "maritime dispute".

Judge Torres Bernárdez stresses the importance of the *uti possidetis juris* principle as the fundamental norm applicable to the case, examining in this connection the contents, object and purpose of the *uti possidetis juris* as customarily understood by the Spanish-American republics, and the relationship between that principle and the *effectivités* invoked in the case, as well as the question of the proof of the *uti possidetis juris* principle, the evidentiary value of the *títulos ejidales* submitted by the Parties included. Judge Torres Bernárdez approves the Chamber's general concentration on applying the *uti possidetis juris* principle in the light of the fundamental State succession character of the case and the fact that both Parties are Spanish-American republics. However, article 5 of the Special Agreement does not exclude the application, wherever pertinent, of other rules of international law also binding the Parties. The principle of *consent,* including any consent implied by the conduct of the Parties subsequent to the critical date of 1821, is for Judge Torres Bernárdez one of those rules of international law which also applied in the case in various ways (element of confirmation or interpretation of the 1821 *uti possidetis juris*; establishment of *effectivités* alleged; determination of situations of "acquiescence" or "recognition").

Regarding the *land boundary dispute,* Judge Torres Bernárdez considers the overall results of the application by the Chamber of the law described to the six sectors in dispute to be as a whole satisfactory, having regard to the evidence submitted by the Parties; subject to a few specific reservations, the frontier lines defined for each of those sectors by the Judgment are *de jure* lines by virtue either of the 1821 *uti possidetis juris* or of the consent derived from conduct of the Parties, or of both. His specific reservations concern the line between Talquezalar and Piedra Menuda in the first sector (the question of the Tepangüisir boundary marker and corresponding indentation), the line between Las Lagunetas or Portillo de Las Lagunetas and Poza del Cajón in the third sector (the Gualcuquín or El Amatillo river line) and the Las Cañas river line of the frontier in the fourth sector, particularly the segment of that line running from the Torola lands down to the Mojón of Champate. Judge Torres Bernárdez voted, however, in favour of the frontier lines defined by the Judgment for the six sectors, out of the conviction that those lines are "as a whole" *de jure* lines as requested by the Parties in article 5 of the Special Agreement.

So far as the *island dispute* is concerned, Judge Torres Bernárdez upholds the submission of the Republic of Honduras that Meanguera and Meanguerita were the only *islands in dispute* as between the Parties at the current proceedings. He dissociates himself, therefore, from the finding of the majority that El Tigre was also an island *in dispute*, as well as from the reasoning of the Judgment as to the definition of the *islands in dispute*: both the finding and the reasoning in question are contrary to the stability of international relations and do not correspond to basic tenets of international judicial law. A *non-existing dispute* objection formally submitted by a party has an autonomy of its own, should be determined as a preliminary matter on the basis of the objective grounds provided by the case file as a whole and should not be disposed of by subsuming it into the different matters of the existence of jurisdiction and its exercise. Judge Torres Bernárdez stresses his view that, as a consequence of the approach followed by the majority, the Judgment concludes by stating the obvious, namely, that the island of El Tigre is part of the sovereign territory of the Republic of Honduras. Honduras had not requested the Chamber to pronounce any such "confirmation" of its sovereignty of El Tigre, a sovereignty which was not subject to adjudication, because it had been decided over 170 years ago by the 1821 *uti possidetis juris* as well as by the recognition of the Republic of El Salvador and third Powers over 140 years ago.

As to the islands which he considers to be in dispute, namely, Meanguera and Meanguerita, Judge Torres Bernárdez concurs with the other members of the Chamber in the finding that the island of Meanguera is today part of the sovereign territory of the Republic of El Salvador. The path whereby Judge Torres Bernárdez reaches this conclusion differs, however, from the one followed in the Judgment. In his opinion, the island of Meanguera, as well as the island of Meanguerita, belonged in 1821 to the Republic of Honduras by virtue of the *uti possidetis juris* principle. He considers, therefore, that the inconclusive finding of the Chamber in this respect is not supported by the colonial titles and *effectivités* documented by the Parties. He finds, however, that the 1821 *uti possidetis juris* rights of Honduras in Meanguera were at a certain moment in time (well after the dispute arose in 1854) displaced or eroded in favour of El Salvador as a result of the State *effectivités* established by the latter in and with respect to the island and of the related past conduct of the Republic of Honduras at the relevant time vis-à-vis such *effectivités* and their gradual development. On the other hand, similar State *effectivités* on the part of El Salvador and related past conduct of Honduras being absent in the case of Meanguerita, Judge Torres Bernárdez concludes that the 1821 *uti possidetis juris* must needs prevail in the case of that island. This means that today, as in 1821, sovereignty over Meanguerita belongs to the Republic of Honduras. Judge Torres Bernárdez regrets that the Judgment failed to treat the question of sovereignty over Meanguerita on its own merits, and, having regard to the circumstances of the case, he rejects the applicability to Meanguerita of the concept of "proximity" as well as the thesis of its constituting an "appendage" of Meanguera.

Judge Torres Bernárdez endorses *in toto* the reasoning and conclusions of the Judgment concerning the substantive aspects of the "*maritime dispute*" with respect to both the "particular régime" of the Gulf of Fonseca and its waters and the entitlement of the Republic of Honduras, as well as the Republic of El Salvador and the Republic of Nicaragua, to a territorial sea, continental shelf and exclusive economic zone in the open waters of the Pacific Ocean seaward of the central portion of the closing line of the Gulf of Fonseca as that line is defined in the Judgment, delimitation of those maritime spaces outside the Gulf of Fonseca having to be effected by agreement on the basis of international law. Thus, the rights of the Republic of Honduras as a State participating on a basis of perfect equality with the other two States of the Gulf in the "particular régime" of the Gulf of Fonseca, as well as the status of the Republic of Honduras as a Pacific coastal State, have been fully recognized by the Judgment, which dismisses some arguments advanced at the current proceedings aimed at occluding Honduras at the back of the Gulf.

As to the "particular régime" of the Gulf of Fonseca, Judge Torres Bernárdez underlines, in his opinion, that the Gulf of Fonseca is a "historic bay" to which the Republic of Honduras, the Republic of El Salvador and the Republic of Nicaragua succeeded in 1821 on the occasion of their separation from Spain and their constitution as independent sovereign nations. The "historic" status of the waters of the Gulf of Fonseca was there when the "successorial event" took place. This means, in the opinion of Judge Torres Bernárdez, that the sovereign rights of each and every one of the three republics in the waters of the Gulf cannot be subject to question by any foreign Power. But at the moment when the succession occurred the predecessor State had not—administratively speaking—divided the waters of the historic bay of Fonseca between the territorial jurisdictions of the colonial provinces, or units thereof, which in 1821 formed, respectively, one or another of the three States of the Gulf. Thus, Judge Torres Bernárdez concludes that the Judgment is quite right in declaring that the historic waters of the Gulf which had not been divided by Honduras, El Salvador and Nicaragua subsequent to 1821 continued to be held in sovereignty by the three republics jointly, pending their delimitation.

In this connection, Judge Torres Bernárdez emphasizes that the "joint sovereignty" status of the undivided "historic waters" of the Gulf of Fonseca has, therefore, a "successorial origin" as stated in the Judgment. It is a "joint sovereignty", pending delimitation, which results from the operation of the principles and rules of international law governing succession to territory, the "historic waters" of the Gulf of Fonseca entailing, like any other historic waters, "territorial rights". Judge Torres Bernárdez also stresses that the present Judgment limits itself to *declaring* the legal situation of the waters of the Gulf of Fonseca resulting from the above and subsequent related developments, i.e., to declaring the existing "particular régime" of the Gulf of Fonseca as a "historic bay" in terms of contemporary international law, but without adding elements of any kind to that "particular régime" as it exists at present. The Judgment is not therefore a piece of judicial legislation and should not be read that way at all. Nor is it a Judgment on the interpretation and/or application of the 1917 judgement of the Central American Court of Justice. Conversely, that 1917 judgement is not an element for the interpretation or application of the present Judgment, which stands on its own feet.

By declaring the "particular régime" of the historic bay of Fonseca in terms of the international law in force, and not of the international law in force in 1917 or earlier, the Chamber, according to Judge Torres Bernárdez, has clari-

fied a number of legal issues such as the "internal" character of the waters within the Gulf, the meaning of the 1-marine-league belt of exclusive jurisdiction over them, the "baseline" character of the "closing line" of the Gulf, and the identification of those States which participate as equal partners in the "joint sovereignty" over the undivided waters of the Gulf. The individual elements now composing the "particular régime" of the Gulf of Fonseca declared by the Judgment vary, however, in nature. Some result from the succession, others from subsequent agreement or concurrent conduct (implied consent) of the three nations of the Gulf as independent States. In this respect Judge Torres Bernárdez refers to the "maritime belt" of exclusive sovereignty or jurisdiction—considered by the Judgment as forming part of the "particular régime" of Fonseca—as one of those elements of the "particular régime" which possess a "consensual" origin, pointing out that the scope of the States' present consent to the "maritime belt" had not been pleaded before the Chamber. It follows, in his view, that any problems which might arise concerning entitlement to, delimitation of, location, etc., of "maritime belts" are matters to be solved by agreement among the States of the Gulf.

As to the competence of the Chamber to effect "delimitations"—a question relating to the interpretation of paragraph 2 of article 2 of the Special Agreement on which the Parties were greatly at variance—Judge Torres Bernárdez considers that the issue has become "moot" because of the Judgment's recognition of rights and entitlements of the Republic of Nicaragua within and outside the Gulf. As a result of this supervenient "mootness", Judge Torres Bernárdez, invoking the jurisprudence of the Court, considers that the Judgment should have refrained from making any judicial pronouncement on the said interpretative dispute. As to the substance of this dispute, Judge Torres Bernárdez concludes that the Chamber was competent to effect "delimitations" under article 2, paragraph 2, of the Special Agreement, dissociating himself from the finding to the contrary of the majority of the Chamber.

Lastly, Judge Torres Bernárdez expresses his agreement with the tenor of the declaration appended by Vice-President Oda. In the view of Judge Torres Bernárdez, a non-party State intervening under Article 62 of the Statute—like the Republic of Nicaragua in the current proceedings—is under certain obligations of a kind analogous *mutatis mutandis* to that provided for in Article 63 of the Statute, but the Judgment as such is not *res judicata* for Nicaragua.

Dissenting opinion of Vice-President Oda

In his dissenting opinion, Judge Oda states that, while he is in agreement with the Chamber's findings on the disputes concerning the land frontier and the islands, his understanding of both the contemporary and the traditional law of the sea is greatly at variance with the views underlying the Judgment's pronouncements in regard to the maritime spaces. He considers that the concept of a "pluri-State" bay has no existence as a legal institution and that consequently the Gulf of Fonseca is not a "bay" in the legal sense. Neither was the Chamber right to assume that it belonged to the category of a "historic bay". Instead of its waters being held in joint sovereignty outside a 3-mile coastal belt, as the Chamber holds, they consist of the sum of the territorial seas of each State.

In the contemporary law of the sea, Judge Oda explains, waters adjacent to coasts have to be either "internal waters"—the case of (legal) "bays" or of "historic bays" counting as such—or territorial waters: there is no third possibility (excepting the new concept of archipelagic waters, not applicable in the instant case). But the Chamber has obscured the issue by employing vocabulary extraneous to the past and present law of the sea. Its assessment of the legal status of the maritime spaces thus finds no warrant in that law.

Judge Oda supports his position with a detailed analysis of the development since 1894 of the definition and status of a "bay" in international law, from the early work of the Institut de droit international and International Law Association, to the most recent United Nations Conference on the Law of the Sea, passing through arbitral case-law and the opinions of authoritative writers and rapporteurs.

Judge Oda lists five reasons why full weight should not have been given to the conclusions of the Central American Court of Justice in 1917 to the effect that the waters of the Gulf were subject to a condominium, created by joint inheritance of an area which had constituted a unity previous to the 1821 succession, except for a 3-mile coastal belt under the exclusive sovereignty of the respective riparian States, and he points out the exiguity of the area remaining after deduction of that belt. Indeed, the Central American Court appears to have acted under the influence of a sense prevalent among the three riparian States that the Gulf should not remain open to free use by any other State than themselves, and to have authorized a *sui generis* regime based on a local illusion as to the historical background of law and fact. Yet there is no ground for believing that prior to 1821 or 1839 either Spain or the Federal Republic of Central America had any control in the Gulf beyond the traditional cannon-range from the shore. Both the 1917 judgement and the present Judgment depend on the assumption that the Gulf waters prior to those dates not only formed an undivided bay but lay also *as an entirety* within a single jurisdiction. But at those times there did not exist any concept of a bay as a geographical entity possessing a distinct legal status. Moreover, even if in 1821 or 1839 all the waters of the Gulf did possess unitary status, the natural result of the partition of the coasts among three new territorial sovereigns would have been the inheritance and control by each one separately of its own offshore waters, a solution actually reflected in the acknowledgement of the littoral belt. Judge Oda considers that by endorsing that belt and treating it as "internal waters" the Chamber's Judgment has confused the law of the sea. It similarly relies on a concept now discarded as superfluous when it describes the maritime spaces in the Gulf as "historic waters"; this description had been used on occasion to justify the status either of internal waters or of territorial sea, though not both at once, but the concept had never existed as an independent institution in the law of the sea.

As to the true legal status of the waters of the Gulf of Fonseca, Judge Oda finds that there is no evidence to suggest that, as from the time when the concept of territorial sea emerged in the last century, the claims of the three riparian States to territorial seas in the Gulf differed from their claims off their other coasts, though El Salvador and Honduras eventually legislated for the exercise of police power beyond the 3-mile territorial sea and Nicaragua reportedly took the same position, which received general acceptance. Neither did their attitudes in 1917 feature a

common confidence in rejecting the application to all the Gulf waters of the then prevalent "open seas" doctrine, even if they all preferred that an area covered entirely by their territorial seas and police zones should not remain open to free use by other States—a preference behind their common agreement in the instant proceedings to denominate the Gulf (erroneously) as a "historic bay".

The boundary line drawn by the Honduran/Nicaraguan mixed commission in 1900 demonstrated that at any time the waters of the Gulf could be so divided, though as between El Salvador and Honduras the presence of scattered islands would have complicated the task. Whatever the status of such divided waters may earlier have been, the Gulf of Fonseca must now be deemed entirely covered by the respective territorial seas of the three riparian States, given the universally agreed 12-mile limit and the claims of Latin American States that contributed to its acceptance. No maritime space exists in the Gulf more than 12 miles from any of its coasts.

Beyond establishing the legal status of the waters, the Chamber was not in a position to effect any delimitation. Nevertheless, article 15 of the 1982 United Nations Convention on the Law of the Sea, providing for delimitation, failing agreement, by the equidistance method unless historic title or other special circumstances dictate otherwise, should not be ignored. Judge Oda points out that application of the equidistance method thus remains a rule in the delimitation of the territorial sea, even if that of achieving "an equitable solution" prevails in the delimitation of the economic zone and continental shelf of neighbouring States.

Against that background, Judge Oda considers the right of Honduras within and without the Gulf. Within it, Honduras is in his view not entitled to any claim beyond the meeting-point of the three respective territorial seas. Its title is thus locked within the Gulf. In its decision as to the legal status of the waters, the Chamber seems to have been concerned to ensure the innocent passage of Honduran vessels, but such passage through territorial seas is protected for any State by international law. In any case, the mutual understanding displayed by the three riparian States should enable them to cooperate, in keeping with the provisions on an "enclosed or semi-enclosed sea" in the 1982 Convention.

As for the waters outside the Gulf, Judge Oda cannot accept the Chamber's finding that, since a condominium prevails up to the closing line, Honduras is entitled to a continental shelf or exclusive economic zone in the Pacific. That conclusion flies in the face of a geographical reality such as there can never be any question of completely refashioning. Whether Honduras, which possesses a long Atlantic coastline, can be included in the category of "geographically disadvantaged States" as defined by the 1982 Convention is open to question. This does not, however, rule out the possibility of its being granted the right to fish in the exclusive economic zones of the other two States.

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94. CASE CONCERNING APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE (BOSNIA AND HERZEGOVINA *v.* YUGOSLAVIA (SERBIA AND MONTENEGRO)) (PROVISIONAL MEASURES)

Order of 8 April 1993

In an Order issued in the case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Yugoslavia (Serbia and Montenegro)), the Court called upon Yugoslavia (Serbia and Montenegro) to "immediately . . . take all measures within its power to prevent commission of the crime of genocide". The Court's Order of provisional measures stated that Yugoslavia

> "should in particular ensure that any military, paramilitary or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, do not commit any acts of genocide, of conspiracy to commit genocide, of direct and public incitement to commit genocide, or of complicity in genocide, whether directed against the Muslim population of Bosnia and Herzegovina or against any other national, ethnical, racial or religious group".

The Court also held that neither Party should "aggravate or extend the existing dispute over the prevention or punishment of the crime of genocide, or render it more difficult of solution".

The Court issued these provisional measures in response to a suit initiated by Bosnia and Herzegovina on 20 March 1993. The Court found that it had prima facie jurisdiction to issue its Order under the Convention on the Prevention and Punishment of the Crime of Genocide concluded by the United Nations in 1948, to which Yugoslavia and Bosnia and Herzegovina are parties. The Genocide Convention describes as genocide acts "committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group".

*

* *

The full text of the operative paragraph of the Order reads as follows:

"52. For these reasons,

THE COURT

Indicates, pending its final decision in the proceedings instituted on 20 March 1993 by the Republic of Bosnia and Herzegovina against the Federal Republic of Yugoslavia (Serbia and Montenegro), the following provisional measures:

A. (1) Unanimously,

The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) should immediately, in pursuance of its undertaking in the Convention on the Prevention and Punishment of the Crime of Genocide of

9 December 1948, take all measures within its power to prevent commission of the crime of genocide;

(2) By 13 votes to 1,

The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) should in particular ensure that any military, paramilitary or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, do not commit any acts of genocide, of conspiracy to commit genocide, of direct and public incitement to commit genocide, or of complicity in genocide, whether directed against the Muslim population of Bosnia and Herzegovina or against any other national, ethnical, racial or religious group;

IN FAVOUR: President Sir Robert Jennings; Vice-President Oda; Judges Ago, Schwebel, Bedjaoui, Ni, Evensen, Guillaume, Shahabuddeen, Aguilar Mawdsley, Weeramantry, Ranjeva, Ajibola;

AGAINST: Judge Tarassov;

B. Unanimously,

The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) and the Government of the Republic of Bosnia and Herzegovina should not take any action and should ensure that no action is taken which may aggravate or extend the existing dispute over the prevention or punishment of the crime of genocide, or render it more difficult of solution."

*

* *

Judge Tarassov appended a declaration to the Order.

*

* *

In its Order, the Court recalls that on 20 March 1993 Bosnia and Herzegovina instituted proceedings against Yugoslavia in respect of a dispute concerning alleged violations by Yugoslavia of the Convention on the Prevention and Punishment of the Crime of Genocide. In the Application Bosnia and Herzegovina, basing the jurisdiction of the Court on article IX of the Convention for the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly of the United Nations on 9 December 1948 (hereinafter called "the Genocide Convention"), recounts a series of events in Bosnia and Herzegovina from April 1992 up to the present day which, in its contention, amount to acts of genocide within the definition given in the Genocide Convention and claims that the acts complained of have been committed by former members of the Yugoslav People's Army (YPA) and by Serb military and paramilitary forces under the direction of, at the behest of, and with assistance from Yugoslavia, and that Yugoslavia is therefore fully responsible under international law for their activities.

The Court refers to the submissions of Bosnia and Herzegovina, which requests the Court to adjudge and declare:

"(*a*) That Yugoslavia (Serbia and Montenegro) has breached, and is continuing to breach, its legal obligations towards the people and State of Bosnia and Herzegovina under articles I, II (*a*), II (*b*), II (*c*), II (*d*), III (*a*), III (*b*), III (*c*), III (*d*), III (*e*), IV and V of the Genocide Convention;

(*b*) That Yugoslavia (Serbia and Montenegro) has violated and is continuing to violate its legal obligations toward the people and State of Bosnia and Herzegovina under the four Geneva Conventions of 1949, their Additional Protocol I of 1977, the customary international laws of war including the Hague Regulations on Land Warfare of 1907, and other fundamental principles of international humanitarian law;

(*c*) That Yugoslavia (Serbia and Montenegro) has violated and continues to violate articles 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26 and 28 of the Universal Declaration of Human Rights with respect to the citizens of Bosnia and Herzegovina;

(*d*) That Yugoslavia (Serbia and Montenegro), in breach of its obligations under general and customary international law, has killed, murdered, wounded, raped, robbed, tortured, kidnapped, illegally detained and exterminated the citizens of Bosnia and Herzegovina, and is continuing to do so;

(*e*) That in its treatment of the citizens of Bosnia and Herzegovina, Yugoslavia (Serbia and Montenegro) has violated, and is continuing to violate, its solemn obligations under Articles 1 (3), 55 and 56 of the Charter of the United Nations;

(*f*) That Yugoslavia (Serbia and Montenegro) has used and is continuing to use force and the threat of force against Bosnia and Herzegovina in violation of Articles 2 (1), 2 (2), 2 (3), 2 (4) and 33 (1) of the Charter of the United Nations;

(*g*) That Yugoslavia (Serbia and Montenegro), in breach of its obligations under general and customary international law, has used and is using force and the threat of force against Bosnia and Herzegovina;

(*h*) That Yugoslavia (Serbia and Montenegro), in breach of its obligations under general and customary international law, has violated and is violating the sovereignty of Bosnia and Herzegovina by:

—armed attacks against Bosnia and Herzegovina by air and land;

—aerial trespass into Bosnian airspace;

—efforts by direct and indirect means to coerce and intimidate the Government of Bosnia and Herzegovina;

(*i*) That Yugoslavia (Serbia and Montenegro), in breach of its obligations under general and customary international law, has intervened and is intervening in the internal affairs of Bosnia and Herzegovina;

(*j*) That Yugoslavia (Serbia and Montenegro), in recruiting, training, arming, equipping, financing, supplying and otherwise encouraging, supporting, aiding, and directing military and paramilitary actions in and against Bosnia and Herzegovina by means of its agents and surrogates, has violated and is violating its express charter and treaty obligations to Bosnia and Herzegovina and, in particular, its charter and treaty obligations under Article 2 (4) of the Charter of the United Nations, as well as its obligations under general and customary international law;

(*k*) That under the circumstances set forth above, Bosnia and Herzegovina has the sovereign right to defend itself and its people under Article 51 of the Charter and customary international law, including by means of immediately obtaining military weapons, equipment, supplies and troops from other States;

(*l*) That under the circumstances set forth above, Bosnia and Herzegovina has the sovereign right under

Article 51 of the Charter and customary international law to request the immediate assistance of any State to come to its defence, including by military means (weapons, equipment supplies, troops, etc.);

(*m*) That Security Council resolution 713 (1991), imposing a weapons embargo upon the former Yugoslavia, must be construed in a manner that shall not impair the inherent right of individual or collective self-defence of Bosnia and Herzegovina under the terms of Article 51 of the Charter and the rules of customary international law;

(*n*) That all subsequent Security Council resolutions that refer to or reaffirm resolution 713 (1991) must be construed in a manner that shall not impair the inherent right of individual or collective self-defence of Bosnia and Herzegovina under the terms of Article 51 of the Charter and the rules of customary international law;

(*o*) That Security Council resolution 713 (1991) and all subsequent Security Council resolutions referring thereto or reaffirming thereof must not be construed to impose an arms embargo upon Bosnia and Herzegovina, as required by Articles 24 (1) and 51 of the Charter and in accordance with the customary doctrine of *ultra vires*;

(*p*) That pursuant to the right of collective self-defence recognized by Article 51 of the Charter, all other States parties to the Charter have the right to come to the immediate defence of Bosnia and Herzegovina—at its request—including by means of immediately providing it with weapons, military equipment and supplies, and armed forces (soldiers, sailors, airpeople, etc.);

(*q*) That Yugoslavia (Serbia and Montenegro) and its agents and surrogates are under an obligation to cease and desist immediately from its breaches of the foregoing legal obligations, and is under a particular duty to cease and desist immediately:

—from its systematic practice of so-called 'ethnic cleansing' of the citizens and sovereign territory of Bosnia and Herzegovina;

—from the murder, summary execution, torture, rape, kidnapping, mayhem, wounding, physical and mental abuse, and detention of the citizens of Bosnia and Herzegovina;

—from the wanton devastation of villages, towns, districts, cities, and religious institutions in Bosnia and Herzegovina;

—from the bombardment of civilian population centres in Bosnia and Herzegovina, and especially its capital, Sarajevo;

—from continuing the siege of any civilian population centres in Bosnia and Herzegovina, and especially its capital, Sarajevo;

—from the starvation of the civilian population in Bosnia and Herzegovina;

—from the interruption of, interference with, or harassment of humanitarian relief supplies to the citizens of Bosnia and Herzegovina by the international community;

—from all use of force—whether direct or indirect, overt or covert—against Bosnia and Herzegovina, and from all threats of force against Bosnia and Herzegovina;

—from all violations of the sovereignty, territorial integrity or political independence of Bosnia and Herzegovina, including all intervention, direct or indirect, in the internal affairs of Bosnia and Herzegovina;

—from all support of any kind—including the provision of training, arms, ammunition, finances, supplies, assistance, direction or any other form of support—to any nation, group, organization, movement or individual engaged or planning to engage in military or paramilitary actions in or against Bosnia and Herzegovina;

(*r*) That Yugoslavia (Serbia and Montenegro) has an obligation to pay Bosnia and Herzegovina, in its own right and as *parens patriae* for its citizens, reparations for damages to persons and property as well as to the Bosnian economy and environment caused by the foregoing violations of international law in a sum to be determined by the Court. Bosnia and Herzegovina reserves the right to introduce to the Court a precise evaluation of the damages caused by Yugoslavia (Serbia and Montenegro)".

The Court further refers to the request made by Bosnia and Herzegovina (also on 20 March 1993) for the indication of the following provisional measures:

"1. That Yugoslavia (Serbia and Montenegro), together with its agents and surrogates in Bosnia and elsewhere, must immediately cease and desist from all acts of genocide and genocidal acts against the people and State of Bosnia and Herzegovina, including but not limited to murder; summary executions; torture; rape; mayhem; so-called 'ethnic cleansing'; the wanton devastation of villages, towns, districts and cities; the siege of villages, towns, districts and cities; the starvation of the civilian population; the interruption of, interference with, or harassment of humanitarian relief supplies to the civilian population by the international community; the bombardment of civilian population centres; and the detention of civilians in concentration camps or otherwise;

2. That Yugoslavia (Serbia and Montenegro) must immediately cease and desist from providing, directly or indirectly, any type of support—including training, weapons, arms, ammunition, supplies, assistance, finances, direction or any other form of support—to any nation, group, organization, movement, militia or individual engaged in or planning to engage in military or paramilitary activities in or against the people, State and Government of Bosnia and Herzegovina;

3. That Yugoslavia (Serbia and Montenegro) itself must immediately cease and desist from any and all types of military or paramilitary activities by its own officials, agents, surrogates, or forces in or against the people, State and Government of Bosnia and Herzegovina, and from any other use or threat of force in its relations with Bosnia and Herzegovina;

4. That under the current circumstances, the Government of Bosnia and Herzegovina has the right to seek and receive support from other States in order to defend itself and its people, including by means of immediately obtaining military weapons, equipment and supplies;

5. That under the current circumstances, the Government of Bosnia and Herzegovina has the right to request the immediate assistance of any State to come to its defence, including by means of immediately providing weapons, military equipment and supplies, and armed forces (soldiers, sailors, airpeople, etc.);

6. That under the current circumstances, any State has the right to come to the immediate defence of Bosnia and Herzegovina—at its request—including by means of immediately providing weapons, military equipment and supplies, and armed forces (soldiers, sailors, and airpeople, etc.)".

The Court also refers to the recommendation by Yugoslavia (in written observations on the request for provisional measures, submitted on 1 April 1993) that the Court order the application of the following provisional measures:

"—to instruct the authorities controlled by A. Izetbegovic to comply strictly with the latest agreement on a cease-fire in the 'Republic of Bosnia and Herzegovina' which went into force on 28 March 1993;

—to direct the authorities under the control of A. Izetbegovic to respect the Geneva Conventions for the Protection of Victims of War of 1949 and the 1977 Additional Protocols thereof, since the genocide of Serbs living in the 'Republic of Bosnia and Herzegovina' is being carried out by the commission of very serious war crimes which are in violation of the obligation not to infringe upon the essential human rights;

—to instruct the authorities loyal to A. Izetbegovic to close immediately and disband all prisons and detention camps in the 'Republic of Bosnia and Herzegovina' in which the Serbs are being detained because of their ethnic origin and subjected to acts of torture, thus presenting a real danger for their life and health;

—to direct the authorities controlled by A. Izetbegovic to allow, without delay, the Serb residents to leave safely Tuzla, Zenica, Sarajevo and other places in the 'Republic of Bosnia and Herzegovina', where they have been subject to harassment and physical and mental abuse, and having in mind that they may suffer the same fate as the Serbs in eastern Bosnia, which was the site of the killing and massacres of a few thousand Serb civilians;

—to instruct the authorities loyal to A. Izetbegovic to cease immediately any further destruction of Orthodox churches and places of worship and of other Serb cultural heritage, and to release and stop further mistreatment of all Orthodox priests being in prison;

—to direct the authorities under the control of A. Izetbegovic to put an end to all acts of discrimination based on nationality or religion and the practice of 'ethnic cleansing', including the discrimination relating to the delivery of humanitarian aid, against the Serb population in the 'Republic of Bosnia and Herzegovina'."

Oral observations were presented by the Parties at public hearings held on 1 and 2 April 1993.

The Court begins by considering Yugoslavia's claim in its written observations that the legitimacy and mandate of the Government and the President of Bosnia and Herzegovina are disputed. The Court observes that the Agent of Bosnia and Herzegovina stated that President Izetbegovic is recognized by the United Nations as the legitimate Head of State of the Republic of Bosnia and Herzegovina; that the Court has been seised of the case on the authority of a Head of State, treated as such in the United Nations; that the power of a Head of State to act on behalf of the State in its international relations is universally recognized; and that accordingly the Court may, for the purposes of the present proceedings on a request for provisional measures, accept the seisin as the act of that State.

Turning to the question of jurisdiction, the Court recalls that it ought not to indicate provisional measures unless the provisions invoked by the Applicant or found in the Statute appear, prima facie, to afford a basis on which the jurisdiction of the Court might be established; and that this consideration embraces jurisdiction both *ratione personae* and *ratione materiae*.

The Court then refers to the indication by Bosnia and Herzegovina in the Application that the "continuity" of Yugoslavia with the former Socialist Federal Republic of Yugoslavia, a Member of the United Nations, has been contested by the entire international community, including the United Nations Security Council (cf. resolution 777 (1992)) and General Assembly (cf. resolution 47/1). After citing the texts of the above-mentioned resolutions of the Security Council and General Assembly, as well as the text of a letter from the Legal Counsel of the United Nations to the Permanent Representatives to the United Nations of Bosnia and Herzegovina and Croatia, which contains the "considered view of the United Nations Secretariat regarding the practical consequences of the adoption by the General Assembly of resolution 47/1", and noting that the solution adopted therein is not free from legal difficulties, the Court observes that the question whether or not Yugoslavia is a Member of the United Nations and as such a party to the Statute of the Court is one which the Court does not need to determine at the present stage of the proceedings. Article 35 of the Statute, after providing that the Court shall be open to the parties to the Statute, continues:

"2. The conditions under which the Court shall be open to other States shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council, but in no case shall such conditions place the parties in a position of inequality before the Court."

The Court therefore considers that proceedings may validly be instituted by a State against a State which is a party to such a special provision in a treaty in force, but is not party to the Statute, and independently of the conditions laid down by the Security Council; that a compromissory clause in a multilateral convention, such as article IX of the Genocide Convention, relied on by Bosnia and Herzegovina in the present case, in the view of the Court, can be regarded prima facie as such a "special provision"; that accordingly if Bosnia and Herzegovina and Yugoslavia are both parties to the Genocide Convention, disputes to which article IX applies are in any event prima facie within the jurisdiction *ratione personae* of the Court.

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The Court then turns to the consideration of its jurisdiction *ratione materiae*; article IX of the Genocide Convention, upon which Bosnia and Herzegovina in its Application claims to found the jurisdiction of the Court, provides that

"Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."

The Court observes that the former Socialist Federal Republic of Yugoslavia signed the Genocide Convention on 11 December 1948, and deposited an instrument of ratification, without reservation, on 29 August 1950; and that both Parties to the present case correspond to parts of

the territory of the former Socialist Federal Republic of Yugoslavia.

The Court proceeds to consider two instruments: a declaration whereby (the present) Yugoslavia, on 27 April 1992, proclaimed its intention to honour the international treaties of the former Yugoslavia, and a "Notice of Succession" to the Genocide Convention deposited by Bosnia and Herzegovina on 29 December 1992. Yugoslavia contended that Bosnia and Herzegovina should be held to have acceded (not succeeded) to the Convention with effect, under article XI thereof, only as from the ninetieth day following the deposit of its instrument, so that the Court would possess jurisdiction, if at all, only subject to a temporal limitation. The Court, however, considers it unnecessary to pronounce upon this contention in deciding whether to indicate provisional measures, when it is concerned not so much with the past as with the present and future. On the basis of the two instruments the Court finds that article IX of the Genocide Convention appears to afford a basis on which the jurisdiction of the Court might be founded to the extent that the subject-matter of the dispute relates to "the interpretation, application or fulfilment" of the Convention, including disputes "relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III" of the Convention.

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Having further examined a document which in Bosnia and Herzegovina's submission constituted an additional basis of jurisdiction of the Court in this case, namely a letter, dated 8 June 1992, addressed to the President of the Arbitration Commission of the International Conference on the former Yugoslavia by the President of the Republic of Montenegro and the President of the Republic of Serbia, the Court finds itself unable to regard that letter as constituting a prima facie basis of jurisdiction in the present case and must proceed therefore on the basis only that it has prima facie jurisdiction, both *ratione personae* and *ratione materiae*, under article IX of the Genocide Convention.

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With regard to its jurisdiction, the Court finally observes that the objection by Yugoslavia to the effect that "it would be premature and inappropriate for the Court to indicate provisional measures" while the Security Council is acting in the matter under Article 25 and Chapter VII of the Charter is primarily addressed to those measures which go beyond matters within the scope of the Genocide Convention and which for that reason the Court cannot consider. It recalls that in any event the Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions, and that both organs can therefore perform their separate but complementary functions with respect to the same events.

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After summing up the rights which Bosnia and Herzegovina and Yugoslavia seek to have protected by the indication of provisional measures, the Court observes that it is confined to the consideration of such rights under the Genocide Convention as might form the subject-matter of a Judgment of the Court in the exercise of its jurisdiction under article IX of that Convention.

The Court notes that the Applicant claims that acts of genocide have been committed, and will continue to be committed, against, in particular, the Muslim inhabitants of Bosnia and Herzegovina and that the facts stated in the Application show that Yugoslavia is committing acts of genocide, both directly and by means of its agents and surrogates, and that there is no reason to believe that Yugoslavia will voluntarily desist from this course of conduct while the case is pending before the Court; and that the Respondent observes that the situation is not one of aggression by one State against another, but a civil war, and that Yugoslavia has not committed any acts of genocide, at the same time requesting the Court "to establish the responsibility of the authorities" of Bosnia and Herzegovina for acts of genocide against the Serb people in Bosnia and Herzegovina.

The Court observes that, pursuant to article I of the Genocide Convention, all parties to that Convention have undertaken "to prevent and to punish" the crime of genocide; and that in the view of the Court, in the circumstances brought to its attention and outlined above in which there is a grave risk of acts of genocide being committed, Yugoslavia and Bosnia and Herzegovina, whether or not any such acts in the past may be legally imputable to them, are under a clear obligation to do all in their power to prevent the commission of any such acts in the future.

The Court further observes that, in the context of the present proceedings on a request for provisional measures, it cannot make definitive findings of fact or of imputability and that it is not called upon now to establish the existence of breaches of the Genocide Convention by either Party, but to determine whether the circumstances require the indication of provisional measures to be taken by the Parties for the protection of rights under the Genocide Convention. The Court then finds that it is satisfied, taking into account the obligation imposed by article I of the Genocide Convention, that the indication of measures is required for the protection of such rights.

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From the information available to it, the Court is also satisfied that there is a grave risk of action being taken which may aggravate the existing dispute or render it more difficult of solution. The Court furthermore re-echoes the words of the General Assembly which it had already cited in 1951, to the effect that the crime of genocide "shocks the conscience of mankind, results in great losses to humanity . . . and is contrary to moral law and to the spirit and aims of the United Nations".

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The Court finally observes that the decision given in the present proceedings in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the merits themselves, and leaves unaffected the right of the Governments of Bosnia and Herzegovina and Yugoslavia to submit arguments in respect of such jurisdiction or such merits.

Declaration of Judge Tarassov

Judge Tarassov supports the provisional measures indicated by the Court in paragraph 52 A (1) and paragraph 52 B of its Order. He is, however, of the opinion that the Court should have indicated the same measures in respect of Bosnia and Herzegovina as it has done in respect of Yugoslavia in the above-mentioned paragraph 52 A (1).

To his regret, he is unable to vote in favour of paragraph 52 A (2) of the Order, for three reasons: first, because the provisions thereof are very close to a prejudgment of the merits in that they are open to the interpretation that Yugoslavia is indeed, or at least may very well be, involved in acts of genocide; second, because of the lack of balance in these provisions which single out one element of the population of Bosnia and Herzegovina for protection; and third, because of the impracticability of what is demanded from Yugoslavia; in this last respect the Court should not imply that Yugoslavia may have responsibility for the commission of acts which in fact may be beyond its control.

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95. CASE CONCERNING MARITIME DELIMITATION IN THE AREA BETWEEN GREENLAND AND JAN MAYEN (DENMARK *v.* NORWAY)

Judgment of 14 June 1993

In its Judgment on the case concerning Maritime Delimitation in the Area between Greenland and Jan Mayen, the Court, by 14 votes to 1, fixed a delimitation line for both the continental shelf and the fishery zones of Denmark and of Norway in the area between Greenland and Jan Mayen.

The Court was composed as follows: President Sir Robert Jennings; Vice-President Oda; Judges Ago, Schwebel, Bedjaoui, Ni, Evensen, Tarassov, Guillaume, Shahabuddeen, Aguilar Mawdsley, Weeramantry, Ranjeva, Ajibola; Judge *ad hoc* Fischer; Registrar Valencia-Ospina.

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The full text of the operative paragraph is as follows:

"94. *For these reasons,*

THE COURT,

By fourteen votes to one,

Decides that, within the limits defined

1. to the north by the intersection of the line of equidistance between the coasts of Eastern Greenland and the western coasts of Jan Mayen with the 200-mile limit calculated as from the said coasts of Greenland, indicated on sketch-map No. 2 as point A, and

2. to the south, by the 200-mile limit around Iceland, as claimed by Iceland, between the points of intersection of that limit with the two said lines, indicated on sketch-map No. 2 as points B and D,

the delimitation line that divides the continental shelf and fishery zones of the Kingdom of Denmark and the Kingdom of Norway is to be drawn as set out in paragraphs 91 and 92 of the present Judgment.

IN FAVOUR: President Sir Robert Jennings; Vice-President Oda; Judges Ago, Schwebel, Bedjaoui, Ni, Evensen, Tarassov, Guillaume, Shahabuddeen, Aguilar Mawdsley, Weeramantry, Ranjeva, Ajibola;

AGAINST: Judge *ad hoc* Fischer."

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Vice-President Oda and Judges Evensen, Aguilar Mawdsley and Ranjeva appended declarations to the Judgment of the Court.

Vice-President Oda and Judges Schwebel, Shahabuddeen, Weeramantry and Ajibola appended separate opinions to the Judgment of the Court.

Judge *ad hoc* Fischer appended a dissenting opinion to the Judgment of the Court.

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Review of the proceedings and summary of facts
(paras. 1-21)

The Court outlines the successive stages of the proceedings as from the date the case was brought before it (paras. 1-8) and sets out the submissions of the Parties (paras. 9-10). It recalls that Denmark, instituting proceedings on 16 August 1988, had asked the Court

"to decide, in accordance with international law, where a single line of delimitation shall be drawn between Denmark's and Norway's fishing zones and continental shelf areas in the waters between Greenland and Jan Mayen";

and had, in the course of the proceedings, made the following submissions:

"To adjudge and declare that Greenland is entitled to a full 200-mile fishery zone and continental shelf area vis-à-vis the island of Jan Mayen; and consequently

To draw a single line of delimitation of the fishing zone and continental shelf area of Greenland in the waters between Greenland and Jan Mayen at a distance of 200 nautical miles measured from Greenland's baseline."

"If the Court, for any reason, does not find it possible to draw the line of delimitation requested in paragraph (2), Denmark requests the Court to decide, in accordance with international law and in the light of the facts and arguments developed by the Parties, where the line of delimitation shall be drawn between Denmark's and Norway's fisheries zones and continental shelf areas in the waters between Greenland and Jan Mayen, and to draw that line."

and that Norway had asked the Court to adjudge and declare that the median line constituted the boundary for the purposes of delimitation of the relevant areas of both the continental shelf and the fisheries zone between Norway and Denmark in the region between Jan Mayen and

Greenland. The Court then describes the maritime areas, which have featured in the arguments of the Parties (paras. 11-21).

The contention that a delimitation already exists
(paras. 22-40)

A principal contention of Norway is that a delimitation has already been established between Jan Mayen and Greenland. The effect of treaties in force between the Parties—a bilateral Agreement of 1965 and the 1958 Geneva Convention on the Continental Shelf—has been, according to Norway, to establish the median line as the boundary of the continental shelf of the Parties, and the practice of the Parties in respect of fishery zones has represented a recognition of existing continental shelf boundaries as being also applicable to the exercise of fisheries jurisdiction. These contentions, that the applicability of a median line delimitation in the relations between the Parties has long been recognized in the context both of the continental shelf and of fishery zones and that a boundary is already in place, will need to be examined first.

The 1965 Agreement
(paras. 23-30)

On 8 December 1965, Denmark and Norway concluded an Agreement concerning the delimitation of the continental shelf. Article 1 of that Agreement reads:

> "The boundary between those parts of the continental shelf over which Norway and Denmark respectively exercise sovereign rights shall be the median line which at every point is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each Contracting Party is measured."

Article 2 provides that "in order that the principle set forth in article 1 may be properly applied, the boundary shall consist of straight lines" which are then defined by eight points, enumerated with the relevant geodetic coordinates and as indicated on the chart thereto annexed; the lines so defined lie in the Skagerrak and part of the North Sea, between the mainland territories of Denmark and Norway. Norway contends that the text of article 1 is general in scope, unqualified and without reservation, and that the natural meaning of that text must be "to establish definitively the basis for all boundaries which would eventually fall to be demarcated" between the Parties. In its view article 2, which admittedly relates only to the continental shelves of the two mainlands, "is concerned with *demarcation*". Norway deduces that the Parties are and remain committed to the median line principle of the 1965 Agreement. Denmark on the other hand argues that the Agreement is not of such general application and that its object and purpose is solely the delimitation in the Skagerrak and part of the North Sea on a median line basis.

The Court considers that the object and purpose of the 1965 Agreement was to provide simply for the question of the delimitation in the Skagerrak and part of the North Sea, where the whole seabed (with the exception of the "Norwegian Trough") consists of continental shelf at a depth of less than 200 metres, and that there is nothing to suggest that the Parties had in mind the possibility that a shelf boundary between Greenland and Jan Mayen might one day be required, or intended that their Agreement should apply to such a boundary.

After examining the Agreement in its context, in the light of its object and purpose, the Court also takes into account the subsequent practice of the Parties, especially a subsequent treaty in the same field concluded in 1979. It considers that if the intention of the 1965 Agreement had been to commit the Parties to the median line in all ensuing shelf delimitations, it would have been referred to in the 1979 Agreement. The Court is thus of the view that the 1965 Agreement did not result in a median line delimitation of the continental shelf between Greenland and Jan Mayen.

The 1958 Geneva Convention on the Continental Shelf
(paras. 31-32)

The validity of the argument that the 1958 Convention resulted in a median line continental shelf boundary already "in place" between Greenland and Jan Mayen is found to depend on whether the Court finds that there are "special circumstances" as contemplated by the Convention, a question to be dealt with later. The Court therefore turns to the arguments which Norway bases upon the conduct of the Parties and of Denmark in particular.

Conduct of the Parties
(paras. 33-40)

Norway contends that, up to some ten years ago at least, the Parties by their "conjoint conduct" had long recognized the applicability of a median line delimitation in their mutual relations. The Court observes that it is the conduct of Denmark which has primarily to be examined in this connection.

The Court is not persuaded that a Danish Decree of 7 June 1963 concerning the Exercise of Danish Sovereignty over the Continental Shelf supports the argument which Norway seeks to base on conduct. Nor does a Danish Act of 17 December 1976 or an Executive Order of 14 May 1980, issued pursuant to that Act, commit Denmark to acceptance of a median line boundary in the area. An Agreement of 15 June 1979 between the Parties concerning the delimitation between Norway and the Faroe Islands does not commit Denmark to a median line boundary in a quite different area. Danish statements made in the course of diplomatic contacts and during the Third United Nations Conference on the Law of the Sea had also not prejudiced Denmark's position.

Summing up, the Court concludes that the Agreement entered into between the Parties on 8 December 1965 cannot be interpreted to mean, as contended by Norway, that the Parties have already defined the continental shelf boundary as the median line between Greenland and Jan Mayen. Nor can the Court attribute such an effect to the provision of article 6, paragraph 1, of the 1958 Convention, so as to conclude that by virtue of that Convention the median line is already the continental shelf boundary between Greenland and Jan Mayen. Nor can such a result be deduced from the conduct of the Parties concerning the continental shelf boundary and the fishery zone. In consequence, the Court does not consider that a median line boundary is already "in place", either as the continental shelf boundary, or as that of the fishery zone. The Court therefore proceeds to examine the law applicable at present to the delimitation question still outstanding between the Parties.

The applicable law
(paras. 41-48)

The Court notes that the Parties differ on the question whether what is required is one delimitation line or two lines, Denmark asking for "a single line of delimitation of the fishery zone and continental shelf area", and Norway contending that the median line constitutes the boundary for delimitation of the continental shelf, and constitutes also the boundary for the delimitation of the fishery zone, i.e., that the two lines would coincide, but the two boundaries would remain conceptually distinct.

The Court refers to the Gulf of Maine case in which it was asked what was "the course of the single maritime boundary that divides the continental shelf and fishery zones of Canada and the United States of America". It observes that in the present case it is not empowered—or constrained—by any agreement for a single dual-purpose boundary and that it has already found that there is not a continental shelf boundary already in place. It therefore goes on to examine separately the two strands of the applicable law: the effect of article 6 of the 1958 Convention if applied at the present time to the delimitation of the continental shelf boundary, and then the effect of the application of the customary law which governs the fishery zone.

The Court further observes that the applicability of the 1958 Convention to the continental shelf delimitation in this case does not mean that article 6 of that Convention can be interpreted and applied either without reference to customary law on the subject, or wholly independently of the fact that a fishery zone boundary is also in question in these waters. After examining the case-law in this field and the provisions of the 1982 United Nations Convention on the Law of the Sea, the Court notes that the statement (in those provisions) of an "equitable solution" as the aim of any delimitation process reflects the requirements of customary law as regards the delimitation both of continental shelf and of exclusive economic zones.

The provisional median line
(paras. 49-52)

Turning first to the delimitation of the continental shelf, the Court finds that it is appropriate, both on the basis of article 6 of the 1958 Convention and on the basis of customary law concerning the continental shelf, to begin with the median line as a provisional line and then to ask whether "special circumstances" require any adjustment or shifting of that line. After subsequent examination of the relevant precedents with regard to the delimitation of the fishery zones, it appears to the Court that, both for the continental shelf and for the fishery zones in this case, it is proper to begin the process of delimitation by a median line provisionally drawn.

"Special circumstances" and "relevant circumstances"
(paras. 54-58)

The Court then observes that it is called upon to examine every particular factor of the case which might suggest an adjustment or shifting of the median line provisionally drawn. The aim in each and every situation must be to achieve "an equitable result". From this standpoint, the 1958 Convention requires the investigation of any "special circumstances"; the customary law based upon equitable principles, on the other hand, requires the investigation of "relevant circumstances".

The concept of "special circumstances" was included in the 1958 Geneva Conventions on the Territorial Sea and the Contiguous Zone (art. 12) and on the Continental Shelf (art. 6, paras. 1 and 2). It was and remains linked to the equidistance method there contemplated. It is thus apparent that special circumstances are those circumstances which might distort the result produced by an unqualified application of the equidistance principle. General international law has employed the concept of "relevant circumstances". This concept can be defined as a fact necessary to be taken into account, in the delimitation process, to the extent that it affects the rights of the Parties over certain maritime areas. Although it is a matter of categories which are different in origin and in name, there is inevitably a tendency towards assimilation between the special circumstances of article 6 of the 1958 Convention and the relevant circumstances under customary law, and this if only because they both are intended to enable the achievement of an equitable result. This must be especially true in the case of opposite coasts where, as has been seen, the tendency of customary law, like the terms of article 6, has been to postulate the median line as leading prima facie to an equitable result.

The Court then turns to the question whether the circumstances of the present case require adjustment or shifting of that line, taking into account the arguments relied on by Norway to justify the median line, and the circumstances invoked by Denmark as justifying the 200-mile line.

Disparity of length of coasts
(paras. 61-71)

A first factor of a geophysical character, and one which has featured most prominently in the argument of Denmark, in regard to both continental shelf and fishery zone, is the disparity or disproportion between the lengths of the "relevant coasts".

Prima facie, a median line delimitation between opposite coasts results in general in an equitable solution, particularly if the coasts in question are nearly parallel. There are, however, situations—and the present case is one such—in which the relationship between the length of the relevant coasts, and the maritime areas generated by them by application of the equidistance method, is so disproportionate that it has been found necessary to take this circumstance into account in order to ensure an equitable solution.

In the light of the existing case-law, the Court comes to the conclusion that the striking difference in length of the relevant coasts in this case (which had been calculated as approximately 9 (for Greenland) to 1 (for Jan Mayen)) constitutes a special circumstance within the meaning of article 6, paragraph 1, of the 1958 Convention. Similarly, as regards the fishery zones, the Court is of the opinion that the application of the median line leads to manifestly inequitable results.

It follows that, in the light of the disparity of coastal lengths, the median line should be adjusted or shifted in such a way as to effect a delimitation closer to the coast of Jan Mayen. It should, however, be made clear that taking account of the disparity of coastal lengths does not mean a direct and mathematical application of the relationship between the length of the coastal front of eastern Greenland and that of Jan Mayen. Nor do the circumstances require the Court to uphold the claim of Denmark that the boundary line should be drawn 200 miles from the base-

lines on the coast of eastern Greenland, i.e., a delimitation giving Denmark maximum extension of its claim to continental shelf and fishery zone. The result of such a delimitation would be to leave to Norway merely the residual part of the "area relevant to the delimitation dispute" as defined by Denmark. The delimitation according to the 200-mile line calculated from the coasts of eastern Greenland may from a mathematical perspective seem more equitable than that effected on the basis of the median line, regard being had to the disparity in coastal lengths; but this does not mean that the result is equitable in itself, which is the objective of every maritime delimitation based on law. The Court observes in this respect that the coast of Jan Mayen, no less than that of eastern Greenland, generates potential title to the maritime areas recognized by customary law, i.e., in principle up to a limit of 200 miles from its baselines. To attribute to Norway merely the residual area left after giving full effect to the eastern coast of Greenland would run wholly counter to the rights of Jan Mayen and also to the demands of equity.

At this stage of its analysis, the Court thus considers that neither the median line nor the 200-mile line calculated from the coasts of eastern Greenland in the relevant area should be adopted as the boundary of the continental shelf or of the fishery zone. It follows that the boundary line must be situated between these two lines described above, and located in such a way that the solution obtained is justified by the special circumstances confronted by the 1958 Convention on the Continental Shelf, and equitable on the basis of the principles and rules of customary international law. The Court will therefore next consider what other circumstances may also affect the position of the boundary line.

Access to resources
(paras. 72-78)

The Court then turns to the question whether access to the resources of the area of overlapping claims constitutes a factor relevant to the delimitation. The Parties are essentially in conflict over access to fishery resources, the principal exploited fishery resource being capelin. The Court has therefore to consider whether any shifting or adjustment of the median line, as fishery zone boundary, would be required to ensure equitable access to the capelin fishery resources.

It appears to the Court that the seasonal migration of the capelin presents a pattern which, north of the 200-mile line claimed by Iceland, may be said to centre on the southern part of the area of overlapping claims, approximately between that line and the parallel of 72° north latitude, and that the delimitation of the fishery zone should reflect this fact. It is clear that no delimitation in the area could guarantee to each Party the presence in every year of fishable quantities of capelin in the zone allotted to it by the line. It appears, however, to the Court that the median line is too far to the west for Denmark to be assured of an equitable access to the capelin stock, since it would attribute to Norway the whole of the area of overlapping claims. For this reason also the median line thus requires to be adjusted or shifted eastwards. The Court is further satisfied that while ice constitutes a considerable seasonal restriction of access to the waters, it does not materially affect access to migratory fishery resources in the southern part of the area of overlapping claims.

Population and economy
(paras. 79-80)

Denmark considers as also relevant to the delimitation the major differences between Greenland and Jan Mayen as regards population and socio-economic factors.

The Court observes that the attribution of maritime areas to the territory of a State, which, by its nature, is destined to be permanent, is a legal process based solely on the possession by the territory concerned of a coastline. The Court recalls in the present dispute the observations it had occasion to make, concerning continental shelf delimitation, in the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* case, namely, that a delimitation should not be influenced by the relative economic position of the two States in question, in such a way that the area of continental shelf regarded as appertaining to the less rich of the two States would be somewhat increased in order to compensate for its inferiority in economic resources.

The Court therefore concludes that, in the delimitation to be effected in this case, there is no reason to consider either the limited nature of the population of Jan Mayen or socio-economic factors as circumstances to be taken into account.

Security
(para. 81)

Norway has argued, in relation to the Danish claim to a 200-mile zone off Greenland, that "the drawing of a boundary closer to one State than to another would imply an inequitable displacement of the possibility of the former State to protect interests which require protection".

In the Libya/Malta case, the Court was satisfied 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 questions of security a particular consideration in the present case" (*I.C.J. Reports 1985*, p. 42, para. 51).

The Court is similarly satisfied in the present case as regards the delimitation to be described below.

Conduct of the Parties
(paras. 82-86)

Denmark has contended that the conduct of the Parties is a highly relevant factor in the choice of the appropriate method of delimitation where such conduct has indicated some particular method as being likely to produce an equitable result. In this respect, Denmark relies on the maritime delimitation between Norway and Iceland, and on a boundary line established by Norway between the economic zone of mainland Norway and the fishery protection zone of the Svalbard Archipelago (Bear Island/Bjørnøya).

So far as Bear Island is concerned, this territory is situated in a region unrelated to the area of overlapping claims now to be delimited. In that respect, the Court observes that there can be no legal obligation for a party to a dispute to transpose, for the settlement of that dispute, a particular solution previously adopted by it in a different context. As for the delimitation between Iceland and Norway, international law does not prescribe, with a view to reaching an equitable solution, the adoption of a single method for the delimitation of the maritime spaces on all sides of an island, or for the whole of the coastal front of a particular State, rather than, if desired, varying systems of delimita-

tion for the various parts of the coast. The conduct of the parties will in many cases therefore have no influence on such a delimitation. For these reasons, the Court concludes that the conduct of the Parties does not constitute an element which could influence the operation of delimitation in the present case.

The definition of the delimitation line
(paras. 87-93)

Having thus completed its examination of the geophysical and other circumstances brought to its attention as appropriate to be taken into account for the purposes of the delimitation of the continental shelf and the fishery zones, the Court has come to the conclusion that the median line, adopted provisionally for both as first stage in the delimitation, should be adjusted or shifted to become a line such as to attribute a larger area of maritime space to Denmark than would the median line. The line drawn by Denmark 200 nautical miles from the baselines of eastern Greenland would, however, be excessive as an adjustment, and would be inequitable in its effects. The delimitation line must therefore be drawn within the area of overlapping claims, between the lines proposed by each Party. The Court will therefore now proceed to examine the question of the precise position of that line.

To give only a broad indication of the manner in which the definition of the delimitation line should be fixed, and to leave the matter for the further agreement of the Parties, as urged by Norway, would in the Court's view not be a complete discharge of its duty to determine the dispute. The Court is satisfied that it should define the delimitation line in such a way that any questions which might still remain would be matters strictly relating to hydrographic technicalities which the Parties, with the help of their experts, can certainly resolve. The area of overlapping claims in this case is defined by the median line and the 200-mile line from Greenland, and those lines are both geometrical constructs; there might be differences of opinion over basepoints, but given defined basepoints, the two lines follow automatically. The median line provisionally drawn as first stage in the delimitation process has accordingly been defined by reference to the basepoints indicated by the Parties on the coasts of Greenland and Jan Mayen. Similarly, the Court may define the delimitation line, now to be indicated, by reference to that median line and to the 200-mile line calculated by Denmark from the basepoints on the coast of Greenland. Accordingly, the Court will proceed to establish such a delimitation, using for this purpose the baselines and coordinates which the Parties themselves have been content to employ in their pleadings and oral argument.

[Para. 91] The delimitation line is to lie between the median line and the 200-mile line from the baselines of eastern Greenland. It will run from point A in the north, the point of intersection of those two lines, to a point on the 200-mile line drawn from the baselines claimed by Iceland, between points D (the intersection of the median line with the 200-mile line claimed by Iceland) and B (the intersection of Greenland's 200-mile line and the 200-mile line claimed by Iceland) on sketch-map No. 2. For the purposes of definition of the line, and with a view to making proper provision for equitable access to fishery resources, the area of overlapping claims will be divided into three zones, as follows. Greenland's 200-mile line (between points A and B on sketch-map No. 2) shows two marked changes of direction, indicated on the sketch-map as points I and J; similarly, the median line shows two corresponding changes of direction, marked as points K and L. Straight lines drawn between point I and point K, and between point J and point L, thus divide the area of overlapping claims into three zones, to be referred to, successively from south to north, as zone 1, zone 2 and zone 3.

[Para. 92] The southernmost zone, zone 1, corresponds essentially to the principal fishing area. In the view of the Court, the two Parties should enjoy equitable access to the fishing resources of this zone. For this purpose a point, to be designated point M, is identified on the 200-mile line claimed by Iceland between points B and D, and equidistant from those points, and a line is drawn from point M so as to intersect the line between points J and L, at a point designated point N, so as to divide zone 1 into two parts of equal area. The dividing line is shown on sketch-map No. 2 as the line between points N and M. So far as zones 2 and 3 are concerned, it is a question of drawing the appropriate conclusions, in the application of equitable principles, from the circumstance of the marked disparity in coastal lengths, discussed in paragraphs 61 to 71 above. The Court considers that an equal division of the whole area of overlapping claims would give too great a weight to this circumstance. Taking into account the equal division of zone 1, it considers that the requirements of equity would be met by the following division of the remainder of the area of overlapping claims: a point (O on sketch-map No. 2) is to be determined on the line between I and K such that the distance from I to O is twice the distance from O to K; the delimitation of zones 2 and 3 is then effected by the straight line from point N to this point O, and the straight line from point O to point A.

The Court sets out the coordinates of the various points, for the information of the Parties.

Declaration of Vice-President Oda

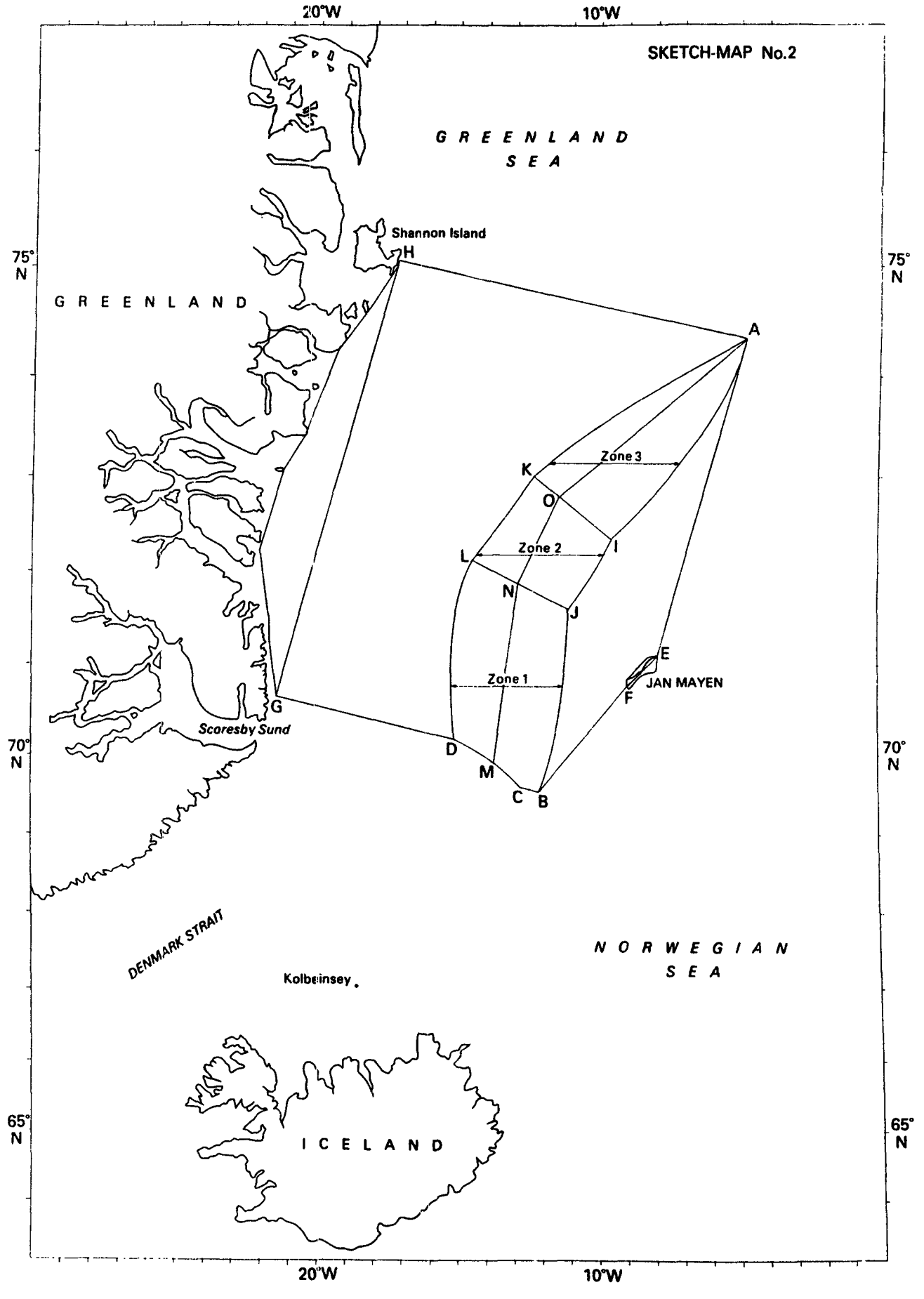
In his declaration, Judge Oda explains that, the Court having taken a decision on the substance of the case despite his own view that the Application should have been dismissed as misconceived, he voted with the majority because the line chosen lay within the infinite range of possibilities open to selection by the Parties had they reached agreement.

Declaration of Judge Evensen

In his concurring declaration, Judge Evensen stresses that the United Nations Convention on the Law of the Sea of 10 December 1982 expresses a number of principles that must be considered governing principles of international law although the Convention has not yet entered into force.

Jan Mayen must be regarded an island and not solely a rock. Article 121, paragraph 2, of the Convention provides that in principle islands shall be governed by the same legal regime as "other land territory". Thus, Jan Mayen must be taken into consideration in the delimitation of the maritime zones vis-à-vis Greenland, a continental-size area.

It lies within the Court's measure of discretion to establish a system of equitable access to fish resources in areas of overlapping claims. In his declaration, Judge Evensen endorses the proposed system for the distribution of these resources of the adjacent seas.


SKETCH-MAP No.2
20°W
10°W
75° N
70° N
65° N
GREENLAND SEA
GREENLAND
Shannon Island
H
A
K
Zone 3
O
L
Zone 2
I
N
J
E
Zone 1
JAN MAYEN
F
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D
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B
DENMARK STRAIT
NORWEGIAN SEA
Kolbeinsey
ICELAND

Declaration of Judge Aguilar Mawdsley

Judge Aguilar Mawdsley voted for the Judgment because he concurs with its reasoning. He is, however, not persuaded that the delimitation line as drawn by the Court provides for an equitable result. In his opinion, the difference in the lengths of the coasts of Greenland and Jan Mayen is such that Greenland (Denmark) should have received a larger proportion of the disputed area. Given the importance attached to this factor in the Judgment, it would have been logical at least to make an equal distribution of zones 1, 2 and 3.

Declaration of Judge Ranjeva

Judge Ranjeva appended a declaration to the Court's Judgment indicating that he had voted in favour of the operative part and subscribed to the arguments on which it is based. In his view, the result was an equitable one. He would nevertheless have wished the Court to be more explicit in stating its reasons for drawing the delimitation line adopted. For in the exercise of its discretionary power, the Court could indeed have been more specific as regards the criteria, methods and rules of law applied. Also, he would have preferred the Court to make it clear that it was in relation to the rights of the Parties to their maritime spaces that the special or relevant circumstances could or sometimes should be taken into account in a delimitation operation; for these were facts affecting the rights of States, as recognized in positive law, either in their entirety, or in the exercise of the powers relating thereto. The proper administration of justice and legal security depend on the certainty of the legal rule.

On the other hand, in the view of Judge Ranjeva, although the Court—and rightly so—had no need to explore the legal scope of statements made by a State at the Third United Nations Conference on the Law of the Sea, the Court should not, considering the exceptional procedure adopted on that occasion, have taken account of positions which were unofficial only and entirely non-committing.

Separate opinion of Vice-President Oda

In his separate opinion, Judge Oda emphasizes that the Court can be endowed with the competence to delimit a maritime boundary only by specific agreement of both parties concerned. Denmark's unilateral Application ought, consequently, to have been dismissed. Denmark's submissions furthermore supposed, wrongly, that the exclusive economic zone (EEZ) could coexist with a fishery zone of the kind eliminated from the 1982 Convention on the Law of the Sea. Its request for a single-line boundary also overlooked the separate background and evolution of the continental shelf regime.

In that respect, Judge Oda considers that the Court wrongly followed the Parties in applying article 6 of the 1958 Convention, which relates to a superseded concept of the continental shelf. What applies today to the delimitation of either the continental shelf or the EEZ is the customary law reflected in the 1982 Convention, which leaves the Parties free to reach agreement on any line they choose, since the reference to an "equitable solution" is not expressive of a rule of law.

A third party called upon to settle a disagreement over delimitation may either suggest guidelines to the parties or itself choose a line providing an equitable solution. In Judge Oda's view the Court, as a judicial body applying international law, is, however, precluded from taking the second course unless mandated by both parties to do so. It should not have so proceeded on an Application which relied on declarations under Article 36, paragraph 2, of the Statute, since such declarations confer jurisdiction only for strictly legal disputes, whereas an act of delimitation requires an assessment *ex aequo et bono*.

Judge Oda further criticizes the Court's concentration on the area of overlap between claims, to the neglect of the whole relevant area, as well as its failure to give any good reason why access to fishing resources should have been taken into account in relation to a boundary applying to the continental shelf.

Separate opinion of Judge Schwebel

Judge Schwebel, in his separate opinion, maintains that the Court's Judgment is questionable with respect to the following three questions:

1. Should the law of maritime delimitation be revised to introduce and apply distributive justice?

2. Should the differing extent of the lengths of opposite coastlines determine the position of the line of delimitation?

3. Should maximalist claims be rewarded?

However, he concluded that, since what is equitable appears to be as variable as the climate of The Hague, ground for dissent from the Court's Judgment is lacking.

Separate opinion of Judge Shahabuddeen

In his separate opinion, Judge Shahabuddeen says that he understands the Judgment to be upholding Norway's view that the 1958 conventional delimitation formula means that, in the absence of agreement and of special circumstances, the boundary is the median line. He gives his reasons for agreeing with this view and for declining to accept that the conventional formula is to be equated with the customary formula. He is not persuaded that the equation suggested by the 1977 Anglo-French arbitral decision should be followed.

He thinks that the concept of natural prolongation, considered in a physical sense, has placed limits on recourse to proportionality. In his view, the movement away from the physical aspect of natural prolongation should be followed by a relaxation of those limits.

Judge Shahabuddeen gives his reasons for holding that the decision of the Court is not *ex aequo et bono*. He has some doubts as to whether a single line is possible in the absence of agreement by the Parties to such a line being established. He agrees that in the state of the technical material before the Court, an actual delimitation line should not be drawn, but considers that, had the material been adequate, the Court could competently have drawn such a line notwithstanding Norway's non-consent to that being done.

Finally, in his view, where Parties have failed to agree on a boundary, the resulting dispute as to what is the boundary is susceptible of judicial settlement via a unilateral Application made under Article 36, paragraph 2, of the Statute of the Court.

Separate opinion of Judge Weeramantry

Judge Weeramantry, in his separate opinion, expresses his agreement with the Judgment of the Court and examines the special role played by equity in the Court's reasoning and conclusions. As the use of equity in maritime delimitation is currently passing through a critical phase, the opinion studies its operation in this case from several angles. It looks at the relevance to the Judgment of equitable principles, equitable procedures, equitable methods and equitable results. The opinion stresses that equity operates, in the Judgment, *infra legem* and not *contra legem* or *ex aequo et bono*, and traces the various routes of entry of equity into maritime delimitation. It distinguishes the *a priori* employment of equity to work towards a result from its *a posteriori* employment, to check a result thus obtained, and sets out the various uses of equity and its various methods of operation in this case. It also analyses the Judgment in the light of the several component elements of an equitable decision.

Examining the various uncertainties in the use of equity in maritime delimitation, the opinion seeks to show that these do not constitute a sufficient reason for rejecting the use of equity as an aid both to particular delimitations such as the present and to the general development of the law of the sea.

The opinion also looks at the particular invocations, by treaty and otherwise, of equity in maritime delimitation. It concludes by examining the concept of equity in global terms, showing that a search of global traditions of equity can yield perspectives of far-reaching importance to the developing law of the sea.

Separate opinion of Judge Ajibola

In his separate opinion, Judge Ajibola, while strongly supporting the Court's decision, considers that some areas of the Judgment should be elaborated. He first refers to some procedural issues relating to jurisdiction: Could the Court draw any line, and should the line have been a dual-purpose single line or two lines? Should only a declaratory judgment have been given? Can the Court engage in a delimitation without the agreement of the Parties? However that might be, the Court, once convinced that there is an issue in dispute, ought to proceed to a decision on the merits.

As to the question of whether there should be one line or two, the development of the law of maritime delimitation and the relevant case-law supports the Court's conclusions.

Characterizing the Danish submissions as more a claim of entitlement than a call for delimitation, Judge Ajibola points out that, despite the disparity of size, the entitlement of Norway in respect of Jan Mayen is equally justifiable and recognized in international law.

He then examines the equitable principles in maritime boundary delimitation, coming to the conclusion that they are the fundamental principles which now apply to maritime delimitation in customary international law and that they can be expected to underlie its future development.

Finally, Judge Ajibola examines the concepts of "special circumstances" under the 1958 Convention and of "relevant circumstances" under customary international law, concluding that there is effective equivalence between, on the one hand, the triad of agreement, special circumstances and equidistance and, on the other, that of agreement, relevant circumstances and equitable principles, with the last-mentioned constituting the ultimate rule under modern customary law.

Dissenting opinion of Judge ad hoc *Fischer*

Judge Fischer has voted against the decision as he considers that the most equitable solution would have been a delimitation at a distance of 200 nautical miles from East Greenland. His main reasons are the following.

He does not think that the Court has sufficiently taken the difference between the relevant coasts of East Greenland (approximately 524 kilometres) and Jan Mayen (approximately 58 kilometres) into consideration. The ratio is more than 9 to 1 in favour of Greenland whereas the ratio of allocated area is only 3 to 1. The delimitation 200 miles from Greenland would have allocated areas to the Parties in the ratio of 6 to 1, which, according to Judge Fischer, would have been in conformity with the generally accepted principle of proportionality.

Contrary to the standpoint of the Court, Judge Fischer considers that the fundamental difference between Greenland and Jan Mayen with respect to their demographic, socio-economic and political structures should have been taken into consideration. He has underlined that Greenland is a viable human society with a population of 55,000 which is heavily dependent on fisheries and with political autonomy whereas Jan Mayen has no population in the proper sense of the word.

Judge Fischer furthermore considers that the Iceland–Jan Mayen delimitation which respects Iceland's 200-mile zone is highly important for the present case. As the relevant factors in the two cases are very similar, it would have been just and equitable to draw the delimitation line in the present case in a manner similar to the Iceland–Jan Mayen delimitation.

Judge Fischer is opposed to the method of using a median line as a provisionally drawn line. Judicial practice is in his opinion ambiguous and no such method can be deduced from article 6 of the 1958 Convention on the Continental Shelf.

Finally, Judge Fischer considers the method of dividing the area of overlapping claims into three zones and of dividing each of these zones according to different criteria to be artificial and without foundation in international law.

96. CASE CONCERNING APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE (BOSNIA AND HERZEGOVINA *v.* YUGOSLAVIA (SERBIA AND MONTENEGRO)) (PROVISIONAL MEASURES)

Order of 13 September 1993

In an Order issued in the case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Yugoslavia (Serbia and Montenegro)), the Court issued an interim order of provisional measures reaffirming the measures it ordered on 8 April 1993, when Bosnia and Herzegovina first moved in the Court against Yugoslavia (Serbia and Montenegro). It held that "the present perilous situation demands, not an indication of provisional measures additional to those indicated by the Court's Order of 8 April 1993, but immediate and effective implementation of those measures".

The Court declined to adopt more far-reaching injunctions requested by Bosnia as well as an injunction sought by Yugoslavia requiring Bosnia to take all measures within its power to prevent commission of the crime of genocide against the Serbs in Bosnia. In declining Bosnian requests, among others, to interdict plans to partition Bosnian territory, to declare annexation of Bosnian territory to be illegal, and to hold that Bosnia must have the means to prevent acts of genocide and partition by obtaining military supplies, the Court pointed out that it had prima facie jurisdiction in this case to order interim measures only within the scope of the jurisdiction conferred on it by the Convention on the Prevention and Punishment of the Crime of Genocide. It was not entitled to deal with broader claims.

At the same time, the Court recorded that, since its Order of 8 April, and despite it and many resolutions of the United Nations Security Council, "great suffering and loss of life has been sustained by the population of Bosnia and Herzegovina in circumstances which shock the conscience of mankind and flagrantly conflict with moral law . . . ". It observed that the "grave risk" which the Court apprehended in April of the dispute over the commission of genocide in Bosnia being aggravated and extended "has been deepened by the persistence of conflicts" on its territory "and the commission of heinous acts in the course of those conflicts". The Court declared that it is "not satisfied that all that might have been done has been done" to prevent genocide in Bosnia, and reminded the Parties to the case that they were obliged to take the Court's provisional measures "seriously into account".

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In its Order, the Court recalls that on 20 March 1993 Bosnia and Herzegovina instituted proceedings against Yugoslavia in respect of a dispute concerning alleged violations by Yugoslavia of the Convention on the Prevention and Punishment of the Crime of Genocide. In the Application Bosnia and Herzegovina, basing the jurisdiction of the Court on article IX of the Convention for the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly of the United Nations on 9 December 1948 (hereinafter called "the Genocide Convention"), recounts a series of events in Bosnia and Herzegovina from April 1992 up to the present day which, in its contention, amount to acts of genocide within the definition given in the Genocide Convention and claims that the acts complained of have been committed by former members of the Yugoslav People's Army (YPA) and by Serb military and paramilitary forces under the direction of, at the behest of, and with assistance from Yugoslavia, and that Yugoslavia is therefore fully responsible under international law for their activities.

The Court refers to the submissions of Bosnia and Herzegovina, which request the Court to adjudge and declare:

[*See paragraphs (a)-(r) reproduced on pages 46 and 47, in the Order of 8 April 1993.*]

The Court further refers to the request made by Bosnia and Herzegovina (also on 20 March 1993) for the indication of the following provisional measures:

[*See paragraphs 1-6 reproduced on page 47, in the Order of 8 April 1993.*]

The Court also refers to the recommendation by Yugoslavia (in written observations on the request for provisional measures, submitted on 1 April 1993) that the Court order the application of the following provisional measures:

"—to instruct the authorities controlled by A. Izetbegovic to comply strictly with the latest agreement on a cease-fire in the 'Republic of Bosnia and Herzegovina' which went into force on 28 March 1993;

—to direct the authorities under the control of A. Izetbegovic to respect the Geneva Conventions for the Protection of Victims of War of 1949 and the 1977 Additional Protocols thereof, since the genocide of Serbs living in the 'Republic of Bosnia and Herzegovina' is being carried out by the commission of very serious war crimes which are in violation of the obligation not to infringe upon the essential human rights;

—to instruct the authorities loyal to A. Izetbegovic to close immediately and disband all prisons and detention camps in the 'Republic of Bosnia and Herzegovina' in which the Serbs are being detained because of their ethnic origin and subjected to acts of torture, thus presenting a real danger for their life and health;

—to direct the authorities controlled by A. Izetbegovic to allow, without delay, the Serb residents to leave safely Tuzla, Zenica, Sarajevo and other places in the 'Republic of Bosnia and Herzegovina', where they have been subject to harassment and physical and mental abuse, and having in mind that they may suffer the same fate as the Serbs in eastern Bosnia, which was the site of the killing and massacres of a few thousand Serb civilians;

—to instruct the authorities loyal to A. Izetbegovic to cease immediately any further destruction of Orthodox churches and places of worship and of other Serb cultural heritage, and to release and stop further mistreatment of all Orthodox priests being in prison;

—to direct the authorities under the control of A. Izetbegovic to put an end to all acts of discrimination based on nationality or religion and the practice of 'ethnic cleansing', including the discrimination relating to the delivery of humanitarian aid, against the Serb population in the 'Republic of Bosnia and Herzegovina'."

After recalling its Order of 8 April 1993, the Court refers to a second request of Bosnia and Herzegovina, filed on 27 July 1993, by which it urgently requests the Court to indicate the following additional provisional measures:

"1. That Yugoslavia (Serbia and Montenegro) must immediately cease and desist from providing, directly or indirectly, any type of support—including training, weapons, arms, ammunition, supplies, assistance, finances, direction or any other form of support—to any nation, group, organization, movement, military, militia or paramilitary force, irregular armed unit, or individual in Bosnia and Herzegovina for any reason or purpose whatsoever;

2. That Yugoslavia (Serbia and Montenegro) and all of its public officials—including and especially the President of Serbia, Mr. Slobodan Milosevic—must immediately cease and desist from any and all efforts, plans, plots, schemes, proposals or negotiations to partition, dismember, annex or incorporate the sovereign territory of Bosnia and Herzegovina;

3. That the annexation or incorporation of any sovereign territory of the Republic of Bosnia and Herzegovina by Yugoslavia (Serbia and Montenegro) by any means or for any reason shall be deemed illegal, null, and void *ab initio*;

4. That the Government of Bosnia and Herzegovina must have the means 'to prevent' the commission of acts of genocide against its own People as required by article I of the Genocide Convention;

5. That all Contracting Parties to the Genocide Convention are obliged by article I thereof 'to prevent' the commission of acts of genocide against the People and State of Bosnia and Herzegovina;

6. That the Government of Bosnia and Herzegovina must have the means to defend the People and State of Bosnia and Herzegovina from acts of genocide and partition and dismemberment by means of genocide;

7. That all Contracting Parties to the Genocide Convention have the obligation thereunder 'to prevent' acts of genocide, and partition and dismemberment by means of genocide, against the People and State of Bosnia and Herzegovina;

8. That in order to fulfil its obligations under the Genocide Convention under the current circumstance, the Government of Bosnia and Herzegovina must have the ability to obtain military weapons, equipment, and supplies from other Contracting Parties;

9. That in order to fulfil their obligations under the Genocide Convention under the current circumstances, all Contracting Parties thereto must have the ability to provide military weapons, equipment, supplies and armed forces (soldiers, sailors, airpeople) to the Government of Bosnia and Herzegovina at its request;

10. That United Nations Peacekeeping Forces in Bosnia and Herzegovina (i.e., UNPROFOR) must do all in their power to ensure the flow of humanitarian relief supplies to the Bosnian People through the Bosnian city of Tuzla".

The Court then recalls that on 5 August 1993 the President of the Court addressed a message to both Parties, referring to Article 74, paragraph 4, of the Rules of Court, which enables him, pending the meeting of the Court,

"to call upon the parties to act in such a way as will enable any order the Court may make on the request for provisional measures to have its appropriate effects",

and stating:

"I do now call upon the Parties so to act, and I stress that the provisional measures already indicated in the Order which the Court made after hearing the Parties, on 8 April 1993, still apply.

Accordingly I call upon the Parties to take renewed note of the Court's Order and to take all and any measures that may be within their power to prevent any commission, continuance, or encouragement of the heinous international crime of genocide".

The Court further refers to a request by Yugoslavia, filed on 10 August 1993, whereby Yugoslavia requested the Court to indicate the following provisional measure:

"The Government of the so-called Republic of Bosnia and Herzegovina should immediately, in pursuance of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, take all measures within its power to prevent commission of the crime of genocide against the Serb ethnic group".

Hearings on the two requests were held on 25 and 26 August 1993.

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After referring to several questions of procedure, the Court begins by considering that in order to be admissible the second request by Bosnia and Herzegovina, and that of Yugoslavia, should be based upon new circumstances such as to justify their being examined. The Court finds that that is the case.

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Turning to the question of its jurisdiction, the Court recalls that in its Order of 8 April 1993 the Court considered that article IX of the Genocide Convention, to which both the Applicant and the Respondent are parties, appeared to the Court

"to afford a basis on which the jurisdiction of the Court might be founded to the extent that the subject-matter of the dispute relates to 'the interpretation, application or fulfilment' of the Convention, including disputes 'relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III' of the Convention" (*I.C.J. Reports 1993*, p. 16, para. 26).

It thereafter examines several additional bases of jurisdiction relied on by the Applicant, finding that the 1919 Treaty of Saint-Germain-en-Laye is irrelevant for the present request; that no new fact has been put forward to reopen the question of whether the letter of 8 June 1992 addressed to the President of the Arbitration Commission of the International Conference for Peace in Yugoslavia may constitute a ground for jurisdiction; that the Court's jurisdiction under customary and conventional laws of war and international humanitarian law is not prima facie established; and that a communication Yugoslavia made in the context of the first request for provisional measures by the Applicant, dated 1 April 1993, cannot, even prima facie, be interpreted as "an unequivocal indication" of a "voluntary and indisputable" acceptance of the Court's jurisdiction.

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The Court then observes that the power of the Court to indicate provisional measures under Article 41 of the Statute of the Court has as its object to preserve the respective rights of the parties pending the decision of the Court, and presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings; and whereas it follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by the Court to belong either to the Applicant or to the Respondent and that the Court, having established the existence of one basis on which its jurisdiction might be founded, namely, article IX of the Genocide Convention, and having been unable to find that other suggested bases could prima facie be accepted as such, ought not to indicate measures for the protection of any disputed rights other than those which might ultimately form the basis of a judgment in the exercise of the jurisdiction thus prima facie established.

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After reiterating the measures it indicated in its Order of 8 April 1993, the Court then sums up the rights sought to be protected, as enumerated in the second request of Bosnia and Herzegovina for the indication of provisional measures, and concludes that nearly all of those rights were asserted in almost identical terms in Bosnia and Herzegovina's first request and that only one of them is such that it may prima facie to some extent fall within the rights arising under the Genocide Convention; and that it was therefore in relation to that paragraph and for the protection of rights under the Convention that the Court indicated provisional measures in its Order of 8 April 1993.

The Court then turns to the list of measures which the Applicant requests it to indicate and observes that it includes certain measures which would be addressed to States or entities not parties to the proceedings. The Court considers that the judgment in a particular case has, in accordance with Article 59 of the Statute of the Court, "no binding force except between the parties"; and that accordingly the Court may, for the preservation of those rights, indicate provisional measures to be taken by the parties, but not by third States or other entities who would not be bound by the eventual judgment to recognize and respect those rights.

Three of the measures requested by the Applicant provide that the Government of Bosnia and Herzegovina "must have the means" to prevent the commission of genocide, and to defend its people against genocide, and "must have the ability to obtain military weapons, equipment and supplies" from the other parties to the Genocide Convention. The Court observes that Article 41 of the Statute empowers the Court to indicate measures "which ought to be taken to preserve the respective rights of either party", and that this means measures which ought to be taken by one or both parties to the case; that, however, it is clear that the intention of the Applicant in requesting these measures is not that the Court indicate that the Respondent ought to take certain steps for the preservation of the Applicant's rights, but rather that the Court make a declaration of what those rights are, which "would clarify the legal situation for the entire international community", in particular the members of the United Nations Security Council. The Court accordingly finds that this request must be regarded as outside the scope of Article 41 of the Statute.

Two of the measures requested relate to the possibility of "partition and dismemberment", annexation or incorporation of the sovereign territory of Bosnia and Herzegovina. The Court is unable to accept that a "partition and dismemberment", or annexation of a sovereign State, or its incorporation into another State, could in itself constitute an act of genocide and thus a matter falling within the jurisdiction of the Court under article IX of the Genocide Convention. On the other hand, in so far as it is the Applicant's contention that such "partition and dismemberment", annexation or incorporation will result from genocide, the Court, in its Order of 8 April 1993, has already indicated that Yugoslavia should "take all measures within its power to prevent commission of the crime of genocide", whatever might be its consequences.

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Turning to the request by Yugoslavia, the Court does not find that the circumstances, as they now present themselves to the Court, are such as to require a more specific indication of measures addressed to Bosnia and Herzegovina so as to recall to it both its undoubted obligations under the Genocide Convention and the need to refrain from action of the kind contemplated by paragraph 52 B of the Court's Order of 8 April 1993.

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The Court finally refers to Article 75, paragraph 2, of the Rules of Court, which recognizes the power of the Court, when a request for provisional measures has been made, to indicate measures that are in whole or in part other than those requested and observes that the Court has to consider the circumstances drawn to its attention and to determine whether those circumstances require the indication of further provisional measures to be taken by

the Parties for the protection of rights under the Genocide Convention.

After reviewing the situation and after referring to several pertinent resolutions of the Security Council, the Court comes to the conclusion that

"the present perilous situation demands, not an indication of provisional measures additional to those indicated by the Court's Order of 8 April 1993 . . . but immediate and effective implementation of those measures".

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The full text of the operative paragraph reads as follows:

"61. For these reasons,

THE COURT,

(1) By 13 votes to 2,

Reaffirms the provisional measure indicated in paragraph 52 A (1) of the Order made by the Court on 8 April 1993, which should be immediately and effectively implemented;

IN FAVOUR: President Sir Robert Jennings; Vice-President Oda; Judges Schwebel, Bedjaoui, Ni, Evensen, Guillaume, Shahabuddeen, Aguilar Mawdsley, Weeramantry, Ajibola, Herczegh; Judge *ad hoc* Lauterpacht;

AGAINST: Judge Tarassov; Judge *ad hoc* Kreća;

(2) By 13 votes to 2,

Reaffirms the provisional measure indicated in paragraph 52 A (2) of the Order made by the Court on 8 April 1993, which should be immediately and effectively implemented;

IN FAVOUR: President Sir Robert Jennings; Vice-President Oda; Judges Schwebel, Bedjaoui, Ni, Evensen, Guillaume, Shahabuddeen, Aguilar Mawdsley, Weeramantry, Ajibola, Herczegh; Judge *ad hoc* Lauterpacht;

AGAINST: Judge Tarassov; Judge *ad hoc* Kreća;

(3) By 14 votes to 1,

Reaffirms the provisional measure indicated in paragraph 52 B of the Order made by the Court on 8 April 1993, which should be immediately and effectively implemented.

IN FAVOUR: President Sir Robert Jennings; Vice-President Oda; Judges Schwebel, Bedjaoui, Ni, Evensen, Tarassov, Guillaume, Shahabuddeen, Aguilar Mawdsley, Weeramantry, Ajibola, Herczegh; Judge *ad hoc* Lauterpacht;

AGAINST: Judge *ad hoc* Kreća."

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Vice-President Oda appended a declaration to the Order of the Court.

Judges Shahabuddeen, Weeramantry and Ajibola and Judge *ad hoc* Lauterpacht appended separate opinions to the Order.

Judge Tarassov and Judge *ad hoc* Kreća appended dissenting opinions to the Order.

Declaration of Vice-President Oda

Vice-President Oda, in his declaration, regrets that the Court took no specific position on Yugoslavia's request for the indication of a provisional measure to the effect that Bosnia and Herzegovina should do all in its power to prevent genocidal acts against the Serb ethnic group, a request presented on the basis of evidence submitted to the United Nations. He is unconvinced by the Court's reasons for avoiding a direct response to this request.

Separate opinion of Judge Shahabuddeen

In his separate opinion, Judge Shahabuddeen explained his reasons for agreeing with the Court's holding on the question of prorogated jurisdiction. He could not accept Yugoslavia's objection that Bosnia and Herzegovina's request for interim measures amounted to a request for an interim judgment. Nor could he accept that, in the circumstances of the case, Bosnia and Herzegovina was not entitled to rely on media material. In his view, Yugoslavia had not complied with the provisional measures indicated by the Court on 8 April 1993. For this and other reasons given by him, he considered that it would not be correct for the Court to act on the basis of the material presented by Yugoslavia.

Separate opinion of Judge Weeramantry

Judge Weeramantry in his separate opinion stated that the facts before the Court fall into three categories: accounts and reports carried by the media; statements of disinterested third parties such as United Nations officials; and communiqués issued by the Government of Yugoslavia and the Government of the Republic of Serbia. The opinion states that even if the first category be completely excluded, the material placed before the Court in the second and third categories is sufficient to satisfy the Court on a provisional basis and for the limited purpose of interim measures that circumstances exist, in terms of Article 41 of the Statute of the Court, showing a prima facie case of non-compliance by Yugoslavia with the Order of the Court of 8 April.

The rest of the opinion addresses the question whether a provisional order made by the Court is binding in law. The opinion examines the general principles applicable to the matter as well as the relevant provisions of the Charter of the United Nations, the Statute of the Court and the Rules of Court, and reaches the conclusion that provisional measures once ordered impose an obligation of compliance with that Order which is binding in law.

It also states that in the absence of such a principle the competence of the Court to discharge the obligations resting upon it under the Charter and the Statute would be significantly impaired.

Separate opinion of Judge Ajibola

On the two requests for indication of provisional measures presented to the Court by both Parties, Judge Ajibola reaches the same conclusion, in his separate opinion, as the Court, albeit via another route. He points out that since the Parties have not complied with the first Order issued by the Court, it has the power to insist that no subsequent Order should be indicated until the Parties ensure that the earlier Order of 8 April 1993 has been complied with. In

his view, the Court has that power, not only by invoking its statutory power under the Statute and Rules of Court, but also as a part of its inherent power under general international law.

He further states that in his view the Court has the power to indicate provisional measures as part of its incidental power and function, and that such measures ought to be binding, effective and enforceable, since otherwise it may be impeded from functioning as a Court. It is for these alternative reasons that he supports the decision of the Court, whereby it reaffirms the provisional measures indicated in paragraph 52 of its Order of 8 April 1993.

Separate opinion of Judge ad hoc *Lauterpacht*

Judge *ad hoc* Lauterpacht, concurring with the Court, says that he would have preferred the Court's Order to be more detailed both in its statement of material facts and in the measures which it indicates. Emphasizing the unprecedented human dimension of the case, he finds that the atrocities committed by the Serbs against the Muslims in Bosnia, especially the process of "ethnic cleansing", amount to genocide and that the Respondent Government has done nothing to rebut the evidence of its support for the Bosnian Serbs.

He observes that the Security Council's arms embargo has led to a marked imbalance between the weaponry in the hands of the Serbian and Muslim populations of Bosnia and Herzegovina and that the United Nations Special Rapporteur (whose view has been adopted by the General Assembly) has identified this imbalance as having contributed to the intensity of ethnic cleansing in the area. He points to the fact that the prohibition of genocide has long been accepted as a matter of *jus cogens*, a legal order superior to treaties. In so far, therefore, as the embargo can be seen as contributing to ethnic cleansing and thus to genocide, its continuing validity has become doubtful and the Security Council should know this when reconsidering the embargo.

In addition to sharing the Court's opinion that it possesses jurisdiction under the Genocide Convention, Judge Lauterpacht holds that the Respondent has, by a request that it made to the Court on 1 April 1993, given the Court additional jurisdiction to deal with certain other aspects of the conflict in Bosnia. He, therefore, favours the indication of additional measures to cover such matters as compliance with the Geneva Conventions, the release of detainees and the ending of discrimination on ethnic grounds.

Dissenting opinion of Judge Tarassov

Judge Tarassov recalls that he had been unable to support one of the measures indicated by the Order of the Court of 8 April 1993, because it came, in his view, close to a prejudgment and imposed ill-defined and virtually unlimited requirements on Yugoslavia. Bosnia's second request confirmed his apprehensions in that it ascribed alleged acts of genocide entirely to Yugoslavia with no attempt to establish a causal link. To base a finding of a State's responsibility on a simple ethnic link with part of the population of another State would be very dangerous for international law. Nevertheless, the Court has reiterated its previous conclusions, but without duly mentioning Bosnia's own obligations analogous to those of Yugoslavia, despite the latter's specific request in that sense. The Court thus seems to have prematurely decided that Yugoslavia has the lion's share of responsibility for the prevention of acts of genocide.

Judge Tarassov finds this a one-sided approach to a fratricidal war in which all ethnic groups involved have suffered inexpressibly. He is unable to support an Order enshrining it when all interested parties have accepted a constitutional agreement and are urged by the Security Council to conclude a just and comprehensive political settlement as soon as possible. To stress the need for the Parties to the case to facilitate that settlement would have been to indicate the most urgent and effective measure for the prevention of genocide, but unfortunately the Court made no reference at all to that need. The Court's silence on the point amounts to a regrettable failure to exercise its moral authority.

Dissenting opinion of Judge ad hoc *Kreća*

Judge *ad hoc* Kreća is of the opinion that the indicated provisional measures, particularly the first two of them, are not balanced, and that they are broad, being ambiguous and suggestive, so that both in wording and in content they come dangerously close to, and even incorporate, certain elements of an interim judgment.

He takes the view that the prejudicial nature of these measures emanates from this Order which, in substance, is a reaffirmation of the Order of 8 April 1993.

In his opinion, in this stage of proceedings in which the Court cannot make "definitive findings of fact and imputability", if the Court found that all requirements for the indication of such measures had been met, it should have decreed a general provisional measure which would, in substance, have coincided with the message of the President of the Court of 5 August 1993 addressed to both Parties in the dispute, together with specific interim measures based on the concept of notoriety which would include a request to the Applicant to continue the peace negotiations as the most effective and expedient way to put an end to the inferno of civil war in Bosnia and Herzegovina.

Judge *ad hoc* Kreća also believes that, in relation to the general measure, such specific interim measures should be of either an alternative or a cumulative nature.

97. CASE CONCERNING THE TERRITORIAL DISPUTE (LIBYAN ARAB JAMAHIRIYA/CHAD)

Judgment of 3 February 1994

In its Judgment in the case concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad), the Court found that the boundary between Libya and Chad is defined by the Treaty of Friendship and Good Neighbourliness concluded on 10 August 1955 between France and Libya, and determined the course of that boundary (cf. sketch-map No. 4).

The Court was composed as follows: President Sir Robert Jennings; Vice-President Oda; Judges Ago, Schwebel, Bedjaoui, Ni, Evensen, Tarassov, Guillaume, Shahabuddeen, Aguilar Mawdsley, Weeramantry, Ranjeva, Ajibola, Herczegh; Judges *ad hoc* Sette-Camara, Abi-Saab; Registrar Valencia-Ospina.

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The full text of the operative paragraph is as follows:

"77. For these reasons,

THE COURT,

By 16 votes to 1,

(1) *Finds* that the boundary between the Great Socialist People's Libyan Arab Jamahiriya and the Republic of Chad is defined by the Treaty of Friendship and Good Neighbourliness concluded on 10 August 1955 between the French Republic and the United Kingdom of Libya;

(2) *Finds* that the course of that boundary is as follows:

> From the point of intersection of the 24th meridian east with the parallel 19°30′ of latitude north, a straight line to the point of intersection of the Tropic of Cancer with the 16th meridian east; and from that point a straight line to the point of intersection of the 15th meridian east and the parallel 23° of latitude north;

these lines are indicated, for the purpose of illustration, on sketch-map No. 4 on page 39 of this Judgment.

IN FAVOUR: President Sir Robert Jennings; Vice-President Oda; Judges Ago, Schwebel, Bedjaoui, Ni, Evensen, Tarassov, Guillaume, Shahabuddeen, Aguilar Mawdsley, Weeramantry, Ranjeva, Ajibola, Herczegh; Judge *ad hoc* Abi-Saab;

AGAINST: Judge *ad hoc* Sette-Camara."

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Judge Ago appended a declaration to the Judgment of the Court.

Judges Shahabuddeen and Ajibola appended separate opinions to the Judgment of the Court.

Judge *ad hoc* Sette-Camara appended a dissenting opinion to the Judgment of the Court.

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Review of the proceedings and statement of claims
(paras. 1-21)

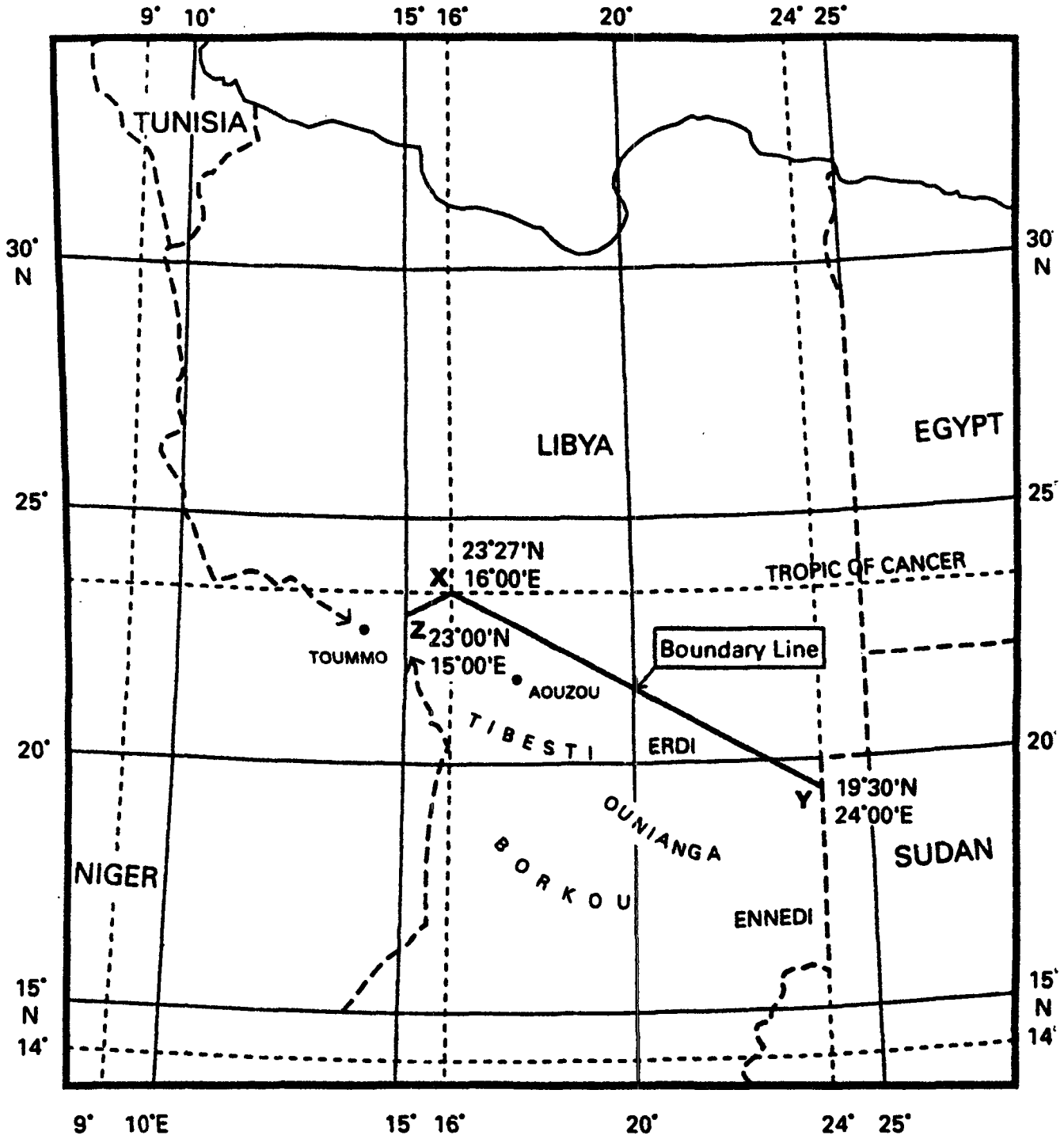
The Court outlines the successive stages of the proceedings as from the time the case was brought before it (paras. 1-16) and sets out the submissions of the Parties (paras. 17-21). It recalls that the proceedings had been instituted by two successive notifications of the Special Agreement constituted by the 1989 "Framework Agreement [Accord-Cadre] on the Peaceful Settlement of the Territorial Dispute between the Great Socialist People's Libyan Arab Jamahiriya and the Republic of Chad"—the notification filed by Libya on 31 August 1990 and the communication from Chad filed on 3 September 1990, read in conjunction with the letter from the Agent of Chad of 20 September 1990.

In the light of the Parties' communications to the Court, and their submissions, the Court observes that Libya proceeds on the basis that there is no existing boundary, and asks the Court to determine one, while Chad proceeds on the basis that there is an existing boundary, and asks the Court to declare what that boundary is. Libya considers that the case concerns a dispute regarding attribution of territory, while in Chad's view it concerns a dispute over the location of a boundary.

The Court then refers to the lines claimed by Chad and by Libya, as illustrated in the attached sketch-map No. 1. Libya's claim is on the basis of a coalescence of rights and titles of the indigenous inhabitants, the Senoussi Order, the Ottoman Empire, Italy and Libya itself; and that of Chad is on the basis of a Treaty of Friendship and Good Neighbourliness concluded by France and Libya on 10 August 1955, or, alternatively, on French *effectivités*, either in relation to, or independently of, the provisions of earlier treaties.

The 1955 Treaty of Friendship and Good Neighbourliness between France and Libya
(paras. 23-56)

Having drawn attention to the long and complex historical background to the dispute and having enumerated a number of conventional instruments reflecting that history and which appear to be relevant, the Court observes that it is recognized by both Parties that the 1955 Treaty of Friendship and Good Neighbourliness between France and Libya is the logical starting point for consideration of the issues before the Court. Neither Party questions the validity of the 1955 Treaty, nor does Libya question Chad's right to invoke against Libya any such provisions thereof as relate to the frontiers of Chad. The 1955 Treaty, a complex treaty, comprised, in addition to the Treaty itself, four appended Conventions and eight annexes; it dealt with a broad range of issues concerning the future relationship between the two parties. It was provided by article 9 of the Treaty that the Conventions and annexes appended to it formed an integral part of the Treaty. One of the matters specifically addressed was the question of frontiers, dealt with in article 3 and annex I.

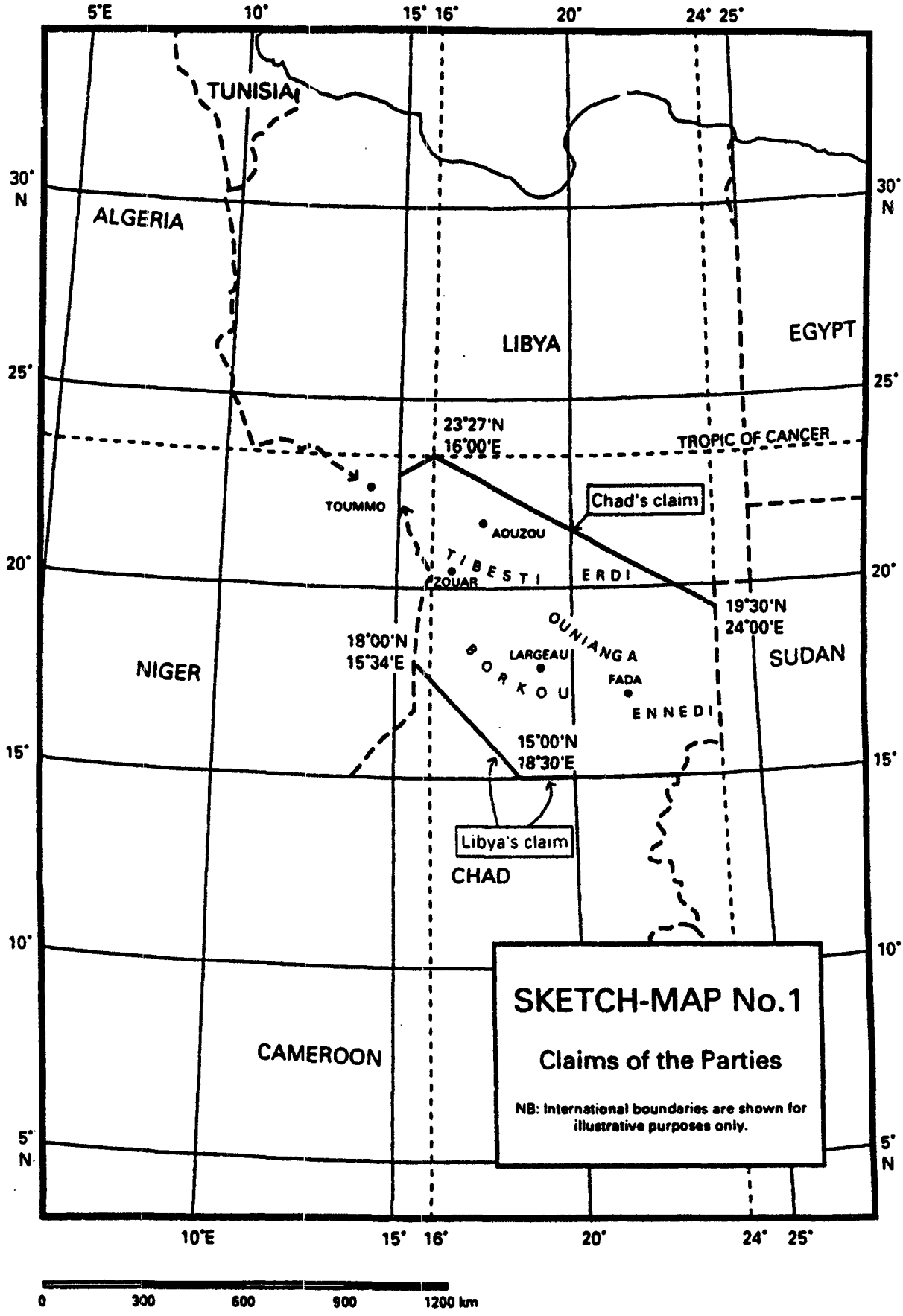


SKETCH-MAP No.4

Boundary Line determined by the Court's Judgment

NB: International boundaries indicated by packed lines are shown for illustrative purposes only.

0 300 600 900 1200 km


5°E
10°
15°
16°
20°
24°
25°
TUNISIA
30° N
ALGERIA
LIBYA
EGYPT
25°
23°27'N
16°00'E
TROPIC OF CANCER
TOUMMO
Chad's claim
AOUZOU
TIBESTI
ERDI
ZOUAR
20°
19°30'N
24°00'E
OUNIANGA
18°00'N
15°34'E
LARGEAU
BORKOU
FADA
NIGER
SUDAN
ENNEDI
15°00'N
18°30'E
15°
Libya's claim
CHAD
10°
CAMEROON
5° N
10°E
0
300
600
900
1200 km
SKETCH-MAP No.1
Claims of the Parties
NB: International boundaries are shown for illustrative purposes only.

The Court then examines article 3 of the 1955 Treaty, together with the annex to which that article refers, in order to decide whether or not that Treaty resulted in a conventional boundary between the territories of the Parties. It observes that if the 1955 Treaty did result in a boundary, this furnishes the answer to the issues raised by the Parties: it would be a response at one and the same time to the Libyan request to determine the limits of the respective territories of the Parties and to the request of Chad to determine the course of the frontier.

Article 3 of the Treaty begins as follows:

"The two High Contracting Parties recognize that the frontiers between the territories of Tunisia, Algeria, French West Africa and French Equatorial Africa on the one hand, and the territory of Libya on the other, are those that result from the international instruments in force on the date of the constitution of the United Kingdom of Libya as listed in the attached Exchange of Letters (Ann. I)."

Annex I to the Treaty comprises an exchange of letters which, after quoting article 3, begins as follows:

"The reference is to [*Il s'agit de*] the following texts:

—the Franco-British Convention of 14 June 1898;

—the Declaration completing the same, of 21 March 1899;

—the Franco-Italian Agreements of 1 November 1902;

—the Convention between the French Republic and the Sublime Porte, of 12 May 1910;

—the Franco-British Convention of 8 September 1919;

—the Franco-Italian Arrangement of 12 September 1919."

The Court recalls that, in accordance with the rules of general international law, reflected in article 31 of the 1969 Vienna Convention on the Law of Treaties, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. Interpretation must be based above all upon the text of the treaty. As a supplementary measure, recourse may be had to means of interpretation such as the preparatory work of the treaty and the circumstances of its conclusion.

According to article 3 of the 1955 Treaty, the parties "*recognize* [*reconnaissent*] that the frontiers . . . are those that result" from certain international instruments. The word "recognize" used in the Treaty indicates that a legal obligation is undertaken. To recognize a frontier is essentially to "accept" that frontier, that is, to draw legal consequences from its existence, to respect it and to renounce the right to contest it in future.

In the view of the Court, the terms of the Treaty signified that the parties thereby recognized complete frontiers between their respective territories as resulting from the combined effect of all the instruments listed in annex I; no relevant frontier was to be left undefined and no instrument listed in annex I was superfluous. It would be incompatible with a recognition couched in such terms to contend, as Libya has done, that only some of the specified instruments contributed to the definition of the frontier, or that a particular frontier remained unsettled. So to contend would be to deprive article 3 of the Treaty and annex I of their ordinary meaning. By entering into the Treaty, the parties recognized the frontiers to which the text of the Treaty referred; the task of the Court is thus to determine the exact content of the undertaking entered into.

The fixing of a frontier depends on the will of the sovereign States directly concerned. There is nothing to prevent the parties from deciding by mutual agreement to consider a certain line as a frontier, whatever the previous status of that line. If it was already a territorial boundary, it is confirmed purely and simply. If it was not previously a territorial boundary, the agreement of the parties to "recognize" it as such invests it with a legal force which it had previously lacked. International conventions and case-law evidence a variety of ways in which such recognition can be expressed. The fact that article 3 of the Treaty specifies that the frontiers recognized are "those that result from the international instruments" defined in annex I means that all of the frontiers result from those instruments. Any other construction would be contrary to the actual terms of article 3 and would render completely ineffective the reference to one or other of those instruments in annex I. Article 3 of the 1955 Treaty refers to the international instruments "*en vigueur*" (in force) on the date of the constitution of the United Kingdom of Libya, "*tels qu'ils sont définis*" (as listed) in the attached exchange of letters; Libya contends that the instruments mentioned in annex I and relied on by Chad were no longer in force at the relevant date. The Court is unable to accept these contentions. Article 3 does not refer merely to the international instruments "*en vigueur*" (in force) on the date of the constitution of the United Kingdom of Libya, but to the international instruments "*en vigueur*" on that date "*tels qu'ils sont définis*" (as listed) in annex I. To draw up a list of governing instruments while leaving to subsequent scrutiny the question whether they were in force would have been pointless. It is clear to the Court that the parties agreed to consider the instruments listed as being in force for the purposes of article 3, since otherwise they would not have referred to them in the annex. The text of article 3 clearly conveys the intention of the parties to reach a definitive settlement of the question of their common frontiers. Article 3 and annex I are intended to define frontiers by reference to legal instruments which would yield the course of such frontiers. Any other construction would be contrary to one of the fundamental principles of interpretation of treaties, consistently upheld by international jurisprudence, namely, that of effectiveness.

The object and purpose of the Treaty as stated in the preamble confirm the interpretation of the Treaty given above, inasmuch as that object and purpose led naturally to the definition of the territory of Libya, and thus the definition of its boundaries.

The conclusions which the Court has reached are further reinforced by an examination of the context of the Treaty, and, in particular, of the Convention of Good Neighbourliness between France and Libya, concluded between the parties at the same time as the Treaty, as well as by the *travaux préparatoires*.

The frontier line
(paras. 57-65)

Having concluded that the contracting parties wished, by the 1955 Treaty, and particularly by its article 3, to define their common frontier, the Court examines what is the frontier between Libya and Chad which results from the international instruments listed in annex I.

(a) *To the east of the line of 16° longitude*
(paras. 58-60)

The Franco-British Declaration of 1899, which complements the Convention of 1898, defines a line limiting the French zone (or sphere of influence) to the north-east in the direction of Egypt and the Nile Valley, already under British control. It provides in paragraph 3 as follows:

> "It is understood, in principle, that to the north of the 15th parallel the French zone shall be limited to the north-east and east by a line which shall start from the point of intersection of the Tropic of Cancer with the 16th degree of longitude east of Greenwich (13°40′ east of Paris), shall run thence to the south-east until it meets the 24th degree of longitude east of Greenwich (21°40′ east of Paris), and shall then follow the 24th degree until it meets, to the north of the 15th parallel of latitude, the frontier of Darfour as it shall eventually be fixed."

Different interpretations of this text were possible, since the point of intersection of the line with the 24th degree of longitude east was not specified, and the original text of the Declaration was not accompanied by a map showing the course of the line agreed. However, a few days after the adoption of that Declaration, the French authorities published its text in a *Livre jaune* including a map. That map showed the line as running not directly south-east, but rather in an east-south-east direction, so as to terminate at approximately the intersection of the 24° meridian east with the parallel 19° of latitude north.

For the purposes of the present Judgment, the question of the position of the limit of the French zone may be regarded as resolved by the Convention of 8 September 1919 signed at Paris between Great Britain and France, supplementary to the 1899 Declaration.

Its concluding paragraph provided:

> "It is understood that nothing in this Convention prejudices the interpretation of the Declaration of the 21st March, 1899, according to which the words in Article 3 '. . . shall run thence to the south-east until it meets the 24th degree of longitude east of Greenwich (21°40′ east of Paris)' are accepted as meaning '. . . shall run thence in a south-easterly direction until it meets the 24th degree of longitude east of Greenwich at the intersection of that degree of longitude with parallel 19°30′ degrees of latitude'."

The 1919 Convention presents this line as an interpretation of the Declaration of 1899; in the view of the Court, for the purposes of the present Judgment, there is no reason to categorize it either as a confirmation or as a modification of the Declaration. Inasmuch as the two States parties to the Convention are those that concluded the Declaration of 1899, there can be no doubt that the "interpretation" in question constituted, from 1919 onwards, and as between them, the correct and binding interpretation of the Declaration of 1899. It is opposable to Libya by virtue of the 1955 Treaty. For these reasons, the Court concludes that the line described in the 1919 Convention represents the frontier between Chad and Libya to the east of the line of 16° longitude.

(b) *To the west of the line of 16° longitude*
(paras. 61-62)

The Franco-Italian Agreements (Exchange of Letters) of 1 November 1902 state that

> "the limit to French expansion in North Africa, as referred to in the above-mentioned letter . . . dated 14 December 1900, is to be taken as corresponding to the frontier of Tripolitania as shown on the map annexed to the Declaration of 21 March 1899".

The map referred to could only be the map in the *Livre jaune*, which showed a pecked line indicating the frontier of Tripolitania. That line must therefore be examined by the Court.

(c) *The complete line*
(paras. 63-65)

It is clear that the eastern end-point of the frontier will lie on the meridian 24° east, which is here the boundary of the Sudan. To the west, the Court is not asked to determine the tripoint Libya-Niger-Chad; Chad in its submissions merely asks the Court to declare the course of the frontier "as far as the fifteenth degree east of Greenwich". In any event, the Court's decision in this respect, as in the *Frontier Dispute* case, "will . . . not be opposable to Niger as regards the course of that country's frontiers" (*I.C.J. Reports 1986*, p. 580, para. 50). Between 24° and 16° east of Greenwich, the line is determined by the Anglo-French Convention of 8 September 1919: i.e., the boundary is a straight line from the point of intersection of the meridian 24° east with the parallel 19°30′ north to the point of intersection of the meridian 16° east with the Tropic of Cancer. From the latter point, the line is determined by the Franco-Italian exchange of letters of 1 November 1902, by reference to the *Livre jaune* map: i.e., this line, as shown on that map, runs towards a point immediately to the south of Toummo; before it reaches that point, however, it crosses the meridian 15° east, at some point on which, from 1930 onward, was situated the commencement of the boundary between French West Africa and French Equatorial Africa. This line is confirmed by references in the Particular Convention annexed to the 1955 Treaty to a place called Muri Idie.

Chad, which in its submissions asks the Court to define the frontier as far west as the 15° meridian, has not defined the point at which in its contention the frontier intersects that meridian. Nor have the Parties indicated to the Court the exact coordinates of Toummo in Libya. However, on the basis of the information available, and in particular the maps produced by the Parties, the Court has come to the conclusion that the line of the *Livre jaune* map crosses the 15° meridian east at the point of intersection of that meridian with the parallel 23° of north latitude. In this sector, the frontier is thus constituted by a straight line from the latter point to the point of intersection of the meridian 16° east with the Tropic of Cancer.

Subsequent attitudes of the Parties
(paras. 66-71)

Having concluded that a frontier resulted from the 1955 Treaty, and having established where that frontier lay, the Court considers the subsequent attitudes of the Parties to the question of frontiers. It finds that no subsequent agreement, either between France and Libya, or between Chad and Libya, has called in question the frontier in this region deriving from the 1955 Treaty. On the contrary, if one considers treaties subsequent to the entry into force of the 1955 Treaty, there is support for the proposition that after 1955 the existence of a determined frontier was accepted and acted upon by the Parties.

The Court then examines the attitudes of the Parties, subsequent to the 1955 Treaty, on occasions when matters pertinent to the frontiers came up before international forums, and notes the consistency of Chad's conduct in relation to the location of its boundary.

Permanent boundary established
(paras. 72-73)

The Court finally states that, in its view, the 1955 Treaty, notwithstanding the provisions in article 11 to the effect that "The present Treaty is concluded for a period of 20 years", and for unilateral termination of the Treaty, must be taken to have determined a permanent frontier. There is nothing in the 1955 Treaty to indicate that the boundary agreed was to be provisional or temporary; on the contrary, it bears all the hallmarks of finality. The establishment of this boundary is a fact which, from the outset, has had a legal life of its own, independently of the fate of the 1955 Treaty. Once agreed, the boundary stands, for any other approach would vitiate the fundamental principle of the stability of boundaries. A boundary established by treaty thus achieves a permanence which the treaty itself does not necessarily enjoy. When a boundary has been the subject of agreement, the continued existence of that boundary is not dependent upon the continuing life of the treaty under which the boundary is agreed.

Declaration of Judge Ago

My own view is still the conviction that, at the time of the independence of the new State of Libya, the southern frontier of that country with the French possessions of West Africa and Equatorial Africa, between Toummo and the frontier of the Anglo-Egyptian Sudan, had not yet been the subject of a treaty delimitation between the parties then directly concerned. I recognize, however, that by concluding the Treaty of 10 August 1955 with France, the Government of Libya, which was primarily interested in other aspects of the body of questions to be settled, implicitly recognized, with regard to that southern frontier, the conclusions which the French Government deduced from the instruments mentioned in annex I to that Treaty.

It is for that reason that I have decided to add my vote to those of my colleagues who have pronounced in favour of the Judgment.

Separate opinion of Judge Shahabuddeen

In his separate opinion, Judge Shahabuddeen observed that the case involved a number of important issues relating to the state of the international community a century ago. Those issues were, however, foreclosed by the answer which the Court had returned to what both Parties agreed was the threshold question, that is to say, whether the boundary claimed by Chad was supported by the 1955 Franco-Libyan Treaty. The answer given by the Court resulted inevitably from the application of the normal principles of interpretation to the provisions of the Treaty. He did not consider that it was either relevant or necessary to invoke the principle of stability of boundaries in support of that answer. The issue before the Court was whether there was any treaty in existence defining the boundary. In his opinion, the principle of stability of boundaries did not assist in answering that question.

Separate opinion of Judge Ajibola

In his separate opinion, Judge Ajibola generally supports the view taken by the Court in its Judgment that the Treaty of Friendship and Good Neighbourliness between the French Republic and Libya of 10 August 1955 in effect determines the boundary dispute between the latter and Chad.

He further deals with some aspects of the mode of interpretation of the 1955 Treaty, concentrating in particular upon such questions as the object and purpose of the Treaty, good faith and the subsequent acts of the Parties.

Judge Ajibola also examines the claims and submissions of the Parties and particularly those of Libya in relation to what is termed "litigation and strategy" on the issue of the "borderlands".

Finally, he advances two other extrinsic but supplementary grounds of support for the Judgment of the Court, the first being based on estoppel, acquiescence, preclusion and recognition, and the second based on the principle of *uti possidetis.*

Dissenting opinion of Judge ad hoc *Sette-Camara*

In his dissenting opinion, Judge Sette-Camara observes that the borderlands were never a *terra nullius* open to occupation according to international law. The land was occupied by local indigenous tribes, confederations of tribes, often organized under the Senoussi Order. Furthermore, it was under the distant and laxly exercised sovereignty of the Ottoman Empire, which marked its presence by delegation of authority to the local people.

The great European Powers were engrossed with the task of carving up Africa but they did not go beyond the distribution of spheres of influence.

French presence in the borderlands did not occur before 1913, after the Treaty of Ouchy, which put an end to the war between Italy and the Ottoman Empire. Historic title over the region belonged first to the indigenous peoples, and eventually passed to the Ottoman Empire, and later to Italy.

The frictions between the colonial Powers' ambitions led to the Fashoda incident, which triggered the negotiations leading to the 1899 Declaration, which established a division of spheres of influence and limits to the French expansion northward and eastward.

In fact, in the present case there were two key questions: (1) Is there, or has there ever been, a conventional boundary between Libya and Chad east of Toummo? (2) Are the Conventions listed in annex I of the 1955 Franco-Libyan Treaty of Friendship and Good Neighbourliness actually boundary treaties?

As to the first question, Judge Sette-Camara is convinced that there is not now nor has there ever been a boundary line, short of the line of the 1935 Laval-Mussolini Treaty which was not ratified.

As to the second question, Judge Sette-Camara believes that none of the treaties listed in annex I qualifies as a boundary treaty: the 1899 Declaration divided spheres of influence only. The 1902 Barrère-Prinetti Treaty, a secret exchange of letters concluded by France and Italy, dealt with reciprocal respect for interests of France in Morocco and Italian ambitions in Tripolitania and Cyrenaica and intruded into territory under the sovereignty of the Ottoman Empire. The 1919 Convention also divided spheres of influence and dealt mainly with the Wadai-Darfour frontier.

As to the 1955 Treaty, the rock of the Chadian argument, its article 11 established an agreed duration of 20 years. The Chadian Counter-Memorial itself recognized that it lapsed in 1975.

The question of *effectivités* is to be disregarded, since there is no evidence on the point provided by the Parties.

In a series of treaties concluded since 1972 by the two countries, there is no reference to the existence of a further dispute.

Judge Sette-Camara believes that the titles to the territory asserted by Libya are valid. Neither France nor Chad presented sounder titles.

In the opinion of Judge Sette-Camara, it is regrettable that neither the Court nor the Parties explored the compromise solution that would have been the line of United Nations map No. 241, which is close to the 1935 line but not identical to it, or reverted to the 1899 strict south-east line, which was at the origin of the dispute and which continues to appear on very recent maps, for instance, the 1988 OAU map attached to its Subcommittee's report on the Libya-Chad dispute.

Both lines would have offered the advantage of dividing the Tibesti massif between the two countries, which both claim to be essential for their defence.

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98. CASE CONCERNING MARITIME DELIMITATION AND TERRITORIAL QUESTIONS BETWEEN QATAR AND BAHRAIN (QATAR *v.* BAHRAIN) (JURISDICTION AND ADMISSIBILITY)

Judgment of 1 July 1994

The Court delivered a Judgment in the case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain.

The Court was composed as follows: President Bedjaoui; Vice-President Schwebel; Judges Oda, Sir Robert Jennings, Tarassov, Guillaume, Shahabuddeen, Aguilar Mawdsley, Weeramantry, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma; Judges *ad hoc* Valticos, Ruda; Registrar Valencia-Ospina.

The operative paragraph of the Judgment reads as follows:

"41. For these reasons,

THE COURT,

(1) By 15 votes to 1,

Finds that the exchanges of letters between the King of Saudi Arabia and the Amir of Qatar dated 19 and 21 December 1987, and between the King of Saudi Arabia and the Amir of Bahrain dated 19 and 26 December 1987, and the document headed 'Minutes' and signed at Doha on 25 December 1990 by the Ministers for Foreign Affairs of Bahrain, Qatar and Saudi Arabia, are international agreements creating rights and obligations for the Parties;

. . .

(2) By 15 votes to 1,

Finds that by the terms of those agreements the Parties have undertaken to submit to the Court the whole of the dispute between them, as circumscribed by the text proposed by Bahrain to Qatar on 26 October 1988, and accepted by Qatar in December 1990, referred to in the 1990 Doha Minutes as the 'Bahraini formula';

. . .

(3) By 15 votes to 1,

Decides to afford the Parties the opportunity to submit to the Court the whole of the dispute;

. . .

(4) By 15 votes to 1,

Fixes 30 November 1994 as the time-limit within which the Parties are, jointly or separately, to take action to this end;

. . .

(5) By 15 votes to 1,

Reserves any other matters for subsequent decision."

Those who voted IN FAVOUR were: President Bedjaoui; Vice-President Schwebel; Judges Sir Robert Jennings, Tarassov, Guillaume, Shahabuddeen, Aguilar Mawdsley, Weeramantry, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma; Judges *ad hoc* Valticos, Ruda; and

AGAINST: Judge Oda.

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Judge Shahabuddeen appended a declaration to the Judgment; Vice-President Schwebel and Judge *ad hoc* Valticos appended separate opinions; Judge Oda appended a dissenting opinion.

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History of the case
(paras. 1-14)

In its Judgment, the Court recalls that on 8 July 1991 the Minister for Foreign Affairs of the State of Qatar filed in the Registry of the Court an Application instituting proceedings against the State of Bahrain in respect of certain disputes between the two States relating to sovereignty over the Hawar islands, sovereign rights over the shoals of Dibal and Qit'at Jaradah, and the delimitation of the maritime areas of the two States.

The Court then recites the history of the case. It recalls that in its Application Qatar founded the jurisdiction of the Court upon two agreements between the Parties stated to have been concluded in December 1987 and December 1990, respectively, the subject and scope of the commitment to jurisdiction being determined, according to the Applicant, by a formula proposed by Bahrain to Qatar on 26 October 1988 and accepted by Qatar in December 1990. Bahrain contested the basis of jurisdiction invoked by Qatar.

The Court then refers to the different stages of the proceedings before it and to the submissions of the Parties.

Summary of the circumstances in which a solution to the dispute between Bahrain and Qatar has been sought over the past two decades
(paras. 15-20)

Endeavours to find a solution to the dispute took place in the context of a mediation, sometimes referred to as "good offices", beginning in 1976, by the King of Saudi Arabia with the agreement of the Amirs of Bahrain and Qatar, which led, during a tripartite meeting in March 1983, to the approval of a set of "Principles for the Framework for Reaching a Settlement". The first of these principles specified that

> "All issues of dispute between the two countries, relating to sovereignty over the islands, maritime boundaries and territorial waters, are to be considered as complementary, indivisible issues, to be solved comprehensively together."

Then, in 1987, the King of Saudi Arabia sent the Amirs of Qatar and Bahrain letters in identical terms, in which he put forward new proposals. The Saudi proposals which were adopted by the two Heads of State included four points, the first of which was that

> "All the disputed matters shall be referred to the International Court of Justice, at The Hague, for a final ruling binding upon both parties, who shall have to execute its terms."

The third provided for formation of a Tripartite Committee, composed of representatives of the States of Bahrain and Qatar and of the Kingdom of Saudi Arabia,

> "for the purpose of approaching the International Court of Justice, and satisfying the necessary requirements to have the dispute submitted to the Court in accordance with its regulations and instructions so that a final ruling, binding upon both parties, be issued".

Then, in 1988, following an initiative by Saudi Arabia, the Heir Apparent of Bahrain, when on a visit to Qatar, transmitted to the Heir Apparent of Qatar a text (subsequently known as the *Bahraini formula*) which reads as follows:

> "*Question*
>
> The Parties request the Court to decide any matter of territorial right or other title or interest which may be a matter of difference between them; and to draw a single maritime boundary between their respective maritime areas of seabed, subsoil and superjacent waters."

The matter was again the subject of discussion two years later, on the occasion of the annual meeting of the Co-operation Council of Arab States of the Gulf at Doha in December 1990. Qatar then let it be known that it was ready to accept the Bahraini formula. The Minutes of the meeting which then took place stated that the two Parties had reaffirmed what was agreed previously between them; had agreed to continue the good offices of King Fahd of Saudi Arabia until May 1991; that after this period, the matter might be submitted to the International Court of Justice in accordance with the Bahraini formula, while Saudi Arabia's good offices would continue during the submission of the matter to arbitration; and that, should a brotherly solution acceptable to the two Parties be reached, the case would be withdrawn from arbitration.

The good offices of King Fahd did not lead to the desired outcome within the time-limit thus fixed, and on 8 July 1991 Qatar instituted proceedings before the Court against Bahrain.

According to Qatar, the two States "have made express commitments in the Agreements of December 1987 . . . and December 1990 . . . , to refer their disputes to the . . . Court". Qatar therefore considers that the Court has been enabled "to exercise jurisdiction to adjudicate upon those disputes" and, as a consequence, upon the Application of Qatar.

Bahrain maintains on the contrary that the 1990 Minutes do not constitute a legally binding instrument. It goes on to say that, in any event, the combined provisions of the 1987 exchanges of letters and of the 1990 Minutes were not such as to enable Qatar to seise the Court unilaterally and concludes that the Court lacks jurisdiction to deal with the Application of Qatar.

The nature of the exchanges of letters of 1987 and of the 1990 Doha Minutes
(paras. 21-30)

The Court begins by enquiring into the nature of the texts upon which Qatar relies before turning to an analysis of the content of those texts. It observes that the Parties agree that the exchanges of letters of December 1987 constitute an international agreement with binding force in their mutual relations, but that Bahrain maintains that the Minutes of 25 December 1990 were no more than a simple record of negotiations, similar in nature to the Minutes of the Tripartite Committee, and that accordingly they did not rank as an international agreement and could not, therefore, serve as a basis for the jurisdiction of the Court.

After examining the 1990 Minutes (see above), the Court observes that they are not a simple record of a meeting, similar to those drawn up within the framework of the Tripartite Committee; they do not merely give an account of discussions and summarize points of agreement and disagreement. They enumerate the commitments to which the Parties have consented. They thus create rights and obligations in international law for the Parties. They constitute an international agreement.

Bahrain maintains that the signatories of the 1990 Minutes never intended to conclude an agreement of that kind. The Court does not, however, find it necessary to consider what might have been, in that regard, the intentions of the Foreign Minister of Bahrain or, for that matter, those of the Foreign Minister of Qatar. Nor does it accept Bahrain's contention that the subsequent conduct of the Parties showed that they never considered the 1990 Minutes to be an agreement of this kind.

The content of the exchanges of letters of 1987 and of the 1990 Doha Minutes
(paras. 31-39)

Turning to an analysis of the content of these texts, and of the rights and obligations to which they give rise, the Court first observes that, by the exchanges of letters of December 1987 (see above), Bahrain and Qatar entered into an undertaking to refer all the disputed matters to the Court and to determine, with the assistance of Saudi Arabia (in the Tripartite Committee), the way in which the Court was to be seised in accordance with the undertaking thus given.

The question of the determination of the "disputed matters" was only settled by the Minutes of December 1990.

Those Minutes placed on record the fact that Qatar had finally accepted the Bahraini formula. Both Parties thus accepted that the Court, once seised, should decide "any matter of territorial right or other title or interest which may be a matter of difference between [the Parties]"; and should "draw a single maritime boundary between their respective maritime areas of seabed, subsoil and superjacent waters".

The formula thus adopted determined the limits of the dispute with which the Court would be asked to deal. It was devised to circumscribe that dispute, but, whatever the manner of seisin, it left open the possibility for each of the Parties to present its own claims to the Court, within the framework thus fixed. However, while the Bahraini formula permitted the presentation of distinct claims by each of the Parties, it none the less presupposed that the whole of the dispute would be submitted to the Court.

The Court notes that at present it has before it solely an Application by Qatar setting out the particular claims of that State within the framework of the Bahraini formula. Article 40 of the Court's Statute provides that when cases are brought before the Court "the subject of the dispute and the parties shall be indicated". In the present case the identity of the parties presents no difficulty, but the subject of the dispute is another matter.

In the view of Bahrain, the Qatar Application comprises only some of the elements of the subject-matter intended to be comprised in the Bahraini formula and that was in effect acknowledged by Qatar.

The Court consequently decides to afford the Parties the opportunity to ensure the submission to the Court of the whole of the dispute as it is comprehended within the 1990 Minutes and the Bahraini formula, to which they have both agreed. The Parties may do so by a joint act or by separate acts; the result should in any case be that the Court has before it "any matter of territorial right or other title or interest which may be a matter of difference between" the Parties, and a request that it "draw a single maritime boundary between their respective maritime areas of seabed, subsoil and superjacent waters".

Declaration of Judge Shahabuddeen

My preference would have been for the issue of jurisdiction to be fully decided at this stage. I have, however, voted for the Judgment, understanding the intent to be to offer to the Parties an opportunity, which merits acceptance, to submit the whole of the dispute to the Court. The reasons for the preference are accordingly not set out.

Separate opinion of Vice-President Schwebel

Vice-President Schwebel, who voted for the operative paragraphs of the Judgment as "unobjectionable", described the Judgment as novel and disquieting. It lacked an essential quality of a judgment of this or any court: it did not adjudge the principal issues submitted to it. It was a commanding feature of the practice of the Court that its judgments disposed of the submissions of the parties, but this Judgment failed to do so, because it neither upheld nor declined jurisdiction. Vice-President Schwebel questioned whether the judicial function is served by such an innovation.

Separate opinion of Judge Valticos

In his separate opinion, Judge Valticos took the view that the case in hand was confused and that it was not really clear whether the two States had agreed to refer their dispute to the Court or whether their agreement had also related to the subject of the dispute and the method of seisin. One could, of course, accept that an agreement was reached but, as regards the Minutes of the Doha meeting, it was couched in ambiguous terms. There was, in particular, a problem relating to the Arabic term "*al-tarafan*" used in that connection by the Parties.

In any case, the Court should only proceed to deal with the merits of the present case if both States were to seise it of their disputes, whether jointly or separately, and in accordance with the formula which has been accepted by them and which provides that each State is to submit to the Court the questions with which it would like the Court to deal.

Dissenting opinion of Judge Oda

Judge Oda finds himself unable to vote in favour of the present Judgment, as it transforms the unilateral Application by Qatar into a unilateral filing of an agreement which is found to have been improperly drafted. In his view, the Court should rather have determined whether it had jurisdiction to entertain that unilateral Application. The Court now appears—for the first time in its history—to render an interlocutory judgment. Judge Oda maintains, however, that it cannot take this course without first having settled the jurisdictional issue. What will happen if the Parties do not "take action" to submit the whole of the dispute to the Court? Will either or both Parties be considered not to have complied with the present Judgment; or will the Court simply decide to discontinue the present case, which has already been entered in the General List and of which it will assume that it has been seised? It seems to Judge Oda that the Court is simply making a gesture of issuing an invitation, in the guise of a Judgment, to the Parties to proceed to the submission of a new case independently of the present Application.

The question in the present case is whether the "1987 Agreement" or the "1990 Agreement" is of the nature of "treaties and conventions in force" within the meaning of Article 36 (1) of the Statute, i.e., whether they contain a compromissory clause. After an examination of the nature and contents of the 1987 and 1990 documents, Judge Oda comes to the conclusion that neither Agreement falls within this category.

What were Qatar and Bahrain then trying to achieve in the negotiations by endorsing those documents?

After examining the negotiations which had been going on for more than two decades, Judge Oda concludes that if any mutual understanding was reached between Qatar and Bahrain in December 1987, it was simply an agreement to form a Tripartite Committee, which was to facilitate the drafting of a *special agreement*; he further concludes that the Tripartite Committee was unable to produce an agreed draft of a special agreement; and that the Parties in signing the Minutes of the Doha meeting agreed that reference to the International Court of Justice was to be an alternative to Saudi Arabia's good offices, which did not, however, imply any authorization such as to permit one Party to make an approach to the Court by unilateral application, ignoring "what was agreed previously between the two parties", that is to say, the drafting of a special agreement in accordance with the Bahraini formula.

In conclusion, Judge Oda is confident that neither the "1987 Agreement" nor the "1990 Agreement" can be deemed to constitute a basis for the jurisdiction of the Court in the event of a unilateral application under Article 38 (1) of the Rules of Court and that the Court is not empowered to exercise jurisdiction in respect of the relevant disputes unless they are jointly referred to the Court by a special agreement under Article 39 (1) of the Rules of Court which, in his view, has not occurred in this case. The Court has none the less opted for the role of conciliator instead of finding, as he believes it ought to have done, that it lacks jurisdiction to entertain the Application filed by Qatar on 8 July 1991.

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99. CASE CONCERNING MARITIME DELIMITATION AND TERRITORIAL QUESTIONS BETWEEN QATAR AND BAHRAIN (QATAR *v.* BAHRAIN) (JURISDICTION AND ADMISSIBILITY)

Judgment of 15 February 1995

The Court delivered its Judgment on jurisdiction and admissibility in the case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain.

The Court was composed as follows: President Bedjaoui; Vice-President Schwebel; Judges Oda, Sir Robert Jennings, Guillaume, Shahabuddeen, Aguilar Mawdsley, Weeramantry, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma; Judges *ad hoc* Valticos, Torres Bernárdez; Registrar Valencia-Ospina.

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* *

The operative paragraph of the Judgment reads as follows:

"50. For these reasons,

THE COURT,

(1) By 10 votes to 5,

Finds that it has jurisdiction to adjudicate upon the dispute submitted to it between the State of Qatar and the State of Bahrain;

. . .

(2) By 10 votes to 5,

Finds that the Application of the State of Qatar as formulated on 30 November 1994 is admissible.

. . . "

Those who voted IN FAVOUR: President Bedjaoui; Judges Sir Robert Jennings, Guillaume, Aguilar Mawdsley, Weeramantry, Ranjeva, Herczegh, Shi, Fleischhauer; Judge *ad hoc* Torres Bernárdez;

AGAINST: Vice-President Schwebel; Judges Oda, Shahabuddeen, Koroma; Judge *ad hoc* Valticos.

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* *

Vice-President Schwebel, Judges Oda, Shahabuddeen and Koroma, and Judge *ad hoc* Valticos appended dissenting opinions to the Judgment of the Court.

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* *

History of the case and submissions
(paras. 1-15)

In its Judgment, the Court recalls that on 8 July 1991 Qatar filed an Application instituting proceedings against Bahrain in respect of certain disputes between the two States relating to sovereignty over the Hawar islands, sovereign rights over the shoals of Dibal and Qit'at Jaradah, and the delimitation of the maritime areas of the two States.

The Court then recites the history of the case. It recalls that in its Application Qatar founded the jurisdiction of the Court upon two agreements between the Parties stated to have been concluded in December 1987 and December 1990, respectively, the subject and scope of the commitment to jurisdiction being determined by a formula proposed by Bahrain to Qatar on 26 October 1988 and accepted by Qatar in December 1990 (the "Bahraini formula"). Bahrain contested the basis of jurisdiction invoked by Qatar.

By its Judgment of 1 July 1994, the Court found that the exchanges of letters between the King of Saudi Arabia and the Amir of Qatar dated 19 and 21 December 1987, and between the King of Saudi Arabia and the Amir of Bahrain dated 19 and 26 December 1987, and the document headed "Minutes" and signed at Doha on 25 December 1990 by the Ministers for Foreign Affairs of Bahrain, Qatar and Saudi Arabia, were international agreements creating rights and obligations for the Parties; and that, by the terms of those agreements, the Parties had undertaken to submit to the Court the whole of the dispute between them, as circumscribed by the Bahraini formula. Having noted that it had before it only an Application from Qatar setting out that State's specific claims in connection with that formula, the Court decided to afford the Parties the opportunity to submit to it the whole of the dispute. It fixed 30 November 1994 as the time-limit within which the Parties were jointly or separately to take action to that end; and reserved any other matters for subsequent decision.

On 30 November 1994, the Agent of Qatar filed in the Registry a document entitled "Act to comply with paragraphs (3) and (4) of operative paragraph 41 of the Judgment of the Court dated 1 July 1994". In the document, the Agent referred to "the absence of an agreement between the Parties to act jointly" and declared that he was thereby submitting to the Court "the whole of the dispute between Qatar and Bahrain, as circumscribed by the text . . . referred to in the 1990 Doha Minutes as the 'Bahraini formula' ".

He enumerated the subjects which, in Qatar's view, fell within the Court's jurisdiction:

"1. The Hawar Islands, including the island of Janan;
2. Fasht al Dibal and Qit'at Jaradah;
3. The archipelagic baselines;

4. Zubarah;

5. The areas for fishing for pearls and for fishing for swimming fish and any other matters connected with maritime boundaries.

It is understood by Qatar that Bahrain defines its claim concerning Zubarah as a claim of sovereignty.

Further to its Application Qatar requests the Court to adjudge and declare that Bahrain has no sovereignty or other territorial right over the island of Janan or over Zubarah, and that any claim by Bahrain concerning archipelagic baselines and areas for fishing for pearls and swimming fish would be irrelevant for the purpose of maritime delimitation in the present case."

On 30 November 1994, the Registry also received from the Agent of Bahrain a document entitled "Report of the State of Bahrain to the International Court of Justice on the attempt by the Parties to implement the Court's Judgment of 1st July, 1994". In that "Report", the Agent stated that his Government had welcomed the Judgment of 1 July 1994 and understood it as confirming that the submission to the Court of "the whole of the dispute" must be "consensual in character, that is, a matter of agreement between the Parties". Yet, he observed, Qatar's proposals had "taken the form of documents that can only be read as designed to fall within the framework of the maintenance of the case commenced by Qatar's Application of 8th July, 1991"; and, further, Qatar had denied Bahrain "the right to describe, define or identify, in words of its own choosing, the matters which it wishes specifically to place in issue", and had opposed "Bahrain's right to include in the list of matters in dispute the item of 'sovereignty over Zubarah' ".

Bahrain submitted observations on Qatar's Act to the Court on 5 December 1994. It said that

"the Court did not declare in its Judgment of 1st July, 1994 that it had jurisdiction in the case brought before it by virtue of Qatar's unilateral Application of 1991. Consequently, if the Court did not have jurisdiction at that time, then the Qatari separate Act of 30th November, even when considered in the light of the Judgment, cannot create that jurisdiction or effect a valid submission in the absence of Bahrain's consent".

A copy of each of the documents produced by Qatar and Bahrain was duly transmitted to the other Party.

Jurisdiction of the Court
(paras. 16-44)

The Court begins by referring to the negotiations held between the Parties following the Court's Judgment of 1 July 1994, to the "Act" addressed by Qatar to the Court on 30 November 1994, and to the comments made thereon by Bahrain on 5 December 1994.

The Court then recalls that, in its Judgment of 1 July 1994, it reserved for subsequent decision all such matters as had not been decided in that Judgment. Accordingly, it must rule on the objections of Bahrain in its decision on its jurisdiction to adjudicate upon the dispute submitted to it and on the admissibility of the Application.

Interpretation of paragraph 1 of the Doha Minutes
(paras. 25-29)

Paragraph 1 of the Doha Minutes places on record the agreement of the Parties to "*reaffirm what was agreed previously between [them]*".

The Court proceeds, first of all, to define the precise scope of the commitments which the Parties entered into in 1987 and agreed to reaffirm in the Doha Minutes of 1990. In this regard, the essential texts concerning the jurisdiction of the Court are points 1 and 3 of the letters of 19 December 1987. By accepting those points, Qatar and Bahrain agreed, on the one hand, that

"All the disputed matters shall be referred to the International Court of Justice, at The Hague, for a final ruling binding upon both parties, who shall have to execute its terms"

and, on the other, that a Tripartite Committee be formed

"for the purpose of approaching the International Court of Justice, and satisfying the necessary requirements to have the dispute submitted to the Court in accordance with its regulations and instructions so that a final ruling, binding upon both parties, be issued".

Qatar maintains that, by that undertaking, the Parties clearly and unconditionally conferred upon the Court jurisdiction to deal with the disputed matters between them. The work of the Tripartite Committee was directed solely to considering the procedures to be followed to implement the commitment thus made to seise the Court. Bahrain, on the contrary, maintains that the texts in question expressed only the Parties' consent in principle to a seisin of the Court, but that such consent was clearly subject to the conclusion of a Special Agreement marking the end of the work of the Tripartite Committee.

The Court cannot agree with Bahrain in this respect. Neither in point 1 nor in point 3 of the letters of 19 December 1987 can it find the condition alleged by Bahrain to exist. It is indeed apparent from point 3 that the Parties did not envisage seising the Court without prior discussion, in the Tripartite Committee, of the formalities required to do so. But the two States had none the less agreed to submit to the Court all the disputed matters between them, and the Committee's only function was to ensure that this commitment was given effect, by assisting the Parties to approach the Court and to seise it in the manner laid down by its Rules. By the terms of point 3, neither of the particular modalities of seisin contemplated by the Rules of Court was either favoured or rejected.

The Tripartite Committee met for the last time in December 1988, without the Parties having reached agreement either as to the "disputed matters" or as to the "necessary requirements to have the dispute submitted to the Court". It ceased its activities at the instance of Saudi Arabia and without opposition from the Parties. As the Parties did not, at the time of signing the Doha Minutes in December 1990, ask to have the Committee re-established, the Court considers that paragraph 1 of those Minutes could only be understood as contemplating the acceptance by the Parties of point 1 in the letters from the King of Saudi Arabia dated 19 December 1987 (the commitment to submit to the Court "all the disputed matters" and to comply with the judgment to be handed down by the Court), to the exclusion of point 3 in those same letters.

Interpretation of paragraph 2 of the Doha Minutes
(paras. 30-42)

The Doha Minutes not only confirmed the agreement reached by the Parties to submit their dispute to the Court, but also represented a decisive step along the way towards a peaceful solution of that dispute, by settling the contro-

versial question of the definition of the "disputed matters". This is one of the principal objects of paragraph 2 of the Minutes which, in the translation that the Court will use for the purposes of the present Judgment, reads as follows:

> "(2) The good offices of the Custodian of the Two Holy Mosques, King Fahd Ben Abdul Aziz, shall continue between the two countries until the month of Shawwal 1411 A.H., corresponding to May 1991. Once that period has elapsed, the two parties may submit the matter to the International Court of Justice in accordance with the Bahraini formula, which has been accepted by Qatar, and with the procedures consequent on it. The good offices of the Kingdom of Saudi Arabia will continue during the period when the matter is under arbitration."

Paragraph 2 of the Minutes, which formally placed on record Qatar's acceptance of the Bahraini formula, put an end to the persistent disagreement of the Parties as to the subject of the dispute to be submitted to the Court. The agreement to adopt the Bahraini formula showed that the Parties were at one on the extent of the Court's jurisdiction. The formula had thus achieved its purpose: it set, in general but clear terms, the limits of the dispute the Court would henceforth have to entertain.

The Parties none the less continue to differ on the question of the method of seisin. For Qatar, paragraph 2 of the Minutes authorized a unilateral seisin of the Court by means of an application filed by one or the other Party, whereas for Bahrain, on the contrary, that text only authorized a joint seisin of the Court by means of a special agreement.

The Parties have devoted considerable attention to the meaning which, according to them, should be given to the expression "*al-tarafan*" [Qatar: "the parties"; Bahrain: "the two parties"] as used in the second sentence of the original Arabic text of paragraph 2 of the Doha Minutes. The Court observes that the dual form in Arabic serves simply to express the existence of two units (the parties or the two parties), so what has to be determined is whether the words, when used here in the dual form, have an *alternative* or a *cumulative* meaning: in the first case, the text would leave each of the Parties with the option of acting unilaterally, and, in the second, it would imply that the question be submitted to the Court by both Parties acting in concert, either jointly or separately.

The Court first analyses the meaning and scope of the phrase "Once that period has elapsed, the two parties may submit the matter to the International Court of Justice". It notes that the use in that phrase of the verb "may" suggests in the first place, and in its most material sense, the option or right for the Parties to seise the Court. In fact, the Court has difficulty in seeing why the 1990 Minutes, the object and purpose of which were to advance the settlement of the dispute by giving effect to the formal commitment of the Parties to refer it to the Court, would have been confined to opening up for them a possibility of joint action which not only had always existed but, moreover, had proved to be ineffective. On the contrary, the text assumes its full meaning if it is taken to be aimed, for the purpose of accelerating the dispute settlement process, at opening the way to a possible unilateral seisin of the Court in the event that the mediation of Saudi Arabia had failed to yield a positive result by May 1991. The Court also looks into the possible implications, with respect to that latter interpretation, of the conditions in which the Saudi mediation was to go forward, according to the first and third sentences of paragraph 2 of the Minutes. The Court further notes that the second sentence can be read as affecting the continuation of the mediation. On that hypothesis, the process of mediation would have been suspended in May 1991 and could not have resumed prior to the seisin of the Court. For the Court, it could not have been the purpose of the Minutes to delay the resolution of the dispute or to make it more difficult. From that standpoint, the right of unilateral seisin was the necessary complement to the suspension of mediation.

The Court then applies itself to an analysis of the meaning and scope of the terms "in accordance with the Bahraini formula, which has been accepted by Qatar, and with the procedures consequent on it", which conclude the second sentence of paragraph 2 of the Doha Minutes. The Court must ascertain whether, as is maintained by Bahrain, that reference to the Bahraini formula, and, in particular, to the "procedures consequent on it", had the aim and effect of ruling out any unilateral seisin. The Court is aware that the Bahraini formula was originally intended to be incorporated into the text of a special agreement. However, it considers that the reference to that formula in the Doha Minutes must be evaluated in the context of those Minutes rather than in the light of the circumstances in which that formula was originally conceived. If the 1990 Minutes referred back to the Bahraini formula, it was in order to determine the subject-matter of the dispute which the Court would have to entertain. But the formula was no longer an element in a special agreement, which, moreover, never saw the light of day; it henceforth became part of a binding international agreement which itself determined the conditions for seisin of the Court. The Court notes that the very essence of that formula was, as Bahrain clearly stated to the Tripartite Committee, to circumscribe the dispute with which the Court would have to deal, while leaving it to each of the Parties to present its own claims within the framework thus fixed. Given the failure to negotiate a special agreement, the Court takes the view that the only procedural implication of the Bahraini formula on which the Parties could have reached agreement in Doha was the possibility that each of them might submit distinct claims to the Court.

Consequently, it seems to the Court that the text of paragraph 2 of the Doha Minutes, interpreted in accordance with the ordinary meaning to be given to its terms in their context and in the light of the object and purpose of the said Minutes, allowed the unilateral seisin of the Court.

In these circumstances, the Court does not consider it necessary to resort to supplementary means of interpretation in order to determine the meaning of the Doha Minutes but has recourse to them in order to seek a possible confirmation of its interpretation of the text. Neither the *travaux préparatoires* of the Minutes, however, nor the circumstances in which the Minutes were signed, can, in the Court's view, provide it with conclusive supplementary elements for that interpretation.

Links between jurisdiction and seisin
(para. 43)

The Court still has to examine one other argument. According to Bahrain, even if the Doha Minutes were to be interpreted as not ruling out unilateral seisin, that would still not authorize one of the Parties to seise the Court by way of an Application. Bahrain argues, in effect, that seisin is not merely a procedural matter but a question of juris-

diction; that consent to unilateral seisin is subject to the same conditions as consent to judicial settlement and must therefore be unequivocal and indisputable; and that, where the texts are silent, joint seisin must by default be the only solution.

The Court considers that, as an act instituting proceedings, seisin is a procedural step independent of the basis of jurisdiction invoked. However, the Court is unable to entertain a case so long as the relevant basis of jurisdiction has not been supplemented by the necessary act of seisin: from this point of view, the question of whether the Court was validly seised appears to be a question of jurisdiction. There is no doubt that the Court's jurisdiction can only be established on the basis of the will of the Parties, as evidenced by the relevant texts. But in interpreting the text of the Doha Minutes, the Court has reached the conclusion that it allows a unilateral seisin. Once the Court has been validly seised, both Parties are bound by the procedural consequences which the Statute and the Rules make applicable to the method of seisin employed.

In its Judgment of 1 July 1994, the Court found that the exchanges of letters of December 1987 and the Minutes of December 1990 were international agreements creating rights and obligations for the Parties, and that by the terms of those agreements the Parties had undertaken to submit to it the whole of the dispute between them. In the present Judgment, the Court has noted that, at Doha, the Parties had reaffirmed their consent to its jurisdiction and determined the subject-matter of the dispute in accordance with the Bahraini formula; it has further noted that the Doha Minutes allowed unilateral seisin. The Court considers, consequently, that it has jurisdiction to adjudicate upon the dispute.

Admissibility
(paras. 45-48)

Having thus established its jurisdiction, the Court still has to deal with certain problems of admissibility, as Bahrain has reproached Qatar with having limited the scope of the dispute to only those questions set out in Qatar's Application.

In its Judgment of 1 July 1994, the Court decided:

"to afford the Parties the opportunity to ensure the submission to the Court of the entire dispute as it is comprehended within the 1990 Minutes and the Bahraini formula, to which they have both agreed".

Qatar, by a separate act of 30 November 1994, submitted to the Court "the whole of the dispute between Qatar and Bahrain, as circumscribed" by the Bahraini formula (see above). The terms used by Qatar are similar to those used by Bahrain in several draft texts, except in so far as these related to *sovereignty* over the Hawar islands and *sovereignty* over Zubarah. It appears to the Court that the form of words used by Qatar accurately described the subject of the dispute. In the circumstances, the Court, while regretting that no agreement could be reached between the Parties as to how it should be presented, concludes that it is now seised of the whole of the dispute, and that the Application of Qatar is admissible.

Dissenting opinion of Vice-President Schwebel

Vice-President Schwebel dissented from the Court's Judgment. Since the terms of the treaty at issue—the Doha Minutes—were "quintessentially unclear", the Court was bound to weigh the preparatory work of its text, which in fact had been the principal focus of the argument of the Parties. That preparatory work showed that, as the price of signature of the Doha Minutes, Bahrain had required that the draft text as proposed at Doha be altered to exclude application to the Court by "either party", in favour of the agreed text authorizing application by "the two parties". In proposing and achieving this alteration, Bahrain could only have intended to debar application by "either party" and hence to require application by both parties.

The Court, despite the compelling character of the preparatory work, gave it inconclusive weight. In effect it set aside the preparatory work either because it vitiated rather than confirmed the Court's interpretation, or because its construction of the treaty's text was in the Court's view so clear that reliance upon the preparatory work was unnecessary.

In Judge Schwebel's view, the Court's construction of the Doha Minutes for such reasons was at odds with the rules of interpretation prescribed by the Vienna Convention on the Law of Treaties. It did not comport with a good-faith interpretation of the treaty's terms "in the light of its object and purpose" because the object and purpose of both Parties to the treaty was not to authorize unilateral recourse to the Court. It did not implement the Convention's provision for recourse to the preparatory work because, far from confirming the meaning arrived at by the Court's interpretation, the preparatory work vitiated it. Moreover, the Court's failure to determine the meaning of the treaty in the light of its preparatory work resulted, if not in an unreasonable interpretation of the treaty itself, in an interpretation of the preparatory work which was "manifestly . . . unreasonable".

These considerations have special force where the treaty at issue is one that is construed to confer jurisdiction on the Court. Where the preparatory work of a treaty demonstrates—as in this case—the lack of a common intention of the parties to confer jurisdiction on the Court, the Court is not entitled to base its jurisdiction on that treaty.

Dissenting opinion of Judge Oda

It is Judge Oda's view that the Parties in the case had, by 30 November 1994, failed to take any action, either jointly or separately, in response to the Court's Judgment of 1 July 1994 (which, in any case, in Judge Oda's opinion was not so much a "Judgment" as a record of the Court's attempted conciliation).

On 30 November 1994, the Registry received an "Act" by Qatar and a "Report" by Bahrain. The "Report" of Bahrain was not intended to have any legal effect. The "Act" by Qatar was, in Judge Oda's opinion, intended to modify or add to the original submissions presented in the Application of Qatar.

In the event of any modification of or addition to its submissions by Qatar, the Court should have formally notified Bahrain of that modification or addition and should have given Bahrain an opportunity to express its views within a certain time. The Court did not take any such action.

What did happen was that the Court received Bahrain's "Comments" on the "Act" of Qatar which were sent to the Registry on Bahrain's own initiative on 5 December 1994, only a few days after it had received a copy of the "Act" of Qatar from the Registry. As no further oral proceedings were ordered by the Court, Bahrain was not given

the opportunity to express its formal position on those modifications of or additions to the submissions by Qatar. The procedure taken by the Court appears to Judge Oda to have been very unfortunate, as the Court proceeded instead to draft the present Judgment.

The Court seems to Judge Oda to be saying that the "1987 documents" and the "1990 Doha Minutes" together constitute an international agreement containing a compromissory clause as contemplated by Article 36, paragraph 1, of the Statute. The Court appears further to consider that by its amended submissions as of 30 November 1994 Qatar has submitted "the whole of the dispute" to the Court, so that the Application of Qatar now falls within the ambit of the "1990 Agreement".

For the reasons already set out in his dissenting opinion to the July 1994 Judgment and partly repeated here, Judge Oda is of the view that neither the 1987 exchanges of letters nor the 1990 Doha Minutes fall within the category of "treaties and conventions in force" which specially provide for certain matters to be referred to the Court for a decision by means of a unilateral application under Article 36, paragraph 1, of the Statute.

After examining the negotiations which had been going on between the Parties, Judge Oda concludes that if any mutual understanding was reached between Qatar and Bahrain in December 1987, it was simply an agreement to form a Tripartite Committee, which was to facilitate the drafting of a *special agreement*. He further concludes that the Tripartite Committee was unable to produce an agreed draft of a special agreement; and that the Parties in signing the Minutes of the Doha meeting agreed that reference to the International Court of Justice was to be an alternative to Saudi Arabia's good offices, which did not, however, imply any authorization such as to permit one Party to make an approach to the Court by unilateral application.

Judge Oda is further of the view that, even if the "1990 Agreement" can constitute a basis on which the Court may be seised of the dispute, there seems to be nothing in the present Judgment to show that the amended or additional submissions of Qatar filed on 30 November 1994 in fact comprise "the whole of the dispute", as compared to the opposite position which seems to have been taken by Bahrain. He is therefore unable to vote in favour of the present Judgment.

Dissenting opinion of Judge Shahabuddeen

In his dissenting opinion, Judge Shahabuddeen agreed that the Parties had conferred jurisdiction on the Court to adjudicate on the whole of the dispute. In his view, however, the whole of the dispute was not before the Court, for the reason that Bahrain's claim to sovereignty over Zubarah had not been submitted to the Court by or with the authority of Bahrain; further, if that claim was before the Court, the manner in which it was presented did not enable the Court to deal with it judicially. In addition, he considered that the Parties had not agreed to a right of unilateral application. He concluded that the case was not within the Court's jurisdiction; alternatively, that it was inadmissible.

Dissenting opinion of Judge Koroma

In his dissenting opinion, Judge Koroma observed that it is well established in international law and has been fundamental to the jurisprudence of the Court that the jurisdiction of the Court exists only in so far as the parties to a dispute have accepted it and, more particularly, is contingent on the consent of the Respondent State. Such consent, he further observed, must be clear and indubitable.

In the present case, the Respondent State, Bahrain, had consistently maintained that its consent to the jurisdiction, if at all granted, was conditional upon reaching a special agreement with Qatar, to submit all their disputed matters to the Court, and seise the Court jointly or together.

The Court, in its Judgment of 1 July 1994, held that the relevant documents on which the Applicant relied to found its jurisdiction constituted international agreements, creating rights and obligations for the Parties. The Court was, however, unable to find that it had jurisdiction to hear the dispute, but instead found that the terms of those agreements to submit the whole of the dispute had not been met. It therefore decided to afford the Parties the opportunity to submit the whole of the dispute, jointly or separately.

In his view, the 1 July 1994 Judgment was a finding in favour of the contention that the consent to confer jurisdiction on the Court was subject to the conclusion of a special agreement, defining the subject-matter of the dispute. The Parties were unable to reach agreement to seise the Court of the "whole of the dispute" within the time-limit prescribed by the Court. It, therefore, follows that the Court is not in a position to assume jurisdiction in the matter.

Moreover, one of the legal instruments on which the Court based itself to found jurisdiction had, at the insistence of Bahrain, employed the Arabic expression "*al-tarafan*", translated to mean "the two parties" or "the parties", instead of "each of the two parties" as had been proposed, as a means of seising the Court. The Court instead was seised unilaterally. This issue was of crucial importance to the finding of jurisdiction and was at best ambiguous. The Court should have declined to assume jurisdiction on this ground of ambiguity.

It is well understood that the powers of the Court to assume jurisdiction are limited by the terms of the agreement between the parties under which a dispute is submitted to it. The Agreements in issue contemplated a special agreement and joint seisin by the Parties. Those conditions were not met and the Court, therefore, lacked the power to decide the case and should have declared it inadmissible.

Dissenting opinion of Judge Valticos

Judge Valticos considers that the Court is not competent to consider the dispute, among other things because, by its preceding Judgment of 1 July 1994, the Court had asked *both States* to submit to it the *whole of the dispute*, whereas only one of them (Qatar) did so. Among the contentious issues thus mentioned by Qatar is the question of "*Zubarah*", which Bahrain rejected because the latter State had asked for the term "sovereignty" to be included in the wording of the question. Although the Court considers that the mention of Zubarah makes it possible to raise the question of sovereignty over that territory, this is questionable since in reality Qatar proposed that it should simply be noted that Bahrain defines its claim concerning Zubarah as a claim of sovereignty, which might enable it to dispute the competence of the Court on this topic. Hence, there is no full agreement of the two States regarding the subject-matter of the dispute.

Furthermore, the Court had indicated that, in submitting to it the whole of the dispute, the Parties were to react

jointly or separately. This raises the question of the Arabic term *al-tarafan*, used in the Doha Minutes, which had raised the problem of whether this term referred to both Parties taken together or separately. In the conditions in which this text was adopted—following an amendment proposed by Bahrain—this term should have been understood to mean "both Parties at once".

As regards the Judgment of 1 July 1994, the above wording manifestly referred, in either case, to an act by the two Parties, whether effected jointly or separately. Moreover, this was a logical consequence of the principle according to which the Court can only be seised by the two Parties to a dispute, unless there is an agreement to the contrary, which was not the case here. Furthermore, the two Parties endeavoured, unsuccessfully, to negotiate a special agreement. Also, the reference to the Bahraini formula presupposes a combined operation.

There was thus neither full agreement of the Parties on the subject-matter of the dispute, nor an act by which the two Parties submitted the whole of the dispute to the Court.

In the Judgment of 1 July 1994, the Court did not rule on its jurisdiction, wishing "to afford the Parties the opportunity to submit (to it) the whole of the dispute between them". Only one of the two States responded to this request; the other, disagreeing with the form of words of its opponent, was opposed to the case being brought before the Court.

The Court should therefore have concluded that it had no jurisdiction to entertain the question.

The Court may thus perhaps have provided an opportunity for the prevention of a conflict, at the same time formulating a thesis intended to satisfy both Parties, since it accepts that its jurisdiction covers sovereignty over Zubarah. However, the Judgment suffers from the legal weakness constituted by the absence of actual consent by one of the Parties and the inadequacy of the seisin.

The Court thus showed itself to be insufficiently exacting as regards the consensual principle which lies at the root of its jurisdiction and the trust placed in it by the international community.

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100. CASE CONCERNING EAST TIMOR (PORTUGAL *v.* AUSTRALIA)

Judgment of 30 June 1995

In its Judgment in the case concerning East Timor (Portugal *v.* Australia), the Court, by 14 votes to 2, found that it could not exercise the jurisdiction conferred upon it by the declarations made by the Parties under Article 36, paragraph 2, of its Statute to adjudicate upon the dispute referred to it by the Application of the Portuguese Republic.

Those who voted IN FAVOUR were: President Bedjaoui; Vice-President Schwebel; Judges Oda, Sir Robert Jennings, Guillaume, Shahabuddeen, Aguilar Mawdsley, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin; Judge *ad hoc* Sir Ninian Stephen.

AGAINST: Judge Weeramantry; Judge *ad hoc* Skubiszewski.

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Judges Oda, Shahabuddeen, Ranjeva, and Vereshchetin appended separate opinions to the Judgment of the Court.

Judge Weeramantry and Judge *ad hoc* Skubiszewski appended dissenting opinions to the Judgment of the Court.

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Procedural history
(paras. 1-10)

In its Judgment, the Court recalls that on 22 February 1991 Portugal instituted proceedings against Australia concerning "certain activities of Australia with respect to East Timor". According to the Application Australia had, by its conduct, "failed to observe . . . the obligation to respect the duties and powers of [Portugal as] the administering Power [of East Timor] . . . and . . . the right of the people of East Timor to self-determination and the related rights". In consequence, according to the Application, Australia had "incurred international responsibility vis-à-vis both the people of East Timor and Portugal". As the basis for the jurisdiction of the Court, the Application refers to the declarations by which the two States have accepted the compulsory jurisdiction of the Court under Article 36, paragraph 2, of its Statute. In its Counter-Memorial, Australia raised questions concerning the jurisdiction of the Court and the admissibility of the Application. In the course of a meeting held by the President of the Court, the Parties agreed that these questions were inextricably linked to the merits and that they should therefore be heard and determined within the framework of the merits. The written proceedings having been completed in July 1993, hearings were held between 30 January and 16 February 1995. The Judgment then sets out the final submissions which were presented by both Parties in the course of the oral proceedings.

Historical background
(paras. 11-18)

The Court then gives a short description of the history of the involvement of Portugal and Indonesia in the Territory of East Timor and of a number of Security Council and General Assembly resolutions concerning the question of East Timor. It further describes the negotiations between Australia and Indonesia leading to the Treaty of 11 December 1989, which created a "Zone of Cooperation . . . in an area between the Indonesian Province of East Timor and Northern Australia".

Summary of the contentions of the Parties
(paras. 19-20)

The Court then summarizes the contentions of both Parties.

Australia's objection that there exists in reality no dispute between the Parties
(paras. 21-22)

The Court goes on to consider Australia's objection that there is in reality no dispute between itself and Portugal. Australia contends that the case as presented by Portugal is artificially limited to the question of the lawfulness of Australia's conduct, and that the true respondent is Indonesia, not Australia. Australia maintains that it is being sued in place of Indonesia. In this connection, it points out that Portugal and Australia have accepted the compulsory jurisdiction of the Court under Article 36, paragraph 2, of its Statute, but that Indonesia has not.

The Court finds in this respect that for the purpose of verifying the existence of a legal dispute in the present case, it is not relevant whether the "real dispute" is between Portugal and Indonesia rather than Portugal and Australia. Portugal has, rightly or wrongly, formulated complaints of fact and law against Australia which the latter has denied. By virtue of this denial, there is a legal dispute.

Australia's objection that the Court is required to determine the rights and obligations of Indonesia
(paras. 23-35)

The Court then considers Australia's principal objection, to the effect that Portugal's Application would require the Court to determine the rights and obligations of Indonesia. Australia contends that the jurisdiction conferred upon the Court by the Parties' declarations under Article 36, paragraph 2, of the Statute would not enable the Court to act if, in order to do so, the Court were required to rule on the lawfulness of Indonesia's entry into and continuing presence in East Timor, on the validity of the 1989 Treaty between Australia and Indonesia, or on the rights and obligations of Indonesia under that Treaty, even if the Court did not have to determine its validity. In support of its argument, it refers to the Court's Judgment in the case of *Monetary Gold Removed from Rome in 1943*. Portugal agrees that if its Application required the Court to decide any of these questions, the Court could not entertain it. The Parties disagree, however, as to whether the Court is required to decide any of these questions in order to resolve the dispute referred to it.

Portugal contends first that its Application is concerned exclusively with the objective conduct of Australia, which consists in having negotiated, concluded and initiated performance of the 1989 Treaty with Indonesia, and that this question is perfectly separable from any question relating to the lawfulness of the conduct of Indonesia.

Having carefully considered the argument advanced by Portugal which seeks to separate Australia's behaviour from that of Indonesia, the Court concludes that Australia's behaviour cannot be assessed without first entering into the question why it is that Indonesia could not lawfully have concluded the 1989 Treaty, while Portugal allegedly could have done so; the very subject-matter of the Court's decision would necessarily be a determination whether, having regard to the circumstances in which Indonesia entered and remained in East Timor, it could or could not have acquired the power to enter into treaties on behalf of East Timor relating to the resources of its continental shelf. The Court could not make such a determination in the absence of the consent of Indonesia.

The Court rejects Portugal's additional argument that the rights which Australia allegedly breached were rights *erga omnes* and that accordingly Portugal could require it, individually, to respect them regardless of whether or not another State had conducted itself in a similarly unlawful manner.

In the Court's view, Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter of the United Nations and from United Nations practice, has an *erga omnes* character, is irreproachable. The principle of self-determination of peoples has been recognized by the Charter and in the jurisprudence of the Court; it is one of the essential principles of contemporary international law. However, the Court considers that the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things. Whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case.

The Court goes on to consider another argument of Portugal which, the Court observes, rests on the premise that the United Nations resolutions, and in particular those of the Security Council, can be read as imposing an obligation on States not to recognize any authority on the part of Indonesia over East Timor and, where the latter is concerned, to deal only with Portugal. Portugal maintains that those resolutions would constitute "givens" on the content of which the Court would not have to decide *de novo*.

The Court takes note of the fact that, for the two Parties, the Territory of East Timor remains a Non-Self-Governing Territory and its people has the right to self-determination, and that the express reference to Portugal as the "administering Power" in a number of the above-mentioned resolutions is not at issue between them. The Court finds, however, that it cannot be inferred from the sole fact that a number of resolutions of the General Assembly and the Security Council refer to Portugal as the administering Power of East Timor that they intended to establish an obligation on third States to treat exclusively with Portugal as regards the continental shelf of East Timor. Without prejudice to the question whether the resolutions under discussion could be binding in nature, the Court considers as a result that they cannot be regarded as "givens" which constitute a sufficient basis for determining the dispute between the Parties.

It follows from this that the Court would necessarily have to rule upon the lawfulness of Indonesia's conduct as a prerequisite for deciding on Portugal's contention that Australia violated its obligation to respect Portugal's status as administering Power, East Timor's status as a Non-Self-Governing Territory and the right of the people of the Territory to self-determination and to permanent sovereignty over its wealth and natural resources. Indonesia's rights and obligations would thus constitute the very subject-matter of such a judgment made in the absence of that State's consent. Such a judgment would run directly counter to the "well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent" (*Monetary Gold Removed from Rome in 1943, I.C.J. Reports 1954*, p. 32).

Conclusions
(paras. 36-37)

The Court accordingly finds that it is not required to consider Australia's other objections and that it cannot rule on Portugal's claims on the merits, whatever the importance of the questions raised by those claims and of the rules of international law which they bring into play.

The Court recalls in any event that it has taken note in the Judgment that, for the two Parties, the Territory of East Timor remains a Non-Self-Governing Territory and its people has the right to self-determination.

Separate opinion of Judge Oda

Judge Oda, while agreeing that Portugal's Application should be dismissed, as the Court lacks jurisdiction to entertain it, considers that its dismissal should not have been based upon the absence of Indonesia's consent, as in the Court's Judgment, but upon the *sole* consideration that Portugal lacked *locus standi*.

After examining Portugal's complaint, Judge Oda concludes that Portugal "has given an incorrect definition of the dispute and seems to have overlooked the difference between the *opposability* to any State of its rights and duties as the administering Power or of the rights of the people of East Timor and *the more basic question* of whether Portugal is the State entitled to assert these rights and duties". He further points out that the right of the people of East Timor to self-determination and the related rights have not been challenged by Australia and, in any event, cannot be made an issue in the present case. That case relates in Judge Oda's view *solely* to the title to the continental shelf which Portugal claims to possess as a coastal State.

Judge Oda goes on to note that in the area of the "Timor Gap" Australia has not asserted a new claim to any seabed area intruding into the area of any State or of the people of the Territory of East Timor, nor has it acquired any new seabed area from any State or from that people. The continental shelves of Australia and of the opposite State overlap somewhere in the middle of the "Timor Gap", and Australia should and did negotiate the question of that overlapping with the coastal State lying opposite to it across the Timor Sea.

The central question in the present case is *whether Portugal or Indonesia*, as a State lying opposite to Australia, was entitled to the continental shelf in the "Timor Gap".

From a survey of events in relation to the delimitation of the continental shelf in the relevant areas, it appears that since the 1970s Indonesia claimed the status of a coastal State for East Timor and, as such, negotiated with Australia. If Portugal had also claimed that status, it could and should have initiated a dispute over the corresponding title to the continental shelf *with Indonesia*, but not with Australia. *Not unless and until* such time as Portugal had been established as having the status of the coastal State entitled to the corresponding continental shelf could any issue concerning the seabed area of the "Timor Gap" have been the subject-matter of a dispute *between Portugal and Australia*. Had that been the case, the treaty between Australia and Indonesia would certainly have been null and void from the outset. The reliance of the Judgment on the principle of the required consent of the third party to the Court's jurisdiction (as exemplified in the *Monetary Gold* case) accordingly seems to be irrelevant.

A further historical survey shows that, in Judge Oda's view, "while the military intervention of Indonesia in East Timor and the integration of East Timor into Indonesia in the mid-1970s were not approved by the United Nations, there has not been any reason to assume that Portugal has, since the late 1970s and up to the present time, been entrusted with the rights and responsibilities of an administering Power for the Non-Self-Governing Territory of East Timor. Few States in the international community have in the recent past regarded, or at present regard, Portugal as a State located in East Timor or would maintain that as such it may lay claim to the continental shelf off the coast of East Timor". Portugal therefore lacks standing as an Applicant State in this proceeding which relates to the continental shelf extending southward into the Timor Sea from the coast of East Timor in the "Timor Gap".

Separate opinion of Judge Shahabuddeen

In his separate opinion, Judge Shahabuddeen added that the judgment requested by Portugal would not only involve the determination of a question of the international responsibility of an absent State; it would involve the determination of its rights under a Treaty to which it is a party, as well as the determination of the validity of the Treaty itself.

Separate opinion of Judge Ranjeva

Judge Ranjeva wholly approves of the Court for recalling that the right of peoples to self-determination is one of the essential principles of contemporary international law, possessing the characteristic of an absolute right *erga omnes*, and for upholding Australia's first objection to the effect that Portugal's Application would oblige the Court to rule on the rights and obligations of Indonesia. According to Judge Ranjeva, the rights and obligations of Indonesia at issue concern releasing Australia from its obligations vis-à-vis Indonesia and depriving Indonesia of the benefit of the effects of the principle *pacta sunt servanda*, which it is entitled to expect from the 1989 Timor Gap Treaty, whose validity has not been disputed. The consensual nature of international jurisdiction prohibits the Court from adjudicating on the legal interests of a State which has not clearly expressed its consent to jurisdiction.

According to the analysis of the jurisprudence of the *Monetary Gold* case made by Judge Ranjeva in his separate opinion, a prior decision, in the sense understood in the Judgment of 1954, is essential when subjective rights are the object of that prior decision; he voices reservations regarding the transposition of this rule were the prior decision to concern a question of an objective right *erga omnes*. This question required additional explanation since *jus cogens* falls within the province of positive law.

Lastly, Judge Ranjeva enumerates a number of questions which remained open and unanswered by virtue of the methodological choice made by the Court, examples being the possibility of an interpretation limiting the domain of the Court's jurisdiction *ratione juris* solely to disputes involving subjective rights, the definition of the notion of the third parties falling within the residual category exterior to the circle of the Parties. For Judge Ranjeva, determining the framework for the development of international law is part of the Court's "scientific responsibility".

Separate opinion of Judge Vereshchetin

In his separate opinion, Judge Vereshchetin takes the view that since the right of the people of East Timor to self-determination lies at the core of the whole case, the Court should have had reliable evidence on how far the Application was supported by that people. The necessity for the Court to have this evidence was only reinforced by the fact that the other Party in the dispute sought to disclaim the alleged disregard of the legal rights and interests of the people of East Timor as well as the rights consequential to the status of Portugal as administering Power. However, neither in the written pleadings nor in the course of the oral arguments has the Court been provided with such evidence.

Although the Charter of the United Nations does not explicitly impose on the administering Power the duty to consult the people of a Non-Self-Governing Territory when the matter at issue directly concerns that people, in the view of Judge Vereshchetin the jurisprudence of the Court shows that such a duty does exist in international law at the present stage of its development and in the contemporary setting of the decolonization process. The above duty may be dispensed with only in exceptional cases, which cannot be held to apply in the present case.

The lack of any evidence as to the view of the people of East Timor, on whose behalf the Application has been filed, is one of the principal reasons leading to the inability of the Court to decide the dispute.

Dissenting opinion of Judge Weeramantry

Judge Weeramantry, in his opinion, expresses agreement with the Court's decision dismissing the objection that no real dispute exists between Australia and Portugal. He also agrees with the stress laid by the Court on the importance of self-determination as "one of the essential principles of contemporary international law".

However, he differs from the majority of the Court on the question whether the Court lacks jurisdiction on the ground that a decision against Australia would involve a decision concerning the rights of Indonesia, a third State, not before the Court.

The opinion analyses the *Monetary Gold* decision and the prior and subsequent jurisprudence on this matter, and concludes from this analysis that, having regard to the facts of this case, the *Monetary Gold* decision is not relevant inasmuch as the Court could determine the matter before it entirely on the basis of the obligations and actions of Australia alone, without any need to make an adjudication on the conduct of Indonesia. A central principle of State responsibility in international law is the individual responsibility of a State for its actions, quite apart from the complicity of another State in those actions.

The Respondent State's actions, in negotiating, concluding and initiating performance of the Timor Gap Treaty and taking internal legislative measures for its application, are thus justiciable on the basis of its unilateral conduct.

The rights of self-determination and permanent sovereignty over natural resources are rights *erga omnes* belonging to the people of East Timor, and therefore generate a corresponding duty upon all States, including the Respondent, to recognize and respect those rights. The act of being party to a treaty recognizing that East Timor (admittedly a Non-Self-Governing Territory and recognized as such by the United Nations) has been incorporated in another State, which treaty deals with a valuable non-renewable resource of the people of East Timor for an initial period of 40 years, without reference to them or their authorized representative, raises substantial doubts regarding the compatibility of these acts with the rights of the people of East Timor and the obligations of Australia. The Court could have proceeded to determine whether a course of action had been made out against Australia on such actions, without the need for any adjudication concerning Indonesia.

The opinion also holds in favour of the right of Portugal to maintain this Application as the administering Power over East Timor, recognized as such by the United Nations. The position and responsibilities of an administering Power which continues to be so recognized by the United Nations are not lost by the mere circumstance of loss of physical control, for such a proposition would run contrary to the protective scheme embodied in the Charter of the United Nations for the care of Non-Self-Governing Territories.

Dissenting opinion of Judge Skubiszewski

In Judge Skubiszewski's view, the Court has jurisdiction in this case and the Portuguese claims are admissible. The requirements of judicial propriety are also met. The Court can render a decision on the merits.

In particular, even if the Court finds itself without jurisdiction to adjudicate on any issue relating to the Timor Gap Treaty, the Court could deal with the first submission of Portugal, i.e., with the status of East Timor, the applicability to that Territory of the principle of self-determination and some other basic principles of international law, and the position of Portugal as administering Power. This is so because the first submission can be separated from the remaining submissions which concern exclusively the specific issues of the Treaty. It is true that the Court refers to the status of the Territory and to self-determination, and in this respect Judge Skubiszewski concurs with the Court (as he also does in regard to the Court's rejection of the Australian objection that there is no dispute between the Parties). But Judge Skubiszewski thinks that the Court should have elaborated on these matters (as there are some unclear points) and included the result of such elaboration in the operative clause. By not doing so, the Court adopted a narrow view of its function.

The *Monetary Gold* rule does not exclude jurisdiction in this case. The premise for the application of the rule is lacking here: to decide on all the submissions of Portugal, the Court need not adjudicate on any powers, rights and duties of Indonesia. In this case the Court adopted an extensive interpretation of the *Monetary Gold* rule; this interpretation contrasts with its earlier practice. The Court has gone beyond the limit of the operation of *Monetary Gold*.

The Court can decide on the lawfulness of some unilateral acts of Australia leading to the conclusion of the Treaty. A decision thereon does not imply any adjudication on Indonesia, nor does it involve any finding on the validity of the Treaty (which the Court is not competent to make). The conduct of Australia can be assessed in the light of United Nations law and resolutions. Such assessment is not linked to any passing upon Indonesia's activities.

Portugal has the capacity to act before the Court in this case on behalf of East Timor and to vindicate the respect for its position as administering Power.

In discussing and defining the present status of the Territory (i.e., after annexation by Indonesia), the rule of non-recognition is relevant. In the instance of East Timor, recognition of annexation erodes self-determination. The position of Portugal as administering Power was questioned by Australia; the Court should have clarified this issue. It is within its jurisdiction.

Even if the Court's Judgment is legally correct (which it is not), the Court's function cannot be reduced to legal correctness alone. Otherwise the Court would restrict its function to the detriment of justice and of the basic constitutional rule that it is "the principal judicial organ of the United Nations". That restrictive approach is illustrated by the Judgment and it is cause for concern.

101. REQUEST FOR AN EXAMINATION OF THE SITUATION IN ACCORDANCE WITH PARAGRAPH 63 OF THE COURT'S JUDGMENT OF 20 DECEMBER 1974 IN THE *NUCLEAR TESTS (NEW ZEALAND* v. *FRANCE)* CASE

Order of 22 September 1995

The Court handed down its decision that New Zealand's Request for an Examination of the Situation in accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the *Nuclear Tests (New Zealand* v. *France)* Case, made on 21 August 1995, "does not fall within the provisions of the said paragraph 63 and must consequently be dismissed".

Consequently, New Zealand's request for provisional measures and the applications for permission to intervene submitted by Australia, Samoa, Solomon Islands, the Marshall Islands and the Federated States of Micronesia, as well as the declarations of intervention made by the last four States, all of which are proceedings incidental to New Zealand's main Request, likewise had to be dismissed.

The Court limited the present proceedings to the examination of the following question: "Do the Requests submitted to the Court by the Government of New Zealand on 21 August 1995 fall within the provisions of paragraph 63 of the Judgment of the Court of 20 December 1974 in the case concerning *Nuclear Tests (New Zealand* v. *France)*?". In the Court's view, that question has two elements. The first element concerns the courses of procedure envisaged by the Court in paragraph 63 of its 1974 Judgment, when it stated that "the Applicant could request an examination of the situation *in accordance with the provisions of the Statute*"; the other concerns the question whether the "basis" of that Judgment has been "affected" within the meaning of paragraph 63 thereof.

In its examination of that question, the Court found in the first place that by inserting in paragraph 63 the abovementioned phrase the Court did not exclude a special procedure for access to it (unlike those mentioned in the Court's Statute, like the filing of a new application, or a request for interpretation or revision, which would have been open to the Applicant in any event). Secondly, however, the Court found that that special procedure would only be available to the Applicant if circumstances were to arise which affected the basis of the 1974 Judgment. And that, it found, was not the case, as the basis of that Judgment was France's undertaking not to conduct any further atmospheric nuclear tests and only a resumption of nuclear tests in the atmosphere would therefore have affected it.

The decision was taken by 12 votes to 3. Three declarations, one separate opinion and three dissenting opinions were appended to the Order.

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In its Order, the Court recalls that on 21 August 1995 New Zealand filed a "Request for an Examination of the Situation" in accordance with paragraph 63 of the Court's Judgment of 20 December 1974 in the *Nuclear Tests (New Zealand* v. *France)* case; it is indicated in the Request that it "aris[es] out of a proposed action announced by France which will, if carried out, affect the basis of the Judgment rendered by the Court on 20 December 1974 in the *Nuclear Tests (New Zealand* v. *France)* case"; and that "the immediate circumstance giving rise to the present phase of the Case is a decision announced by France in a media statement of 13 June 1995" by the President of the French Republic, according to which "France would conduct a final series of eight nuclear weapons tests in the South Pacific starting in September 1995". New Zealand expressly founds its "Request for an Examination of the Situation" on paragraph 63 of the Judgment of 20 December 1974 (cited below). At the end of its Request, New Zealand states that the rights for which it seeks protection all fall within the scope of the rights invoked in paragraph 28 of its Application of 1973, but that, at the present time, it seeks recognition only of those rights that would be adversely affected by entry into the marine environment of radioactive material as a result of the further tests to be carried out at Mururoa or Fangataufa Atolls, and of its entitlement to protection and to the benefit of a properly conducted Environmental Impact Assessment; within these limits, New Zealand asks the Court to adjudge and declare:

"(i) that the conduct of the proposed nuclear tests will constitute a violation of the rights under international law of New Zealand, as well as of other States;

further or in the alternative,

(ii) that it is unlawful for France to conduct such nuclear tests before it has undertaken an Environmental Impact Assessment according to accepted international standards. Unless such an assessment establishes that the tests will not give rise, directly or indirectly, to radioactive contamination of the marine environment the rights under international law of New Zealand, as well as the rights of other States, will be violated."

The Court further recalls that on the same day New Zealand filed a request for the following provisional measures:

"(1) that France refrain from conducting any further nuclear tests at Mururoa and Fangataufa Atolls;

(2) that France undertake an environmental impact assessment of the proposed nuclear tests according to accepted international standards and that, unless the assessment establishes that the tests will not give rise to radioactive contamination of the marine environment, France refrain from conducting the tests;

(3) that France and New Zealand 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 decisions the Court may give in this case".

The Court also refers to the submission of applications for permission to intervene by Australia, Samoa, Solomon Islands, the Marshall Islands and the Federated States of Micronesia, as well as to the declarations on intervention made by the last four States. It then refers to the presentation, at the invitation of the President of the Court, of informal aides-mémoire by New Zealand and France and to the public sittings held on 11 and 12 September 1995.

The Court then summarizes the views expressed by the two States in the course of the proceedings.

The Court finally observes that New Zealand's "Request for an Examination of the Situation" submitted under paragraph 63 of the 1974 Judgment, even if it is disputed *in limine* whether it fulfils the conditions set in that paragraph, must none the less be the object of entry in the General List of the Court for the sole purpose of enabling the latter to determine whether those conditions are fulfilled; and that it has accordingly instructed the Registrar.

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The Court begins by citing paragraph 63 of the Judgment of 20 December 1974, which provides: "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, the Court observes that if the basis of this Judgment were to be affected, the Applicant could request an examination of the situation in accordance with the provisions of the Statute; the denunciation by France, by letter dated 2 January 1974, of the General Act for the Pacific Settlement of International Disputes, which is relied on as a basis of jurisdiction in the present case, cannot constitute by itself an obstacle to the presentation of such a request."

It then indicates that the following question has to be answered *in limine*: "Do the Requests submitted to the Court by the Government of New Zealand on 21 August 1995 fall within the provisions of paragraph 63 of the Judgment of the Court of 20 December 1974 in the case concerning *Nuclear Tests (New Zealand* v. *France)*?"; and that the present proceedings have consequently been limited to that question. The question has two elements: one concerns the courses of procedure envisaged by the Court in paragraph 63 of its 1974 Judgment, when it stated that "the Applicant could request an examination of the situation *in accordance with the provisions of the Statute*"; the other concerns the question whether the "basis" of that Judgment has been "affected" within the meaning of paragraph 63 thereof.

As to the first element of the question before it, the Court recalls that New Zealand expresses the following view: "paragraph 63 is a mechanism enabling the continuation or the resumption of the proceedings of 1973 and 1974. They were not fully determined. The Court foresaw that the course of future events might in justice require that New Zealand should have that opportunity to continue its case, the progress of which was stopped in 1974. And to this end in paragraph 63 the Court authorized these derivative proceedings. . . . the presentation of a Request for such an examination is to be part of the same case and not of a new one." New Zealand adds that paragraph 63 could only refer to the procedure applicable to the examination of the situation once the Request was admitted; it furthermore explicitly states that it is not seeking an interpretation of the 1974 Judgment under Article 60 of the Statute, nor a revision of that Judgment under Article 61.

France, for its part, stated as follows: "As the Court itself has expressly stated, the possible steps to which it alludes are subject to compliance with the 'provisions of the Statute' . . . The French Government incidentally further observes that, even had the Court not so specified, the principle would nevertheless apply: any activity of the Court is governed by the Statute, which circumscribes the powers of the Court and prescribes the conduct that States must observe without it being possible for them to depart therefrom, even by agreement . . . ; as a result and *a fortiori*, a State cannot act unilaterally before the Court in the absence of any basis in the Statute. Now New Zealand does not invoke any provision of the Statute and could not invoke any that would be capable of justifying its procedure in law. It is not a request for interpretation or revision (*a*), nor a new Application, whose entry in the General List would, for that matter, be quite out of the question (*b*)".

The Court observes that in expressly laying down, in paragraph 63 of its Judgment of 20 December 1974, that, in the circumstances set out therein, "the Applicant could request an examination of the situation *in accordance with the provisions of the Statute*", the Court cannot have intended to limit the Applicant's access to legal procedures such as the filing of a new application (Statute, Art. 40, para. 1), a request for interpretation (Statute, Art. 60) or a request for revision (Statute, Art. 61), which would have been open to it in any event; by inserting the above-mentioned words in paragraph 63 of its Judgment, the Court did not exclude a special procedure, in the event that the circumstances defined in that paragraph were to arise, in other words, circumstances which "affected" the "basis" of the Judgment. The Court goes on to point out that such a procedure appears to be indissociably linked, under that paragraph, to the existence of those circumstances; and that if the circumstances in question do not arise, that special procedure is not available.

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The Court then considers that it must determine the second element of the question raised, namely, whether the basis of its Judgment of 20 December 1974 has been affected by the facts to which New Zealand refers and whether the Court may consequently proceed to examine the situation as contemplated by paragraph 63 of that Judgment; to that end, it must first define the basis of that Judgment by an analysis of its text. The Court observes that in 1974 it took as the point of departure of its reasoning the Application filed by New Zealand in 1973; and that in its Judgment of 20 December 1974 it affirmed that "in the circumstances of the present case, as already mentioned, the Court must ascertain the true subject of the dispute, the object and purpose of the claim . . . In doing so it must take into account not only the submission, but the Application as a whole, the arguments of the Applicant before the Court, and other documents referred to . . ." (*I.C.J. Reports 1974*, p. 467, para. 31). Referring, among other things, to a statement made by the Prime Minister of New Zealand, the Court found that "for purposes of the Application, the New Zealand claim is to be interpreted as applying only to atmospheric tests, not to any other form of testing, and as applying only to atmospheric tests so conducted as to give rise to radio-active fall-out on New Zealand territory" (*I.C.J. Reports 1974*, p. 466, para. 29). In making, in 1974, this finding and the one in the *Nuclear Tests (Australia* v. *France)* case (for the Court, the two cases appeared identical as to their subject-matter, which concerned exclusively atmospheric tests), the Court had addressed the question whether New Zealand, when filing its 1973 Application, might have had broader objectives than the cessation of

atmospheric nuclear tests—the "primary concern" of the Government of New Zealand, as it now puts it. The Court concludes that it cannot now reopen this question since its current task is limited to an analysis of the Judgment of 1974.

The Court recalls that, moreover, it took note, at that time, of the communiqué issued by the Office of the President of the French Republic on 8 June 1974, stating that "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" (*I.C.J. Reports 1974*, p. 469, para. 35) and of other official declarations of the French authorities on the same subject, made publicly outside the Court and *erga omnes*, and expressing the French Government's intention to put an end to its atmospheric tests; and that, comparing the undertaking entered into by France with the claim asserted by New Zealand, it found that it faced "a situation in which the objective of the Applicant [had] in effect been accomplished" (*I.C.J. Reports 1974*, p. 475, para. 55) and accordingly indicated that "the object of the claim having clearly disappeared, there is nothing on which to give judgment" (*I.C.J. Reports 1974*, p. 477, para. 62). The Court concludes that the basis of the 1974 Judgment was consequently France's undertaking not to conduct any further atmospheric nuclear tests; that it was only, therefore, in the event of a resumption of nuclear tests in the atmosphere that that basis of the Judgment would have been affected; and that that hypothesis has not materialized.

The Court observes further that in analysing its Judgment of 1974, it reached the conclusion that that Judgment dealt exclusively with atmospheric nuclear tests; that consequently it is not possible for the Court now to take into consideration questions relating to underground nuclear tests; and that the Court cannot, therefore, take account of the arguments derived by New Zealand, on the one hand from the conditions in which France has conducted underground nuclear tests since 1974, and on the other from the development of international law in recent decades—and particularly the conclusion, on 25 November 1986, of the Noumea Convention—any more than of the arguments derived by France from the conduct of the New Zealand Government since 1974. It finally observes that its Order is without prejudice to the obligations of States to respect and protect the natural environment, obligations to which both New Zealand and France have in the present instance reaffirmed their commitment.

The Court therefore finds that the basis of the 1974 Judgment has not been affected; that New Zealand's Request does not therefore fall within the provisions of paragraph 63 of that Judgment; and that that Request must consequently be dismissed. It also points out that following its Order, the Court has instructed the Registrar to remove that Request from the General List as of 22 September 1995.

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Finally, the Court indicates that it must likewise dismiss New Zealand's "Further Request for the Indication of Provisional Measures", as well as the applications for permission to intervene submitted by Australia, Samoa, Solomon Islands, the Marshall Islands and the Federated States of Micronesia and the declarations of intervention made by the last four States—all of which are proceedings incidental to New Zealand's main Request.

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The full text of the operative paragraph reads as follows:

"68. Accordingly,

THE COURT,

(1) By twelve votes to three,

Finds that the 'Request for an Examination of the Situation' in accordance with paragraph 63 of the Judgment of the Court of 20 December 1974 in the *Nuclear Tests (New Zealand* v. *France)* case, submitted by New Zealand on 21 August 1995, does not fall within the provisions of the said paragraph 63 and must consequently be dismissed;

IN FAVOUR: President Bedjaoui; Vice-President Schwebel; Judges Oda, Guillaume, Shahabuddeen, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Ferrari Bravo, Higgins;

AGAINST: Judges Weeramantry, Koroma; Judge *ad hoc* Sir Geoffrey Palmer;

(2) By twelve votes to three,

Finds that the 'Further Request for the Indication of Provisional Measures' submitted by New Zealand on the same date must be dismissed;

IN FAVOUR: President Bedjaoui; Vice-President Schwebel; Judges Oda, Guillaume, Shahabuddeen, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Ferrari Bravo, Higgins;

AGAINST: Judges Weeramantry, Koroma; Judge *ad hoc* Sir Geoffrey Palmer;

(3) By twelve votes to three,

Finds that the 'Application for Permission to Intervene' submitted by Australia on 23 August 1995, and the 'Applications for Permission to Intervene' and 'Declarations of Intervention' submitted by Samoa and Solomon Islands on 24 August 1995, and by the Marshall Islands and the Federated States of Micronesia on 25 August 1995, must likewise be dismissed.

IN FAVOUR: President Bedjaoui; Vice-President Schwebel; Judges Oda, Guillaume, Shahabuddeen, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Ferrari Bravo, Higgins;

AGAINST: Judges Weeramantry, Koroma; Judge *ad hoc* Sir Geoffrey Palmer."

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Vice-President Schwebel and Judges Oda and Ranjeva appended declarations to the Order of the Court. Judge Shahabuddeen appended a separate opinion; and Judges Weeramantry and Koroma and Judge *ad hoc* Sir Geoffrey Palmer appended dissenting opinions to the Order.

Declaration of Vice-President Schwebel

Vice-President Schwebel, in a declaration, maintained that France's objections to the maintenance by New Zealand of its Requests were tantamount to an objection to admissibility, and should have been treated accordingly pursuant to the Rules of Court.

Declaration of Judge Oda

In his declaration, Judge Oda fully supported the Order, which dismisses New Zealand's Request to reopen the *Nuclear Tests (New Zealand* v. *France)* case of 1973/1974, as he shared the reasoning with regard to the matters of procedure leading to the refusal of that Request. But, as the Member of the Court from the only country which has suffered the devastating effects of nuclear weapons, he felt bound to express his personal hope that no further tests of any kind of nuclear weapons would be carried out under any circumstances in future.

Declaration of Judge Ranjeva

In his declaration, Judge Ranjeva expressed regret that the Court had overemphasized procedural formalism while not adhering to the structure of the reasoning adopted in paragraph 63 of the 1974 Judgment. As he saw it, dealing first with the question of the basis of that Judgment and the conclusions reached in the Order rendered the developments devoted to procedural questions without object.

Separate opinion of Judge Shahabuddeen

In his separate opinion, Judge Shahabuddeen said that the growing recognition of the need to protect the natural environment was striking. He understood New Zealand's concerns and agreed with its case on several points. He agreed that New Zealand was entitled to come to the Court, entitled to a hearing and entitled to a Judge *ad hoc*, and that it was not shut out by the words in paragraph 63 of the 1974 Judgment, "in accordance with the provisions of the Statute".

Judge Shahabuddeen also accepted that New Zealand was opposed to nuclear contamination arising from nuclear testing of any kind. The question was how far was this general opposition to contamination from nuclear testing of any kind made the subject of the specific dispute presented in the particular case which New Zealand brought against France in 1973.

The question was important because New Zealand was seeking to link its present Request to the 1973 case. France contended that there could be no linkage because, in its view, the 1973 case concerned atmospheric nuclear tests, whereas New Zealand's present Request concerned a different question, of underground nuclear tests. New Zealand's view was that the 1973 case concerned the general subject of nuclear contamination by nuclear testing of any kind, and was therefore wide enough to include nuclear contamination by underground tests.

On this crucial issue, Judge Shahabuddeen noted that, after references in New Zealand's 1973 Application to discussions between New Zealand and France, paragraph 8 of that Application stated:

> "The French Government . . . made it plain that it did not accept the contention that its programme of atmospheric nuclear testing in the South Pacific involved a violation of international law. There is, accordingly, a dispute between the Government of New Zealand and the French Government as to the legality of atmospheric nuclear tests in the South Pacific region."

That passage fell under the heading "The Subject of the Dispute". Paragraph 10 of the Application, falling under the same heading, added:

> "Having failed to resolve through diplomatic means the dispute that exists between it and the French Government, the New Zealand Government is compelled to refer the dispute to the International Court of Justice."

Thus, the dispute which was referred by New Zealand to the Court in 1973 was one "as to the legality of atmospheric nuclear tests"; it was not one concerning the wider subject of nuclear contamination by nuclear testing of any kind. The subject of the 1973 case being different from the subject of New Zealand's present Request, it followed that the latter could not be linked to the former.

In the circumstances, although agreeing with New Zealand on several points, Judge Shahabuddeen felt prevented by substantial legal obstacles from agreeing with it on the remainder of its case.

Dissenting opinion of Judge Weeramantry

Judge Weeramantry, in his opinion, stated that the Court in 1974 had devised a special procedure, distinct from procedures for revision or interpretation of its Judgment, enabling New Zealand to approach the Court if the "basis" of the Judgment was "affected". The Court laid down no limits of time for this purpose.

A situation has now arisen, not contemplated then, of a continuance of the same sort of radioactive contamination as brought New Zealand to the Court in 1973.

The Court would not have considered the shift of venue to underground tests as having brought New Zealand's dispute to an end had the knowledge available today been available to the Court then. Had it possessed that knowledge, it would have been strange if the Court had been prepared to commit New Zealand to the dangers now complained of and, at the same time, had viewed New Zealand's grievances as having come to an end in consequence of the shifting of the venue of the explosions.

New Zealand's complaint in 1973 was that damage was caused by French nuclear explosions in the Pacific. New Zealand's complaint today is the same. The cause is the same, namely, French nuclear tests in the Pacific. The damage is the same, namely, radioactive contamination. The only difference is that the weapons are detonated underground.

Judge Weeramantry's opinion states that New Zealand has made out a prima facie case of danger from French nuclear tests, on the basis of which, in the absence of rebutting evidence by France, New Zealand has shown that the "basis" of the 1974 Judgment is now "affected". This gives New Zealand a right to request an examination of the situation, and places the Court under a duty to consider that Request and the interim measures following from it. It also places on the Court the duty to consider the applications for permission to intervene of Australia, Samoa, Solomon Islands, the Marshall Islands and the Federated States of Micronesia.

Judge Weeramantry also pointed out that important principles of environmental law are involved in this case, such as the precautionary principle, the principle that the burden of proving safety lies on the author of the act complained of, and the intergenerational principle relating to the rights of future generations. Judge Weeramantry regretted that the Court had not availed itself of the opportunity to consider these principles.

Dissenting opinion of Judge Koroma

In his dissenting opinion, Judge Koroma stated that he was unable to support either the Order of the Court, or most of its reasoning.

Judge Koroma pointed out that New Zealand had established that its Requests fall under the provisions of paragraph 63 of the Court's Judgment rendered in 1974 in the *Nuclear Tests (New Zealand* v. *France)* case.

He recalled that that Judgment had dealt with the effects of radioactive fallout resulting from *atmospheric tests*, whereas New Zealand's Application then related to *nuclear tests* in the South Pacific region, and, to the extent that new scientific evidence now suggests that radioactive fallout could result from underground tests in the region, the basis of the Judgment has been affected.

He also stated that the Court should have taken cognizance of the legal trend prohibiting nuclear tests with radioactive effect on the environment, and should have proceeded to examine the Request submitted by New Zealand.

Dissenting opinion of Judge ad hoc *Sir Geoffrey Palmer*

Judge *ad hoc* Sir Geoffrey Palmer's dissenting opinion reaches a different conclusion from that of the Court. In his view, paragraph 63 of the 1974 Judgment is wide enough to provide grounds for the Court to entertain the present Application and in the circumstances it should do so. The fundamental issue in the case in the view of the majority turns on the distinction between atmospheric and underground testing. In Judge Palmer's opinion, both involve nuclear contamination and that is sufficient in the particular circumstances that have occurred to provide grounds for the Court to examine the situation and proceed to the next stage of the case.

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102. CASE CONCERNING THE LAND AND MARITIME BOUNDARY BETWEEN CAMEROON AND NIGERIA (CAMEROON *v.* NIGERIA) (PROVISIONAL MEASURES)

Order of 15 March 1996

In the case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon *v.* Nigeria), the Court issued an Order indicating the following provisional measures:

"(1) Unanimously,

Both Parties should ensure that no action of any kind, and particularly no action by their armed forces, is taken which might prejudice the rights of the other in respect of whatever judgment the Court may render in the case, or which might aggravate or extend the dispute before it;

(2) By sixteen votes to one,

Both Parties should observe the agreement reached between the Ministers for Foreign Affairs in Kara, Togo, on 17 February 1996, for the cessation of all hostilities in the Bakassi Peninsula;

IN FAVOUR: President Bedjaoui; Vice-President Schwebel; Judges Oda, Guillaume, Shahabuddeen, Weeramantry, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Ferrari Bravo, Higgins, Parra-Aranguren; Judge *ad hoc* Mbaye;

AGAINST: Judge *ad hoc* Ajibola;

(3) By twelve votes to five,

Both Parties should ensure that the presence of any armed forces in the Bakassi Peninsula does not extend beyond the positions in which they were situated prior to 3 February 1996;

IN FAVOUR: President Bedjaoui; Vice-President Schwebel; Judges Oda, Guillaume, Ranjeva, Herczegh, Fleischhauer, Koroma, Ferrari Bravo, Higgins, Parra-Aranguren; Judge *ad hoc* Mbaye;

AGAINST: Judges Shahabuddeen, Weeramantry, Shi, Vereshchetin; Judge *ad hoc* Ajibola;

(4) By sixteen votes to one,

Both Parties should take all necessary steps to conserve evidence relevant to the present case within the disputed area;

IN FAVOUR: President Bedjaoui; Vice-President Schwebel; Judges Oda, Guillaume, Shahabuddeen, Weeramantry, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Ferrari Bravo, Higgins, Parra-Aranguren; Judge *ad hoc* Mbaye;

AGAINST: Judge *ad hoc* Ajibola;

(5) By sixteen votes to one,

Both Parties should lend every assistance to the fact-finding mission which the Secretary-General of the United Nations has proposed to send to the Bakassi Peninsula.

IN FAVOUR: President Bedjaoui; Vice-President Schwebel; Judges Oda, Guillaume, Shahabuddeen, Weeramantry, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Ferrari Bravo, Higgins, Parra-Aranguren; Judge *ad hoc* Mbaye;

AGAINST: Judge *ad hoc* Ajibola."

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Judges Oda, Shahabuddeen, Ranjeva and Koroma appended declarations to the Order of the Court; Judges Weeramantry, Shi and Vereshchetin appended a joint declaration to the Order of the Court.

Judge *ad hoc* Mbaye appended a declaration to the Order of the Court.

Judge *ad hoc* Ajibola appended a separate opinion to the Order of the Court.

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The Court was composed as follows: President Bedjaoui; Vice-President Schwebel; Judges Oda, Guillaume, Shahabuddeen, Weeramantry, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Ferrari Bravo, Higgins, Parra-Aranguren; Judges *ad hoc* Mbaye, Ajibola; Registrar Valencia-Ospina.

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In its Order, the Court recalls that on 29 March 1994, Cameroon instituted proceedings against Nigeria in respect of a dispute described as "relat[ing] essentially to the question of sovereignty over the Bakassi Peninsula".

In the Application, Cameroon, basing the jurisdiction of the Court on the declarations made by the two States pursuant to Article 36, paragraph 2, of the Statute, states that "Cameroon's title [to the Bakassi Peninsula] is contested" by Nigeria; that "since the end of 1993, this contestation has taken the form of an aggression by . . . Nigeria, whose troops are occupying several Cameroonian localities in the Bakassi Peninsula"; and that this "has resulted in great prejudice to . . . Cameroon, for which the Court is respectfully requested to order reparation". Cameroon further states that the "delimitation [of the maritime boundary between the two States] has remained a partial one and [that], despite many attempts to complete it, the two Parties have been unable to do so"; and it accordingly requests the Court, "in order to avoid further incidents between the two countries, . . . to determine the course of the maritime boundary between the two States beyond the line fixed in 1975".

At the close of its Application, Cameroon presents the following submissions:

"On the basis of the foregoing statement of facts and legal grounds, the Republic of Cameroon, while reserving for itself the right to complement, amend or modify the present Application in the course of the proceedings and to submit to the Court a request for the indication of provisional measures should they prove to be necessary, asks the Court to adjudge and declare:

(*a*) that sovereignty over the Peninsula of Bakassi is Cameroonian, by virtue of international law, and that that Peninsula is an integral part of the territory of Cameroon;

(*b*) that the Federal Republic of Nigeria has violated and is violating the fundamental principle of respect for frontiers inherited from colonization (*uti possidetis juris*);

(*c*) that by using force against the Republic of Cameroon, the Federal Republic of Nigeria has violated and is violating its obligations under international treaty law and customary law;

(*d*) that the Federal Republic of Nigeria, by militarily occupying the Cameroonian Peninsula of Bakassi, has violated and is violating the obligations incumbent upon it by virtue of treaty law and customary law;

(*e*) that in view of these breaches of legal obligation, mentioned above, the Federal Republic of Nigeria has the express duty of putting an end to its military presence in Cameroonian territory, and effecting an immediate and unconditional withdrawal of its troops from the Cameroonian Peninsula of Bakassi;

(*e'*) that the internationally unlawful acts referred to under (*a*), (*b*), (*c*), (*d*) and (*e*) above involve the responsibility of the Federal Republic of Nigeria;

(*e''*) that consequently, and on account of the material and non-material damage inflicted upon the Republic of Cameroon, reparation in an amount to be determined by the Court is due from the Federal Republic of Nigeria to the Republic of Cameroon, which reserves the introduction before the Court of [proceedings for] a precise assessment of the damage caused by the Federal Republic of Nigeria.

(*f*) In order to prevent any dispute arising between the two States concerning their maritime boundary, the Republic of Cameroon requests the Court to proceed to prolong the course of its maritime boundary with the Federal Republic of Nigeria up to the limit of the maritime zones which international law places under their respective jurisdictions".

On 6 June 1994, Cameroon filed an Additional Application "for the purpose of extending the subject of the dispute" to a further dispute, described in that Additional Application as "relat[ing] essentially to the question of sovereignty over a part of the territory of Cameroon in the area of Lake Chad".

In that Additional Application, it is indicated that "Cameroon's title to [that part of the territory] is contested by . . . Nigeria"; and that

"that contestation initially took the form of a massive introduction of Nigerian nationals into the disputed area, followed by an introduction of Nigerian security forces, effected prior to the official statement of its claim by the Government of the Federal Republic of Nigeria quite recently, for the first time".

In its Additional Application, Cameroon also requested the Court "to specify definitively" the frontier between the two States from Lake Chad to the sea, and asked it to join the two Applications and "to examine the whole in a single case".

At the close of its Additional Application, Cameroon presented the following submissions:

"On the basis of the foregoing statement of facts and legal grounds, and subject to the reservations expressed in paragraph 20 of its Application of 29 March 1994, the Republic of Cameroon asks the Court to adjudge and declare:

(*a*) that sovereignty over the disputed parcel in the area of Lake Chad is Cameroonian, by virtue of international law, and that that parcel is an integral part of the territory of Cameroon;

(*b*) that the Federal Republic of Nigeria has violated and is violating the fundamental principle of respect for frontiers inherited from colonization (*uti possidetis juris*), and its recent legal commitments concerning the demarcation of frontiers in Lake Chad;

(*c*) that the Federal Republic of Nigeria, by occupying, with the support of its security forces, parcels of Cameroonian territory in the area of Lake Chad, has violated and is violating its obligations under treaty law and customary law;

(*d*) that in view of these legal obligations, mentioned above, the Federal Republic of Nigeria has the express duty of effecting an immediate and unconditional withdrawal of its troops from Cameroonian territory in the area of Lake Chad;

(*e*) that the internationally unlawful acts referred to under (*a*), (*b*), (*c*) and (*d*) above involve the responsibility of the Federal Republic of Nigeria;

(*e'*) that consequently, and on account of the material and non-material damage inflicted upon the Republic of Cameroon, reparation in an amount to be determined by the Court is due from the Federal Republic of Nigeria to the Republic of Cameroon, which reserves the introduction before the Court of [proceedings for] a precise assessment of the damage caused by the Federal Republic of Nigeria;

(*f*) that in view of the repeated incursions of Nigerian groups and armed forces into Cameroonian territory, all along the frontier between the two countries, the consequent grave and repeated incidents, and the vacillating and contradictory attitude of the Federal Republic of Nigeria in regard to the legal instruments defining the frontier between the two countries and the exact course of that frontier, the Republic of Cameroon respectfully asks the Court to specify definitively the frontier between Cameroon and the Federal Republic of Nigeria from Lake Chad to the sea".

The Court recalls that at a meeting which the President of the Court held with the representatives of the Parties on 14 June 1994, the Agent of Nigeria stated that he had no objection to the Additional Application being treated, in accordance with the wish expressed by Cameroon, as an amendment to the initial Application, so that the Court could deal with the whole in a single case; and that by an Order dated 16 June 1994 the Court indicated that it had no objection itself to such a procedure.

It further refers to the fact that Cameroon filed its Memorial on the merits and that Nigeria filed certain preliminary objections to the jurisdiction of the Court and the admissibility of the claims of Cameroon.

The Order then recounts that on 12 February 1996 the Agent of Cameroon, referring to the "grave incidents which have taken place between the . . . forces [of the two Parties] in the Bakassi Peninsula since . . . 3 February 1996", communicated to the Court a request for the indication of provisional measures based on Article 41 of the Statute and on Article 73 of the Rules of Court, at the close of which Cameroon asked the Court to indicate the following measures:

"1. the armed forces of the Parties shall withdraw to the position they were occupying before the Nigerian armed attack of 3 February 1996;

2. the Parties shall abstain from all military activity along the entire boundary until the judgment of the Court takes place;

3. the Parties shall abstain from any act or action which might hamper the gathering of evidence in the present case".

The Court then refers to a communication of 16 February 1996 by the Agent of Nigeria entitled "Cameroonian Government forces Nigerians to register and vote in municipal elections", which concluded in the following terms:

"The Nigerian Government hereby invites the International Court of Justice to note this protest and call the Government of Cameroon to order.

. . . [T]he Government of Cameroon should be warned to desist from further harassment of Nigerian citizens in the Bakassi Peninsula until the final determination of the case pending at the International Court of Justice."

The Court finally recalls that hearings were held on 5, 6 and 8 March 1996.

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The Court begins by considering that the two Parties have each made a declaration recognizing the compulsory jurisdiction of the Court in accordance with Article 36, paragraph 2, of the Statute neither of which includes any reservation and that those declarations constitute a prima facie basis upon which the Court's jurisdiction in the present case might be founded. The Court further considers that the consolidated Application of Cameroon does not appear prima facie to be inadmissible in the light of the preliminary objections raised by Nigeria.

The Court goes on to observe that the power conferred upon it by Article 41 of the Statute of the Court and Article 73 of the Rules of Court to indicate provisional measures has as its object to preserve the respective rights of the Parties, pending a decision of the Court, and presupposes that irreparable prejudice shall not be caused to rights which are the subject of dispute in judicial proceedings; that it follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by the Court to belong either to the Applicant or to the Respondent; and that such measures are only justified if there is urgency.

The Court finds that the mediation conducted by the President of the Republic of Togo and the ensuing communiqué announcing the cessation of all hostilities published on 17 February 1996 do not deprive the Court of the rights and duties pertaining to it in the case brought before it. It is clear from the submissions of both Parties to the Court that there were military incidents and that they caused suffering and occasioned fatalities—of both military and civilian personnel—while causing others to be wounded or unaccounted for, as well as causing major material damage. The rights at issue in these proceedings are sovereign rights which the Parties claim over territory, and these rights also concern persons; and armed actions have regrettably occurred on territory which is the subject of proceedings before the Court.

Independently of the requests for the indication of provisional measures submitted by the Parties to preserve specific rights, the Court possesses by virtue of Article 41 of the Statute the power to indicate provisional measures with a view to preventing the aggravation or extension of the dispute whenever it considers that circumstances so require.

The Court finds that the events that have given rise to the request, and more especially the killing of persons, have caused irreparable damage to the rights that the Parties may have over the Peninsula; that persons in the disputed area and, as a consequence, the rights of the Parties within that area are exposed to serious risk of further irreparable damage; and that armed actions within the territory in dispute could jeopardize the existence of evidence relevant to the present case. From the elements of information available to it, the Court takes the view that there is a risk that events likely to aggravate or extend the dispute may occur again, thus rendering any settlement of that dispute more difficult.

The Court here observes that, in the context of the proceedings concerning the indication of provisional measures, it cannot make definitive findings of fact or of imputability, and that the right of each Party to dispute the facts alleged against it, to challenge the attribution to it of responsibility for those facts, and to submit arguments, if appropriate, in respect of the merits must remain unaffected by the Court's decision.

The Court then draws attention to the fact that the decision given in the present proceedings in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case, or any questions relating to the admissibility of the Application or relating to the merits themselves, and leaves unaffected the right of the Governments of Cameroon and Nigeria to submit arguments in respect of those questions.

After mentioning letters of the President of the Security Council, dated 29 February 1996, which call upon the two Parties:

> "to respect the cease-fire they agreed to on 17 February in Kara, Togo, . . . to refrain from further violence . . . [and] and to take necessary steps to return their forces to the positions they occupied before the dispute was referred to the International Court [of Justice]",

and also the proposal of the Secretary-General of the United Nations to dispatch a fact-finding mission into the Bakassi Peninsula, the Court indicates the provisional measures cited above.

Declaration of Judge Oda

In his declaration, Judge Oda points out, first, that in his view the date given in the passage reading "the presence of any armed forces in the Bakassi Peninsula does not extend beyond the position in which they were situated prior to 3 February 1996" should have been 29 March 1994, that is, the date on which Cameroon filed the Application instituting proceedings in this case and the date which seems to be indicated in the mediation proposed by the President of Togo.

Secondly, he signals his concern about the use of the term "irreparable damage" in paragraph 42 of the Order in view of the fact that the damage the Court finds to have been caused may not concern the real subject of the case, while, in addition, the Court has not been able to form any clear and precise idea of events.

Declaration of Judge Shahabuddeen

In his declaration, Judge Shahabuddeen affirmed that the Court's Order should help to maintain friendly relations between two fraternal and neighbouring countries. He had voted for four of the five elements of the *dispositif*, but did not think that there was a satisfactory juridical basis for the remaining element. It was essential that a provisional measure limiting the movement of troops should incorporate a clear physical benchmark with reference to which it could be determined whether the limitation was observed. In this case, the evidence did not permit the Court to specify such a benchmark. This being so, the particular provisional measure could lead to new dispute, instead of serving the intended purpose of avoiding conflict.

Declaration of Judge Ranjeva

Judge Ranjeva, in his declaration appended to the Order, points to the development of a new "given" in international judicial relations, i.e., the appearance of a step in the procedure consisting of a request for the indication of provisional measures on account of the occurrence of an armed conflict grafted on to a legal dispute. In that hypothesis, and when the circumstances of the case so require (exposure of the rights of the Parties to a risk of irreparable damage, urgency . . .), the Court may indicate measures of a military character, according to a jurisprudence already defined in the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)*. When ordering those provisional measures, the Court is not acting as an authority invested with any general police power but as the principal judicial organ participating in the objectives of the maintenance of international peace and security which come within the remit of the United Nations.

Declaration of Judge Koroma

In his declaration, Judge Koroma pointed out that he had voted in favour of the Order on the clear understanding that it does not prejudge the issues before the Court, but rather aims to preserve the respective rights of either Party.

He was of the view that, on the basis of the material before the Court, the possibility of a further military engagement between the armed forces of both countries, resulting in irreparable damage including further loss of human life, of itself provides the Court with sufficient reason to grant the Order.

It is hoped that the Order will discourage either Party from taking any measures which might cause irreparable damage to the millions of each of the Parties' nationals residing in the other's territory, and will help reduce tension between the two States and restore the fraternal relations which have always existed between the two countries, pending the decision of the Court.

Joint declaration of Judges Weeramantry, Shi and Vereshchetin

Judges Weeramantry, Shi and Vereshchetin voted with the majority of the Court in regard to items 1, 2, 4 and 5 in the *dispositif*, but were unable to support the majority of the Court in relation to item 3.

The reason for their inability to support this clause was that the Parties had given the Court two entirely different versions in regard to the incidents of 3 February 1996. These different versions involve entirely different positions in regard to the location of their respective armed forces on that date.

The Court Order, requiring the Parties to ensure that the presence of any armed forces in the Bakassi Peninsula should not extend beyond the positions in which they were situated prior to 3 February 1996, in effect leaves it to each Party to determine what that position was and to act upon that determination. These positions may well be contradictory, thus leaving open the possibility of confusion upon the ground. The Order may thus be interpreted as containing an internal contradiction.

For these reasons, these Judges were unable to support item 3 of the *dispositif*.

Declaration of Judge Mbaye

Having stressed the "striking similarities" between the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali), Provisional Measures*, and the present proceedings relating to the request for the indication of provisional measures (case concerning the *Land and Maritime Boundary between Cameroon and Nigeria*), Judge Mbaye, while accepting that cases are rarely identical, welcomed the fact that the Court had consolidated the jurisprudence of the Chamber in the former of the above-mentioned cases, by indicating that "both Parties should ensure that the pres-

ence of any armed forces in the Bakassi Peninsula does not extend beyond the positions in which they were situated prior to 3 February 1996". He considers that this provision, taken together with the indication in the Order that the Parties "should ensure that no action of any kind . . . is taken . . . which might aggravate or extend the dispute" or impede the collection of evidence, constitutes a set of indications indispensable in the case of events of the same kind as those forming the basis of the present request for the indication of provisional measures.

Separate opinion of Judge Ajibola

I voted along with the other Members of the Court with regard to the first of the provisional measures indicated in this Order because I believe that such a measure, which accords with the Statute and Rules of Court (Article 41 of the Statute of the Court and Article 75 (2) of the Rules), is also in consonance with the jurisprudence of the Court. The Court on similar matters likewise involving armed incidents has not in the recent past hesitated to indicate such provisional measures, as can be seen in such cases as *United States of America* v. *Nicaragua, Frontier Dispute (Burkina Faso/ Republic of Mali)* and the *Bosnia* case relating to the Genocide Convention. The Order is in line with many of the Court's recent indications that both parties should avoid any acts or actions that might aggravate or extend the dispute. The Court has the power and duty to so indicate.

However, I regret to say that I am unable to vote with the rest of the Members of the Court on the remaining provisional measures which the Court has indicated because they are unnecessary, non-legal and "counter-productive". It is my belief that it is not the duty of the Court to indicate such measures when it has referred to the circumstances in the recital which, in my view, is enough.

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103. LEGALITY OF THE USE BY A STATE OF NUCLEAR WEAPONS IN ARMED CONFLICT

Advisory Opinion of 8 July 1996

The Court found, by 11 votes to 3, that it was not able to give the advisory opinion requested by the World Health Organization on the question of the Legality of the Use by a State of Nuclear Weapons in Armed Conflict.

The Court considered that there are three conditions which must be satisfied in order to found the jurisdiction of the Court when a request for an advisory opinion is submitted to it by a specialized agency: the agency requesting the opinion must be duly authorized, under the Charter of the United Nations, to request opinions from the Court; the opinion requested must be on a legal question; and this question must be one arising within the scope of the activities of the requesting agency.

The first two conditions had been met. With regard to the third, however, the Court found that although according to its Constitution the World Health Organization (WHO) is authorized to deal with the effects on health of the use of nuclear weapons, or of any other hazardous activity, and to take preventive measures aimed at protecting the health of populations in the event of such weapons being used or such activities engaged in, the question put to the Court in the present case relates *not to the effects* of the use of nuclear weapons on health, but to the legality of the use of such weapons *in view of their health and environmental effects*. And the Court pointed out that whatever those effects might be, the competence of WHO to deal with them is not dependent on the legality of the acts that caused them. The Court further pointed out that international organizations do not, unlike States, possess a general competence, but are governed by the "principle of speciality", that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them. Besides, the World Health Organization is an international organization of a particular kind—a "specialized agency" forming part of a system based in the Charter of the United Nations, which is designed to organize international cooperation in a coherent fashion by bringing the United Nations, invested with powers of general scope, into relationship with various autonomous and complementary organizations, invested with sectorial powers. The Court therefore concluded that the responsibilities of WHO are necessarily restricted to the sphere of public "health" and cannot encroach on the responsibilities of other parts of the United Nations system, and that there is no doubt that questions concerning the use of force, the regulation of armaments and disarmament are within the competence of the United Nations and lie outside that of the specialized agencies. The request for an advisory opinion submitted by WHO thus does not relate to a question which arises "within the scope of [the] activities" of that Organization.

The Court was composed as follows: President Bedjaoui, Vice-President Schwebel; Judges Oda, Guillaume, Shahabuddeen, Weeramantry, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Ferrari Bravo, Higgins; Registrar Valencia-Ospina.

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Judges Ranjeva and Ferrari Bravo appended declarations to the advisory opinion of the Court; Judge Oda appended a separate opinion; Judges Shahabuddeen, Weeramantry and Koroma appended dissenting opinions.

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Submission of the request and subsequent procedure (paras. 1-9)

The Court begins by recalling that by a letter dated 27 August 1993, filed in the Registry on 3 September 1993, the Director-General of the World Health Organization officially communicated to the Registrar a decision taken by the World Health Assembly to submit a question to the

Court for an advisory opinion. The question set forth in resolution WHA46.40, adopted by the Assembly on 14 May 1993, reads as follows:

"In view of the health and environmental effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under international law including the WHO Constitution?"

The Court then recapitulates the various stages of the proceedings.

Jurisdiction of the Court
(paras. 10-31)

The Court begins by observing that, in view of Article 65, paragraph 1, of its Statute and of Article 96, paragraph 2, of the Charter, three conditions must be satisfied in order to found the jurisdiction of the Court when a request for an advisory opinion is submitted to it by a specialized agency: the agency requesting the opinion must be duly authorized, under the Charter, to request opinions from the Court; the opinion requested must be on a legal question; and this question must be one arising within the scope of the activities of the requesting agency.

Authorization of WHO to request advisory opinions
(paras. 11-12)

Where WHO is concerned, the above-mentioned texts are reflected in article 76 of that Organization's Constitution, and in paragraph 2 of article X of the agreement of 10 July 1948 between the United Nations and WHO, which the Court finds leave no doubt that WHO has been duly authorized, in accordance with Article 96, paragraph 2, of the Charter, to request advisory opinions of the Court.

"Legal question"
(paras. 13-17)

The Court observes that it has already had occasion to indicate that questions

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

It finds that the question put to the Court by the World Health Assembly does in fact constitute a legal question, as in order to rule on the question submitted to it the Court must identify the obligations of States under the rules of law invoked, and assess whether the behaviour in question conforms to those obligations, thus giving an answer to the question posed based on law.

The fact that this question also has political aspects, as, in the nature of things, is the case with so many questions which arise in international life, does not suffice to deprive it of its character as a "legal question" and to "deprive the Court of a competence expressly conferred on it by its Statute". Nor are the political nature of the motives which may be said to have inspired the request or the political implications that the opinion given might have of relevance in the establishment of the Court's jurisdiction to give such an opinion.

Question arising "within the scope of the activities" of WHO
(paras. 18-31)

The Court observes that in order to delineate the field of activity or the area of competence of an international organization, one must refer to the relevant rules of the organization and, in the first place, to its constitution. From a formal standpoint, the constituent instruments of international organizations are multilateral treaties, to which the well-established rules of treaty interpretation apply. But they are also treaties of a particular type; their object is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals. Such treaties can raise specific problems of interpretation owing, *inter alia*, to their character which is conventional and at the same time institutional; the very nature of the organization created, the objectives which have been assigned to it by its founders and the imperatives associated with the effective performance of its functions, as well as its own practice, are all elements which may deserve special attention when the time comes to interpret these constituent treaties.

According to the customary rule of interpretation as expressed in article 31 of the 1969 Vienna Convention on the Law of Treaties, the terms of a treaty must be interpreted "in their context and in the light of its object and purpose" and there shall be

"taken into account, together with the context:

. . .

(*b*) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation".

The Court has had occasion to apply this rule of interpretation several times and will also apply it in this case.

Interpretation of the WHO Constitution
(paras. 20-26)

The Court points out that the functions attributed to WHO are listed in 22 subparagraphs (subparagraphs (*a*) to (*v*)) in article 2 of its Constitution. None of these subparagraphs expressly refers to the legality of any activity hazardous to health; and none of the functions of WHO is dependent upon the legality of the situations upon which it must act. Moreover, it is stated in the introductory sentence of article 2 that the Organization discharges its functions "in order to achieve its objective". The objective of the Organization is defined in article 1 as being "the attainment by all peoples of the highest possible level of health".

Also referring to the preamble to the Constitution, the Court concludes that, interpreted in accordance with their ordinary meaning, in their context and in the light of the object and purpose of the WHO Constitution, as well as of the practice followed by the Organization, the provisions of its article 2 may be read as authorizing the Organization to deal with the effects on health of the use of nuclear weapons, or of any other hazardous activity, and to take preventive measures aimed at protecting the health of populations in the event of such weapons being used or such activities engaged in.

It goes on to observe that the question put to the Court in the present case relates, however, *not to the effects* of the use of nuclear weapons on health, but to the *legality* of the use of such weapons *in view of their health and envi-*

ronmental effects. And the Court points out that, whatever those effects might be, the competence of WHO to deal with them is not dependent on the legality of the acts that caused them. Accordingly, it does not seem to the Court that the provisions of article 2 of the WHO Constitution, interpreted in accordance with the criteria referred to above, can be understood as conferring upon the Organization a competence to address the legality of the use of nuclear weapons, and thus in turn a competence to ask the Court about that.

In the view of the Court, none of the functions referred to in the resolution by which the Court has been seised of this request for an opinion has a sufficient connection with the question before it for that question to be capable of being considered as arising "within the scope of [the] activities" of WHO. The causes of the deterioration of human health are numerous and varied; and the legal or illegal character of these causes is essentially immaterial to the measures which WHO must in any case take in an attempt to remedy their effects. In particular, the legality or illegality of the use of nuclear weapons in no way determines the specific measures, regarding health or otherwise (studies, plans, procedures, etc.), which could be necessary in order to seek to prevent or cure some of their effects. The reference in the question put to the Court to the health and environmental effects, which according to WHO the use of a nuclear weapon will always occasion, does not make the question one that falls within WHO's functions.

The Court goes on to point out that international organizations are subjects of international law which do not, unlike States, possess a general competence. International organizations are governed by the "principle of speciality", that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them.

The powers conferred on international organizations are normally the subject of an express statement in their constituent instruments. Nevertheless, the necessities of international life may point to the need for organizations, in order to achieve their objectives, to possess subsidiary powers which are not expressly provided for in the basic instruments that govern their activities. It is generally accepted that international organizations can exercise such powers, known as "implied" powers.

The Court is of the opinion, however, that to ascribe to WHO the competence to address the legality of the use of nuclear weapons—even in view of their health and environmental effects—would be tantamount to disregarding the principle of speciality; for such competence could not be deemed a necessary implication of the Constitution of the Organization in the light of the purposes assigned to it by its member States.

WHO is, moreover, an international organization of a particular kind. As indicated in the preamble and confirmed by article 69 of its Constitution, "the Organization shall be brought into relation with the United Nations as one of the specialized agencies referred to in Article 57 of the Charter of the United Nations". As its Articles 57, 58 and 63 demonstrate, the Charter laid the basis of a "system" designed to organize international cooperation in a coherent fashion by bringing the United Nations, invested with powers of general scope, into relationship with various autonomous and complementary organizations, invested with sectorial powers.

If, according to the rules on which that system is based, WHO has, by virtue of Article 57 of the Charter, "wide international responsibilities", those responsibilities are necessarily restricted to the sphere of public "health" and cannot encroach on the responsibilities of other parts of the United Nations system. And there is no doubt that questions concerning the use of force, the regulation of armaments and disarmament are within the competence of the United Nations and lie outside that of the specialized agencies.

For all these reasons, the Court considers that the question raised in the request for an advisory opinion submitted to it by WHO does not arise "within the scope of [the] activities" of that Organization as defined by its Constitution.

WHO's practice
(para. 27)

A consideration of the practice of WHO bears out these conclusions. None of the reports and resolutions referred to in the preamble to World Health Assembly resolution WHA46.40, nor resolution WHA46.40 itself, could be taken to express, or to amount on its own to, a practice establishing an agreement between the members of the Organization to interpret its Constitution as empowering it to address the question of the legality of the use of nuclear weapons, nor can, in the view of the Court, such a practice be inferred from isolated passages of certain resolutions of the World Health Assembly cited during the present proceedings.

The Court further considers that the insertion of the words "including the WHO Constitution" in the question put to the Court does not change the fact that WHO is not empowered to seek an opinion on the interpretation of its Constitution in relation to matters outside the scope of its functions.

Other arguments
(paras. 29-30)

The Court finally considered that other arguments put forward in the proceedings to found the jurisdiction of the Court—concerning the way in which World Health Assembly resolution WHA46.40 had been adopted and concerning the reference to that resolution in General Assembly resolution 49/75 K—did not affect the conclusions reached by the Court concerning the competence of WHO to request an opinion on the question raised.

Having arrived at the view that the request for an advisory opinion submitted by WHO does not relate to a question which arises "within the scope of [the] activities" of that Organization in accordance with Article 96, paragraph 2, of the Charter, the Court finds that an essential condition of founding its jurisdiction in the present case is absent and that it cannot, accordingly, give the opinion requested.

The final paragraph reads as follows:

"32. For these reasons,

THE COURT,

By eleven votes to three,

Finds that it is not able to give the advisory opinion which was requested of it under World Health Assembly resolution WHA46.40 dated 14 May 1993.

IN FAVOUR: President Bedjaoui; Vice-President Schwebel; Judges Oda, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Ferrari Bravo, Higgins;

AGAINST: Judges Shahabuddeen, Weeramantry, Koroma."

Declaration of Judge Ranjeva

Judge Ranjeva voted in favour of the decision of the Court as he considers that it accords with the relevant law. He would none the less have preferred the Court to be more explicit with respect to the problem of its advisory jurisdiction, by stressing the fact that the structure of the question put by the World Health Assembly had not been such as to enable it to exercise the jurisdiction that it did, in any case, possess.

Declaration of Judge Ferrari Bravo

Judge Ferrari Bravo regrets that the Court should have arbitrarily divided into two categories the long line of General Assembly resolutions that deal with nuclear weapons. Those resolutions are fundamental. This is the case of resolution 1 (I) of 24 January 1946, which clearly points to the existence of a truly solemn *undertaking* to eliminate all forms of nuclear weapons, whose presence in military arsenals was declared unlawful. The cold war, which intervened shortly afterwards, prevented the *development* of this concept of illegality, while giving rise to the concept of nuclear deterrence which has *no legal value*. The theory of deterrence, while it has occasioned a practice of the nuclear-weapon States and their allies, has not been able to create a legal practice serving as a basis for the incipient creation of an international custom. It has, moreover, helped to widen the gap between Article 2, paragraph 4, of the Charter and Article 51.

The Court should have proceeded to a constructive analysis of the role of the General Assembly resolutions. These have, from the outset, contributed to the formation of a rule prohibiting nuclear weapons. The theory of deterrence has arrested the development of that rule and, while it has prevented the *implementation* of the prohibition of nuclear weapons, it is none the less still the case that that "bare" prohibition has remained unchanged and continues to produce its effects, at least with regard to the burden of proof, by making it more difficult for the nuclear Powers to vindicate their policies within the framework of the theory of deterrence.

Separate opinion of Judge Oda

Judge Oda, while being in agreement with the Court's decision that the request should be dismissed as well as with the reasoning leading to that decision, nevertheless wishes to make clear his view that the Court should have taken more note of the fact that it was asked not only whether the use of nuclear weapons would be a breach of the obligations of States under international law but whether it would also be a breach of the obligations of States under the WHO Constitution.

Judge Oda is very concerned that the Court may be seised of more requests for advisory opinion which may in essence be unnecessary and oversimplistic. He stressed that the advisory function should only be used in cases of conflict or dispute and not merely to discuss general matters of international law.

He also pointed out that advisory opinions had been requested by specialized agencies in three previous cases in the history of the Court, but strictly in order to solve one or more legal questions arising within the scope of their activities. This precedent has not been followed in the present case.

Judge Oda points out that the request of WHO was drafted without there being any real agreement among the delegates in the World Health Assembly and, in particular, that it was brought to the Court contrary to the repeated admonitions of the Legal Counsel of WHO, who contended that the Organization was not competent to bring this matter to the Court under Article 96 (2) of the Charter of the United Nations.

Dissenting opinion of Judge Shahabuddeen

The main reason for Judge Shahabuddeen's dissent is that, in his respectful view, the Court has mistaken the meaning of WHO's question. Contrary to the Court's impression, WHO is not asking whether the use of nuclear weapons by one of its members is lawful under international law as a general matter; a more reasonable interpretation of the question is that WHO is asking whether such use would be a breach of a member's obligations under international law but only in so far as it would also be a breach of its obligations under the Constitution of WHO. WHO would have to deal with the health and environmental effects produced by the action of a member even if that action is in breach of the member's obligations under that Constitution; but it nevertheless remains competent for WHO to concern itself with the question whether, in producing a situation demanding action by WHO, a member may have breached its obligations under that Constitution.

Dissenting opinion of Judge Weeramantry

Judge Weeramantry, in his dissenting opinion, stated that the question asked by the World Health Organization related to obligations in three particular areas:

(*a*) State obligations in regard to health;

(*b*) State obligations in regard to the environment; and

(*c*) State obligations under the WHO Constitution.

The question asked by WHO was substantially different from the general question of legality of use or threat of use of nuclear weapons, asked by the General Assembly. However, the Court had treated it as a question of general illegality, and had not examined State obligations in the three areas mentioned.

Had the Court inquired into these three areas, it would have found that each of them was intimately linked with the legitimate concerns of WHO and that, in each of these areas, State obligations were violated by nuclear weapons. Judge Weeramantry, in his opinion, examines the health-related and environmentally related effects of nuclear weapons to show the diametrical contrast between those effects and the obligations of States, both as members of the international community, in general, and as subscribing parties to the WHO Constitution.

Judge Weeramantry strongly disagreed with the majority of the Court, who had held that WHO's question was outside the scope of its legitimate sphere of interest. His view, on the other hand, was that the question asked by WHO was entirely within its legitimate and constitutional sphere of interest. WHO was in fact to be commended for having

given its attention to the question of the legality of the nuclear weapon, which was the greatest man-made threat to human health thus far devised.

WHO was the only health authority to which the world would have to turn for international assistance if a country were stricken with a nuclear attack, for its own health services would have collapsed. Moreover, even neutral countries not involved in the dispute, which would be affected by the radiation and other effects of nuclear weapons, would need to turn to WHO for assistance in such an eventuality. Global health was central to the question, just as global health was central to the concerns of WHO.

Planning and prevention were essential parts of the activities of all health authorities, and this general principle unquestionably applied to WHO, which needs the legal information requested, for precisely this purpose.

The Court's decision was based on restricted principles of treaty interpretation and should rather have interpreted WHO's Constitution in the light of its object and purpose—"to promote and protect the health of all peoples". Judge Weeramantry disagreed with the view that United Nations agencies conducted their affairs within a strictly compartmentalized scheme of division of functions. He disagreed with the Court's rigid application of the "principle of speciality" to WHO, so as to take the question of legality out of its area of concern, merely because peace and security fell within the concerns of the Security Council.

The effects of nuclear weapons on health showed the futility of awaiting a nuclear catastrophe for WHO to move into action in providing medical services. The nuclear weapon was, *inter alia*, the greatest cancer-inducing instrumentality yet devised. WHO was just as much entitled to concern itself with the legality of this agency of ill health as it was to inquire into the legality of a cancer-inducing pharmaceutical product. Depending on the answer to that question, it would have to adopt different strategies to deal with the problem.

Moreover, this was the first case ever in which the Court had refused to consider the request of a specialized agency of the United Nations for an advisory opinion. Such a refusal should only be for compelling reasons. No such reason has been shown to exist in the present case. Judge Weeramantry's view was that international law joined with the imperatives of global health in requiring the Court to answer WHO's request.

Dissenting opinion of Judge Koroma

In his dissenting opinion, Judge Koroma stated that the Court's finding that it lacked jurisdiction to respond to the request by WHO was not only unprecedented but also inconsistent with its own jurisprudence.

He also disputed the Court's finding that the question posed by the Organization was outside its competence and scope of activities. To reach that conclusion, Judge Koroma maintained that the Court had misconstrued the question put by WHO as relating to the legality of the use by a State of nuclear weapons in armed conflict. In his view, that question related to the health and environmental effects of nuclear weapons and to the problem of whether those effects would be in breach of the obligations of States, a matter which falls eminently within the competence and scope of the agency's activities.

He recalled that WHO is the specialized agency responsible for the protection and the safeguarding of the health of all peoples at the international level and its responsibilities include the taking of measures to prevent health problems like those which are bound to arise following the use of nuclear weapons. In this connection, he pointed out that the Organization dealt primarily with preventive medicine.

Accordingly, in his view, a request to the Court seeking legal clarification about the health and environmental effects of the use of nuclear weapons not only is a matter which is within the competence of the Organization but is one which should have led the Court to render an advisory opinion.

Judge Koroma recalled that the Court had previously stated that it would:

> "give an opinion based on law, once it has come to the conclusion that the questions put to it are relevant and have a practical and contemporary effect, and consequently . . . not devoid of object and purpose".

He maintained that the request for an advisory opinion by WHO related to an issue which not only was of direct relevance to the Organization, but had practical and contemporary effect as well, and is not devoid of object and purpose.

Having analysed the evidence presented by delegations including those of Japan and the Marshall Islands, and the study carried out under the auspices of WHO on the *Effects of Nuclear War on Health and Health Services*, he came to the conclusion that should a nuclear weapon be used in an armed conflict the number of dead would vary from one million to one thousand million, to which the same number of people injured was to be added. If a larger number of such weapons were to be used, they would have catastrophic effects, including the destruction of transport, food delivery, fuel and basic medical supplies, resulting in possible famine and mass starvation on a global scale. He concluded that nuclear weapons when used are incapable of discriminating between civilians and non-civilians, nor would such weapons spare the hospitals or reservoirs of drinking water that are indispensable for survival after a nuclear attack. He was therefore convinced that nuclear weapons caused superfluous injury and unnecessary suffering to their victims, going so far as to prevent the treatment of those wounded.

Such effects, he maintained, would be patently contrary to international law applicable in armed conflict, and in particular international humanitarian law, as well as constituting a breach of the health and environmental obligations of States under international law, including the WHO Constitution. The Court's findings that such matters were not within the competence or scope of activities of the Organization were therefore incoherent and incomprehensible.

Judge Koroma regretted that, in order to reach those findings, the Court not only had misinterpreted the question—a misinterpretation which both distorted the intention of the question and proved fatal for the request—but had also had to depart from its jurisprudence according to which it would only decline to render an advisory opinion for "compelling reasons". In his view, no such compelling reasons existed or had been established in this case. He was therefore left wondering whether the finding of the Court that it lacked jurisdiction was not the kind of solution resorted to in cases where the need to give a decision on the merits would involve unusual difficulty or embarrass-

ment for the Court. On the other hand, the Court had always responded positively to requests for advisory opinions and regarded its role as a form of participation in the activities of the Organization, while at the same time protecting its judicial character. By declining to render an opinion in this case the Court had, in his view, chosen to vacate its positive record in this sphere, particularly on an issue of such vital importance that embraced not only a legal but a moral and humanitarian dimension as well. He concluded by recalling that "medicine is one of the pillars of peace", but that it can equally be said that health is a pillar of peace—or, as is stated in the WHO Constitution, "the health of all peoples is fundamental to the attainment of peace and security".

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104. LEGALITY OF THE THREAT OR USE OF NUCLEAR WEAPONS

Advisory Opinion of 8 July 1996

The Court handed down its advisory opinion on the request made by the General Assembly of the United Nations on the question concerning the Legality of the Threat or Use of Nuclear Weapons.

The final paragraph of the opinion reads as follows:

"For these reasons,

THE COURT,

(1) By thirteen votes to one,

Decides to comply with the request for an advisory opinion;

IN FAVOUR: President Bedjaoui; Vice-President Schwebel; Judges Guillaume, Shahabuddeen, Weeramantry, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Ferrari Bravo, Higgins;

AGAINST: Judge Oda;

(2) *Replies* in the following manner to the question put by the General Assembly:

A. Unanimously,

There is in neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons;

B. By eleven votes to three,

There is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such;

IN FAVOUR: President Bedjaoui; Vice-President Schwebel; Judges Oda, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Ferrari Bravo, Higgins;

AGAINST: Judges Shahabuddeen, Weeramantry, Koroma;

C. Unanimously,

A threat or use of force by means of nuclear weapons that is contrary to Article 2, paragraph 4, of the Charter of the United Nations and that fails to meet all the requirements of Article 51 is unlawful;

D. Unanimously,

A threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons;

E. By seven votes to seven, by the President's casting vote,

It follows from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law;

However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake;

IN FAVOUR: President Bedjaoui; Judges Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Ferrari Bravo;

AGAINST: Vice-President Schwebel; Judges Oda, Guillaume, Shahabuddeen, Weeramantry, Koroma, Higgins;

F. Unanimously,

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

*

* *

The Court was composed as follows: President Bedjaoui, Vice-President Schwebel; Judges Oda, Guillaume, Shahabuddeen, Weeramantry, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Ferrari Bravo, Higgins; Registrar Valencia-Ospina.

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President Bedjaoui and Judges Herczegh, Shi, Vereshchetin and Ferrari Bravo appended declarations to the advisory opinion of the Court; Judges Guillaume, Ranjeva and Fleischhauer appended separate opinions; Vice-President Schwebel and Judges Oda, Shahabuddeen, Weeramantry, Koroma and Higgins appended dissenting opinions.

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Submission of the request and subsequent procedure (paras. 1-9)

The Court begins by recalling that by a letter dated 19 December 1994, filed in the Registry on 6 January 1995, the Secretary-General of the United Nations officially communicated to the Registrar the decision taken by the Gen-

eral Assembly to submit a question to the Court for an advisory opinion. The final paragraph of resolution 49/75 K, adopted by the General Assembly on 15 December 1994, which sets forth the question, provides that the General Assembly

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

The Court then recapitulates the various stages of the proceedings.

Jurisdiction of the Court
(paras. 10-18)

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

The Court observes that it draws its competence in respect of advisory opinions from Article 65, paragraph 1, of its Statute, while Article 96, paragraph 1, of the Charter provides that:

> "The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question."

Some States which oppose the giving of an opinion by the Court argued that the General Assembly and the Security Council may ask for an advisory opinion on any legal question only within the scope of their activities. In the view of the Court, it matters little whether this interpretation of Article 96, paragraph 1, is or is not correct; in the present case, the General Assembly has competence in any event to seise the Court. Referring to Articles 10, 11 and 13 of the Charter, the Court finds that, indeed, the question put to the Court has relevance to many aspects of the activities and concerns of the General Assembly, including those relating to the threat or use of force in international relations, the disarmament process, and the progressive development of international law.

"Legal question"
(para. 13)

The Court observes that it has already had occasion to indicate that questions

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

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

The fact that this question also has political aspects, as, in the nature of things, is the case with so many questions which arise in international life, does not suffice to deprive it of its character as a "legal question" and to "deprive the Court of a competence expressly conferred on it by its Statute". Nor are the political nature of the motives which may be said to have inspired the request or the political implications that the opinion given might have of relevance in the establishment of the Court's jurisdiction to give such an opinion.

Discretion of the Court to give an advisory opinion
(paras. 14-19)

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

> "The Court's Opinion is given not to the States, but to the organ which is entitled to request it; the reply of the Court, itself an 'organ of the United Nations', represents its participation in the activities of the Organization, and, in principle, should not be refused." (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71.)

In the history of the present Court there has been no refusal, based on the discretionary power of the Court, to act upon a request for an advisory opinion; in the case concerning the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* the refusal to give the World Health Organization the advisory opinion requested by it was justified by the Court's lack of jurisdiction in that case.

Several reasons were adduced in these proceedings in order to persuade the Court that in the exercise of its discretionary power it should decline to render the opinion requested by the General Assembly. Some States, in contending that the question put to the Court is vague and abstract, appeared to mean by this that there exists no specific dispute on the subject-matter of the question. In order to respond to this argument, it is necessary to distinguish between requirements governing contentious procedure and those applicable to advisory opinions. The purpose of the advisory function is not to settle—at least directly—disputes between States, but to offer legal advice to the organs and institutions requesting the opinion. The fact that the question put to the Court does not relate to a specific dispute should consequently not lead the Court to decline to give the opinion requested. Other arguments concerned the fear that the abstract nature of the question might lead the Court to make hypothetical or speculative declarations outside the scope of its judicial function; the fact that the General Assembly has not explained to the Court for what precise purposes it seeks the advisory opinion; that a reply from the Court in this case might adversely affect disarmament negotiations and would, therefore, be contrary to the interest of the United Nations; and that in answering the question posed, the Court would be going beyond its judicial role and would be taking upon itself a law-making capacity.

The Court does not accept those arguments and concludes that it has the authority to deliver an opinion on the question posed by the General Assembly and that there exist no "compelling reasons" which would lead the Court to exercise its discretion not to do so. It points out,

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

Formulation of the question posed
(paras. 20-22)

The Court finds it unnecessary to pronounce on the possible divergences between the English and French texts of the question put. Its real objective is clear: to determine the legality or illegality of the threat or use of nuclear weapons. And the argument concerning the legal conclusions to be drawn from the use of the word "permitted", and the questions of burden of proof to which it was said to give rise, are found by the Court to be without particular significance for the disposition of the issues before it.

The applicable law
(paras. 23-34)

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

The Court considers that the question whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to article 6 of the International Covenant on Civil and Political Rights, as argued by some of the proponents of the illegality of the use of nuclear weapons, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself. The Court also points out that the prohibition of genocide would be pertinent in this case if the recourse to nuclear weapons did indeed entail the element of intent, towards a group as such, required by article II of the Convention on the Prevention and Punishment of the Crime of Genocide. In the view of the Court, it would only be possible to arrive at such a conclusion after having taken due account of the circumstances specific to each case. And the Court further finds that while the existing international law relating to the protection and safeguarding of the environment does not specifically prohibit the use of nuclear weapons, it indicates important environmental factors that are properly to be taken into account in the context of the implementation of the principles and rules of the law applicable in armed conflict.

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

Unique characteristics of nuclear weapons
(paras. 35-36)

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

Provisions of the Charter relating to the threat or use of force
(paras. 37-50)

The Court then addresses the question of the legality or illegality of recourse to nuclear weapons in the light of the provisions of the Charter relating to the threat or use of force.

In Article 2, paragraph 4, of the Charter, the use of force against the territorial integrity or political independence of another State or in any other manner inconsistent with the purposes of the United Nations is prohibited.

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

These provisions do not refer to specific weapons. They apply to any use of force, regardless of the weapons employed. The Charter neither expressly prohibits, nor permits, the use of any specific weapon, including nuclear weapons.

The entitlement to resort to self-defence under Article 51 is subject to the conditions of necessity and proportionality. As the Court stated in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* (*I.C.J. Reports 1986*, p. 94, para. 176): "there is a specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law".

The proportionality principle may thus not in itself exclude the use of nuclear weapons in self-defence in all circumstances. But at the same time, a use of force that is proportionate under the law of self-defence must, in order to be lawful, also meet the requirements of the law applicable in armed conflict, which comprise in particular the principles and rules of humanitarian law. And the Court notes that the very nature of all nuclear weapons and the profound risks associated therewith are further considerations to be borne in mind by States believing they can exercise a nuclear response in self-defence in accordance with the requirements of proportionality.

In order to lessen or eliminate the risk of unlawful attack, States sometimes signal that they possess certain weapons to use in self-defence against any State violating their territorial integrity or political independence. Whether a signalled intention to use force if certain events occur is or is not a "threat" within Article 2, paragraph 4, of the Charter depends upon various factors. The notions of "threat" and "use" of force under Article 2, paragraph 4, of the Charter stand together in the sense that if the use of force itself in a given case is illegal—for whatever reason—the threat to use such force will likewise be illegal. In short, if it is to be lawful, the declared readiness of a State to use force must be a use of force that is in conformity with the Charter. For the rest, no

State—whether or not it defended the policy of deterrence—suggested to the Court that it would be lawful to threaten to use force if the use of force contemplated would be illegal.

Rules on the lawfulness or unlawfulness of nuclear weapons as such
(paras. 49-73)

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

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

It does not seem to the Court that the use of nuclear weapons can be regarded as specifically prohibited on the basis of certain provisions of the Second Hague Declaration of 1899, the Regulations annexed to the Hague Convention IV of 1907 or the 1925 Geneva Protocol. The pattern until now has been for weapons of mass destruction to be declared illegal by specific instruments. But the Court does not find any specific prohibition of recourse to nuclear weapons in treaties expressly prohibiting the use of certain weapons of mass destruction; and observes that, although, in the last two decades, a great many negotiations have been conducted regarding nuclear weapons, they have not resulted in a treaty of general prohibition of the same kind as for bacteriological and chemical weapons.

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

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

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

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

The Court then turns to an examination of customary international law to determine whether a prohibition of the threat or use of nuclear weapons as such flows from that source of law.

It notes that the members of the international community are profoundly divided on the matter of whether non-recourse to nuclear weapons over the past 50 years constitutes the expression of an *opinio juris*. Under these circumstances the Court does not consider itself able to find that there is such an *opinio juris*. It points out that the adoption each year by the General Assembly, by a large majority, of resolutions recalling the content of resolution 1653 (XVI), and requesting the Member States to conclude a convention prohibiting the use of nuclear weapons in any circumstance, reveals the desire of a very large section of the international community to take, by a specific and express prohibition of the use of nuclear weapons, a significant step forward along the road to complete nuclear disarmament. The emergence, as *lex lata*, of a customary rule specifically prohibiting the use of nuclear weapons as such is hampered by the continuing tensions between the nascent *opinio juris*, on the one hand, and the still strong adherence to the doctrine of deterrence (in which the right to use those weapons in the exercise of the right to self-defence against an armed attack threatening the vital security interests of the State is reserved), on the other.

International humanitarian law
(paras. 74-87)

Not having found a conventional rule of general scope, nor a customary rule specifically proscribing the threat or use of nuclear weapons per se, the Court then deals with the question whether recourse to nuclear weapons must be considered as illegal in the light of the principles and rules of international humanitarian law applicable in armed conflict and of the law of neutrality.

After sketching the historical development of the body of rules which originally were called "laws and customs of war" and later came to be termed "international humanitarian law", the Court observes that the cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. According to the second principle, it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that second principle, States do not have unlimited freedom of choice of means in the weapons they use.

The Court also refers to the Martens Clause, which was first included in the Hague Convention II with Respect to the Laws and Customs of War on Land of 1899

and which has proved to be an effective means of addressing the rapid evolution of military technology. A modern version of that clause is to be found in article 1, paragraph 2, of Additional Protocol I of 1977, which reads as follows:

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

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

Turning to the applicability of the principles and rules of humanitarian law to a possible threat or use of nuclear weapons, the Court notes that nuclear weapons were invented after most of the principles and rules of humanitarian law applicable in armed conflict had already come into existence; the Conferences of 1949 and 1974-1977 left these weapons aside, and there is a qualitative as well as quantitative difference between nuclear weapons and all conventional arms. However, in the Court's view, it cannot be concluded from this that the established principles and rules of humanitarian law applicable in armed conflict did not apply to nuclear weapons. Such a conclusion would be incompatible with the intrinsically humanitarian character of the legal principles in question which permeates the entire law of armed conflict and applies to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future. In this respect it seems significant that the thesis that the rules of humanitarian law do not apply to the new weaponry, because of the newness of the latter, has not been advocated in the present proceedings.

The principle of neutrality
(paras. 88-89)

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

Conclusions to be drawn from the applicability of international humanitarian law and the principle of neutrality
(paras. 90-97)

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

According to one point of view, the fact that recourse to nuclear weapons is subject to and regulated by the law of armed conflict does not necessarily mean that such recourse is as such prohibited. Another view holds that recourse to nuclear weapons, in view of the necessarily indiscriminate consequences of their use, could never be compatible with the principles and rules of humanitarian law and is therefore prohibited. A similar view has been expressed with respect to the effects of the principle of neutrality. Like the principles and rules of humanitarian law, that principle has therefore been considered by some to rule out the use of a weapon the effects of which simply cannot be contained within the territories of the contending States.

The Court observes that, in view of the unique characteristics of nuclear weapons, to which the Court has referred above, the use of such weapons in fact seems scarcely reconcilable with respect for the requirements of the law applicable in armed conflict. It considers, nevertheless, that it does not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance. Furthermore, the Court cannot lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defence, in accordance with Article 51 of the Charter, when its survival is at stake. Nor can it ignore the practice referred to as "policy of deterrence", to which an appreciable section of the international community adhered for many years.

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

Obligation to negotiate nuclear disarmament
(paras. 98-103)

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

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

In these circumstances, the Court appreciates the full importance of the recognition by article VI of the Treaty on the Non-Proliferation of Nuclear Weapons of an obligation to negotiate in good faith a nuclear disarmament. The legal import of that obligation goes beyond that of a mere obligation of conduct; the obligation involved here is an obligation to achieve a precise result—nuclear disarmament in all its aspects—by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith. This twofold obligation to pursue and to conclude negotiations formally concerns the 182 States

parties to the Treaty on the Non-Proliferation of Nuclear Weapons, or, in other words, the vast majority of the international community. Indeed, any realistic search for general and complete disarmament, especially nuclear disarmament, necessitates the cooperation of all States.

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The Court finally emphasizes that its reply to the question put to it by the General Assembly rests on the totality of the legal grounds set forth by the Court above (paragraphs 20 to 103), each of which is to be read in the light of the others. Some of these grounds are not such as to form the object of formal conclusions in the final paragraph of the opinion; they nevertheless retain, in the view of the Court, all their importance.

Declaration of President Bedjaoui

After having pointed out that paragraph E of the operative part was adopted by 7 votes to 7, with his own casting vote, President Bedjaoui began by stressing that the Court had been extremely meticulous and had shown an acute sense of its responsibilities when proceeding to consider all the aspects of the complex question put to it by the General Assembly. He indicated that the Court had, however, had to find that in the current state of international law the question was one to which it was unfortunately not in a position to give a clear answer. In his view, the advisory opinion thus rendered does at least have the merit of pointing to the imperfections of international law and inviting the States to correct them.

President Bedjaoui indicated that the fact that the Court was unable to go any further should not "in any way be interpreted as leaving the way open to the recognition of the lawfulness of the threat or use of nuclear weapons". According to him, the Court does no more than place on record the existence of a legal uncertainty. After having observed that the voting of the Members of the Court on paragraph E of the operative part is not the reflection of any geographical dividing line, he gives the reasons that led him to approve the pronouncement of the Court.

To that end, he began by emphasizing the particularly exacting nature of international law and the way in which it is designed to be applied in all circumstances. More specifically, he concluded that "*the very nature of this blind weapon therefore has a destabilizing effect on humanitarian law which regulates discernment in the type of weapon used. Nuclear weapons, the ultimate evil, destabilize humanitarian law which is the law of the lesser evil. The existence of nuclear weapons is therefore a challenge to the very existence of humanitarian law*, not to mention their long-term effects of damage to the human environment, in respect to which the *right to life* can be exercised".

President Bedjaoui considered that "self-defence—if exercised under extreme circumstances in which the very survival of a State is in question—cannot engender a situation in which a State would exonerate itself from compliance with the '*intransgressible*' norms of international humanitarian law". According to him, it would be very rash to accord, without any hesitation, a higher priority to the survival of a State than to the survival of humanity itself.

As the ultimate objective of any action in the field of nuclear weapons is nuclear disarmament, President Bedjaoui concludes by stressing the importance of the obligation to negotiate in good faith for nuclear disarmament—which the Court has, moreover, recognized. He considers for his part that it is possible to go beyond the conclusions of the Court in this regard and to assert "that there in fact exists a twofold *general obligation*, opposable *erga omnes*, to negotiate in good faith and to achieve a specified result"; in other words, given the at least formally unanimous support for that object, that obligation has now—in his view—assumed customary force.

Declaration of Judge Herczegh

Judge Herczegh, in his declaration, takes the view that the advisory opinion could have included a more accurate summary of the present state of international law with regard to the question of the threat and use of nuclear weapons "in any circumstance". He voted in favour of the advisory opinion and, more particularly, in favour of paragraph 105, subparagraph E, as he did not wish to dissociate himself from the large number of conclusions that were expressed and integrated into the advisory opinion, and which he fully endorses.

Declaration of Judge Shi

Judge Shi has voted in favour of the operative paragraphs of the advisory opinion of the Court. However, he has reservations with regard to the role which the Court assigns to the policy of deterrence in determining the existence of a customary rule on the use of nuclear weapons.

In his view, "nuclear deterrence" is an instrument of policy to which certain nuclear-weapon States, supported by those States accepting nuclear umbrella protection, adhere in their relations with other States. This practice is within the realm of international politics and has no legal value from the standpoint of the formation of a customary rule prohibiting the use of the weapons as such.

It would be hardly compatible with the Court's judicial function if the Court, in determining a rule of existing law governing the use of the weapons, were to have regard to the "policy of deterrence".

Also, leaving aside the nature of the policy of deterrence, States adhering to the policy of deterrence, though important and powerful members of the international community and playing an important role on the stage of international politics, by no means constitute a large proportion of the membership of the international community.

Besides, the structure of the community of States is built on the principle of sovereign equality. The Court cannot view these nuclear-weapon States and their allies in terms of material power, but rather should have regard of them from the standpoint of international law. Any undue emphasis on the practice of these materially powerful States, constituting a fraction of the membership of the community of States, would not only be contrary to the principle of sovereign equality of States, but also make it more difficult to give an accurate and proper view of the existence of a customary rule on the use of nuclear weapons.

Declaration of Judge Vereshchetin

In his declaration, Judge Vereshchetin explains the reasons which have led him to vote in favour of paragraph 2 E of the *dispositif*, which carries the implication of the indecisiveness of the Court. In his view, in advisory procedure,

where the Court is requested not to resolve an actual dispute, but to state the law as it finds it, the Court may not try to fill any lacuna or improve the law that is imperfect. The Court cannot be blamed for indecisiveness or evasiveness where the law, upon which it is called to pronounce, is itself inconclusive.

Judge Vereshchetin is of the view that the opinion adequately reflects the current legal situation and shows the most appropriate means to putting an end to the existence of any "grey areas" in the legal status of nuclear weapons.

Declaration of Judge Ferrari Bravo

Judge Ferrari Bravo regrets that the Court should have arbitrarily divided into two categories the long line of General Assembly resolutions that deal with nuclear weapons. Those resolutions are fundamental. This is the case of resolution 1 (I) of 24 January 1946, which clearly points to the existence of a truly solemn *undertaking* to eliminate all forms of nuclear weapons, whose presence in military arsenals was declared unlawful. The cold war, which intervened shortly afterwards, prevented the *development* of this concept of illegality, while giving rise to the concept of nuclear deterrence which has *no legal value*. The theory of deterrence, while it has occasioned a practice of the nuclear-weapon States and their allies, has not been able to create a legal practice serving as a basis for the incipient creation of an international custom. It has, moreover, helped to widen the gap between Article 2, paragraph 4, of the Charter and Article 51.

The Court should have proceeded to a constructive analysis of the role of the General Assembly resolutions. These have, from the outset, contributed to the formation of a rule prohibiting nuclear weapons. The theory of deterrence has arrested the development of that rule and, while it has prevented the *implementation* of the prohibition of nuclear weapons, it is none the less still the case that that "bare" prohibition has remained unchanged and continues to produce its effects, at least with regard to the burden of proof, by making it more difficult for the nuclear Powers to vindicate their policies within the framework of the theory of deterrence.

Separate opinion of Judge Guillaume

After having pondered upon the admissibility of the request for an advisory opinion, Judge Guillaume begins by expressing his agreement with the Court with regard to the fact that nuclear weapons, like all weapons, can only be used in the exercise of the right of self-defence recognized by Article 51 of the Charter. On the other hand, he says he has had doubts about the applicability of traditional humanitarian law to the use—and above all the threat of use—of nuclear weapons. He goes on to say, however, that he has no choice in the matter but to defer to the consensus that has emerged before the Court between the States.

Moving on to an analysis of the law applicable to armed conflict, he notes that that law essentially implies comparisons in which humanitarian considerations have to be weighed against military requirements. Thus, the collateral damage caused to the civilian population must not be "excessive" as compared to the "military advantage" offered. The harm caused to combatants must not be "greater than that unavoidable to achieve legitimate military objectives". On that account, nuclear weapons of mass destruction can only be used lawfully in extreme cases.

In an attempt to define those cases, Judge Guillaume stresses that neither the Charter of the United Nations nor any conventional or customary rule can detract from the natural right of self-defence recognized by Article 51 of the Charter. He deduces from this that international law cannot deprive a State of the right to resort to nuclear weaponry if that resort constitutes the ultimate means by which it can ensure its survival.

He regrets that the Court has not explicitly recognized this, but stresses that it has done so implicitly. It has certainly concluded that it could not, in those extreme circumstances, make a definitive finding of either legality or illegality in relation to nuclear weapons. In other words, it has taken the view that, in such circumstances, the law provides no guidance to States. However, if the law is silent on that matter, the States, in the exercise of their sovereignty, remain free to act as they think fit.

Consequently, it follows implicitly but necessarily from paragraph 2 E of the Court's advisory opinion that the States may resort to "the threat or use of nuclear weapons in an extreme circumstance of self-defence, in which the very survival of a State would be at stake". When recognizing such a right the Court, by so doing, has recognized the legality of policies of deterrence.

Separate opinion of Judge Ranjeva

In his separate opinion, Judge Ranjeva has made a point of emphasizing that, for the first time, the Court has unambiguously stated that the use or threat of use of nuclear weapons is contrary to the rules of international law applicable, *inter alia*, to armed conflict and, more particularly, to the principles and rules of humanitarian law. That indirect response to the question of the General Assembly is, in his view, justified by the very nature of the law of armed conflict, applicable without regard to the status of victim or of aggressor, and that explains why the Court has not gone so far as to uphold the exception of extreme self-defence when the very survival of the State is at stake, as a condition for the suspension of illegality. In his view, State practice shows that a point of no return has been reached: the principle of the legality of the use or threat of use of nuclear weapons has not been asserted; it is on the basis of a justification of an exception to that principle, accepted as being legal, that the nuclear-weapon States attempt to give the reasons for their policies, and the increasingly closer-knit legal regimes of nuclear weapons have come about in the context of the consolidation and implementation of the final obligation to produce a specific result, i.e., generalized nuclear disarmament. These "givens" thus represent the advent of a consistent and uniform practice: an emergent *opinio juris*.

Judge Ranjeva considers, however, that the equal treatment that the advisory opinion has given to the principles of legality and illegality cannot be justified. The General Assembly gave a very clear definition of the object of its question: Does international law authorize the use or threat of use of nuclear weapons in any circumstance? By dealing at the same time and, above all, on the same level with both legality and illegality, the Court has been led to adopt a liberal acceptation of the concept of a "legal question" in an advisory proceeding, as henceforth any question whose object is to ask the Court to look into matters that some people do not seek to understand will be seen as admissible.

In conclusion, Judge Ranjeva, while being aware of the criticisms that specialists in law and judicial matters will be bound to level at the advisory opinion, ultimately considers that it does declare the law as it is, while laying down boundaries the exceeding of which is a matter for the competence of States. He none the less hopes that no Court will ever have to reach a decision along the lines of the second subparagraph of paragraph E.

Separate opinion of Judge Fleischhauer

Judge Fleischhauer's separate opinion highlights that international law is still grappling with and has not yet overcome the dichotomy that is created by the very existence of nuclear weapons between the law applicable in armed conflict, and in particular the rules and principles of humanitarian law, on the one side, and the inherent right of self-defence, on the other. The known qualities of nuclear weapons let their use appear scarcely reconcilable with humanitarian law, while the right to self-defence would be severely curtailed if for a State, victim of an attack with nuclear, chemical or bacteriological weapons or otherwise constituting a deadly menace for its very existence, nuclear weapons were totally ruled out as an ultimate legal option.

The separate opinion endorses the Court's finding that international law applicable in armed conflict, particularly the rules and principles of humanitarian law, applies to nuclear weapons. It goes on to agree with the Court's conclusion that the threat or use of nuclear weapons would generally be contrary to the rules applicable in armed conflict, and in particular the principles and rules of humanitarian law. The separate opinion then welcomes that the Court did not stop there, but that the Court admitted that there can be qualifications to that finding. Had the Court not done so, then it would have given prevalence to one set of principles involved over the other. The principles involved are, however, all legal principles of equal rank.

The separate opinion continues that the Court could and should have gone further and that it could and should have stated that in order to reconcile the conflicting principles, their smallest common denominator would apply. That means that recourse to nuclear weapons could remain a justified legal option in an extreme case of individual or collective self-defence as the last resort of a State victim of an attack with nuclear, bacteriological or chemical weapons or otherwise threatening its very existence. The separate opinion sees a confirmation of this view in the legally relevant State practice relating to matters of self-defence.

For a recourse to nuclear weapons to be considered justified, however, not only would the situation have to be extreme, but all the conditions on which the lawfulness of the exercise of the right of self-defence depends in international law, including the requirement of proportionality, would have to be met. Therefore, the margin for considering that a particular threat or use of nuclear weapons could be legal is extremely narrow.

Finally, the separate opinion endorses the existence of a general obligation of States to pursue in good faith, and bring to a conclusion, negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.

Dissenting opinion of Vice-President Schwebel

Vice-President Schwebel, while agreeing with much of the body of the Court's opinion, dissented because of his "profound" disagreement with its principal operative conclusion: "The Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake." The Court thereby concluded "on the supreme issue of the threat or use of force of our age that it has no opinion . . . that international law and hence the Court have nothing to say. After many months of agonizing appraisal of the law, the Court discovers that there is none. When it comes to the supreme interests of State, the Court discards the legal progress of the twentieth century, puts aside the provisions of the Charter of the United Nations of which it is 'the principal judicial organ', and proclaims, in terms redolent of *Realpolitik*, its ambivalence about the most important provisions of modern international law. If this was to be its ultimate holding, the Court would have done better to have drawn on its undoubted discretion not to render an opinion at all."

The Court's inconclusiveness was in accordance neither with its Statute, nor with its precedent, nor with events which demonstrate the legality of the threat or use of nuclear weapons in extraordinary circumstances. E.g., the threat which Iraq took as a nuclear threat that may have deterred it from using chemical and biological weapons against coalition forces in the Gulf War was "not only eminently lawful but intensely desirable".

While the principles of international humanitarian law govern the use of nuclear weapons, and while "it is extraordinarily difficult to reconcile the use . . . of nuclear weapons with the application of those principles", it does not follow that the use of nuclear weapons necessarily and invariably will contravene those principles. But it cannot be accepted that the use of nuclear weapons on a scale which would—or could—result in the deaths of "many millions in indiscriminate inferno and by far-reaching fallout . . . and render uninhabitable much or all of the earth, could be lawful". The Court's conclusion that the threat or use of nuclear weapons "generally" would be contrary to the rules of international law applicable in armed conflict "is not unreasonable".

The case as a whole presents an unparalleled tension between State practice and legal principle. State practice demonstrates that nuclear weapons have been manufactured and deployed for some 50 years; that in that deployment inheres a threat of possible use ("deterrence"); and that the international community, far from outlawing the threat or use of nuclear weapons in all circumstances, has recognized in effect or in terms that in certain circumstances nuclear weapons may be used or their use threatened. This State practice is not that of a lone and secondary persistent objector, but a practice of the permanent members of the Security Council, supported by a large and weighty number of other States, which together represent the bulk of the world's power and much of its population.

The Nuclear Non-Proliferation Treaty and the negative and positive security assurances of the nuclear Powers unanimously accepted by the Security Council indicate the acceptance by the international community of the threat or use of nuclear weapons in certain circumstances. Other nuclear treaties equally infer that nuclear weapons are not comprehensively prohibited either by treaty or by customary international law.

General Assembly resolutions to the contrary are not law-making or declaratory of existing international law.

When faced with continuing and significant opposition, the repetition of General Assembly resolutions is a mark of ineffectuality in law formation as it is in practical effect.

Dissenting opinion of Judge Oda

Judge Oda voted against part one of the Court's advisory opinion because of his view that, for the reasons of judicial propriety and judicial economy, the Court should have exercised its discretionary power to refrain from rendering an opinion in response to the request.

In the view of Judge Oda, the question in the request is not adequately drafted and there was a lack of a meaningful consensus of the General Assembly with regard to the 1994 request. After examining the developments of the relevant General Assembly resolutions on a convention on the prohibition of the use of nuclear weapons up to 1994, he notes that the General Assembly is far from having reached an agreement on the preparation of a Convention rendering the use of nuclear weapons illegal. In the light of that history, the request was prepared and drafted—not in order to ascertain the status of existing international law on the subject but to try to promote the total elimination of nuclear weapons—that is to say, with highly *political* motives.

He notes that the perpetuation of the NPT regime recognizes two groups of States—the five nuclear-weapon States and the non-nuclear-weapon States. As the five nuclear-weapon States have repeatedly given assurances to the non-nuclear-weapon States of their intention not to use nuclear weapons against them, there is almost no probability of any use of nuclear weapons given the current doctrine of nuclear deterrence.

Judge Oda maintains that an advisory opinion should only be given in the event of a real need. In the present instance there is no need and no rational justification for the General Assembly's request that the Court give an advisory opinion on the existing international law relating to the use of nuclear weapons. He also emphasizes that from the standpoint of judicial economy the right to request an advisory opinion should not be abused.

In concluding his opinion, Judge Oda stresses his earnest hope that nuclear weapons will be eliminated from the world but states that the decision on this matter is a function of political negotiations among States in Geneva (the Conference on Disarmament) or New York (the United Nations) but not one which concerns this judicial institution in The Hague.

He voted against subparagraph E as the equivocations contained therein serve, in his view, to confirm his point that it would have been prudent for the Court to decline from the outset to give any opinion at all in the present case.

Dissenting opinion of Judge Shahabuddeen

In Judge Shahabuddeen's dissenting opinion, the essence of the General Assembly's question was whether, in the special case of nuclear weapons, it was possible to reconcile the imperative need of a State to defend itself with the no less imperative need to ensure that, in doing so, it did not imperil the survival of the human species. If a reconciliation was not possible, which side should give way? The question was, admittedly, a difficult one; but the responsibility of the Court to answer it was clear. He was not persuaded that there was any deficiency in the law or the facts which prevented the Court from returning a definitive answer to the real point of the General Assembly's question. In his respectful view, the Court should and could have given a definitive answer—one way or another.

Dissenting opinion of Judge Weeramantry

Judge Weeramantry's opinion is based on the proposition that the use or threat of use of nuclear weapons is illegal *in any circumstances whatsoever*. It violates the fundamental principles of international law, and represents the very negation of the humanitarian concerns which underlie the structure of humanitarian law. It offends conventional law and, in particular, the Geneva Gas Protocol of 1925 and article 23 (*a*) of the Hague Regulations of 1907. It contradicts the fundamental principle of the dignity and worth of the human person on which all law depends. It endangers the human environment in a manner which threatens the entirety of life on the planet.

He regretted that the Court had not so held, directly and categorically.

However, there were some portions of the Court's opinion which were of value, in that it expressly held that nuclear weapons were subject to limitations flowing from the Charter of the United Nations, the general principles of international law, the principles of international humanitarian law, and a variety of treaty obligations. It was the first international judicial determination to this effect and further clarifications were possible in the future.

Judge Weeramantry's opinion explained that from the time of Henri Dunant, humanitarian law took its origin and inspiration from a realistic perception of the brutalities of war, and the need to restrain them in accordance with the dictates of the conscience of humanity. The brutalities of the nuclear weapon multiplied a thousandfold all the brutalities of war as known in the pre-nuclear era. It was doubly clear therefore that the principles of humanitarian law governed this situation.

His opinion examined in some detail the brutalities of nuclear war, showing numerous ways in which the nuclear weapon was unique, even among weapons of mass destruction, in injuring human health, damaging the environment and destroying all the values of civilization.

The nuclear weapon caused death and destruction; induced cancers, leukaemia, keloids and related afflictions; caused gastrointestinal, cardiovascular and related afflictions; continued, for decades after its use, to induce the health-related problems mentioned above; damaged the environmental rights of future generations; caused congenital deformities, mental retardation and genetic damage; carried the potential to cause a nuclear winter; contaminated and destroyed the food chain; imperilled the ecosystem; produced lethal levels of heat and blast; produced radiation and radioactive fallout; produced a disruptive electromagnetic pulse; produced social disintegration; imperilled all civilization; threatened human survival; wreaked cultural devastation; spanned a time range of thousands of years; threatened all life on the planet; irreversibly damaged the rights of future generations; exterminated civilian populations; damaged neighbouring States; and produced psychological stress and fear syndromes—*as no other weapons do.*

While it was true that there was no treaty or rule of law which expressly outlawed nuclear weapons by name, there was an abundance of principles of international law, and particularly international humanitarian law, which left no

doubt regarding the illegality of nuclear weapons, when one had regard to their known effects.

Among these principles were the prohibition against causing unnecessary suffering, the principle of proportionality, the principle of discrimination between combatants and civilians, the principle against causing damage to neutral States, the prohibition against causing serious and lasting damage to the environment, the prohibition against genocide, and the basic principles of human rights law.

In addition, there were specific treaty provisions contained in the Geneva Gas Protocol (1925) and the Hague Regulations (1907) which were clearly applicable to nuclear weapons, as they prohibited the use of poisons. Radiation fell directly within this description, and the prohibition against the use of poisons was indeed one of the oldest rules of the laws of war.

Judge Weeramantry's opinion also draws attention to the multicultural and ancient origins of the laws of war, referring to the recognition of its basic rules in Hindu, Buddhist, Chinese, Judaic, Islamic, African and modern European cultural traditions. As such, the humanitarian rules of warfare were not to be regarded as a new sentiment, invented in the nineteenth century, and so slenderly rooted in universal tradition that they may be lightly overridden.

The opinion also points out that there cannot be two sets of the laws of war applicable simultaneously to the same conflict—one to conventional weapons, and the other to nuclear weapons.

Judge Weeramantry's analysis includes philosophical perspectives showing that no credible legal system could contain a rule within itself which rendered legitimate an act which could destroy the entire civilization of which that legal system formed a part. Modern juristic discussions showed that a rule of this nature, which may find a place in the rules of a suicide club, could not be part of any reasonable legal system—and international law was pre-eminently such a system.

The opinion concludes with a reference to the appeal in the Russell-Einstein Manifesto to "remember your humanity and forget the rest", without which the risk arises of universal death. In this context, the opinion points out that international law is equipped with the necessary array of principles with which to respond, and that international law could contribute significantly towards rolling back the shadow of the mushroom cloud, and heralding the sunshine of the nuclear-free age.

The question should therefore have been answered by the Court—convincingly, clearly and categorically.

Dissenting opinion of Judge Koroma

In his dissenting opinion, Judge Koroma stated that he fundamentally disagreed with the Court's finding that:

> "... in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake".

Such a finding, he maintained, could not be sustained on the basis of existing international law, or in the face of the weight and abundance of evidence and material presented to the Court. In his view, on the basis of the existing law, particularly humanitarian law and the material available to the Court, the use of nuclear weapons in any circumstance would at the very least result in the violation of the principles and rules of that law and is therefore unlawful.

Judge Koroma also pointed out that although the views of States are divided on the question of the effects of the use of nuclear weapons, or as to whether the matter should have been brought before the Court, he took the view that once the Court had found that the General Assembly was competent to pose the question, and that no compelling reason existed against rendering an opinion, the Court should have performed its judicial function and decided the case on the basis of existing international law. He expressed his regret that the Court, even after holding that:

> "the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law"

—a finding with which he concurred, save for the word "generally"—the Court had flinched from answering the actual question put to it that the threat or use of nuclear weapons in any circumstance would be unlawful under international law.

He maintained that the Court's answer to the question had turned on the "survival of the State", whereas the question posed to the Court was about the lawfulness of the use of nuclear weapons. He therefore found the Court's Judgment not only untenable in law, but even potentially destabilizing of the existing international legal order, as it not only made States that might be disposed to use such weapons judges about the lawfulness of the use of such weapons, but also threw the regime regarding the prohibition of the use of force and self-defence as regulated by the Charter of the United Nations into doubt, while at the same time, albeit unintentionally, it made inroads into the legal restraints imposed on nuclear-weapon States regarding such weapons.

Judge Koroma, in his dissenting opinion, undertook a survey of what, in his view, is the law applicable to the question, analysed the material before the Court and came to the conclusion that it is wholly unconvincing for the Court to have ruled that, in view of the "current state of the law", it could not conclude definitively whether the use of nuclear weapons would be illegal. In his opinion, not only does the law exist in substantial and ample form, but it is also precise and the purported lacuna is entirely unpersuasive. In his opinion, there was no room for a finding of *non liquet* in the matter before the Court.

On the other hand, after analysing the evidence, Judge Koroma came to the same conclusion as the Court that nuclear weapons, when used, are incapable of distinguishing between civilians and military personnel, and would result in the death of thousands if not millions of civilians, cause superfluous injury and unnecessary suffering to survivors, affect future generations, damage hospitals and contaminate the natural environment, food and drinking water with radioactivity, thereby depriving survivors of the means of survival, contrary to the Geneva Conventions of 1949 and the 1977 Additional Protocol I thereto. It followed, therefore, that the use of such weapons would be unlawful.

His dissent from the Court's main finding notwithstanding, Judge Koroma stated that the opinion should not be viewed as entirely without legal significance or merit. The normative findings contained in it should be regarded as a step forward in the historic process of imposing legal restraints in armed conflicts and in reaffirming that nuclear weapons are subject to international law and to the rule of

law. The Court's advisory opinion, in his view, constitutes the first time in history that a tribunal of this standing has declared and reaffirmed that the threat or use of nuclear weapons that is contrary to Article 2, paragraph 4, of the Charter prohibiting the use of force is unlawful and would be incompatible with the requirements of international law applicable in armed conflict. The finding, though qualified, is tantamount to a rejection of the argument that because nuclear weapons were invented after the advent of humanitarian law, they are therefore not subject to that law.

In conclusion, Judge Koroma regretted that the Court did not follow through with those normative conclusions and make the only possible and inescapable finding that because of their established characteristics, it is impossible to conceive of any circumstance when the use of nuclear weapons in an armed conflict would not be unlawful. Such a conclusion by the Court would have been a most invaluable contribution by the Court, as the guardian of legality of the United Nations system, to what has been described as the most important aspect of international law facing humanity today.

Dissenting opinion of Judge Higgins

Judge Higgins appended a dissenting opinion in which she explained that she was not able to support that key finding of the Court in paragraph 2 E. In her view, the Court had not applied the rules of humanitarian law in a systematic and transparent way to show how it reached the conclusion in the first part of paragraph 2 E of the *dispositif*. Nor was the meaning of the first part of paragraph 2 E clear. Judge Higgins also opposed the *non liquet* in the second part of paragraph 2 E, believing it to be unnecessary and wrong in law.

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105. CASE CONCERNING APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE (BOSNIA AND HERZEGOVINA *v.* YUGOSLAVIA) (PRELIMINARY OBJECTIONS)

Judgment of 11 July 1996

In a Judgment issued in the case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Yugoslavia), the Court rejected the preliminary objections raised by Yugoslavia. In addition, the Court found that the Application filed by Bosnia and Herzegovina was admissible.

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The full text of the operative paragraph reads as follows:

"THE COURT,

(1) Having taken note of the withdrawal of the fourth preliminary objection raised by the Federal Republic of Yugoslavia,

Rejects

(*a*) by fourteen votes to one,

the first, second and third preliminary objections;

IN FAVOUR: President Bedjaoui; Vice-President Schwebel; Judges Oda, Guillaume, Shahabuddeen, Weeramantry, Ranjeva, Herczegh, Shi, Koroma, Vereshchetin, Ferrari Bravo, Parra-Aranguren; Judge *ad hoc* Lauterpacht;

AGAINST: Judge *ad hoc* Kreća;

(*b*) by eleven votes to four,

the fifth preliminary objection;

IN FAVOUR: President Bedjaoui; Vice-President Schwebel; Judges Guillaume, Shahabuddeen, Weeramantry, Ranjeva, Herczegh, Koroma, Ferrari Bravo, Parra-Aranguren; Judge *ad hoc* Lauterpacht;

AGAINST: Judges Oda, Shi, Vereshchetin; Judge *ad hoc* Kreća;

(*c*) by fourteen votes to one,

the sixth and seventh preliminary objections;

IN FAVOUR: President Bedjaoui; Vice-President Schwebel; Judges Oda, Guillaume, Shahabuddeen, Weeramantry, Ranjeva, Herczegh, Shi, Koroma, Vereshchetin, Ferrari Bravo, Parra-Aranguren; Judge *ad hoc* Lauterpacht;

AGAINST: Judge *ad hoc* Kreća;

(2) (*a*) by thirteen votes to two,

Finds that, on the basis of article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, it has jurisdiction to adjudicate upon the dispute;

IN FAVOUR: President Bedjaoui; Vice-President Schwebel; Judges Guillaume, Shahabuddeen, Weeramantry, Ranjeva, Herczegh, Shi, Koroma, Vereshchetin, Ferrari Bravo, Parra-Aranguren; Judge *ad hoc* Lauterpacht;

AGAINST: Judge Oda; Judge *ad hoc* Kreća;

(*b*) By fourteen votes to one,

Dismisses the additional bases of jurisdiction invoked by the Republic of Bosnia and Herzegovina;

IN FAVOUR: President Bedjaoui; Vice-President Schwebel; Judges Oda, Guillaume, Shahabuddeen, Weeramantry, Ranjeva, Herczegh, Shi, Koroma, Vereshchetin, Ferrari Bravo, Parra-Aranguren; Judge *ad hoc* Kreća;

AGAINST: Judge *ad hoc* Lauterpacht;

(3) By thirteen votes to two,

Finds that the Application filed by the Republic of Bosnia and Herzegovina on 20 March 1993 is admissible.

IN FAVOUR: President Bedjaoui; Vice-President Schwebel; Judges Guillaume, Shahabuddeen, Weeramantry, Ranjeva, Herczegh, Shi, Koroma, Vereshchetin, Ferrari Bravo, Parra-Aranguren; Judge *ad hoc* Lauterpacht;

AGAINST: Judge Oda; Judge *ad hoc* Kreća."

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The Court was composed as follows: President Bedjaoui; Vice-President Schwebel; Judges Oda, Guillaume, Shahabuddeen, Weeramantry, Ranjeva, Herczegh, Shi, Koroma, Vereshchetin, Ferrari Bravo, Parra-Aranguren; Judges *ad hoc* Lauterpacht, Kreća; Registrar Valencia-Ospina.

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Judge Oda appended a declaration to the Judgment of the Court; Judges Shi and Vereshchetin appended a joint declaration to the Judgment of the Court; Judge *ad hoc* Lauterpacht appended a declaration to the Judgment of the Court.

Judges Shahabuddeen, Weeramantry and Parra-Aranguren appended separate opinions to the Judgment of the Court.

Judge *ad hoc* Kreća appended a dissenting opinion to the Judgment of the Court.

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Institution of proceedings and history of the case
(paras. 1-15)

The Court begins by recalling that on 20 March 1993 the Republic of Bosnia and Herzegovina (hereinafter called "Bosnia and Herzegovina") instituted proceedings against the Federal Republic of Yugoslavia (hereinafter called "Yugoslavia") in respect of a dispute concerning alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter called "the Genocide Convention"), adopted by the General Assembly of the United Nations on 9 December 1948, as well as various matters which Bosnia and Herzegovina claims are connected therewith. The Application invoked article IX of the Genocide Convention as the basis of the jurisdiction of the Court.

On 20 March 1993, immediately after the filing of its Application, Bosnia and Herzegovina submitted a request for the indication of provisional measures under Article 41 of the Statute. On 31 March 1993, the Agent of Bosnia and Herzegovina filed in the Registry, invoking it as an additional basis of the jurisdiction of the Court in the case, the text of a letter dated 8 June 1992, addressed to the President of the Arbitration Commission of the International Conference for Peace in Yugoslavia by the Presidents of the Republics of Montenegro and Serbia. On 1 April 1993, Yugoslavia submitted written observations on Bosnia and Herzegovina's request for provisional measures, in which, in turn, it recommended the Court to order the application of provisional measures to Bosnia and Herzegovina. By an Order dated 8 April 1993, the Court, after hearing the Parties, indicated certain provisional measures with a view to the protection of rights under the Genocide Convention.

On 27 July 1993, Bosnia and Herzegovina submitted a new request for the indication of provisional measures; and, by a series of subsequent communications, it stated that it was amending or supplementing that request, as well as, in some cases, the Application, including the basis of jurisdiction relied on therein. By letters of 6 August and 10 August 1993, the Agent of Bosnia and Herzegovina indicated that his Government was relying, as additional bases of the jurisdiction of the Court in the case, on, respectively, the Treaty between the Allied and Associated Powers and the Kingdom of the Serbs, Croats and Slovenes on the Protection of Minorities, signed at Saint-Germain-en-Laye on 10 September 1919, and on customary and conventional international laws of war and international humanitarian law. On 10 August 1993, Yugoslavia also submitted a request for the indication of provisional measures; and, on 10 August and 23 August 1993, it filed written observations on Bosnia and Herzegovina's new request, as amended or supplemented. By an Order dated 13 September 1993, the Court, after hearing the Parties, reaffirmed the measures indicated in its Order of 8 April 1993 and declared that those measures should be immediately and effectively implemented.

Within the extended time-limit of 30 June 1995 for the filing of the Counter-Memorial, Yugoslavia raised preliminary objections concerning, respectively, the admissibility of the Application and the jurisdiction of the Court to entertain the case. (In view of its length, the text of the preliminary objections has not been reproduced in this summary.)

By a letter dated 2 February 1996, the Agent of Yugoslavia submitted to the Court, "as a document relevant to the case", the text of the General Framework Agreement for Peace in Bosnia and Herzegovina and the annexes thereto (collectively "the peace agreement"), initialled in Dayton, Ohio, on 21 November 1995 and signed in Paris on 14 December 1995 (hereinafter called the "Dayton-Paris Agreement").

Public hearings on the preliminary objections raised by Yugoslavia were held between 29 April and 3 May 1996.

Jurisdiction ratione personae
(paras. 16-26)

Recalling that Bosnia and Herzegovina has principally relied, as a basis for the jurisdiction of the Court in this case, on article IX of the Genocide Convention, the Court initially considers the preliminary objections raised by Yugoslavia on this point. It takes note of the withdrawal by Yugoslavia of its fourth preliminary objection, which therefore need no longer be dealt with. In its third objection, Yugoslavia, on various grounds, has disputed the contention that the Convention binds the two Parties or that it has entered into force between them; and in its fifth objection, Yugoslavia has objected, for various reasons, to the argument that the dispute submitted by Bosnia and Herzegovina falls within the provisions of article IX of the Convention.

The proceedings instituted before the Court are between two States whose territories are located within the former Socialist Federal Republic of Yugoslavia. At the time of the proclamation of the Federal Republic of Yugoslavia, on 27 April 1992, a formal declaration was adopted on its behalf which expressed the intention of Yugoslavia to remain bound by the international treaties to which the former Yugoslavia was party. The Court observes, furthermore, that it has not been contested that Yugoslavia was party to the Genocide Convention. Thus, Yugoslavia was bound by the provisions of the Convention on the date of the filing of the Application in the present case, namely, on 20 March 1993.

For its part, on 29 December 1992, Bosnia and Herzegovina transmitted to the Secretary-General of the United Nations, as depositary of the Genocide Convention, a notice of succession. Yugoslavia has contested the validity and legal effect of that notice, as, in its view, Bosnia and

Herzegovina was not qualified to become a party to the Convention.

The Court notes that Bosnia and Herzegovina became a Member of the United Nations following the decisions adopted on 22 May 1992 by the Security Council and the General Assembly, bodies competent under the Charter. Article XI of the Genocide Convention opens it to "any Member of the United Nations"; from the time of its admission to the Organization, Bosnia and Herzegovina could thus become a party to the Convention. It is of the view that the circumstances of Bosnia and Herzegovina's accession to independence, which Yugoslavia refers to in its third preliminary objection, are of little consequence.

It is clear from the foregoing that Bosnia and Herzegovina could become a party to the Convention through the mechanism of State succession. The Parties to the dispute differed, however, as to the legal consequences to be drawn from the occurrence of a State succession in the present case.

The Court does not consider it necessary, in order to decide on its jurisdiction in this case, to make a determination on the legal issues concerning State succession in respect to treaties which have been raised by the Parties. Whether Bosnia and Herzegovina automatically became party to the Genocide Convention on the date of its accession to independence on 6 March 1992, or whether it became a party as a result—retroactive or not—of its notice of succession of 29 December 1992, at all events it was a party to it on the date of the filing of its Application on 20 March 1993.

Yugoslavia submitted that, even supposing that Bosnia and Herzegovina had been bound by the Convention in March 1993, it could not, at that time, have entered into force between the Parties, because the two States did not recognize one another and the conditions necessary to found the consensual basis of the Court's jurisdiction were therefore lacking. The Court observes, however, that this situation no longer obtains since the signature and the entry into force, on 14 December 1995, of the Dayton-Paris Agreement, article X of which stipulates that the Parties "recognize each other as sovereign independent States within their international borders". And it takes note that, even if it were to be assumed that the Genocide Convention did not enter into force between the Parties until the signature of the Dayton-Paris Agreement, all the conditions are now fulfilled to found the jurisdiction of the Court *ratione personae*. It adds that, indeed, the jurisdiction of the Court must normally be assessed on the date of the filing of the act instituting proceedings, but that the Court, like its predecessor, the Permanent Court of International Justice, has always had recourse to the principle according to which it should not penalize a defect in a procedural act which the applicant could easily remedy.

In the light of the foregoing, the Court considers that it must reject Yugoslavia's third preliminary objection.

Jurisdiction ratione materiae
(paras. 27-33)

In order to determine whether it has jurisdiction to entertain the case on the basis of article IX of the Genocide Convention, it remains for the Court to verify whether there is a dispute between the Parties that falls within the scope of that provision. Article IX of the Convention is worded as follows:

> "Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."

It is jurisdiction *ratione materiae*, as so defined, to which Yugoslavia's fifth objection relates.

The Court notes that there persists between the Parties before it

> "a situation in which the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations" (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74)

and that, by reason of the rejection by Yugoslavia of the complaints formulated against it by Bosnia and Herzegovina, there is a legal dispute.

To found its jurisdiction, the Court must, however, still ensure that the dispute in question does indeed fall within the provisions of article IX of the Genocide Convention.

Yugoslavia disputes this. It contests the existence in this case of an "international dispute" within the meaning of the Convention, basing itself on two propositions: first, that the conflict occurring in certain parts of the Applicant's territory was of a domestic nature, and Yugoslavia was not party to it and did not exercise jurisdiction over that territory at the time in question; and second, that State responsibility, as referred to in the requests of Bosnia and Herzegovina, was excluded from the scope of application of article IX.

With regard to Yugoslavia's first proposition, the Court considers that, irrespective of the nature of the conflict forming the background to the acts referred to in articles II and III of the Convention, the obligations of prevention and punishment which are incumbent upon the States parties to the Convention remain identical. It further notes that it cannot, at this stage in the proceedings, settle the question whether Yugoslavia took part—directly or indirectly—in the conflict at issue, which clearly belongs to the merits. Lastly, as to the territorial problems linked to the application of the Convention, the Court is of the view that it follows from the object and purpose of the Convention that the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*. The Court notes that the obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention.

Concerning the second proposition advanced by Yugoslavia, regarding the type of State responsibility envisaged in article IX of the Convention, the Court observes that the reference in article IX to "the responsibility of a State for genocide or for any of the other acts enumerated in article III" does not exclude any form of State responsibility. Nor is the responsibility of a State for acts of its organs excluded by article IV of the Convention, which contemplates the commission of an act of genocide by "rulers" or "public officials". In the light of the foregoing, the Court considers that it must reject the fifth preliminary objection of Yugoslavia.

Jurisdiction ratione temporis
(para. 34)

In this regard, the Court confines itself to the observation that the Genocide Convention—and in particular article IX—does not contain any clause the object or effect of which is to limit in such manner the scope of its jurisdiction *ratione temporis*, and observes that neither did the Parties themselves make any reservation to that end, either to the Convention or on the occasion of the signature of the Dayton-Paris Agreement. The Court thus finds that it has jurisdiction in this case to give effect to the Genocide Convention with regard to the relevant facts which have occurred since the beginning of the conflict which took place in Bosnia and Herzegovina. As a result, the Court considers that it must reject Yugoslavia's sixth and seventh preliminary objections.

Additional basis of jurisdiction invoked by Bosnia and Herzegovina
(paras. 35-41)

The Court finds further that it is unable to uphold as a basis for its jurisdiction in the present case a letter dated 8 June 1992 addressed to the President of the Arbitration Commission of the International Conference for Peace in Yugoslavia by Mr. Momir Bulatović, President of the Republic of Montenegro, and Mr. Slobodan Milosević, President of the Republic of Serbia; the Treaty between the Allied and Associated Powers (the United States of America, the British Empire, France, Italy and Japan) and the Kingdom of the Serbs, Croats and Slovenes, which was signed at Saint-Germain-en-Laye on 10 September 1919 and entered into force on 16 July 1920; or any other of the additional bases of jurisdiction invoked by Bosnia and Herzegovina. Nor does the Court find that Yugoslavia has given in this case a "voluntary and indisputable" consent which would confer upon the Court a jurisdiction exceeding that which it has already acknowledged to have been conferred upon it by article IX of the Genocide Convention. Its only jurisdiction to entertain the case is on the basis of article IX of the Genocide Convention.

Admissibility of the Application
(paras. 42-45)

According to the first preliminary objection of Yugoslavia, the Application is said to be inadmissible on the ground that it refers to events that took place within the framework of a civil war, and there is consequently no international dispute upon which the Court could make a finding.

This objection is very close to the fifth objection which the Court has already considered. In responding to the latter objection, the Court has in fact also answered this. Having noted that there does indeed exist between the Parties a dispute falling within the provisions of article IX of the Genocide Convention—that is to say, an international dispute—the Court cannot find that the Application is inadmissible on the sole ground that in order to decide the dispute it would be impelled to take account of events that may have occurred in a context of civil war. It follows that the first objection of Yugoslavia must be rejected.

According to the second objection of Yugoslavia, the Application is inadmissible because, as Mr. Alija Izetbegović was not serving as President of the Republic—but only as President of the Presidency—at the time at which he granted the authorization to initiate proceedings, that authorization was granted in violation of certain rules of domestic law of fundamental significance. Yugoslavia likewise contended that Mr. Izetbegović was not even acting legally at that time as President of the Presidency.

The Court observes that, according to international law, there is no doubt that every Head of State is presumed to be able to act on behalf of the State in its international relations and that at the time of the filing of the Application Mr. Izetbegović was recognized, in particular by the United Nations, as the Head of State of Bosnia and Herzegovina. It therefore also rejected the second preliminary objection of Yugoslavia.

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The Court emphasizes, finally, that it does not consider that Yugoslavia has, in presenting its objections, abused its rights to do so under Article 36, paragraph 6, of the Statute of the Court and Article 79 of the Rules of Court, and concludes that having established its jurisdiction under article IX of the Genocide Convention, and having concluded that the Application is admissible, the Court may now proceed to consider the merits of the case on that basis.

Declaration of Judge Oda

Judge Oda, although conscious of some disquiet at being dissociated from the great majority of the Court, stated that as a matter of legal conscience he felt bound to present his position that the Court should have dismissed the Application. Judge Oda cast a negative vote for the reason that the Court lacks jurisdiction *ratione materiae*. In his view, Bosnia and Herzegovina, in its Application, did not give any indication of opposing views regarding the *application or interpretation* of the Genocide Convention which may have existed at the time of filing of the Application, which alone could enable the Court to find that there is a dispute with Yugoslavia under that Convention.

Judge Oda states that the Genocide Convention is unique in having been adopted by the General Assembly in 1948 at a time when—owing to the success of the Nuremberg Trial—the idea prevailed that an international criminal tribunal should be established for the punishment of criminal acts directed against human rights, including genocide, and that the Convention is essentially directed *not* to the rights and obligations of States *but* to the protection of rights of individuals and groups of persons which have become recognized as universal. He states further that the failure of any contracting party "to prevent and to punish" such a crime may only be rectified and remedied through (i) resort to a competent organ of the United Nations (article VIII) or (ii) resort to an international penal tribunal (article VI), but *not* by invoking the responsibility of States in inter-State relations before the International Court of Justice.

Referring to the *travaux préparatoires* of the Convention, he pointed to the very uncertain character of article IX of the Genocide Convention. In his view, Bosnia and Herzegovina, in order to seise the Court of the present case, would certainly have had to show that Yugoslavia could indeed have been responsible for the failure of the fulfilment of the Convention in relation to itself, but, more particularly, Bosnia and Herzegovina would have had to show that Yugoslavia had breached the rights of *Bosnia and*

Herzegovina as a contracting party (which by definition is a State) that should have been protected under the Convention. This, however, has not been shown in the Application and in fact the Convention is not intended to protect the rights of Bosnia and Herzegovina as a State.

After all, Bosnia and Herzegovina does not, in the view of Judge Oda, seem to have alleged that it has a dispute with Yugoslavia relating to the interpretation or application of the Genocide Convention, although only such a dispute—and not the commission of genocide or genocidal acts which certainly are categorized as a crime under international law—can constitute a basis of the Court's jurisdiction under the Convention.

Judge Oda is inclined to doubt whether the International Court of Justice is the appropriate forum for the airing of the questions relating to genocide or genocidal acts which Bosnia and Herzegovina has raised in the current proceedings and whether international law, the Court, or the welfare of the unfortunate individuals concerned will actually benefit from the consideration of cases of this nature by the Court.

He adds that the Court should maintain a very strict position in connection with questions of its jurisdiction, as the consensus of the sovereign States in dispute essentially constitutes the basis of that jurisdiction. If the basic conditions were to be relaxed, he would expect to see a flood of cases pouring into this judicial institution, the task of which is mainly the settlement of international disputes.

Joint declaration of Judge Shi and Judge Vereshchetin

In their joint declaration, Judge Shi and Judge Vereshchetin state that, since article IX of the Genocide Convention affords an arguable legal basis for the Court's jurisdiction to the extent that the subject-matter of the dispute relates to "the interpretation, application or fulfilment" of the Convention, they voted in favour of the Judgment, except for paragraph 1 (*c*) of its *dispositif*. Nevertheless, they express their concern over some substantial elements of the case. In particular, they are disquieted by the statement of the Court, in paragraph 32 of the Judgment, that article IX of the Genocide Convention "does not exclude any form of State responsibility".

In their view, the Convention on Genocide was essentially and primarily designed as an instrument directed towards the punishment of persons committing genocide or genocidal acts and the prevention of the commission of such crimes by individuals, and retains that status. The determination of the international community to bring *individual perpetrators* of genocidal acts to justice, irrespective of their ethnicity or the position they occupy, points to the most appropriate course of action. Therefore, in their view, it might be argued that the International Court of Justice is not the proper venue for the adjudication of the complaints which the Applicant has raised in the current proceedings.

Declaration of Judge ad hoc *Lauterpacht*

Judge *ad hoc* Lauterpacht appended a declaration explaining that, so as to avoid any appearance of inconsistency with his remarks on *forum prorogatum* in his separate opinion of September 1993, he did not vote in favour of paragraph 2 (*b*) of the operative part of the Judgment in so far as it excluded any jurisdiction of the Court beyond that which it has under article IX of the Genocide Convention.

Separate opinion of Judge Shahabuddeen

In his separate opinion, Judge Shahabuddeen expressed the view that the special characteristics of the Genocide Convention pointed to the desideratum of avoiding a succession time-gap. This justified the Convention being construed as implying the expression of a unilateral undertaking by each party to the Convention to treat successor States as continuing as from independence any status which the predecessor State had as a party to the Convention. The necessary consensual bond is completed when the successor State decides to avail itself of the undertaking by regarding itself as a party to the Convention.

Separate opinion of Judge Weeramantry

Judge Weeramantry, in his separate opinion, states that the Genocide Convention is a multilateral humanitarian convention to which there is automatic succession upon the break-up of a State which is party to it.

In his view, this principle follows from many considerations, and is part of contemporary international law. Among these circumstances are that the Convention is not centred on individual State interests, and transcends concepts of State sovereignty. The rights it recognizes impose no burden on the State, and the obligations it imposes exist independently of conventional obligations. Moreover, it embodies rules of customary international law, and is a contribution to global stability. A further circumstance is the undesirability of a hiatus in succession to the Genocide Convention, associated with the special importance of human rights guarantees against genocide during periods of transition. The beneficiaries of the Genocide Convention are not third parties in the sense which attracts the *res inter alios acta* principle. The rights conferred by the Convention are non-derogable.

For all these reasons, the conclusion is compelling that automatic succession applies to the Convention.

In his opinion, Judge Weeramantry also expresses the view that the principle of continuity to the Genocide Convention is of particular importance in contemporary international law, owing to the break-up of States in many parts of the world. It is precisely in such unsettled times that the people of such States need the protection of the Convention.

Separate opinion of Judge Parra-Aranguren

Notwithstanding his approval of the operative parts of the decision, the separate opinion of Judge Parra-Aranguren insisted on two points: (1) the admission made by Yugoslavia on 10 August 1993 that Bosnia and Herzegovina was a party to the Genocide Convention when requesting the Court for indication of provisional measures, being therefore applicable its article IX on jurisdiction; and (2) the declaration made by Bosnia and Herzegovina expressing its wish to succeed to the Convention with effect from 6 March 1992, the date on which it became independent. According to Judge Parra-Aranguren, the Court should have remarked on and developed the point that this declaration is in conformity with the humanitarian nature of the Genocide Convention, the non-performance of which may adversely affect the people of Bosnia and Herzegovina, an observation that the Court had already made in its advisory opinion of 21 June 1971 on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-*

West Africa) notwithstanding Security Council Resolution 276 (1970) (I.C.J. Reports 1971, p. 55, para. 122) and that is in conformity with Article 60, paragraph 5, of the 1969 Vienna Convention on the Law of Treaties.

Dissenting opinion of Judge ad hoc *Kreća*

Judge *ad hoc* Kreća finds that the relevant conditions for the entertainment of the case by the Court, those relating to both jurisdiction and admissibility, have not been met.

There exists the dilemma, not resolved by the Court, as to whether Bosnia and Herzegovina at the time when the Application, as well as the Memorial, were submitted, and Bosnia and Herzegovina today, after entry into force of the Dayton Agreement, are in fact one and the same State. This question is of irrefutable relevance in the circumstances of the present case, since it opens the way for *persona standi in indicio* of Bosnia and Herzegovina. Also, he is of the opinion that the proclamation of Bosnia and Herzegovina as a sovereign and independent State constitutes a substantial breach, both formally and substantively, of the cogent norm on equal rights and self-determination of peoples. Accordingly, one can speak only of succession *de facto* and not of succession *de jure* in relation to the transfer of the rights and obligations of the predecessor State.

Judge *ad hoc* Kreća disagrees with the Court that the "obligation each State thus has to prevent and punish the crime of genocide is not territorially limited by the Convention" (para. 31 of the Judgment). He is of the opinion that it is necessary to draw a clear distinction between the legal nature of the norm prohibiting genocide and the implementation or enforcement of that norm. The fact that the norm prohibiting genocide is a norm of *jus cogens* cannot be understood as implying that the obligation of States to prevent and punish genocide is not territorially limited. More particularly, that norm, like the other norms of international law, is applicable by States not in an imaginary space but in a territorialized international community, which means that territorial jurisdiction, as a general rule, suggests the territorial character of the obligations of those States in both prescriptive and enforcement terms. If this were not the case, the norms of territorial integrity and sovereignty, also having the character of *jus cogens*, would be violated.

He is of the opinion that, under the Genocide Convention, a State cannot be responsible for genocide. The meaning of article IV of the Convention, which stipulates criminal responsibility for genocide or the other acts enumerated in article III of the Convention, excludes, *inter alia*, the exclusion of the criminal responsibility of States and rejects the application of the act of State doctrine in this matter.

Judge *ad hoc* Kreća finds that "automatic succession" is *lex ferenda*, a matter of progressive development of international law, rather than of codification. Notification of succession, in his opinion, is not appropriate per se for expressing consent to be bound by treaty, since, as a unilateral act, it seeks to conclude a collateral agreement in simplified form with the other parties, within the framework of general multilateral conventions, like the Genocide Convention.

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106. CASE CONCERNING OIL PLATFORMS (ISLAMIC REPUBLIC OF IRAN *v.* UNITED STATES OF AMERICA) (PRELIMINARY OBJECTIONS)

Order of 12 December 1996

In an Order issued in the case concerning Oil Platforms (Islamic Republic of Iran *v.* United States of America), the Court delivered a Judgment by which it rejected the preliminary objection to its jurisdiction raised by the United States. It found that it had jurisdiction to deal with the case on the basis of article XXI, paragraph 2, of the Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran, signed at Tehran on 15 August 1955, which entered into force on 16 June 1957.

The United States had argued that the Court lacked jurisdiction, on the one hand, because the Treaty of 1955, which contained commercial and consular provisions, was not applicable in the event of the use of force. The Court found in this respect that the Treaty, which does not expressly exclude any matters from the Court's jurisdiction, imposes on each of the Parties various obligations on a variety of matters. Any action incompatible with those obligations is unlawful, regardless of the means by which it is brought about, including the use of force. Matters relating to the use of force are therefore not per se excluded from the reach of the Treaty.

Other arguments of the United States had related to the scope of various articles of the Treaty of 1955. The Court found in this respect that, considering the object and purpose of the Treaty, article I should be regarded as fixing an objective (of peace and friendship), in the light of which the other Treaty provisions were to be interpreted and applied, but that it could not, taken in isolation, be a basis for the Court's jurisdiction. Neither could article IV, paragraph 1, of the Treaty, the detailed provisions of which concerned the treatment by each party of the nationals and companies of the other party, as well as their property and enterprises, but which did not cover the actions carried out in this case by the United States against Iran, provide such a basis.

With regard to article X, paragraph 1, of the Treaty, however, the Court found that the destruction of the Iranian oil platforms by the United States complained of by Iran was capable of having an effect upon the export trade in Iranian oil and, consequently, upon the freedom of commerce guaranteed in that paragraph. The lawfulness of that destruction could therefore be evaluated in relation to that paragraph.

As a consequence, there existed between the Parties a dispute as to the interpretation and the application of article X, paragraph 1, of the Treaty of 1955; that dispute fell within the scope of the compromissory clause in article XXI, paragraph 2, of the Treaty; and the Court therefore had jurisdiction to entertain the dispute.

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The full text of the operative paragraph reads as follows:

"THE COURT

(1) *rejects*, by fourteen votes to two, the preliminary objection of the United States of America according to which the Treaty of 1955 does not provide any basis for the jurisdiction of the Court;

IN FAVOUR: President Bedjaoui; Judges Guillaume, Shahabuddeen, Weeramantry, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Ferrari Bravo, Higgins, Parra-Aranguren; Judge *ad hoc* Rigaux;

AGAINST: Vice-President Schwebel; Judge Oda;

(2) *finds*, by fourteen votes to two, that it has jurisdiction, on the basis of article XXI, paragraph 2, of the Treaty of 1955, to entertain the claims made by the Islamic Republic of Iran under article X, paragraph 1, of that Treaty.

IN FAVOUR: President Bedjaoui; Judges Guillaume, Shahabuddeen, Weeramantry, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Ferrari Bravo, Higgins, Parra-Aranguren; Judge *ad hoc* Rigaux;

AGAINST: Vice-President Schwebel; Judge Oda."

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The Court was composed as follows: President Bedjaoui; Vice-President Schwebel; Judges Oda, Guillaume, Shahabuddeen, Weeramantry, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Ferrari Bravo, Higgins, Parra-Aranguren; Judge *ad hoc* Rigaux; Registrar Valencia-Ospina.

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Judges Shahabuddeen, Ranjeva, Higgins and Parra-Aranguren and Judge *ad hoc* Rigaux appended separate opinions to the Judgment of the Court.

Vice-President Schwebel and Judge Oda appended dissenting opinions to the Judgment of the Court.

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Institution of proceedings and history of the case
(paras. 1-11)

The Court begins by recalling that on 2 November 1992 the Islamic Republic of Iran instituted proceedings against the United States of America in respect of a dispute

"aris[ing] out of the attack [on] and destruction of three offshore oil production complexes, owned and operated for commercial purposes by the National Iranian Oil Company, by several warships of the United States Navy on 19 October 1987 and 18 April 1988, respectively".

In its Application, Iran contended that these acts constituted a "fundamental breach" of various provisions of the Treaty of Amity, Economic Relations and Consular Rights between the United States of America and Iran, which was signed at Tehran on 15 August 1955 and entered into force on 16 June 1957 (hereinafter called "the Treaty of 1955"), as well as of international law. The Application invokes, as a basis for the Court's jurisdiction, article XXI, paragraph 2, of the Treaty of 1955.

Within the extended time-limit for the filing of the Counter-Memorial, the United States raised a preliminary objection to the jurisdiction of the Court pursuant to Article 79, paragraph 1, of the Rules of Court. Consequently, the proceedings on the merits were suspended. After Iran had filed a written statement of its observations and submissions on the preliminary objection raised by the United States within the time-limit fixed, public hearings were held between 16 and 24 September 1996.

The following final submissions were presented by the Parties:

On behalf of the United States,

"The United States of America requests that the Court uphold the objection of the United States to the jurisdiction of the Court in the case concerning *Oil Platforms (Islamic Republic of Iran* v. *United States of America)*."

On behalf of Iran,

"In the light of the facts and arguments set out above, the Government of the Islamic Republic of Iran requests the Court to adjudge and declare:

1. That the Preliminary Objection of the United States is rejected in its entirety;

2. That, consequently, the Court has jurisdiction under article XXI (2) of the Treaty of Amity to entertain the claims submitted by the Islamic Republic of Iran in its Application and Memorial as they relate to a dispute between the Parties as to the interpretation or application of the Treaty;

3. That, on a subsidiary basis in the event the Preliminary Objection is not rejected outright, it does not possess, in the circumstances of the case, an exclusively preliminary character within the meaning of Article 79 (7) of the Rules of Court; and

4. Any other remedy the Court may deem appropriate."

Article XXI, paragraph 2, of the Treaty of 1955 and the nature of the dispute
(paras. 12-16)

After summarizing the arguments put forward by Iran in the Application and in the course of the subsequent proceedings, the Court concludes that Iran claims only that article I, article IV, paragraph 1, and article X, paragraph 1, of the Treaty of 1955 have been infringed by the United States and that the dispute thus brought into being is said to fall within the jurisdiction of the Court pursuant to article XXI, paragraph 2, of the same Treaty.

The United States for its part maintains that the Application of Iran bears no relation to the Treaty of 1955. It stresses that, as a consequence, the dispute that has arisen between itself and Iran does not fall within the provisions of article XXI, paragraph 2, of the Treaty and deduces from this that the Court must find that it lacks jurisdiction to deal with it.

The Court points out, to begin with, that the Parties do not contest that the Treaty of 1955 was in force at the date of the filing of the Application of Iran and is, moreover, still in force. The Court recalls that it had decided in 1980 that the Treaty of 1955 was applicable at that time (*United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 28, para. 54); none of the circumstances brought to its knowledge in the present case would cause it now to depart from that view.

By the terms of article XXI, paragraph 2, of that Treaty:

"Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means."

It is not contested that several of the conditions laid down by this text have been met in the present case: a dispute has arisen between Iran and the United States; it has not been possible to adjust that dispute by diplomacy; and the two States have not agreed "to settlement by some other pacific means" as contemplated by article XXI. On the other hand, the Parties differ on the question whether the dispute between the two States with respect to the lawfulness of the actions carried out by the United States against the Iranian oil platforms is a dispute "as to the interpretation or application" of the Treaty of 1955. In order to answer that question, the Court cannot limit itself to noting that one of the Parties maintains that such a dispute exists, and the other denies it. It must ascertain whether the violations of the Treaty of 1955 pleaded by Iran do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain, pursuant to article XXI, paragraph 2.

Applicability of the Treaty of 1955 in the event of the use of force
(paras. 17-21)

The Court first deals with the Respondent's argument that the Treaty of 1955 does not apply to questions concerning the use of force. In this perspective, the United States contends that, essentially, the dispute relates to the lawfulness of actions by naval forces of the United States that "involved combat operations" and that there is simply no relationship between the wholly commercial and consular provisions of the Treaty and Iran's Application and Memorial, which focus exclusively on allegations of unlawful uses of armed force.

Iran maintains that the dispute that has arisen between the Parties concerns the interpretation or application of the Treaty of 1955. It therefore requests that the preliminary objection be rejected, or, on a subsidiary basis, if it is not rejected outright, that it should be regarded as not having an exclusively preliminary character within the meaning of Article 79, paragraph 7, of the Rules of Court.

The Court notes in the first place that the Treaty of 1955 contains no provision expressly excluding certain matters from the jurisdiction of the Court. It takes the view that the Treaty of 1955 imposes on each of the Parties various obligations on a variety of matters. Any action by one of the Parties that is incompatible with those obligations is unlawful, regardless of the means by which it is brought about. A violation of the rights of one party under the Treaty by means of the use of force is as unlawful as would be a violation by administrative decision or by any other means. Matters relating to the use of force are therefore not per se excluded from the reach of the Treaty of 1955. The arguments put forward on this point by the United States must therefore be rejected.

Article I of the Treaty
(paras. 22-31)

In the second place, the Parties differ as to the interpretation to be given to article I, article IV, paragraph 1, and article X, paragraph 1, of the Treaty of 1955. According to Iran, the actions which it alleges against the United States are such as to constitute a breach of those provisions and the Court consequently has jurisdiction *ratione materiae* to entertain the Application. According to the United States, this is not the case.

Article I of the Treaty of 1955 provides that: "There shall be firm and enduring peace and sincere friendship between the United States . . . and Iran."

According to Iran, this provision "does not merely formulate a recommendation or desire . . . , but imposes actual obligations on the Contracting Parties, obliging them to maintain long-lasting peaceful and friendly relations"; it would impose upon the Parties "the minimum requirement . . . to conduct themselves with regard to the other in accordance with the principles and rules of general international law in the domain of peaceful and friendly relations".

The United States considers, on the contrary, that Iran "reads far too much into article I". That text, according to the Respondent, "contains no standards", but only constitutes a "statement of aspiration". That interpretation is called for in the context and on account of the "purely commercial and consular" character of the Treaty.

The Court considers that the general formulation of article I cannot be interpreted in isolation from the object and purpose of the Treaty in which it is inserted. There are some Treaties of Friendship which contain not only a provision on the lines of that found in article I but, in addition, clauses aimed at clarifying the conditions of application. However, this does not apply to the present case. Article I is in fact inserted not into a treaty of that type, but into a treaty of "Amity, Economic Relations and Consular Rights" whose object is, according to the terms of the preamble, the "encouraging [of] mutually beneficial trade and investments and closer economic intercourse generally", as well as "regulating consular relations" between the two States. The Treaty regulates the conditions of residence of nationals of one of the parties on the territory of the other (art. II), the status of companies and access to the courts and arbitration (art. III), safeguards for the nationals and companies of each of the contracting parties as well as their property and enterprises (art. IV), the conditions for the purchase and sale of real property and protection of intellectual property (art. V), the tax system (art. VI), the system of transfers (art. VII), customs duties and other import restrictions (arts. VIII and IX), freedom of commerce and navigation (arts. X and XI), and the rights and duties of consuls (arts. XII-XIX).

It follows that the object and purpose of the Treaty of 1955 was not to regulate peaceful and friendly relations between the two States in a general sense. Consequently, article I cannot be interpreted as incorporating into the Treaty all of the provisions of international law concerning such relations. Rather, by incorporating into the body of the Treaty the form of words used in article I, the two States intended to stress that peace and friendship constituted the precondition for a harmonious development of their commercial, financial and consular relations and that such a development would in turn reinforce that peace and

that friendship. It follows that article I must be regarded as fixing an objective, in the light of which the other Treaty provisions are to be interpreted and applied. The Court further observes that it does not have before it any Iranian document in support of Iran's position. As for the United States documents introduced by the two Parties, they show that at no time did the United States regard article I as having the meaning now given to it by the Applicant. Nor does the practice followed by the Parties in regard to the application of the Treaty lead to any different conclusions.

In the light of the foregoing, the Court considers that the objective of peace and friendship proclaimed in article I of the Treaty of 1955 is such as to throw light on the interpretation of the other Treaty provisions, and in particular of articles IV and X. Article I is thus not without legal significance for such an interpretation, but cannot, taken in isolation, be a basis for the jurisdiction of the Court.

Article IV, paragraph 1, of the Treaty
(paras. 32-36)

Article IV, paragraph 1, of the Treaty of 1955 provides that:

> "Each High Contracting Party shall at all times accord fair and equitable treatment to nationals and companies of the other High Contracting Party, and to their property and enterprises; shall refrain from applying unreasonable or discriminatory measures that would impair their legally acquired rights and interests; and shall assure that their lawful contractual rights are afforded effective means of enforcement, in conformity with the applicable laws."

The Court, with regard to the arguments advanced by the Parties, observes that article IV, paragraph 1, unlike the other paragraphs of the same article, does not include any territorial limitation. It further points out that the detailed provisions of that paragraph concern the treatment by each party of the nationals and companies of the other party, as well as their property and enterprises. Such provisions do not cover the actions carried out in this case by the United States against Iran. Article IV, paragraph 1, thus does not lay down any norms applicable to this particular case. This article cannot therefore form the basis of the Court's jurisdiction.

Article X, paragraph 1, of the Treaty
(paras. 37-52)

Article X, paragraph 1, of the Treaty of 1955 reads as follows: "Between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation."

It has not been alleged by the Applicant that any military action has affected its freedom of navigation. Therefore, the question the Court must decide, in order to determine its jurisdiction, is whether the actions of the United States complained of by Iran had the potential to affect "freedom of commerce" as guaranteed by the provision quoted above.

Iran has argued that article X, paragraph 1, does not contemplate only maritime commerce, but commerce in general, while according to the United States the word "commerce" must be understood as being confined to maritime commerce, as being confined to commerce between the United States and Iran, and as referring solely to the actual sale or exchange of goods.

Having regard to other indications in the Treaty of an intention of the parties to deal with trade and commerce in general, and taking into account the entire range of activities dealt with in the Treaty, the view that the word "commerce" in article X, paragraph 1, is confined to maritime commerce does not commend itself to the Court.

In the view of the Court, there is nothing to indicate that the parties to the Treaty intended to use the word "commerce" in any sense different from that which it generally bears. The word "commerce", whether taken in its ordinary sense or in its legal meaning, at the domestic or international level, has a broader meaning than the mere reference to purchase and sale. The Court notes in this connection that the Treaty of 1955 deals, in its general articles, with a wide variety of matters ancillary to trade and commerce; and refers to the *Oscar Chinn* case in which the expression "freedom of trade" was seen by the Permanent Court as contemplating not only the purchase and sale of goods, but also industry, and in particular the transport business.

The Court further points out that it should not in any event overlook that article X, paragraph 1, of the Treaty of 1955 does not strictly speaking protect "commerce" but "*freedom* of commerce". Any act such as the destruction of goods destined to be exported, or capable of affecting their transport and their storage with a view to export, which impedes that "freedom" is thereby prohibited. The Court points out in this respect that the oil pumped from the platforms attacked in October 1987 passed from there by subsea line to the oil terminal on Lavan Island and that the Salman complex, object of the attack of April 1988, was also connected to the oil terminal on Lavan by subsea line.

The Court finds that on the material now before it, it is indeed not able to determine if and to what extent the destruction of the Iranian oil platforms had an effect upon the export trade in Iranian oil; it notes none the less that their destruction was capable of having such an effect and, consequently, of having an adverse effect upon the freedom of commerce as guaranteed by article X, paragraph 1, of the Treaty of 1955. It follows that its lawfulness can be evaluated in relation to that paragraph.

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In the light of the foregoing, the Court concludes that there exists between the Parties a dispute as to the interpretation and the application of article X, paragraph 1, of the Treaty of 1955; that this dispute falls within the scope of the compromissory clause in article XXI, paragraph 2, of the Treaty; and that as a consequence the Court has jurisdiction to entertain this dispute.

The Court notes that since it must thus reject the preliminary objection raised by the United States, the submissions whereby Iran requested it, on a subsidiary basis, to find that the objection did not possess, in the circumstances of the case, an exclusively preliminary character no longer have any object.

Separate opinion of Judge Shahabuddeen

In his separate opinion, Judge Shahabuddeen observed that possibilities for improvement did not prevent him from giving support to the *dispositif* in the form in which it stood. However, he was of the view that the jurisdictional

test which the Court had used precluded it from asking the right questions. Effectively, the Court had sought to make a definitive determination of the meaning of the 1955 Treaty between the Parties. In Judge Shahabuddeen's view, the Court should merely have asked whether the construction of the Treaty on which the Applicant relied was an arguable one, even if it later turned out to be incorrect. This was so far the reason that the question at this stage was not whether the Applicant's claim was sound in law, but whether the Applicant was entitled to an adjudication of its claim. The respectful impression with which he left the case was that the neglect to distinguish between these issues as consistently as was required and to apply the right test meant that the principle on which the Judgment was constructed was not adequate to do full justice to either Party; it created unnecessary disadvantages for both.

Separate opinion of Judge Ranjeva

After setting out his reasons for voting in favour of the Judgment, Judge Ranjeva nevertheless criticized the reference to the first paragraph of article X of the Treaty of 1955; that reference might render the reading of the Judgment difficult. The Court's title of jurisdiction was the compromissory clause, whose terms raised no particular problem of interpretation. But in transposing the reasoning adopted in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia)*, had the Judgment not gone beyond the object of the preliminary objection procedure? The problem, the author of the opinion acknowledged, resided in the fact that the objections were envisaged from the standpoint of their scope and significance and not from that of their definition and that, in reality, it was not easy to draw a distinction between questions appertaining to the preliminary objections procedure and questions appertaining to the merits of the case. In the view of Judge Ranjeva, the circumstances of the case did not warrant the transposition of the analytical method adopted in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia)*, in which the Court first had to make a determination on a condition of the applicability of the compromissory clause. Such a condition was lacking in the present case, as the preliminary problem related more to the applicability in general of the Treaty of 1955 than to that of the compromissory clause. That being so, Judge Ranjeva considered, it was for the Court not to state whether the arguments were true or false from the legal standpoint but to ensure that there was nothing absurd about them or nothing which ran counter to the norms of positive law. Hence, unless the objection related to the *compétence de la compétence* as in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia)*, or unless the objection was of a general nature, as in the present case, the Court's conclusion could but be limited to an affirmative or negative reply to the objection, as otherwise it would run the risk of raising a problem of legal prejudice. Judge Ranjeva regretted that the interpretation of articles I and IV had been made independently and in a strictly analytical framework. Article I implied a negative obligation of conduct inherent to the prescriptions of amity and peace and whose function was to shed light on the understanding of the other treaty provisions. That being so, the author of the opinion wondered whether one was justified in thinking that article IV excluded from its domain the effective and voluntary conduct of one of the litigants with respect to a company falling within the jurisdiction of the other. Lastly, the explicit reference to article X raised the problem of the integrity of the rights of the United States of America: How was the link of connexity established as between freedom of commerce and navigation and a possible claim for reparation as a result of the destruction of warships? In conclusion, Judge Ranjeva considered that the interpretation of the "bases of jurisdiction" did not affect the rights of the Parties, if the preliminary decision were limited to meeting the arguments on the sole basis of the plausibility of the arguments in relation to the problems inherent to the terms of the provisions, whose violation was claimed by the Applicant.

Separate opinion of Judge Higgins

Various contentions had been made by the Parties as to how it should be decided whether Iran's claims fall within the compromissory clause of the 1955 Treaty of Amity, Economic Relations and Consular Rights. In her separate opinion, Judge Higgins addresses the methodology to be used in answering this question. She reviews the relevant case-law of the Permanent Court of International Justice as well as of the International Court. In certain of those cases it had been said that what was required was a "reasonable connection" between the facts alleged and the terms of the treaty said to provide jurisdiction; and that the Court would reach a provisional conclusion as to the claimed bases of jurisdiction. Judge Higgins finds that this line of cases fall into a particular category and that another line of cases, stemming from the *Mavrommatis* case, are the more pertinent precedents for the present case. They require that the Court fully satisfy itself that the facts as alleged by an applicant could constitute a violation of the treaty terms, and that this finding is definitive. Whether there *is* a violation can only be decided on the merits. Accordingly, it is necessary at the jurisdictional stage to examine certain articles of the 1955 Treaty in detail. To do this does not intrude upon the merits.

Using this approach, Judge Higgins agreed with the Court that articles I and IV (1) provided no basis for jurisdiction. However, in her view the correct reason for that conclusion as it applies in article IV (1) is because that provision refers to the obligations of one party towards the nationals, property and enterprises of the other party within the former's own territory; and because the key terms in article IV (1) were standard terms in law and inapplicable to Iran's claims. Judge Higgins agrees that the Court has jurisdiction under article X (1), but only in so far as the destroyed platforms are shown to be closely associated with, or ancillary to, maritime commerce. Petroleum production does not fall within the term "commerce", nor does interference with production fall under "freedom of commerce". But destruction of platforms used to pass petroleum into pipelines concerns transportation, which is comprised within commerce, and thus may fall within article X (1).

Separate opinion of Judge Parra-Aranguren

The actions carried out by the United States in this case were directed against the offshore oil platforms belonging to the National Iranian Oil Company, not against Iran, as

stated in paragraph 36 of the Judgment; and the National Iranian Oil Company is a juridical person different from Iran, even though Iran may own all of its shares. Consequently, as an Iranian corporation, the National Iranian Oil Company is covered by article IV, paragraph 1, of the Treaty of 1955, and shall be accorded "fair and equitable treatment", and also protected against the application of "unreasonable or discriminatory measures" that would impair its legally acquired rights and interests. Therefore, in my opinion, the Court has jurisdiction to entertain the claims made by Iran under said article IV, paragraph 1, on the basis of article XXI, paragraph 2, of the Treaty of 1955.

Separate opinion of Judge ad hoc *Rigaux*

1. Having supported the majority on the two subparagraphs of the *dispositif*—unreservedly so where subparagraph 1 is concerned—I expressed my agreement with subparagraph 2, at the same time regretting the excessively narrow legal basis favoured to found the jurisdiction of the Court.

2. I feel I must also distance myself from certain parts of the reasoning relating to the significance of article I of the Treaty of Amity and respectfully dissociate myself from the reasons why article IV, paragraph 1, was apparently unable to provide an adequate title of jurisdiction.

3. The objections thus formulated against certain parts of the Judgment could have been avoided had the Court adopted a different method, which must be deemed more in keeping with the precedents. This method would have entailed limiting oneself strictly to settling the preliminary objection to jurisdiction and determining whether questions of interpretation and application of the Treaty existed, notably as regards the application, to the facts alleged by the Applicant, of article I, article IV, paragraph 1, and article X, paragraph 1, and the characterization, though not the materiality of which, was disputed by the Respondent.

Dissenting opinion of Vice-President Schwebel

Judge Schwebel dissented from the Court's Judgment on two grounds. In his view, neither the United States nor Iran, in concluding the Treaty of 1955, intended that claims of the character advanced by Iran in this case would be comprehended by the Treaty or its compromissory clause. Nor do the particular claims of Iran fall within the terms of any provision of the Treaty including article X, paragraph 1.

What cannot be denied is that the attacks by the United States Navy on the three Iranian oil platforms at issue constituted a use by the United States of armed force against what it claims to have seen as military objectives located within the jurisdiction of Iran. Is a dispute over such attacks one that arises under the Treaty?

Obviously not, as the title, preamble and terms of the Treaty indicate. It is a Treaty concerned with encouraging mutually beneficial trade and investment and economic relations on the basis of reciprocal equality of treatment. There is no suggestion of regulating the use of armed force by one party against the other.

Not only do the provisions of the Treaty concentrate on the treatment of the nationals of one party in the territory of the other. The Treaty contains none of the treaty provisions that typically do bear on the international use of force. Such provisions are, however, fully found in the Parties' Agreement of Cooperation of 1959.

Moreover, article XX, paragraph 1 (*d*), of the Treaty excludes from its reach measures necessary to protect a party's essential security interests. Such an exclusion clause can hardly entitle the Court to assume jurisdiction over a claim that engages the essential security interests of the Parties. The Court holds that the United States in oral argument concluded that this clause applied to the merits, a conclusion which the Court itself reached in 1986 in construing an identical clause in *Military and Paramilitary Activities in and against Nicaragua*; and the Court declares that it sees no reason to vary the 1986 conclusion. In Judge Schwebel's view, the position of the United States in this case, and the responsibilities of the Court in this case, are somewhat different. The United States affirmed in these proceedings that article XX, paragraph 1 (*d*), manifested the Parties' intent to keep such matters outside the scope of the Treaty; it maintained throughout that it prescribes exceptions to the reach of the Treaty. The Court in *Military and Paramilitary Activities in and against Nicaragua* failed in 1984 to address this question at all at the stage of jurisdiction when it should have; as a consequence it fell to the merits if it was to be addressed at all. This history leaves the Court free in this case objectively to apply the terms of article XX, paragraph 1 (*d*), unconstrained by the 1986 holding. Moreover, question has rightly been raised about the value as a precedent of the Court's holdings in that case.

The Court is right in this case to hold that the Treaty can be violated by a use of force. An expropriation could be effected by force or a consul could be forcibly maltreated. But it does not follow that the use by a party of its armed forces to attack what it treats as military objectives within the jurisdiction of the other party is within the reach of the Treaty.

Both Parties filed with their pleadings documents submitted to the United States Senate in the course of ratification of this and like treaties of friendship, commerce and navigation. Among them are documents that show that intentions in concluding these treaties were to include within the compromissory clause disputes "limited to the differences arising immediately from the specific treaty concerned" and to exclude disputes over military security.

Nor can jurisdiction be based on article X, paragraph 1, of the Treaty. That article concerns maritime commerce. But even if its first paragraph were to be interpreted to concern commerce at large, commerce may not be equated with production. Production is not ancillary to commerce; it is anterior to it. Nor does the Court's reliance on "freedom" of commerce strengthen its interpretation. The fact or allegation that some of the oil platforms at issue were connected by pipeline to port facilities is insufficient to carry Iran's case.

Dissenting opinion of Judge Oda

Judge Oda points out that the present case is practically the first one in the history of the Court in which the Applicant attempts to invoke a compromissory clause of a bilateral treaty as a basis of the Court's jurisdiction. He emphasizes that the meaning of the compromissory clause in a bilateral treaty should be considered with great care because, even if the parties to a bilateral treaty are ready to defer to the jurisdiction of the Court by including a compromissory

clause, neither party may be presumed to entrust the evaluation of the scope—the object and purpose—of the treaty to a third party without its consent, even where a dispute as to the interpretation or application of the individual provisions of the treaty is specified in the compromissory clause contained therein. The subject of a dispute cannot relate to the question of whether essential issues fall within the comprehensive scope—the object and purpose—of the treaty but only concern the "interpretation or application" of the provisions of the agreed text of the treaty. The range of the "interpretation or application" of a treaty as covered by the compromissory clause in a bilateral treaty is strictly limited.

Judge Oda contends that, in view of the basic principle of international justice that referral to the Court should be based upon the consent of sovereign States, neither one of the parties to a *bilateral* treaty should be presumed to have agreed (and certainly, in fact, never has agreed) to let the other party refer unilaterally to the Court a dispute touching upon the object and purpose of the treaty, as, without a mutual understanding on those matters, the treaty itself would not have been concluded. The difference of views of the two States relating to the scope—the object and purpose—of a treaty cannot be the subject of an adjudication by the Court unless both parties have given their consent; such a dispute may, however, be brought to the Court by a special agreement or, alternatively, there may be an occasion for the application of the rule of *forum prorogatum*. The problem which faces the Court in the present case is to determine whether the real dispute between Iran and the United States that has arisen as a result of the latter's attack on and destruction of the Iranian oil platforms in a chain of events that took place during the Iran/Iraq War is, as Iran alleges and the Court concludes, a dispute as to the "interpretation or application" of the 1955 Treaty of Amity within the meaning of its article XXI (2). In his view, this is certainly not the case.

Judge Oda sees the way in which the Court responds to the Iranian Application in this Judgment as deriving from a misconception. The Court was requested by Iran to adjudge at this stage that it has jurisdiction under the Treaty to entertain the *dispute* occasioned by the destruction of the platforms by the United States force, but *not* to entertain any *claims* made by Iran under any specific article—in this case article X (1).

He continues to maintain that failure to dismiss Iran's Application in the present case invites a situation in which a State could, under the pretext of the violation of any trivial provision of any treaty containing a compromissory clause, unilaterally bring the other State party to the treaty before the Court on the sole ground that one of the parties contends that a dispute within the scope of the treaty exists while the other denies it. This would, in his opinion, be no more than the application of a form of false logic far removed from the real context of such a treaty, and constituting nothing short of an abuse of treaty interpretation, so that, to quote from his 1986 separate opinion in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, "the Court might seem in danger of inviting a case 'through the back door' ".

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Litho in United Nations, New York
97-93148—January 1998—2,885
ISBN 92-1-133515-9

United Nations publication
Sales No. E.97.V.7
ST/LEG/SER.F/1/Add.1